

**ARGENTINA CORPORATE  
RESTRUCTURING WORKSHOP**

**CREATING A LEVEL  
PLAYING FIELD &  
PREPACKAGED PLANS**

**Buenos Aires, Argentina  
2 May 2002**

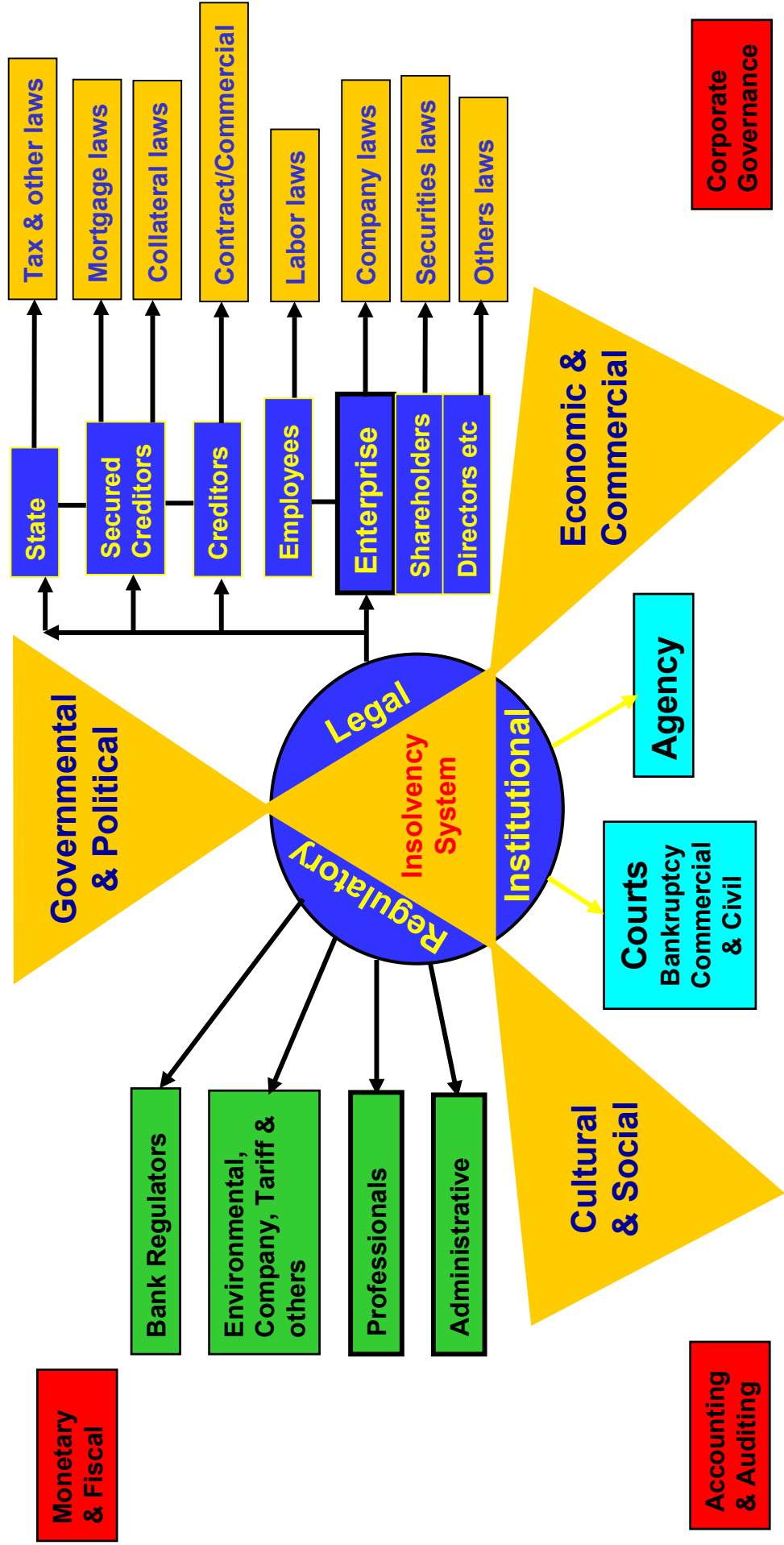
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# TOPICS COVERED

