

***Court Concludes Creditors Did Not Rise to the Occasion in Half-Baked Involuntary Petition Against Argentine Bread Company***

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The Bankruptcy Court for the Southern District of New York recently dismissed an involuntary bankruptcy petition against an Argentine bread company that had few ties to the United States and that was undergoing a reorganization proceeding in Argentina. *In re Compañia de Alimentos Fargo, S.A.*, 376 B.R. 427 (Bankr. S.D.N.Y. 2007).

Fargo was the largest producer and packager of bread products in Argentina. Its operations were centered in Argentina. All of Fargo's 1300 employees worked in Argentina, and nearly all of its customers, sales, and suppliers were in Argentina. Its ties to the United States were limited to a single trademark and three pending trademark applications, as well as unsecured notes issued under U.S. law in the amount of \$120 million.

After the value of the peso plummeted in 2002, pushing Argentina into a recession, Fargo defaulted on its interest payments to the noteholders. Fargo then instituted a *concurso preventivo* insolvency proceeding in Argentina, triggering an automatic stay. Fargo objected to the claim of the indenture trustee (who filed aggregate proofs of claim on behalf of the noteholders) contending that the liabilities under the notes should be converted from dollars to pesos and that, for voting and distribution purposes, the notes should be allowed in the amount paid by the noteholders in the secondary market rather than the face amount of the notes.

The indenture trustee and noteholders prevailed in the Argentine bankruptcy court, but the court of appeals reversed in March 2005. In the process, the court of appeals ruled—on an issue that was not argued or briefed by the parties—that the indenture trustee's claim for voting purposes would be limited to the amount of unpaid prepetition interest, effectively reducing the claim by \$120 million for voting purposes. The court of appeals, however, agreed that the notes should be denominated in dollars and recognized at the face amount for distribution purposes. For the next two years, the *concurso* was stayed while the indenture trustee attempted to appeal to the National Supreme Court.

Frustrated by the delay in the *concurso* proceeding and troubled by the appellate court ruling, three off-shore funds that held 65% of the notes filed an involuntary bankruptcy petition against Fargo in the Southern District of New York. The funds, which were based in the Bahamas, the Cayman Islands, and the British Virgin Islands, also requested discovery against Grupo Bimbo, a Fargo competitor that had indirectly purchased Fargo's senior secured debt and equity. According to the funds, Grupo Bimbo had seized control of the *concurso* proceeding for its own benefit rather than for the benefit of all creditors.

Fargo filed a motion to dismiss the involuntary under §305(a)(1) of the Bankruptcy Code, which provides in relevant part that “[t]he court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if . . . the

interests of creditors and the debtor would be better served by such dismissal or suspension.” 11 U.S.C. § 305(a)(1). The court noted that when another, foreign bankruptcy proceeding is pending with respect to a debtor, U.S. bankruptcy courts typically dismiss or abstain in favor of the foreign court on comity grounds if the foreign forum provides a fair and equitable procedure for resolution of the parties’ rights. Curiously, the issue of whether the representatives of Fargo were “foreign representatives” and whether foreign representatives must be recognized and are required to use §305(a)(2) rather than §305(a)(1) does not appear to have been addressed.

The funds challenged the fairness and efficiency of the Argentine judicial system, contending that the system in general is corrupt, and that the unusual March 2005 court of appeals ruling was evidence of such corruption. The funds also noted the differences between the U.S. and Argentine bankruptcy systems, and pointed to the lengthy delay in the *concurso* proceeding, which had been pending since 2002. The court rejected the funds’ contentions.

First, the court noted that the *concurso* proceeding was similar to a Chapter 11 case because it provided for an automatic stay; it contained claims allowance procedures; and it allowed for the avoidance of fraudulent and preferential transfers. Although it did not provide for equitable subordination of claims—a remedy the funds wanted to use against Grupo Bimbo—there were other remedies to address any harm caused by Grupo Bimbo or Fargo’s insiders. In other respects, the Argentine system was different than the U.S. system but was not repugnant to U.S. law.

Second, even if the Argentine court of appeals made a mistake in its March 2005 ruling, that ruling was still subject to an appeal, and “a mistake does not automatically imply partiality, or worse, corruption.” *In re Companhia de Alimentos Fargo, S.A.*, 376 B.R. at 436. Moreover, some evidence the funds offered in support of their allegations was inadmissible, and other evidence simply failed to show that the Argentine system in general, or the Fargo bankruptcy court in particular, were corrupt or subject to manipulation.

Third, the delays in the *concurso* that were attributable to the appeal of the voting-rights issue appeared to be over, and it was not clear that a U.S. court would have moved any quicker.

Fourth, the court noted the difficulties with pursuing a parallel Chapter 11 case in the United States. Fargo’s business operations, customers, employees, and substantially all of its assets were located in Argentina. The U.S. bankruptcy court did not appear to have jurisdiction over all of Fargo’s creditors, and any confirmed plan in the United States would have to be taken to Argentina to be enforced. The funds would have difficulty enforcing the plan in Argentina, especially considering that the filing of the involuntary petition in the U.S. was a violation of the automatic stay in the *concurso* proceeding.

Finally, the court noted that some of the noteholders purchased their claims against Fargo *after* the *concurso* was filed, so they must not have been overly concerned with the fairness of the Argentine system or the ability to get paid through the *concurso*. In fact, because the filing of the involuntary triggered an automatic stay that could be enforced against one of the Grupo Bimbo affiliates (which was a Delaware LLC), the court speculated that the funds might have filed the involuntary case to “hijack” the *concurso* or increase their leverage in the negotiations.

No matter how you slice it, the court's analysis of the bread company and the involuntary filed against it appear to be sound. With so few jurisdictional crumbs, the U.S. bankruptcy court simply could not keep the bankruptcy case: "Fargo should be reorganized in Argentina—without this Court's oversight or interference." *In re Companhia de Alimentos Fargo, S.A.*, 376 B.R. at 441.