

Einige wichtige Überlegungen zur genehmigten class action bei 2 USD-globals.
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Ambitoweb.com

Thursday, January 6, 2004, Issue N° 1163

Information from Argentina and the world

Section: Economy

From now on, to come out from the default will be increasingly difficult

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New York Judge Thomas Griesa's decision to «certify» a class action against Argentina adds a high degree of controversy to the default under the sovereign debt and makes the situation in which the country is immersed since the end of 2001 much more difficult.

Class actions are collective lawsuits carried on by a group of plaintiffs against a person who, allegedly, has caused damage to a great number of individuals. This type of action is very common in the U.S.A. and gives strength to the plaintiff composed of thousands of scattered injured parties against powerful defendants such as large companies (in the lawsuits against tobacco companies, smokers with health problems sued them for over US\$20 billion).

Although initially these actions have no cost for investors, they usually end up being very expensive, since attorneys' fees set by judges may reach 35% of the total amount recovered.

Last year, Judge Griesa rejected a class action on the grounds that the affected class was not well determined. In view of such rejection, the plaintiff specified the classes (Global 2009 and 2017) and the judge finally authorized the action.

• Procedure

Generally, the steps to be followed in a class action, with reference to the Argentine case, are as follows:

- a member of a numerous group files a claim against the defendant. Such claim may include a petition for class action certification;
- the defendant is summoned;
- the defendant answers the claim. He usually denies the claims and also opposes the petition for class action certification;
- the plaintiff asks for class certification if he has not done so before;
- the judge decides on the class action. If he grants it, as in the Argentine case, the lawsuit continues based on this type of claim;
- the judge appoints a class representative. The representative will be the person with the highest economic interest in the matter;
- a notice is published in important international newspapers informing possible class members (in this case, holders of Global 2009 and 2017 bonds) that a class action has been certified and that they have a determined term to decide whether they will join it or not;
- investors may participate in the class action or stay out of it. If they stay out, they may file an individual action not subject to the class. It is important that Argentine investors stay alert for such notice and consult about its contents, since sometimes, if they do nothing, they are automatically included in the class;
- after certification, the lawsuit goes on according to the procedural steps. In the Argentine case, it is expected that at the end of January, Judge Griesa lifts the waiting period for the collection of sums already adjudged. Plaintiffs will ask for the attachment of payments to the International Monetary Fund, among other attachable assets, in compliance with

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the U.S. laws on sovereign immunity (the immunity is for disbursements by the agency to Argentina, but not the other way round). In fact, the discussion of the feasibility of such attachment has already been brought up in court. Simultaneously, the class representative and his attorney permanently try to reach a repayment agreement with the debtor. If they succeed, class action members will be considered as parties to such agreement. During the course of the collective lawsuit, the debtor cannot negotiate with the members of the class; he can only negotiate with the class representative.

• **Conflicts**

Generally, there are conflicts of interests in class actions, since the interests of the different investors, the interests of the representative and the other investors, the interests of the representative's lawyer and the representative and/or the interests of the representative's lawyer and the other investors may not be aligned and, therefore, this kind of suit, instead of benefiting the injured parties, damages them even more. For instance, a reduction of 50% may be acceptable for the representative and his lawyers, but not for minority investors who in good faith decide to become members of the class in the belief that their rights will be protected. As attorneys' fees may be up to 35% of the sum recovered, it is possible that any type of agreement acceptable for the debtor is reached with the purpose of closing the matter in a transaction with the class representative.

For instance, in the Argentine case, there are four types of investors:

- large vulture funds, such as Dart, which almost certainly will not participate in the class action and will follow their own way trying to obtain even better agreements than those reached by the class;
- Argentine minority investors, from which over 200 have already started individual actions in the courts of New York and who will only accept to participate in the class action if the representative is an Argentine investor and his lawyers are known and trustworthy;
- American institutional investors who make up the Argentine Bondholders Committee (ABC) who, unless any of them manages the class, will not participate in it either. But with the acceleration of class actions and individual actions (such as those brought by Dart and Argentine bondholders), it is possible that, as trustees of their clients, they are obliged to file a claim at least individually;
- it is not known what the other investors, including European investors, will do, although they seem to be more inclined to carry on a class action managed by themselves than to become a member of a class action managed by other investors. Since it is not possible to start two class actions for the same debt, it is likely that they file individual claims.

But in any case, the ramification of class actions gives an important number of bondholders the possibility to join them, and, therefore, to travel the legal road instead of the complex path of the restructuring proposal, promote the start of individual actions by investors who distrust a class procedure but realize that they need to protect their rights, and toughen investors' position in the face of the restructuring process. All of this, added to the merger of different creditor committees into a sole group in Rome, makes the lifting of the default a very difficult objective.

(*) **Author of the book «The Default and the Restructuring of the Argentine Debt».**

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