- ◆ **Context for Insolvency and Workouts**
- ◆ **Advantages of Prepackaged plans**
- ◆ **Statutory Criteria for Prepackaged plan**

# CONTEXT FOR INSOLVENCY SYSTEMS



# CORPORATE RESCUE

## Informal Workouts

- Forum/Commence
- Lead/Committee
- Standstill
- Cash flow/liquidity
- Information
- Evaluate Options
- Negot/Agree/Vote
- Binding: Bank Group; debt holders agreeing; non-binding others

## Formal Workouts

- Application Court, etc.
- Lead/Committee
- Moratorium/suspension
- Cash flow/liquidity
- Information
- Evaluate Options
- Negot/Agree/Vote
- Binding Bank Group, debt holders and possibly other creditors

## Formal Insolvency

- Commence Insolvency
- Committee nominated
- Stay & moratorium
- Cash flow/liquidity -- postpetition financing
- Information/Disclosure
- Evaluate Options
- Negot/Plan/Vote
- Binding: all creditors

# PREPACKS vs. TRADITIONAL Ch. 11

## Traditional Chapter 11

- ◆ **Delay** (ave. 2+ years)
- ◆ **Additional Strain on distressed company**
  - ⇒ Outcome in question
  - ⇒ Customers may leave
- ◆ **Increased uncertainty**
  - ⇒ Creditors are contentious
  - ⇒ Court approval needed for most transactions
- ◆ **Expensive**
  - ⇒ Multiple fees for parties

## Prepackaged Plan

- ◆ **Reduced time in court**
- ◆ **Stable credit relationships**
  - ⇒ suppliers and customers
  - ⇒ trade creditors supportive
- ◆ **Greater certainty**
  - ⇒ Management
  - ⇒ Outcome virtually assured
  - ⇒ Court and creditor intervention minimized
- ◆ **Reduction in Cost (?)**

# PREPACKS vs. WORKOUTS

## Out-of-Court Workout

- ◆ **Cost of Holdouts**
  - ⇒ Debt instruments require consent for significant changes (i.e., payment)
  - ⇒ Small debt holders lack incentives to respond – paid in full or as scheduled
  - ⇒ Target range 90-95%

- ◆ **Tax Considerations**

- ⇒ Debt forgiveness = income to debtor
- ⇒ Net Operating Loss carry-forward more difficult

## Prepackaged Plan

- ◆ **Easier for Holdouts**
  - ⇒ Lower approval threshold --2/3 in amount and simple majority in number
  - ⇒ Prospect of bankruptcy creates incentive to respond

- ◆ **Tax Considerations**

- ⇒ Debt forgiveness is not treated as income to debtor
- ⇒ More favorable tax treatment on NOL carry-forward (caveat: majority shdr rule)

# COMPETING CONSIDERATIONS

- ◆ **Use of Prepacks limited:**
  - ⇨ Mainly used for over-leveraged companies – financial, as opposed to operational, distress
- ◆ **Need for the Automatic Stay**
  - ⇨ Debtor generally in default on outstanding debt
  - ⇨ Bond holders or creditors could initiate collection actions (*race to the courthouse*)
  - ⇨ Out-of-court restructurings are inherently unstable
  - ⇨ Standstill agreement may be limited to certain creditors
- ◆ **Need for Post-petition financing**
  - ⇨ Existing or new lenders may be unwilling to extend new financing in the prospect of bankruptcy or without statutory priority offered by bankruptcy

