ESTUDIO
O'FARRELL
ABOGADOS DESDE 1883

MEMORANDUM

Date: **November 14, 2016**

To: **International Swaps and Derivatives Association, Inc.**

Att.: **Katherine Tew Darras / Yaniré Martes**

Re: **Argentina ï Update on legal issues related to enforceability of privately negotiated over-the-counter derivatives**

I. Scope of memorandum

This memorandum considers the legal issues related to the enforceability under Argentine law of privately negotiated (over-the-counter) derivative transactions with counterparties in Argentina. Capitalized terms used but not defined herein have the meaning as in the ISDA Master Agreement.

II. Assumptions

For the purpose of this memorandum, we make the following assumptions:

(1) The Argentine counterparty and the Other Party enter into agreements in the form of an ISDA Master Agreement, which is governed by New York law or English law (as selected by the parties).

(2) The Other Party is may be acting from a place of business outside of Argentina.

(3) The Argentine counterparty may be acting from a place of business in or outside of Argentina.

(4) The obligations of each party under an ISDA Master Agreement are legal, valid and binding under the relevant governing law. We make this assumption because the courts of Argentina will look to the governing law of the relevant contract to determine the basic contractual position.

(5) To the extent that any obligation arising under a derivative is performed in any jurisdiction outside Argentina, such performance will not be illegal or ineffective by virtue of the laws of that jurisdiction.

III. Qualifications

This memorandum is also subject to the following:

(a) The advice in this memorandum is only in relation to Argentine law as it stands at the date of this memorandum and we have made no investigation and no opinion is expressed or implied as to the laws of any other jurisdiction. We have assumed that no foreign law qualifies or affects the conclusions in this memorandum.

(b) This memorandum is subject to all insolvency and other laws affecting the rights of creditors generally.

(d) Nothing herein is to be taken as an indication that the remedy of an order for specific performance or the issue of an injunction would be available in a court in Argentina, inasmuch as such remedies are available only at the discretion of the courts.

IV. Answers

1. Do OTC derivatives transactions face an enforceability problem (eg due to anti-wagering provisions etc under local law)?

There is no legislation setting forth that derivatives are subject to gaming, wagering or gambling laws. Gaming, wagering or gambling contracts are governed by the Argentine Civil and Commercial Code.

Pursuant to section 1609 of the Civil and Commercial Code, a gaming contract is defined as: ñ*a contract in which two or more people compete, even if only partially, in a physical or intellectual activity, the winner of which receives a measurable asset in money*ò. Unlike the old Civil Code, the Civil and Commercial Code does not provide a definition of wagering or gambling contract. Gaming contracts are solely based on a legal agreement, by which two or more parties submitt themselves to an uncertain event with the expectation of winning something. Under Argentine law, this agreement should have a purely recreational purpose.

In our opinion derivatives should not be characterized as a gaming, wagering or gambling contracts under Argentine Law, insofar as the purpose of these contracts reflects a real commercial purpose (i.e. hedging, arbitrage, speculation or asset/liability management).

Thus, a derivative entered into by a Argentinean counterparty and other party for purposes of hedging a commercial transaction or arbitrage, speculation or asset/liability management, is not likely to be considered as a gaming contract, to the extent that gaming contracts require having a recreational purposes. The parties to a gaming or wagering contract have no intention of managing risk based on commercial activities. Conversely, they pursue a gain solely derived from bets or games.

Furthermore, in derivatives, the parties may negotiate their terms and conditions through the inclusion of amendments in the Schedule or Annex of the relevant Master Agreement, while according to Argentine law, some gaming and wagering contracts do not permit negotiation of their terms and conditions.

2. Are there any issues with foreign law governed contracts (mainly English and New York law) when used for cross-border transactions into your jurisdiction? For example, some countries may restrict the use of foreign law and language documents when it comes to contracting with local public law or state entities.

The choice of English law and New York law or any other foreign law to govern a cross border netting agreement, under which derivative transactions are executed, is a legal and valid choice of law under the laws of Argentina, and the courts of Argentina should honour said choice of law, subject to compliance with certain Argentine evidentiary requirements; provided that it does not contravene Argentine principles of public policy, and that the application of English law or New York law or any other foreign law will be pre-empted by applicable Argentine law in matters of bankruptcy, fraudulent conveyance, insolvency, reorganization, moratorium and laws of general applicability relating to or affecting enforcement of creditorsô rights generally or to general principles of equity.

