

Suing the Giant

The legal consequences of the fall of Lehman and stock market have begun. What will the legal battle look like.

Is it time to sue the Giant? The answer depends on who is considered. The federal government, responsible for the lack of regulation in the U.S. financial market, could be a tentative target. However, it has immunity.

"You can't sue it. There is a constitutional provision that impedes it. Of course, here in Argentina that would be unthinkable given that here the state is the entity most often sued. But there, immunity reaches all of its agencies." Warned Luis Sprovieri, a partner in charge of the litigation section of Baker & McKenzie in Argentina.

Sovereign immunity is what any State would invoke if charged by a developing economy protesting the havoc wreaked by a political and economic error.

"In the United States, sovereign immunity is practically absolute. It is difficult to imagine any successful claim as a result of the financial crisis. On the other hand, it is also not clear that States have an obligation to regulate their financial markets," said Eric Lewis based in the United States and name partner with Baach Robinson & Lewis PLLC.

From the epicenter of the conflict, via e-mail, Lewis clarified that claims against financial entities are widespread. For example, in Spain consumer associations have already initiated action against Spanish banks who offered leveraged titles without

giving complete information regarding the ties that those titles had with Lehman.

The New York offices of Baker & McKenzie is already representing Lehman creditors, although in Buenos Aires Sprovieri recognized that much remains unclear.

"The United States financial crisis is not old enough to have had much done and so far it has not been defined what approaches claimants will take," he said.

Also for Alfredo Rovira, a heavy hitter in the City, "it would seem very premature to think of a situation with significant litigation." Nevertheless, the leader of the firm Brons & Salas remarked that there has been an important increase in financial failures in the U.S.

In relation to these processes, Alexis Kook-Wekott, another partner at Baker & McKenzie, further explained "there are people that still don't know they had underlying assets guaranteed by a Lehman note."

The information hinders a possible legal action to reclaim in the biggest bankruptcy in history because of a question as simple as existing obstacles to finding out if one has rights against the fallen entity.

Apart from a case involving investors, Manuel Varela, a partner at Baach Robinson & Lewis, said that currently in the United States there have already been several municipalities that have sued investment and commercial

banks for various reasons, including for granting harmful loans related to mortgage transactions.

On the other hand, the Argentinean Cristian Francos, a member of the same firm, noted that they are already representing foreign banks that had dealings with Lehman entities. "We expect to see a great deal of civil litigation as well as criminal investigations of the financial institution and their executives," he added.

For Rovira, thinking about investors initiating massive claims against banks and having the sovereign states support them is "apocalyptic" because no one wins.

"When one initiates a case, it is because it has the potential to recover money or because of principles that are at stake, but in this crisis principles are not at issue, instead it is imperative to try to maximize the probability of recovery," he said. However, "pursuing a judgments against the banks in this context would result in a decreasing probability of recovery as the number of claims grow the claimants will find they have claims against bankrupt entities," he continued.

As such, the specialist will encounter a type of litigation completely different from that of recent years. "They will be between banks, financial advisors, and their employers," he added.

At this time, the situation of banks litigating with other banks is a given. On September

29, Citigroup signed an agreement with Wachovia in order to acquire the assets of that bank for a total of US\$2.2 billion, a purchase that required the support of the United States government along with a period until October 6 during which Citigroup had the exclusive right to pursue the purchase of Wachovia. In the interim, Wells Fargo surfaced and offered US\$15 billion, a proposal that was accepted by Wachovia during the exclusivity period, noted Eugenio Bruno, a partner at Nicholson and Cano.

Considering that the exclusivity provision had been violated, Citigroup initiated a claim against Wachovia for US\$60 billion in damages. The first round of which, for many, will be a life or death fight.