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Don't Cry for Me Argentine Bondholders: The Second Circuit Rules

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:

Contacts

Henry Weisburg
New York
+1.212.848.4193
hweisburg@shearman.com

Antonia E. Stolper
New York
+1.212.848.5009
astolper@shearman.com

Stephen J. Marzen
Washington, DC
+1.202.508.8174
smarzen@shearman.com

Patrick Clancy
London
+44.20.7655.5878
patrick.clancy@shearman.com

On August 23, the Second Circuit issued its long-awaited opinion on Argentina's appeal from the Southern District's amended injunction requiring that Argentina make "ratable payment" to the plaintiffs when it next makes payment to holders of its Exchange Bonds. Argentina lost comprehensively, in a carefully written and unanimous decision that is highly critical of Argentina's treatment of its creditors, and is quite clearly designed to minimize Argentina's prospects for a successful petition for certiorari to the Supreme Court.

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The Second Circuit's August 23 Opinion

While relatively short and highly succinct, the August 23 Opinion appears to decimate every argument – whether based in law or policy – advanced by Argentina and the other parties that filed papers in its support. In summary:

- The Second Circuit strives to portray this case as involving the unique conduct of Argentina, not typical of the conduct of other financially-troubled sovereigns, and Argentina's unique *pari passu* clause.
- The August 23 Opinion catalogs and then rejects all of the multiple arguments advanced by Argentina and the other entities (primarily Bank of New York Mellon) who supported Argentina's position.

- However, the Court also stayed the effectiveness of its August 23 Opinion "*pending the resolution by the Supreme Court of a timely petition for a writ of certiorari*."

The Second Circuit's August 23 Opinion, the briefs and other papers relating to this appeal, and our many prior explanations and comments on this case are all available on our Argentine Sovereign Debt webpage: www.shearman.com/argentine-sovereign-debt.

The Second Circuit Suggests This Case, and Argentina's Conduct, Is Unique

In what certainly appears to be an effort to cast this case as unique and fact-bound, reducing the prospect of *certiorari*, the Court identifies Argentina as a "*uniquely recalcitrant debtor*," with a "*long history of defaulting on its debts*," with "*persistent defaults*" and exhibiting "*extraordinary behavior*." August 23 Opinion at 5, 23.[1]

The August 23 Opinion also criticized Argentina's refusal to negotiate, to respond to the Court's own inquiries, and to continually threaten defiance:

> *Recognizing the unusual nature of this litigation and the importance to Argentina of the issues presented, following oral argument, we invited Argentina to propose to the appellees an alternative payment formula and schedule for the outstanding bonds to which it was prepared to commit. Instead, the proposal submitted by Argentina ignored the outstanding bonds and proposed an entirely new set of substitute bonds. In sum, no productive proposals have been forthcoming. To the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2013 oral argument, counsel for Argentina told the panel that it 'would not voluntarily obey' the district court's injunctions, even if those injunctions were upheld by this Court. Moreover, Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree.*

August 23 Opinion at 6-7 (footnotes omitted).

The Court also made clear its view that this case is limited by the particular contract held by the plaintiffs:

> *But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all pari passu clauses or the obligations of other sovereign debtors under pari passu clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its pari passu clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular pari passu clause found in the FAA.*

August 23 Opinion at 23 (citation omitted).

The Second Circuit Rejects Argentina's Arguments

Argentina advanced three main arguments, all of which the Second Circuit rejects.

First, Argentina argued that the Injunction violated the Foreign Sovereign Immunities Act. The Court addresses this argument only in passing, as it was clearly disposed of in the Court's October 26 Opinion in this case. However, the Court

[1] Citations are to the Court's slip opinion, available on our webpage.

does note, "*Absent further guidance from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA.*" August 23 Opinion at 11.

Second, Argentina argued that the Ratable Payment formula in the Injunction – which requires that the Plaintiffs be paid 100% of principal and past-due interest on their bonds, even if the Exchange bondholders are only receiving a periodic interest payment – is inequitable. The Second Circuit also rejects this argument quickly:

> *[T]the undisputed reason that plaintiffs are entitled immediately to 100% of the principal and interest on their debt is that the FAA guarantees acceleration of principal and interest in the event of default. As the district court concluded, the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing.*

August 23 Opinion at 12 (citations omitted).

Third, as the Court sees it, Argentina "*recycles*" various arguments that an affirmance of the Injunction would have "*cataclysmic repercussions in the capital markets and the global economy*," arguments the Court rejects as "*speculative, hyperbolic, and almost entirely of the Republic's own making.*" August 23 Opinion at 20, 21. For example, the Court notes that Argentina offered no evidence that it does not have the money to pay the plaintiffs while also paying the Exchange Bondholders. August 23 Opinion at 21. Similarly, the Court finds no merit in the arguments that an affirmance would imperil future restructurings, given Argentina's "*uniquely recalcitrant*" behavior, its unique *pari passu* clause, and the emerging prevalence of collective action clauses. August 23 Opinion at 23-24. The Court also finds no merit in Argentina's argument that "*the outcome of this case threatens to steer bond issuers away from the New York marketplace,*" because "*New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts.*" August 23 Opinion at 25.