3. Are there provisions (of a statutory, customary, common law etc nature) in local law that provide for the enforceability of close-out netting? Is close-out netting defined in addition to set- off under local law? Does local law allow netting in accordance with the terms of the underlying contract (eg the ISDA Master Agreement)?

Since netting legislation has yet to be passed in Argentina, close-out netting provisions may not be enforceable in case of bankruptcy, judicial or out-of-court reorganization or similar events, with certain exceptions applicable for the benefit of the Budget Secretariat and the Finance Secretariat of the Ministry of Treasury and Public Finance.

The occurrence of an insolvency event affecting an Argentine counterparty (such as bankruptcy, reorganization proceeding, judicial or out-of-court reorganization) which triggers the early termination provisions included in netting agreements (such as the ISDA Master Agreement), will mean that the Non-defaulting Party may not enforced such provisions. The Law 24,522 (the ñBankruptcy Lawò)

provides to a specific procedure to be followed when an Argentine counterparty goes bankrupt.

In this regard, article 145 of the Bankruptcy Law sets forth that if termination pursuant to breach of contract did not occur or was not judicially claimed prior to the date the debtor was adjudged bankrupt, Early Termination provision cannot be invoked in the event of bankruptcy of the Defaulting Party. For instance, said article would affect the enforceability of closing out transactions under the netting agreement (such as the ISDA Master Agreement) and the calculation of a net settlement amount without delay.

In addition, set-off under Argentine law is considered a way of payment, thus, if the insolvent Argentine counterparty sets-off reciprocal claims against the Non-Defaulting Party, it will be performing payment, which may be considered a detriment to the other creditors of said insolvent counterparty. In light of the above and taking into account Section 130 of the Bankruptcy Law which provides that ñsetoff is only applicable before adjudication of bankruptcyò, then, close-out netting provisions will be not enforceable in case of Bankruptcy. In this regard, Section 930, subparagraph f) of the Civil and Commercial Code provides that credits and debts under the scenario of bankruptcy and reorganization proceeding cannot be subject to set-off.

Should the Defaulting Party be served notice of termination on or after the adjudication of bankruptcy or the ruling approving the beginning of reorganization proceeding, the Automatic Early Termination will not be enforceable under Argentine law. By virtue of the Argentine bankruptcy proceeding, under which the debtor may file a bankruptcy petition and after the analysis made by the Argentine bankruptcy court, a ruling in relation to the adjudication of bankruptcy is made, it would be advisable to include in the Schedule to an ISDA Master Agreement entered into with an Argentine counterparty the Automatic Early Termination. In such case, the recognition in writing by the Argentine counterparty of its inability generally to pay its debts as they become due, would be considered a Bankruptcy Event under an ISDA Master Agreement and, then, the Non-defaulting Party will be entitled to early terminate the transactions upon this recognition.

In such a scenario, without having a ruling adjudicating bankruptcy to the Argentine counterparty, it would not be possible to request the revocation of the acts derived from the Automatic Early Termination. Consequently, such acts could not be considered ineffective against the other creditors of the Argentine

counterparty, due to the knowledge by the Non-defaulting Party of the inability of payment recognized by the Argentine counterparty. In this regard, the petition of bankruptcy or any relief under the Bankrutcy Law, such as reorganization proceeding (*concurso preventivo*) or the out-of-court proceeding (*acuerdo preventivo extrajudicial*) will trigger Automatic Early Termination and such clause will be enforceable under Argentine law, to the extent that the Non-defaulting Party sends a notice to the Defaulting Party informing of the Early Termination Date and such notice becomes effective prior to the adjudication of bankruptcy or prior to the ruling approving the beginning of a reorganization proceeding (*concurso preventivo*).

Should the Defaulting Party be served notice on or after the adjudication of bankruptcy or the ruling approving the beginning of reorganization proceeding, the Automatic Early Termination will not be enforceable under Argentine law.