# COMPETING CONSIDERATIONS

- ◆ **Executory Contracts and Leases**
  - ⇒ Non-bankruptcy breach or assignment difficult and costly
  - ⇒ Ch 11 provides mechanisms for this (e.g., Continental)
- ◆ **Unliquidated or Contingent Claims**
  - ⇒ Prepack is not good for company with high unliquidated or contingent claims (e.g., Manville-asbestos, Dow-Corning)
  - ⇒ Out-of-court procedures to resolve these issues are also cumbersome and difficult (ie, class action lawsuits)
  - ⇒ Ch 11 -- better solution; claims resolution mechanisms take time
- ◆ **Need to Solicit General Unsecured Creditors**
  - ⇒ Prepack requires compliance with applicable non-bankruptcy law concerning adequacy of disclosure (1126b).
  - ⇒ Securities rules clear on solicitation of exchange or issuance of existing or new securities
  - ⇒ Comply with Ch. 11 notice and disclosure criteria (Section 1125)

# STATUTORY REQUIREMENTS

## 1. Prepetition Disclosure (1126b)

- ⇨ Pre-bankruptcy plan acceptances are binding if comply with applicable non-bankruptcy law or (i.e., anti-fraud provisions), OR absent any law,
- ⇨ Comply with 1125(a) disclosure requirements
- ⇨ Best to comply with both requirements.

## 2. Adequate Information

- ⇨ Anti-fraud provisions – “false or misleading statements of material fact” or omissions of material fact, as determined under the circumstances of the particular case
- ⇨ Bankruptcy Disclosure – information must be sufficient to enable a reasonable investor typical of claimholders in case to *make an informed decision about the plan*
- ⇨ Safe-Harbor disclosure requirements in bankruptcy (1125c) make disclosure easier than under securities law. Application to pre-petition solicitations is unclear

## 3. Good Faith Voting Requirement

# STATUTORY REQUIREMENTS

## 4. Prepetition Solicitation – Who Votes?

⇒ BR 3018(b) – “holder of record of a security”

⇒ Holder may be in Street name, and not beneficial owner. Problem: Under non-bankruptcy law, cannot force street holders to disclose beneficial owners.

⇒ Southland Corp – Judge ruled beneficial holders must be solicited to vote. Required a re-solicitation. Delay

## 5. How are votes Counted?

⇒ Bankruptcy – dual affirmative vote (amount and number)

⇒ Securities law requires only amount (not number)

⇒ Problem: Securities held in street name registered in name of depository entity (ie, Depository Trust Company), which holds securities for its clients -- brokerage & banks. Brokerage could be beneficial owner or may hold for others.

⇒ Solution: Pre-bankruptcy -- Solicitation on two levels: master ballot-baby ballot

# STATUTORY REQUIREMENTS

## 6. How long is the pre-bankruptcy solicitation?

- ⇒ Securities law: tender/exchange offers must remain open for a minimum of 20 business days from time first published or sent to security holder. Proxy: 10 days minimum.
- ⇒ Bankruptcy has a 25 day minimum requirement.
- ⇒ Test: Period for solicitation cannot be unreasonably short.
- ⇒ Extend for longest period under non-bankruptcy law and take into account season and distribution to beneficial holders. Rule of thumb. At least 30 Calendar days.

## 7. Registration requirements

- ⇒ Securities Act (5) prohibits offer or sale of securities unless registered with the SEC;
- ⇒ Exceptions: Securities Act 3(a)(9); Bankr Code 1145 exempts all entities except “underwriters” for securities issued in plan
- ⇒ SEC staff member has taken position that 1145 exemption does not apply to prepackaged solicitations.

# STATUTORY REQUIREMENTS

## 8. Classification of Claims

- ⇒ 1122 prohibits placing dissimilar claims in the same class.
- ⇒ Law is silent on placing similar claims in different classes. Test: reasonable and necessary to reorganization
- ⇒ Cannot use separate classification to manipulate voting process

## 9. Claims treatment

- ⇒ Unimpaired: Paid in full or no change in legal rights. \*These classes are deemed to have accepted the plan. (1124) No vote
- ⇒ Impaired: any change in payment or legal rights (ie, substitution of collateral, guarantor, change in voting rights)

## 10. Feasibility of plan

- ⇒ Test: Plan not likely to be followed by liquidation or further financial reorganization.
- ⇒ Problem: Incentive to let contingent/unliquidated claims pass through unimpaired. Increases potential for unsuccessful restructuring.