The Second Circuit Rejects the Arguments of the Bank of New York and the Other Intervenors

The Court also addresses the arguments made by a number of entities who appeared in support of Argentina's position, most significantly Bank of New York Mellon, the trustee on Argentina's Exchange Bonds.[2] These entities primarily argued that the District Court lacked jurisdiction over them, that the Injunction impermissibly has extraterritorial effect, and that the injunction violates UCC Article 4A. Again, the Court rejected all of these arguments, largely on the basis that such arguments were premature.

First, with respect to the alleged lack of jurisdiction argument, the Court noted several times that "*district court has issued injunctions against no one except Argentina.*" August 23 Opinion at 15. While the Court acknowledged that "*[every] injunction issued by a district court automatically forbids others – who are not directly enjoined but who act 'in active concert or participation' with an enjoined party – from assisting in a violation of the injunction,*" the Court took the position that any claim of lack of jurisdiction was "*premature.*" August 23 Opinion at 15, 16.

[2] The Court specifically addresses the arguments made by five such entities, Bank of New York, the Exchange Bondholder Group, Euro Bondholders, Fintech Advisory Inc. and ICE Canyon LLC. In a decision of potential significance in terms of future proceedings in this case before the Supreme Court, the Second Circuit held that only Bank of New York Mellon had standing to appeal with respect to the Injunction. August 23 Opinion at 9.

> *[P]ayment system participants have not been deprived of due process because, if and when they are summoned to answer for assisting in a violation of the district court's injunctions, they will be entitled to notice and the right to be heard.*

August 23 Opinion at 16.

Second, with respect to any alleged improper extraterritorial impact, the Court took a similar approach:

> *If others in active concert or participation with Argentina are outside the jurisdiction or reach of the district court, they may assert as much if and when they are summoned to that court for having assisted Argentina in violating United States law.*

August 23 Opinion at 18.

Finally, with respect to the argument that the Injunction violates UCC Article 4A's ban on injunctions against intermediary banks, the Court both expressed its doubt that the Injunction in fact reached any intermediary banks, August 23 Opinion at 19-20, and again found the issue premature and "*a question for future proceedings*." August 23 Opinion at 19.

The Court's position that these issues are not ripe and can be dealt with in the course of injunction enforcement proceedings is unlikely to provide reassurance to any of the payment system participants, who will not want to risk contempt in order to resolve these issues. Most likely they will decline to participate in any payments.

The Second Circuit Stays its Opinion

Consistent with the Court's past practice in this case, the Court, even when ruling against Argentina, continues to extend Argentina procedural courtesies. In the August 23 Opinion, the Court, without being asked, stayed the enforcement of its own opinion: "*However, in view of the n nature of the issues presented, we will stay enforcement of the injunctions pending resolution of a timely petition to the Supreme Court for a writ of certiorari.*" August 23 Opinion at 7. The timing of such a petition and analysis of when the Injunction may become effective is discussed below.

Likely Next Steps

With its appeals as of right exhausted, but a stay in place, Argentina will likely pursue all avenues of discretionary review that are available to it. The avenues of discretionary review and an illustrative time line are listed in the table on the following page and are the same as those pursued by Argentina after the Second Circuit's October 26, 2012 decision.

ILLUSTRATIVE TIMELINE FOR DISCRETIONARY REVIEW OF AUGUST 23, 2013 DECISION

EVENT	*DATE*	*NOTE*
Petition for rehearing to the Second Circuit panel with suggestion of rehearing by the entire Court en banc	September 6, 2013	Rehearing petitions are due 14 days from the entry of judgment. (Fed. R. App. P. 35(c) & 40(a)(1).) Judgment was entered on August 23, 2013
Denial of rehearing petitions	~End September 2013	Disposition of rehearing petitions may vary widely from any estimate
Petition to the United States Supreme Court for writ of certiorari	~End December 2013	A certiorari petition is due 90 days from the date of denial of rehearing. (S. Ct. R. 13.3.) Amici briefs supporting the petition are due 30 days after the case is placed on the Supreme Court's docket. (S. Ct. R. 37.2(a).)

