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This newsletter is intended to provide general information regarding recent developments in the region of North America. The views expressed in this publication are those of the contributors, and not necessarily those of the International Bar Association.

It is uncertain whether broad confidentiality clauses (prohibiting disclosure to third parties in general) and non-disparagement clauses (prohibiting the making of disparaging remarks about the company to third parties in general) would run afoul of the anti-retaliation rules.

Therefore, organisations must be particularly cautious about drafting or attempting to enforce broad confidentiality clauses and non-disparagement clauses that do not contain an express exclusion for regulatory reporting. The goal is to ensure that these agreements or clauses will not be construed as attempts to impede the ability to report proper concerns to regulators without the threat of retaliation.

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Argentina's priority payment on its restructured sovereign debt: judicial protection accorded to holdout creditors

Argentina's external debt instruments have been a source of litigation before domestic and international courts since it defaulted on US$100bn worth of sovereign bonds in 2001–2002. The bonds were issued in accordance with a 1994 fiscal agency agreement (FAA bonds) but as a result of the default, Argentina restructured more than 90 per cent of them through two bond exchanges in 2005 and 2010.[1] The first debt swap enabled Argentina to restructure its external debt with 76.1 per cent of its creditors and the second debt swap with approximately 93 per cent of them. The remaining seven per cent have refused to restructure and are currently holding out.[2]

Argentina's debt swaps resulted in the issuance of new bonds (exchange bonds) worth 70 per cent less than the original bonds' face value,[3] which entitled the exchange bondholders to a single instalment of interest on their bonds. NML Capital Ltd and 18 other plaintiffs (the holdout creditors) sued Argentina in the US federal courts. The holdout creditors argued that Argentina's payment of interest on exchange bonds without full payment of the interest and the principal on the FAA bonds had breached the terms of the FAA.

The FAA requires that Argentina pay back both interest and principal in the event of a default. Moreover, the FAA requires equality of treatment between the proportion paid on FAA bonds and that paid on any restructured bonds issued after the conclusion of the FAA (the ratable payment clause). Finally, the FAA states that any dispute over FAA bonds falls within the jurisdiction of New York courts and is subject to New York law.

In the case *NML Capital Ltd et al v Argentina*, the US District Court for the Southern District of New York had partially granted the action brought by NML Capital Ltd and 18 other plaintiffs against Argentina. The District Court prohibited the latter from paying back the exchange bondholders without any corresponding payment made to the plaintiffs. The US Court of Appeals, Second Circuit partially overruled and partially remanded the District Court's injunctions in an October 2012 decision. On 21 November 2012, the District Court on remand delivered amended orders (injunction orders), which clarified the payment formula underpinning the challenged injunctions and the effects of the injunctions on third parties and intermediary banks.

Argentina claimed that the injunction orders had caused injuries to its country, to exchange bondholders, to participants in the exchange bond payment system and to the public interest, by prohibiting it from paying back the exchange bondholders unless it

made comparable payments to the plaintiffs. The Court of Appeals, in a 23 August 2013 decision, affirmed the District Court's injunction orders and dismissed Argentina's claims of abuse of discretion.

This decision was the object of a petition for a writ of *certiorari* before the US Supreme Court. On 18 November 2013, the Court of Appeals refused to reconsider its earlier decision, which had the effect of requiring Argentina to pay approximately US$1.33bn to FAA bondholders pursuant to the FAA's ratable payment clause.[4]

The US Supreme Court rejected the petition for a writ of *certiorari* on 16 June 2014, thereby precluding it from reviewing the lawfulness of the Court of Appeals' 23 August 2013 decision.[5] On 29 September 2014, US District Judge Thomas Griesa, in response to Argentina's lack of compliance with the Court of Appeals' August decision, found Argentina to be in civil contempt of court, and reserved its penalty for a subsequent hearing. Following the contempt order, Argentina filed an application instituting contentious proceedings against the United States before the International Court of Justice (ICJ), alleging that the US federal decisions in the case *NML Capital Ltd et al v Argentina* had breached the international law principles of national sovereignty and of state immunity.[6]

The Court of Appeals' August 2013 decision triggered a deeper scrutiny of the issue of sovereign debt restructuring by UN institutions.[7] The Court of Appeals recognised at the outset that the dispute between Argentina and the plaintiffs (such as the original FAA bondholders not party to the exchange bond restructuring schemes) essentially raised questions of contract law even though it addressed Argentina's grounds of appeal in both legal and policy-orientated terms.