It is worth mentioning that in a bankruptcy proceeding the creditors and the administrator could challenge Automatic Early Termination in case that such termination affects the estate of the Defaulting Party.

Due to the fact that close out netting provisions are not enforceable in the event the Argentine counterparty goes bankrupt or is otherwise subject to any insolvency proceeding, any foreclosure of collateral posted by the Argentine counterparty to the Non-defaulting party, even held outside Argentina, will be subject to claw back or restriction by an Argentine Bankruptcy Court.

4. In case there are netting provisions under local law, do they apply to all types of counterparties, eg financial institutions, corporates (commodity trading firms, utilities, manufacturers etc), SPV, public law entities (municipalities, central bank, development banks etc)?

Except from the above-mentioned case of the Budget Secretariat and Finance Secretariat of the Ministry of Treasury and Public Finances, Argentine law does not expressly include the concept of netting.

However, netting provisions apply to all types of counterparties prior to the adjudication of Bankruptcy or the ruling approving the beginning of reorganization proceeding (such as *concurso preventivo*).

5. Is the scope of transactions eligible restricted in any way, eg to certain products (rates, currencies, equities, credit etc). What about commodity products (gas, coal, oil, metals, agricultural *etc) and "new" products (emissions allowances, freight rates, weather* variables etc)? Is there a different treatment for financially settled transactions as opposed to physically settled ones (ie where the underlying product is delivered)?

No.

6. Are financial collateral arrangements governed by foreign law recognized under local law? In particular, would title transfer and security interest arrangements (under English and NY law) be enforceable (eg ISDA credit support documentation)?

Financial collateral arrangements governed by foreign law are recognized under Argentina law.

Title transfers and security interest arrangements governed by foreign law (such as English and New York law) are enforceable under Argentine law.

In Argentina, it is not possible for a pledgee to use the pledged assets as though it were the absolute owner of those assets, pursuant to Section 2198 of the Civil and Commercial Code.

However, it is valid and enforceable that the financial collateral arrangement includes a provision allowing the creditor (pledgee) to acquire the collateral (e.g. securities) by a value to be determined at the time of the maturity of the obligation, by an expert appointed by the pledgor and pledgee or based on quotations published in organized markets.

Taking into account that sett-off is only applicable before adjudication of bankruptcy, Agentine bankruptcy court will consider that the foreclosure of collateral by the Non-Defaulting Party after the adjudication of bankruptcy or the commencement of reorganization proceeding of the Argentine counterparty affects the equal treatment of unsecured creditors and, consequently, would be deemed ineffective.

There is no legal and/or regulatory obligation to register in Argentina to evidence a charge/security interest over collateral owned by an Argentine counterparty to secure obligations under a financial collateral arrangement, as long as the collateral is located outside of Argentina. If the collateral (e.g. securities) is held in Argentina, then, the pledge over the securities shall be registered in a depositary institution registered under the Argentine Securities Commission.

7. Any other issues under local law (eg conflict of law rules; jurisdiction issues (eg arbitration recommended)?

(i) Jurisdiction:

The submission by an Argentine Counterparty to the non-exclusive jurisdiction of the U.K courts or U.S. courts (as the case may be) is valid under the laws of Argentina. When an Argentine Counterparty adopts the submission to foreign jurisdiction under a Netting Agreement or related contract, it should be authorized by the governing body of the Argentine counterparty.

If any judgment of a U.K court or U.S. court (as the case may be) is rendered against an Argentine Counterparty in connection with a Netting Agreement and related contract, enforcement of such judgment is recognized in Argentina without any retrial or re-examination of the original action, provided that the requirements of the Civil and Commercial Procedure Code of Argentina are met as follows:

(a) the judgment, which must be final in the jurisdiction where rendered, is issued by a court competent in accordance with the Argentine laws regarding conflict of laws and jurisdiction and resulted from any personal or certain in rem actions;
(b) the defendant against whom enforcement of the judgment is sought is personally served with the summons and, in accordance with due process of law, is given an opportunity to defend herself/himself against the foreign action;
(c) the judgment must be valid in the jurisdiction where rendered and its authenticity must be established in accordance with the requirements of Argentine law;
(d) the judgment does not violate the principles of public policy of Argentine law; and

(e) the judgment is not contrary to a prior or simultaneous judgment of an Argentine court.