ILLUSTRATIVE TIMELINE FOR DISCRETIONARY REVIEW OF AUGUST 23, 2013 DECISION		
EVENT	*DATE*	*NOTE*
Brief in opposition to petition for writ of certiorari	~End January or February 2014	The brief in opposition is due 30 days after the case is placed on the Supreme Court's docket, usually a couple of days after filing the petition. (S. Ct. R. 15.3.) Thirty-day extensions are commonly requested and granted. Plaintiffs requested and obtained extensions in the petition from the October 26, 2012 decision (No. 12-1494), but may not take all of the time available in order to obtain an earlier disposition. Amici briefs supporting respondents are due at the same time
Reply in support of the petition for writ of certiorari		Replies are effectively due 14 days after the brief is filed, at which time the Supreme Court Clerk will distribute the petition and opposition to the Justices
Supreme Court internal proceedings: law clerk memoranda, internal conference, and public order	~March/April 2014	The last argument date of the October Term 2013 is April 30, 2014. The Supreme Court's disposition of the forthcoming certiorari petition comes months after the time when the case could be briefed for argument in October Term 2013

The Supreme Court could issue one of three orders: (1) an order denying the petition; (2) an order granting the petition; or (3) an order inviting the Solicitor General "to file a brief in this case expressing the views of the United States." An order denying the petition would dispose not only of the petition, but the stay as well. (Fed. R. App. P. 41(d)(2)(B).) An order granting the petition would trigger the briefing of the case in the late spring and over the summer. Argument would be heard in the fall of 2014 and a decision would be announced by June 2015.

Like an order granting the petition, an order Calling for the Views of the Solicitor General (a "CVSG") issues after the petition has been fully briefed and requires the affirmative vote of four Justices. The Court CVSGs a dozen to a dozen-and-a-half times each Term. A CVSG increases the statistical chance of obtaining review from about 4.2% to about 42% – or ten times. The Supreme Court follows the SG's recommendation about 80% of the time. It takes the SG about four months on average to respond to the Court's order, but the average conceals seasonality. If the Court issues a CVSG too late for a case to be heard in the current Term, the SG may take longer to respond. In this case, for example, the SG might file his brief expressing the views of the United States later in the summer. (*See generally* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237 (2009).) Assuming (reasonably) that the SG's brief and the parties' supplemental briefs are filed before December 2014, then argument would be heard before the last session in April 2015 and a decision would be announced by June 2015. Thus, whether the Court grants review or CVSGs, the latest date on which the petition would be disposed of is June 2015. The "bookends" for the disposition of the petition from the August 23, 2013 decision are therefore March/April 2014 and June 2015.

With the injunctions stayed pending the disposition of the forthcoming certiorari petition, the existing certiorari petition from the October 26, 2012 decision (the petition is No. 12-1494) is of significance primarily because it complicates the forthcoming petition. The petition is No. 12-1494 was filed on June 24, 2013 and the brief in opposition is currently due (after two extensions) on August 28, 2013. Plaintiffs likely obtained the second extension to enable them to discuss the

Second Circuit's August 23, 2013 decision in their brief in opposition to the October 26, 2012 decision. Argentina will likely discuss the implications of the August 23 Opinion for its current petition in its reply. The discussion of both sides may center on footnote 6 in the August 23 Opinion.

In footnote 6 of the August 23 Opinion, the panel opined that Argentina's petition in No. 12-1494 was premature. Footnote 6 states in full: "*Apparently, Argentina filed a petition for* certiorari *in this matter on June 24, 2013, notwithstanding that, as of that date, no final order had yet issued in this case*. See *Supreme Court Dkt. 12-1494*." From Argentina's position, it would not be helpful to have the Court deny its petition in No. 12-1494 and then submit a successive petition presenting the same questions for review later this year. Even though the first denial might rest on procedural reasons rather than a determination that the questions presented do not merit review, the Court does not explain the reasons why it denies petitions. To guard against that possibility, Argentina may ask the Court to consolidate its petition in No. 12-1494 with its forthcoming petition or hold its current petition for its forthcoming petition. Although the Supreme Court consolidates petitions for briefing and argument and holds petitions pending the decision in another case, consolidating an existing petition for one to be filed months in the future or holding a pending petition for one that has not yet been filed would seem to stretch current practice.

Because we assume that Argentina's forthcoming petition would raise the same question under the Foreign Sovereign Immunities Act as its current petition in No. 12-1494, and a similar question to the equitable powers question, our view of the merits is the same as that expressed in our client note of June 27, 2013 entitled "*Don't Cry for Me Argentine Bondholders: Argentina Seeks Supreme Court Review*." In addition to Argentina, the Second Circuit's August 23 decision states that "*BNY has standing to appeal*." As a result, we could see a petition from the Bank of New York as well as Argentina. The Second Circuit held that the other non-party appellants and intervenors lacked standing to appeal. Non-party appellants Fintech Advisory, Inc. and The Exchange Bondholder Group and intervenor The Euro Bondholders filed briefs amici curiae in No. 12-1494. But they and other disappointed litigants in the Second Circuit may seek to file their own petitions from the Second Circuit's August 23 Opinion as well.

Although the timelines described above seem to be fixed according to the rules of the circuit and Supreme Court, the only prediction that can be made about this case with certainty is its unpredictability. The key driver extending the disposition time and materially increasing Argentina's prospects would be the Solicitor General supporting Argentina in its forthcoming petition. They key driver terminating Argentina's petition – perhaps even before it is filed – would be actions by Argentina that lead to termination of the current stay.

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069