

## Sovereign Debt Litigation

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### District Court Order Paves the Way for the Republic of Argentina to Return to International Credit Markets

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#### SUMMARY

In an important decision in the long-running Argentine debt litigation, the United States District Court for the Southern District of New York ruled yesterday that injunctions prohibiting the Republic of Argentina from paying holders of certain sovereign Argentine debt without first paying holdout bondholders will be automatically vacated once several conditions are met. The injunctions, in effect since 2014, effectively prevent Argentina from issuing new international debt because those injunctions bar Argentina from repaying that debt, and even issuing new debt could be alleged to be an illegal attempt to evade the injunctions. There is uncertainty as to exactly when the injunctions will be lifted because the effect of the order has been stayed for two weeks by the United States Court of Appeals for the Second Circuit, certain bondholders have appealed the district court's decision, and the injunctions will not be vacated in any event unless several conditions are met. Nonetheless, this order paves the way for Argentina to regain access to international credit markets after a 15-year absence. The order also enables Argentina to raise capital to begin paying plaintiffs with whom Argentina has entered into settlement agreements, and thus potentially end litigation that has raged for well over a decade.

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#### BACKGROUND

In 2001, in the midst of one of the worst economic crises in its history, the Republic of Argentina ("Argentina") defaulted on its sovereign debt. Bondholders began suing Argentina in the Southern District of New York, and after the district court entered billions of dollars in judgments against the country, Argentina refused to pay the plaintiffs.<sup>1</sup> Instead, in 2005 and again in 2010, the Republic made offers to bondholders to exchange the defaulted bonds for new bonds for approximately 30 cents on the dollar. At the same time, the Argentine Congress passed a new law known as the "Lock Law," which prohibited

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Argentina from repaying bondholders who did not participate in the exchange offers. Ultimately, more than 91% of bondholders participated in the exchange offers.<sup>2</sup>

Several of the bondholders that declined to participate in the exchange offers, led by a hedge fund called NML Capital, Ltd., a unit of Elliott Management, sought relief from Judge Thomas P. Griesa of the Southern District of New York. These plaintiffs relied on a clause in the contracts governing their bonds known as the “*pari passu*” clause. The *pari passu* clause stated that the debt held by the plaintiffs would “rank at least equally” with certain bonds issued by Argentina in the future.<sup>3</sup> The plaintiffs reasoned that this clause required Argentina to pay the plaintiffs at the same time Argentina paid holders of exchange bonds. Judge Griesa agreed, and on February 23, 2012, he entered injunctions prohibiting the Republic from making payments on the exchange bonds unless a proportional, or “ratable,” payment of the amount due was made to the plaintiffs at the same time; because many of the bondholders had accelerated the debt owing under their bonds, those accelerated bonds would have to have been repaid in full in order for Argentina to make an interest payment on the exchange bonds. Judge Griesa also prohibited Argentina from attempting to evade the injunctions. On August 23, 2013, the Second Circuit affirmed the injunctions in full,<sup>4</sup> and on June 16, 2014, the US Supreme Court denied Argentina’s petition for a writ of certiorari.<sup>5</sup> As a result, Argentina was prevented from making payments on the exchange bonds, and the country defaulted on those bonds on July 31, 2014.<sup>6</sup> In October 2015, Judge Griesa entered similar injunctions in dozens of “me too” lawsuits.<sup>7</sup>

In November 2015, Argentina elected a new president, Mr. Mauricio Macri. President Macri promptly announced his intention to settle with the remaining bondholders. By February 29, 2016, Argentina had reached settlement agreements with plaintiffs who represented 85% of the *pari passu* claims before Judge Griesa, including NML Capital.<sup>8</sup> On February 11, 2016, Argentina asked Judge Griesa to vacate all of the *pari passu* injunctions once Argentina fulfilled certain conditions. The district court could not actually vacate the injunctions because they were the subject of pending appeals before the Second Circuit, but Judge Griesa entered a preliminary “indicative” ruling stating that he would vacate the injunctions once the Second Circuit appeals had concluded.<sup>9</sup> On February 24, 2016, the Second Circuit dismissed the pending appeals at Argentina’s request and sent the cases back to the district court. The Second Circuit stated that if Judge Griesa vacated the *pari passu* injunctions, the order would be automatically stayed for up to two weeks, on condition that appeals were filed within two days, in order to allow objecting parties time to appeal and seek a further stay.<sup>10</sup>