The Court of Appeals first assessed whether the injunction orders had unjustly injured Argentina per se. The Court of Appeals rejected Argentina's claim that the injunction orders had violated the Foreign Sovereign Immunities Act (FSIA), as they did not amount to a seizing of, a forcible restraint on, or an act of legal 'dominion' over Argentina's property.[8] The injunction orders did not select the resources from which Argentina had to pay the FAA bondholders and thus did not qualify as 'attachment', 'arrest' or 'execution' on Argentina's property in the US.

Secondly, the Court of Appeals found ill-grounded Argentina's claim that the injunction orders had caused injuries to exchange bondholders by inflicting on them 'unreasonable hardship or loss' in their capacity as third parties. The Court of Appeals pointed out that Argentina had expressly refused to provide any formal assurance to exchange bondholders, prior to their accepting the exchange offers, that the dispute over the FAA bonds would not impact upon the payments required by the exchange bonds. In any event, even if Argentina did default on the exchange bonds, the exchange bondholders would still be in a position to launch judicial proceedings against Argentina.

Thirdly, the Court of Appeals dismissed Argentina's and the *amici curiae*'s contention that the injunction orders, by targeting participants in the international financial system through which Argentina makes payments to exchange bondholders, had been founded on a lack of personal jurisdiction, had breached the principle of comity and had infringed upon non-parties' due process rights. The Court of Appeals ruled that any District Court's injunction automatically binds '*persons who are in active concert or participation*' with the direct parties to the decision by virtue of Rule 65(d) of the Federal Rules of Civil Procedure.[9] It found that the District Court did not lack personal jurisdiction since it had merely warned payment system participants that their liability could be engaged should they provide any assistance to Argentina in disobeying the Injunction Orders. When addressing the relevance of comity to the case at hand, the Court of Appeals clarified that the injunction orders had not imposed a prohibition on any foreign entity aside from Argentina: the reference to specific foreign payment participants was only meant to acknowledge the applicability of Rule 65(d). Having regard to the question of whether the due process rights of non-parties had been denied, the Court of Appeals held that, if persons actively assisted Argentina in breaching the District Court's injunction orders pursuant to Rule 65(d), they would be given notice and be granted the right to be heard in subsequent proceedings.

Finally, the Court of Appeals dismissed Argentina's claim that the injunction orders would have an adverse impact on the capital markets and on the global economy. The Court of Appeals ruled that Argentina's claim was based on speculative and exaggerated consequences. In particular, the Court of Appeals took the view that the injunction orders would not dissuade other bondholders

from entering into future sovereign debt restructuring schemes (contrary to Argentina's claim) since more recent bond arrangements tend to stipulate 'collective action clauses' that enable a qualified majority of bondholders to extend the effects of a restructuring plan to holdout creditors. The Court of Appeals also held that the injunction orders would not keep bond issuers away from the New York financial market. Whereas New York law does not preclude borrowers and lenders from freely negotiating financial transactions, borrowers shall be held liable for any breach of the terms of transactions they have agreed upon. Requiring a debtor to pay back the bonds it has issued is essential to preserving New York as one of the leading financial platforms worldwide.

The above litigation raises two questions. First, how do you impose a foreign debt restructuring scheme accepted by a majority of bondholders on a minority of recalcitrant bondholders in the absence of inclusion of a collective action clause in the bond exchange offers? Secondly, how do you protect the integrity of a foreign debt restructuring scheme from actions for full recovery of receivables launched by holdout bondholders?

As the UN Secretary-General pointed out in his 22 July 2014 report, although more recent bond agreements have stipulated collective action clauses, an important number of older bonds that have not yet expired do not include such clauses.[10] The Secretary-General rightly signalled that the US decisions in *NML Capital Ltd et al v Argentina* may discourage bondholders not bound by a collective action clause from entering into a foreign debt restructuring scheme, given the absence of a guarantee that they will not be superseded by holdout creditors who will have maintained their original title to the full amount of their bonds. Failing the adoption of an international treaty governing the restructuring of a state's foreign debt, the modalities of reimbursement of foreign debt instruments will likely remain a matter of private law.

In the current state of affairs, the law applicable to the implementation of a foreign debt restructuring scheme is not necessarily that of the issuing state if the bond agreement stipulates a foreign law clause. On the other hand, even if a foreign law clause is stipulated in the bond agreement, the forum competent to resolve a dispute between a sovereign entity and bondholders may moderate the application of the chosen law if the latter is contrary to public policy or may supplement it with other sources of law in order to account for the special status of the defaulting entity. The extent of this 'moderation' will vary depending on whether the competent forum is a domestic court, an international court or an arbitration body – and thus on the scope of its judicial discretion.

