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Don't Cry for Me Argentine Bondholders: Argentina Responds to the Second Circuit's Inquiry

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

In responding to the Second Circuit's March 1 inquiry as to how Argentina planned to "make current" the "original bonds" held by the plaintiffs, Argentina has once again made it clear that it will not treat the plaintiffs any more favorably than the Exchange Bondholders, no matter what the judicial consequences may be. Further, many of the points that Argentina advances in its reply to the Court's inquiry have, in our view, already been rejected by the Second Circuit.

On March 1, the Second Circuit directed Argentina to inform the Court "*how and when it proposes to make current those debt obligations on the original bonds that have gone unpaid over the last 11 years.*" As we read that Order, the focus of the Court's question (particularly when read in light of the oral argument, held just two days before the Court issued this order) was on the words "*make current…the original bonds.*"

On Friday, Argentina released its answer, in the form of a 22-page letter to the Court. (That letter, together with the other papers relating to this appeal and referred to here, are all available on our Argentine Sovereign Debt webpage: www.shearman.com/argentine-sovereign-debt. In its answer, Argentina made it clear that it is willing to offer the plaintiff "holdouts" a package of new bonds that will allow the plaintiffs to realize the values that the Exchange Bondholders have realized, but not the values inherent in the original bonds upon which the plaintiffs have sued. In our view, the Court is unlikely to find this answer to be a sufficient basis for altering Judge Griesa's November 21 Injunction or the "*ratable payment*" formula that is provided.

In considering Argentina's March 29 letter, it is important to recognize what the Second Circuit held in its October 26 decision.[1]

- The *pari passu* clause "*prevents Argentina as payor from discriminating against the FAA bonds [which are the bonds held by the plaintiffs] in favor of other unsubordinated, foreign bonds.*" October 26 decision, at 19. "*Thus we have little difficulty concluding that Argentina breached the Pari Passu Clause of the FAA.*" October 26 decision, at 20.
- "*Moreover, it is clear to us that monetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach….Insofar as Argentina argues that a party's persistent efforts to frustrate the collection of money judgments cannot suffice to establish the inadequacy of a monetary relief, the law is to the contrary.*" October 26 decision, at 24.
- "*Argentina repeatedly expresses its frustration with plaintiffs for refusing to accept the exchange offers….But plaintiffs were completely within their rights to reject the 25-cents-on-the-dollar exchange offers. And because the FAA does not contain a collective action clause, Argentina has no right to force them to accept a restructuring, even one approved by a super-majority.*" October 25 decision, at 26 fn. 15.
- While the Second Circuit expressed its view that it was "*unable to discern …precisely how [the Ratable Payment] formula is intended to operate*," and therefore remanded the case back to the District Court for clarification, it clearly affirmed the judgment of the District Court "*ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt….*" October 26 decision, at 11 and 28.

Argentina appears to be rearguing many of these points in its letter. Most significantly, Argentina continues to argue that the plaintiffs are not entitled to the benefit of the bargain implicit in the original unexchanged FAA bonds, and its offer to the plaintiffs is substantially equivalent to the 2010 exchange offer. As its letter says:

- "*The Republic proposes to treat plaintiffs equitably and ratably with participants in the 2010 Exchange Offer….*" March 29 letter at 2.
- "*This proposal is a voluntary option: plaintiffs can choose between being paid 'equally' on the same terms as the exchange bondholders, or obtaining, and seeking to execute on, judgments for the full amount of their claim….But plaintiffs cannot use the pari passu clause – a provision plaintiffs claim protects <u>against</u> creditor discrimination – to compel payment on terms <u>better</u> than those received by the vast majority of creditors who experienced precisely the same default as plaintiffs, and whose restructured debt obligations arose out of, and served as consideration for the surrender of, the very same defaulted debt held by plaintiffs.*" March 29 letter, at 4; emphasis in original.
- "*[P]laintiffs have a right under the pari passu clause to be treated commensurately with performing debt, not better.*" March 29 letter, at 13.

[1] The Second Circuit this past week denied Argentina's application for *en banc* reconsideration of the Court's October 26 ruling. (This result was hardly a surprise, as the Second Circuit grants approximately 0.03% of the *en banc* petitions it receives. See our "Don't Cry" note of November 14, 2012.)

The letter then goes on to describe a variety of new par and discount bonds Argentina is willing to offer to the plaintiffs. In arguing that these instruments provide the plaintiffs with "*significant*" and "*substantial*" compensation (March 29 letter at 8), Argentina's lawyers attempt to calculate the generous rates of return NML will realize on their "*original bonds*" if they accept Argentina's new offer. March 29 letter at 9 – 11. Notably, they do not detail the discount inherent in accepting these new bonds.

We think that it is highly doubtful that the Court will rule that the offer of new instruments to the plaintiffs is an adequate remedy for the breach of the *pari passu* clause the Court has already ruled has taken place. Further, the Court has already made it quite clear that it will not "*force*" the plaintiffs to "*accept a restructuring*." October 26 decision at 26 fn. 15.

We would expect to see a final decision from the Second Circuit in the next few weeks.

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.

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