The submission by an Argentine counterparty to arbitration, either in Argentina or abroad, is valid under Argentine law.

If an abroad arbitration award is rendered against an Argentine Counterparty in connection with a netting agreement or related contract, enforcement of such arbitration award shall be recognized in Argentina without any retrial or re-examination of the original action, provided that the requirements of the Civil and Commercial Procedure Code described above, as adapted to arbitration awards instead of judgments, are met.

In addition, Argentina is a party to the New York Convention on arbitral awards of 1958 (the ñConventionò). The Convention was entered into by Argentina in August 26, 1958, and approved by the Argentine Congress by Law Nº 23,619. Through such law, the Argentine government declared, on the basis of reciprocity, that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state. The Argentine government also declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Argentine law. In that regard, derivative transactions constitute commercial legal relationships under Argentine law.

The counterparty entering into a cross-border netting agreement shall obtain a Spanish translation by a sworn public translator certified by the *Colegio Público de Traductores* of any document in any language other than Spanish, in order to bring an action thereon in the courts of Argentina (such as the enforcement of an Arbitration award or Court ruling from U.K. courts or U.S. courts). In addition, any public document granted in any country other than Argentina must be duly legalized before the competent Argentine Consulate and before the Ministry of Foreign Relations of Argentina, or if such country is a party to the Convention Abolishing the Requirement of Legalization for Foreign Public Documents adopted at The Hague on October 5, 1961, must bear the "Apostille" provided in such Convention).

(ii) Exchange Control Regulation:

Communication ñAò 6037 issued by the Argentine Central Bank on August 8, 2016 derogated the Communication ñAò 4805, which provided for exchange control restrictions for entering into derivatives by Argentine counterparties.
Communication ñAò 6037 provides that Argentine residents (such as a corporation, bank, credit institution, insurance company, investment firm/broker dealer, state-owned entity ï except for the Argentine Central Bank with respect to which exchange control regulation is not applicable -) may have access to the local exchange market for paying premiums, posting collateral and making the corresponding cancellations with respect to futures, forwards, options and other derivatives entered into by Argentine residents in foreign organized markets or with non-resident counterparties. Consequently, an Argentine counterparty is entitled to purchase foreign currency on the local exchange market for making any payment to the other counterparty under derivatives.

Concerning Argentine financial entities (such as banks/credit institutions), the access to the local exchange market will be subject to transactions allowed for specific ruling in force. Such specific ruling refers to Communication ñAò 6038 which sets forth that derivatives entered into by financial entities with the other counterparty may only be performed:

(A) Within institutionalized markets from OECD (Organization for Economic Co-operation and Development) member countries, always when the other Counterparty (i) complies with the rules or ñCredit Assesmentsò, requiring for that purpose international credit rating of ñinvestment gradeò or higher and (ii) is cleared through a central counterparty (CCP);

(B) Through transactions not included in point (A) above, to the extent that the following conditions are verified concurrently:

(i) Derivatives shall assess the posting of initial margin and shall include the daily integration of margins (ñmark to marketò); and

(ii) The Counterparty shall be:

1) A foreign bank complying with point 3.1. of the rules of ñCredit Assessmentsò, requiring for that purpose international credit rating of ñinvestment gradeò or higher;

2) Incorporated in countries and/or territories considered as cooperative in terms of tax transparency, in accordance with the provisions of Section 1 of Executive Decree N° 589/13 and supplementaries;

3) Subject to principles, standards or rules related to prevention of money laundering an terrorism financing internationally accepted, by the FATF-GAFI; and

4) Registered with, or its main office or controlling shareholder, is in any of the countries which are members of the Basle Committee on Banking Supervision.

Consequently, derivatives to be entered into with Argentine financial entities (such as banks/credit institutions) should be checked on a case-by-case basis, in order to determine whether or not the above-described conditions are met.

For further information and advice on the application of the laws of Argentina to OTC derivatives transactions as well as enforceability of ISDA Master Agreement, please contact:

Sebastián Luegmayer (luegmayers@eof.com.ar), Tel: (0054) 11 4346-1045.