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### THE DISTRICT COURT’S DECISION

On March 2, 2016, Judge Griesa issued an order stating that the *pari passu* injunctions will be automatically vacated when two conditions are met. First, Argentina must repeal several laws, including the “Lock Law” that prohibits payments to bondholders other than holders of exchange bonds. Second, Argentina must actually pay any plaintiff with whom Argentina had entered into a settlement agreement

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on or before February 29, 2016. Only after those laws are repealed and the plaintiffs that reached agreements by February 29 are paid will the injunctions be vacated.<sup>11</sup>

Judge Griesa held that “vacating the injunctions in no way impedes the settlement negotiations now taking place.” The court explained that the remaining plaintiffs can continue to negotiate with Argentina, but that these plaintiffs “cannot be allowed” to use the injunctions “as a tool for leverage in negotiations.” The court also noted that “[t]here is a pressing need for certainty and finality.” The court acknowledged that some bondholders may appeal his decision (and several bondholders filed an appeal today), but stated that any “appeal[] must happen promptly to ensure the certainty and finality needed for existing settlements to succeed.” Judge Griesa further explained that some of the settlement agreements require the Republic to pay the plaintiffs by mid-April, and thus Argentina “needs time to raise the capital required to pay” these plaintiffs, something it could not do while the status of the injunctions remained uncertain.<sup>12</sup>

Some of the plaintiffs had asked Judge Griesa to delay any ruling for 30 days in order to allow time for those plaintiffs that had not yet entered into settlement agreements to negotiate with Argentina. Judge Griesa rejected this request, explaining that such a delay “could seriously erode the Republic’s ability to move forward and raise the capital necessary to fund the settlements.” Judge Griesa also noted that the Second Circuit had already stayed this order for two weeks and that plaintiffs can still negotiate with Argentina during the pendency of an appeal.<sup>13</sup>

The court concluded by explaining why the injunctions were no longer justified. Judge Griesa noted that Argentina had reached settlements amounting to “at least \$6.2 billion” and representing over 85% of the *pari passu* claims pending before the court. Judge Griesa also pointed to the fact that Argentina had dropped its pending appeals of the injunctions, “thus showing a completely changed attitude.” Finally, in a speech on March 1, President Macri had urged the Argentine Congress to approve the settlements, “an important step toward fulfilling a condition of this order.” As such, Judge Griesa wrote, “circumstances have changed so significantly as to render the injunctions inequitable and detrimental to the public interest.”<sup>14</sup>

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## IMPLICATIONS

The vacatur of the injunctions will allow Argentina to resume payments on the exchange bonds and to return to the international debt markets. There will be some bondholders who do not reach a settlement with Argentina, but in the past, similarly situated creditors have been unable to prevent Argentina from issuing new debt in a properly structured offer, such as in connection with the 2005 and 2010 exchange offers.

The vacatur order provides that the injunctions remain in effect until the conditions set forth in Judge Griesa’s March 2 order are met. First, the Argentine Congress must repeal the “Lock Law” and a related law. President Macri’s political party does not hold a majority of seats in the Argentine Congress, and

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initial reports in the news media suggest that the Argentine Congress may not act immediately on President Macri's request.<sup>15</sup> Second, assuming the Argentine Congress approves the deals and repeals the necessary laws, Argentina will need to pay in full any plaintiffs with settlement agreements that were signed on or before February 29. That requirement apparently means Argentina will need to pay more than \$6 billion prior to lifting of the injunctions. The settlement agreement between Argentina and plaintiffs with some of the largest claims, including NML Capital, requires Argentina to pay those plaintiffs by April 14, 2016.<sup>16</sup> Judge Griesa's March 2 order specifically contemplates that Argentina would need to "raise the capital" to make these payments. Although the injunctions remain in effect, they do not, by their express terms, prevent the issuance of new debt — only payment thereon (without a ratable payment) — and it would be difficult to contend that issuing debt that is contemplated by Judge Griesa's order would be an "evasion" of them. Thus, it appears that Argentina may issue debt securities at any time, but would continue to be prevented from paying interest on the new debt securities until the injunctions are vacated.

