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Don't Cry for Me Argentine Bondholders: Argentina Seeks Supreme Court Review

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Argentina filed a petition for writ of certiorari in US Supreme Court: what Argentina wants, when the Supreme Court will answer, and whether or not Argentina will get its day in the high Court.

On June 24, the Republic of Argentina filed a petition for a writ of certiorari in the US Supreme Court asking the high Court to review the October 26, 2012 decision of the US Court of Appeals for the Second Circuit in *NML v. Argentina*. As previously reported, the Second Circuit's decision interpreted the *pari passu* clause to require equal treatment of Holdout and Exchange Bondholders. It also held that injunctions mandating ratable payments to the Holdout Bondholders before or concurrent with payments to the Exchange Bondholders did not violate the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. 1330, 1332(a), 1391(f), 1601-1611). Argentina's petition, the Second Circuit's decision, our previous client notes, and key documents and oral arguments are all on our Argentine Sovereign Debt webpage, at <http://www.shearman.com/argentine-sovereign-debt/>.

Argentina's petition comes 90 days after the Second Circuit denied Argentina's petition for rehearing en banc on March 26 and is thus timely filed. The Second Circuit panel denied Argentina's petition for panel rehearing on February 28, but the 90-day clock ran from the subsequent denial of the petition for rehearing en banc. Since the US Supreme Court is now in its summer recess, NML's brief in opposition and Argentina's reply in support of its petition will be filed over the summer. The Supreme Court will not decide the petition until late September (when the Court in recent years has granted review) or the order list issued on the first Monday in October (when the Court denies review of the vast majority of petitions briefed over the summer recess). The Supreme Court begins its October Term 2013 on the first Monday in October.

While the parties brief Argentina's petition for Supreme Court review, they continue to wait for the Second Circuit panel to decide the ratable payment and injunction scope issues argued on February 27. The Second Circuit panel may issue its decision at any time. Along with its decision, or after it acts on any rehearing petitions, the Second Circuit will likely

decide whether to continue its November 28, 2012 stay of the District Court's injunctions. The injunctions are currently "stayed pending further order of this Court." The Second Circuit panel's upcoming decision may well occasion stay litigation in the Second Circuit and Supreme Court.

Argentina's petition asks the Supreme Court to review the Second Circuit's October 26 judgment. Although that judgment construed both the *pari passu* clause and the FSIA, the *pari passu* clause presents a question of New York law while the FSIA presents a question of federal law. The US Supreme Court generally reviews federal questions on which lower courts have disagreed, not state law questions that can be authoritatively resolved by a state's highest court. Accordingly, Argentina did not ask the US Supreme Court to review the *pari passu* clause. The Second Circuit's reading of the *pari passu* clause to require equal treatment of Holdout and Exchange Bondholders is therefore authoritatively decided.

Argentina's petition presents two federal questions for review: first, are injunctions on a foreign state's property outside the United States beyond the scope of the FSIA; and, second, do pre-judgment injunctions compelling payment of allegedly past-due money claims exceed traditional equitable powers.

It is common knowledge that the Supreme Court grants review of few of the 130 petitions it receives each week. The statistics bear out the long odds against Argentina's petition. The US Supreme Court maintains two dockets, a paid docket for whose petitions a filing fee is paid and an *in forma pauperis* ("IFP") docket for whose petitions the filing fee is waived. The US Supreme Court grants a higher percentage of petitions on the paid docket than the IFP docket, but the grant rate even on the paid docket is little more than four percent. A successful petition typically identifies a sharp conflict among the federal circuit courts of appeal on an important question of federal law.

In support of its petition, Argentina suggests that the Second Circuit's decision conflicts with circuit court decisions holding that injunctions attaching foreign-state immune assets violate the FSIA. Argentina characterizes the District Court's injunctions as requiring not equal treatment, but payment. On that premise, Argentina contends in its first question presented that the injunctions violate the FSIA because that statute does not authorize execution of a foreign state's assets outside the United States. *See* Petition 19 ("courts 'may not grant, by injunction, relief which they may not provide by attachment'") (citation omitted). Similarly, in the second question presented (which does not appear to have been pressed or passed on in the Second Circuit's October 26, 2012 decision), Argentina contends that the injunctions exceed federal equity power because that power does not authorize pre-judgment injunctions compelling payment of past-due money obligations.

The Second Circuit construed the *pari passu* clause, however, to require equal treatment of Holdout and Exchange Bondholders and ratable payment of the former before or concurrently with payment of the latter. Consistent with the injunctions, Argentina could treat the Holdout and Exchange Bondholders equally by making ratable payments to both or declining to pay either.

If the injunctions require equal treatment and not payment, the Supreme Court may not agree with Argentina that they "effectively function as execution devices" (Petition 22) and are tantamount to orders that Argentina turn over immune assets. Equal treatment does not necessarily require payment. Argentina consented to the New York courts' personal jurisdiction over it, which subjects it to federal equity power. Although a prejudgment injunction that attaches a foreign state's immune assets would be in considerable tension with precedent construing the FSIA and federal equity power, injunctions that impose a condition of equal treatment on a foreign state's use of immune assets are "unprecedented" – as Argentina describe the District Court's injunctions eight times in its petition. Unfortunately for Argentina, unprecedented decisions that present questions of first impression are generally not strong candidates for Supreme Court review.

Whether the US Supreme Court is inclined to review Argentina's questions may well turn on whether the Court takes Argentina's 10 references to the briefs of the United States in the Second Circuit as an occasion to call for the views of the Solicitor General. The SG's views on whether Argentina's petition merits review would carry considerable weight with the Court.

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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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