

November 14, 2012

Don't Cry for Me Argentine Bondholders: Update

We are writing this further update to address several current developments in the continuing litigation – now proceeding in both the District Court and in the Second Circuit – in *NML Capital Ltd., et al. v. The Republic of Argentina*.

1. New Website

In view of the overwhelming interest in this case, we have created a new website, on which we have posted all of our prior client notes on this matter, as well as many of the more relevant background materials, including briefs, hearing transcripts, correspondence to the District Court from the parties and similar items. The address of this new site is <http://www.shearman.com/argentine-sovereign-debt/>, and you can link to it [HERE](#). We will add items to that site as this matter proceeds.

2. Argentina Petitions the Second Circuit for Panel Rehearing and Rehearing En Banc

Yesterday Argentina filed a “petition for panel rehearing and rehearing en banc” of the Second Circuit panel’s October 26, 2012 decision. You can link to it [HERE](#). The petition identifies two questions that Argentina characterizes as being of “exceptional importance” and that it argues should be reconsidered by the three-judge panel or decided by the full 13-judge court: *first*, whether a court may enjoin a foreign state’s use of its property outside the United States in alleged violation of the Foreign Sovereign Immunities Act; and *second*, whether a court may construe a boilerplate *pari passu* clause contrary to alleged market understanding and in a way that threatens future sovereign debt restructurings.

Petitions for panel rehearing and rehearing en banc are infrequently granted, especially if the petitioner’s contentions were already considered and rejected by the panel, and the petitioner’s submission is that the circuit court just got it wrong. The Second Circuit is particularly stingy in rehearing cases en banc compared to other circuit courts of appeal.

*According to the official statistics, in the 11-year period from 2000 through 2010, the twelve regional circuits heard a total of more than 325,000 cases that were terminated on the merits after oral hearings or submissions on briefs. A total of 667 (as reported) to 670 cases (using our Second Circuit data) were heard en banc during that same 11-year period—a little over 2/10 of 1% of the total. The average for the Second Circuit was about one-eighth that of the system-wide average: **eight cases heard en banc out of a total of 27,856 appeals that were terminated on the merits, or less than 3/100 of 1% of the cases.***

Federal Bar Council, Second Circuit Courts Committee, *En Banc Practices in the Second Circuit: Time for a Change?*, July 2011, at 4 (emphasis added; footnotes omitted).

Argentina will find it difficult to beat the odds because its petition repeats the arguments in its circuit court briefs and does not identify any legal authority or fact of record that the panel overlooked. On the FSIA question, the petition contends that

the injunctions “restrain the Republic from making scheduled interest payments.” But the panel expressly considered and rejected that characterization of the injunctions in its October 26 decision (at page 25). On the *pari passu* question, the petition contends that “the panel ignored the tide of authority – set forth in the briefs of the United States and the New York Clearing House Association,” among other authorities, that the panel’s interpretation of the *pari passu* clause “runs counter-to-market understanding.” However, the circuit court addressed that point, stating that “we are unpersuaded that the clause has this well settled meaning Argentina’s primary authorities and Argentina itself appear to concede as much In short, the record reveals that Argentina’s interpretation of the *Pari Passu* Clause is neither well settled nor uniformly acted upon.”

Whether the panel decided the FSIA and *pari passu* questions correctly or incorrectly, it appears to have considered Argentina’s contentions. Such petitions find it challenging to obtain review.

The rules of appellate procedure do not permit a response to a petition for rehearing unless one is ordered by the circuit court. No rule or practice specifies a time within which the circuit court must act. The timing of the Second Circuit’s action on the rehearing petition will likely be short in view of the fact that the content and applicability of the injunctions are currently before Judge Griesa, and (as discussed below) he has made it clear that he is going to move very quickly. Once Judge Griesa issues the amended injunctions, Argentina will in any event return to the Second Circuit and the panel may issue a new decision (which will again be subject to a petition for (panel) rehearing and suggestion of rehearing en banc).

3. District Court Proceedings

a. Hearing Before Judge Griesa

The transcript from last week’s hearing before District Judge Griesa is now available, and is posted to our new webpage and is available [HERE](#). Judge Griesa’s comments make it quite clear that he is going to move very quickly, and that his intention is that the plaintiffs will be paid something – the amount remains to be determined – at the time Argentina is to make payment on the Exchange Bonds this coming December. As Judge Griesa said at last Friday’s hearing:

THE COURT: One of the things I have in mind is that, subject to what the Court of Appeals has asked, the plaintiffs are entitled to money and they are entitled to money if the legal steps were in order, they are entitled to money out of the December payments. They are entitled to money. And they have been waiting for years to get some money. But they are entitled to money. And they are going to get something. The Court of Appeals didn’t say they are going to get nothing. The Court of Appeals said that the district court should do some more work to resolve how much. But they will get something.

Now when should they start? Should they wait until March? That is money that they are being deprived of that they are entitled to. They have a legal right to. What the Court of Appeals is saying is that the Republic has breached these clauses. Breached these clauses. So the plaintiffs are entitled to that money.

So what I am saying to all of you is that I will keep the stay in effect until I make my ruling. I will consider continuing the stay while the Court of Appeals does further work. But the Court of Appeals further work is not going to say there is no money coming. It is a matter of how much.

So I have to tell you that I will keep the stay in effect until my ruling and at that time I will entertain applications to continue the stay or to dissolve the stay. And obviously to some extent whether it is appropriate to continue the stay

depends on what I rule. I am repeating myself for the umpteenth time, but some money is due to the plaintiffs out of those December payments. It's due. How much is a question.

This extract makes it clear that Judge Griesa intends to issue a revised injunction prior to December, which he can do in light of the fact that he has ordered that briefing be concluded by November 19. The question then becomes, *first*, whether Judge Griesa or the Second Circuit will stay the effectiveness of the amended injunction, and *second*, how quickly the Second Circuit will move. As we have previously pointed out, the Second Circuit, in its October 26 decision, took a number of procedural steps designed to expedite its review following remand to the District Court.

While extraordinary, it does seem possible that proceedings in both courts can be concluded by December 2, the next day on which Argentina is to pay interest on Exchange Bonds.

b. Plaintiffs' Brief on Remand

Pursuant to the schedule set by Judge Griesa, the plaintiffs filed their brief on remand in the District Court late last night. This brief is on our webpage and is available [HERE](#).

Plaintiffs made three primary points:

First, they argue that the ratable payment mechanism should specify that, in the event Argentina makes full payment to the Exchange Bondholders, it should make full payment to the FAA Bondholders:

If Argentina pays any installment currently due under the Exchange Bonds in full, it must pay in full the amount it currently owes to the plaintiffs. . . If Argentina makes the full approximately \$3 billion payment that it must make under the Exchange bonds on December 15, 2012, it must then pay everything that it then owes to the plaintiffs – or roughly \$1.43 billion.

Second, plaintiffs have responded to the Second Circuit's concerns about the impact of the injunction on "pure intermediaries" by specifying exactly which entities in the Exchange Bond payment stream should be treated as "agents and participants" subject to the injunction.

Finally, the plaintiffs argue that Judge Griesa should not continue to stay the revised injunction, once issued. In support of this argument, the plaintiffs quote extensively from press and other reports from Buenos Aires that the Argentine government may defy the injunction, an issue that Judge Griesa raised at Friday's hearing.

Argentina's reply brief is to be filed on November 16.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

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