The date when the injunctions are actually vacated will also depend on when the Second Circuit decides the pending appeal of Judge Griesa's March 2 order. The Second Circuit has ordered expedited briefing on the merits, and that briefing will conclude on March 25, with any oral argument to follow sometime thereafter.<sup>17</sup> In the meantime, Judge Griesa's order will likely be stayed—several of the plaintiffs have filed an unopposed motion with the Second Circuit asking the Court to extend the existing stay until it renders a decision in the appeal.

In any event, the district court's March 2 order represents an important step in the long-running Argentine bond litigation. The order signals the beginning of the final chapter in that litigation, and it paves the way for Argentina to return to international credit markets for the first time in nearly 15 years.

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ENDNOTES

- <sup>1</sup> Sullivan & Cromwell LLP has represented the Central Bank of Argentina in litigation related to Argentina's 2001 default.
- <sup>2</sup> *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 252-53 (2d Cir. 2012).
- <sup>3</sup> *Id.* at 251.
- <sup>4</sup> *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013).
- <sup>5</sup> *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014).
- <sup>6</sup> *See, e.g., Sarah Marsh and Richard Lough, Argentine Markets Fall Post-Default, New York Hearing on Friday*, Reuters (Aug. 1, 2014 12:43 AM), <http://www.reuters.com/article/us-argentina-debt-idUSKBN0G00DX20140801>.
- <sup>7</sup> *NML Capital, Ltd. v. Republic of Argentina*, No. 14-cv-8601, 2015 WL 6656573 (Oct. 30, 2015).
- <sup>8</sup> *See Memorandum and Order, NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, at 4 (S.D.N.Y. Mar. 2, 2016), Dkt. No. 912.
- <sup>9</sup> *Id.* at 2.
- <sup>10</sup> *Id.* at 2, 4.
- <sup>11</sup> *Id.* at 5.
- <sup>12</sup> *See id.* at 3-4.
- <sup>13</sup> *Id.* at 4.
- <sup>14</sup> *Id.* at 4-5.
- <sup>15</sup> *See, e.g., Hugh Bronstein and Maximilian Heath, Clock Ticks as Argentina's Macri Asks Congress to OK Creditors Deal*, Reuters (Mar. 1, 2016 11:12 AM), <http://www.reuters.com/article/us-argentina-debt-macri-idUSKCN0W34OQ>.
- <sup>16</sup> *See Supplemental Memorandum of Law of NML Capital, Ltd., NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, at 8-9 (S.D.N.Y. Feb. 29, 2016), Dkt. No. 901.
- <sup>17</sup> *See Order, Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 16-628 (2d Cir. Mar. 8, 2016), Dkt. No. 30.

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## CONTACTS

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### New York

Sergio J. Galvis	+1-212-558-4740	<a href="mailto:galviss@sullcrom.com">galviss@sullcrom.com</a>
Joseph E. Neuhaus	+1-212-558-4240	<a href="mailto:neuhausj@sullcrom.com">neuhausj@sullcrom.com</a>
Christopher L. Mann	+1-212-558-4625	<a href="mailto:mannc@sullcrom.com">mannc@sullcrom.com</a>

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### Washington, D.C.

Robert S. Risoleo	+1-202-956-7510	<a href="mailto:risoleor@sullcrom.com">risoleor@sullcrom.com</a>
Dennis C. Sullivan	+1-202-956-7554	<a href="mailto:sullivand@sullcrom.com">sullivand@sullcrom.com</a>

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