In light of these circumstances, the legal regime governing foreign debt restructuring is not uniform or predictable from a conflict of laws perspective, despite the United Nations Conference on Trade and Development (UNCTAD)'s adoption of the Draft Principles on Promoting Responsible Lending and Borrowing of 26 April 2011. Currently, such a regime hinges on:

- the nature of the bond agreement;
- the existence of a foreign law clause;
- the nature of the competent forum in case of dispute between the sovereign entity and bondholders; and
- ultimately on courts' or arbitration bodies' interpretative approach to conflict of laws questions.

As explained in the Secretary-General's Report, what is currently missing in the international financial sector is an 'international debt workout' that would obviate the absence of 'clear sovereign insolvency procedures'.[11] As a follow up to the Secretary-General's Report, the UN General Assembly issued a resolution on 17 September 2014. This called for the adoption of a sound international legal framework governing sovereign debt restructuring by the end of 2014 to enhance the international financial system's efficiency, predictability and stability in light of the UN objectives of sustainable and equitable economic growth.[12]

Within such a novel legal framework, sovereign creditors would have to act in good faith with a view towards achieving 'a consensual rearrangement of the debt of sovereign states'.[13] Based on a draft General Assembly resolution put forward by Bolivia, an ad hoc committee would be instituted in which all UN members and observers could participate.[14] This committee would be tasked with elaborating an international legal framework regulating sovereign debt restructuring processes following inter-governmental negotiations.[15]

The committee would give consideration to the views and comments submitted by UN members, international inter-governmental organisations, regional commissions,

academics, the private sector, and NGOs.[16] The UNCTAD Draft Principles should inform the content of the future international legal framework. Accordingly, the latter ought to place on the sovereign entity the obligation to account for the seniority of debts and not to arbitrarily discriminate between creditors.

As suggested by the UNCTAD Draft Principles, the new international legal framework should also condition sovereign debt restructuring upon satisfaction of a proportionality requirement.

Notes

1 Karen Halverson Cross, 'US Supreme Court Denies *Certiori* and Affirms Discovery in Bondholder Litigation against Argentina' (2014) 18/23 AJIL; Secretary-General, 'External debt sustainability and development' (2014) A/69/167 section 43.
2 Embassy of Argentina in Washington DC, '10 reasons why NML v Argentina matters', available at *http://embassyofargentina.us/embassyofargentina.us/argentinamonthly/10reasonswhynmlvargentinamatters.pdf*
3 Cross, see n1.
4 http://www.reuters.com/article/2013/11/18/usa-court-argentina-idUSL2N0J31Y720131118.
5 134 S.Ct. 2819
6 International Court of Justice (7 August 2014) Press Release No 2014/25, available at http://www.icj-cij.org/presscom/files/4/18354.pdf.
7 *NML Capital, Ltd v Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013).
8 28 USC §1610.
9 Fed R Civ P 65(d).
10 'External debt sustainability and development', see n1, para 47.
11 *Ibid* at para 48, 57.
12 UN General Assembly, 'Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes' (2014) A/RES/68/304 section 5.
13 *Ibid*, preamble.
14 UN General Assembly, 'Modalities for the intergovernmental negotiations and the adoption of a multilateral legal framework for sovereign debt restructuring processes' (2014) A/c.2/69/L.4 para 1-7.
15 *Ibid* at para 1-7.
16 *Ibid*.

Past is prologue: understanding what comes next in 2015 in the *NML Capital Ltd v Argentina* litigation

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Argentina defaulted on its debt in 2001, but the legal drama pitting Argentina against the so-called 'vulture funds' continues to play out in US courts. This past year, US courts have dealt Argentina several blows at multiple levels, including a June 2014 decision by the US Supreme Court rejecting Argentina's petition for certiorari to overrule the judgments and injunctions issued by the District Court for the Southern District of New York (affirmed by the Second Circuit Court of Appeal). The judgments and injunctions ordered Argentina to make full payment of the principal with accrued interest to holdout bondholders, should it make installment payments to exchange bondholders per the terms of its restructured debt offerings of 2005 and 2010.

Indeed, there has been high drama in the US courts this past year relating to the Argentina saga. According to Argentina, orders issued by Judge Griesa of the District Court effectively forced Argentina to selectively default on installment interest payments owed to the exchange bondholders of restructured debt in July and October of this year. Meanwhile, Judge Griesa has found Argentina to be in civil contempt of the court's orders for attempting to reroute payment to the exchange bondholders through an Argentine state-owned bank. As a result of these developments, the tension between the parties, as well as between Argentina and the US, continues to mount. The question that remains is whether there is sufficient economic and political will for