

Argentina: keeping score during February 27 NY court hearing

- Tomorrow's NY Court of Appeals hearing on the issue of scorecard litigation is critical for Argentine bond markets
- A ruling is only likely to be delivered at a later date—possibly within a month—but the hearing will shape investors views of potential outcomes
- The accompanying “scorecard” organizes the key arguments presented by the defense (Argentina), the plaintiffs (holdout creditors) and third parties affected (restructured creditors and financial intermediaries) in this litigation of unprecedented nature in NY courts
- The template is presents a simplified mapping of the issues to assist in understand how the different arguments might weigh on the Court's decision to revoke or affirm the District Court's remanded orders which are adverse for Argentina
- The merits of the case have already been ruled in favor of holdout creditors. The technical discussion involving UCC Art 4A and FRCP 65 is expected to figure prominently in the judges' decision defining whether to enjoin (or not) different intermediaries involved in the payment chain. These considerations will dictate whether the orders can be implemented successfully
- We maintain an underweight Argentina sovereign debt recommendation in light of the threat that this binary litigation outcome pose for the bonds
- Our view assumes that the odds are skewed toward enjoining the indenture trustee and registered holders while potentially carving out other intermediaries of the payment chain (those referred to by the NYFRB as “pure intermediaries”)
- Implications of subsequent appeals by Argentina and potential sovereign decisions to re-route (or not) restructured bond payments, if they come into play, will require separate and additional consideration

The Appeals Court hearing between Argentina and holdout creditors regarding *pari passu* will be held tomorrow, Wednesday. The panel of judges is not expected to rule immediately. Instead, we would expect a ruling to be delivered within a one-month timeframe. However, impressions from the courtroom discussions will constituting useful indications of which way the court might sway. The “scorecard” included in this brief organize and simplify the arguments that are likely to dominate the hearing so as to facilitate processing the legal developments. The considerations emphasized by judges in the Q&A of the hearing can be mapped onto the template in a way that allows investors to make up their own mind as to what side of the arguments the judges are receptive or hostile to.

See page 8 for analyst certification and important disclosures.

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A “Scorecard” for the *pari passu* hearing

The arguments of both parties are listed in the “scorecard” according to the court orders they may affect and which appeals court judges must decide to affirm or revoke. The boxes are intended to be used to keep score of which party to the litigation is perceived to be arguing its views more convincingly in front of judges. Arguments do not necessarily carry equivalent weight for the judges. Thus, although the scorecard allows adding up the perceived “wins” and “losses” for each party, attention to which specific arguments is being won by one or another party is an important to inferring whether judges may affirm or revoke the orders.

The litigation involves three orders:

- First, one requiring Argentina to pay holdouts ratably when making payments to restructured bondholders;
- Second, enjoining intermediaries from assisting Argentina in processing those payments if it does not comply with the order and;
- Third, ordering Argentina not to attempt to re-route payments with the intent of avoiding the orders and enjoining third parties from assisting it in doing so.

The hearing will focus on the first two orders which have been remanded by the District Court and stayed by the Appeals Court. Thus, the arguments listed in the “scorecard” on the next page relate to those orders.

The merits of the case before the NY Court of Appeals have already been ruled in favor of holdout creditors and, in doing so, judges have also expressed their view on broad themes involving fairness considerations and policy implications of the ruling. These themes remain highly controversial and avidly debated among market participants—and, in our view, for very good reasons. But if such concerns form a small part of the Court’s discussion it will testify to the fact that—unlike investors—judges consider these matters have been adequately settled.

There do remain high-profile themes/arguments that are pending argument—like the equitable nature of the pro-rata remedy, irreparable harm of the injunctions, territorial aspect of the orders— that will command attention at the hearing. But the key issues that may decide the case are likely to be more technical in nature. In particular, the legal discussion will focus on a narrow technical angle riddled with subtle interpretations of the vocabulary contained in the UCC 4A or FRCP 65 (see Appendix 1 and 2) and whether the injunctions are consistent with these constraints—for third parties in general and in specific cases.

An adverse ruling for Argentina: considering further appeals and re-routing

If Argentina loses the case we expect a decision regarding Argentina’s petition for a panel rehearing and en banc rehearing to be provided at the time that the panel ruling is issued. The odds suggests that these petitions will be denied—although we are

more constructive on the possibility that the case might, if ruled against Argentina, be considered for review by the Supreme Court

Note that we have additionally included the third order—which is outstanding (not stayed)—in the “scorecard” because, if holdouts prevail, interpretation of this order will come to the fore of discussions among investors and shape expectations of the end-game situation for restructured bonds.

Indeed, the third order reminds investors that third parties are always and everywhere (in the U.S.) enjoined from assisting Argentina in re-routing payments— independently of what the court decides with respect to which parties are enjoined or not with respect to supporting the existing process of servicing restructured debt. This provides awareness of the operational difficulties that a potential (unprecedented) re-routing of payments might face if the ruling is adverse to Argentina and several other conditions are subsequently met (i.e. Argentina’s expected appeals petitions (panel, en banc, certiorari) are not successful and Argentina opts not to pay holdouts.

A Pari Passu “Scorecard” for Feb 27 NY Court Hearing

ORDER #1 (REMANDED): Argentina is ordered to make pro-rata payments to holdouts (100% of accelerated claim + past due interest) - <u>ORDERS STAYED</u>			Affirm DC	Revoke DC	Alternative ¹
Arguments	Argentina's and/or third parties' position	Holdout's position	Hostile Arg / Receptive holdouts	Receptive Arg / Hostile holdouts	Receptive Arg AND Holdouts
(1) Pro rata payment is an adequate remedy for pari passu breach	NO. Breach of pari passu does not justify pro rata payment [ARG, EBG]	YES. Breach of pari passu justifies pro rata payment; already upheld by AC ruling ("law of the case") [NML]; Extraordinary relief is justified by Argentina's actions [IB]			
(2) Pro rata remedy constitutes equitable relief	NO. Holdouts payment exceeds restructured bond installments; Prioritizes holdouts rights over restructured bondholders [ARG, EBG, PH]; Alternatively, proposes to offer holdouts (cram down) terms of 2010 debt swap [ARG]	YES. Holdouts are not obliged to accept debt swap; lack of alternative formula from Argentina; 2010 debt exchange (cram down) is not an alternative formula; claim requires cash, not installment, payment [NML]			
(3) Payment formula defines an economically feasible payment for Argentina	NO. Argentina compares: \$43 bn contingent claims > \$40 bn reserves; Undoes a debt restructuring in which 92% of bondholders participated [ARG]	YES. Holdouts compare: \$1.4 bn claims in litigation < \$40 bn reserves; already upheld by DC ruling ("law of the case") [NML]			
(4) Requirement of ratable payment violates sovereign immunity (FSIA Sec 1609)	YES. By illegitimately requiring sovereign to bring onshore its offshore assets [ARG]	NO. Already upheld by AC ruling ("law of the case") [NML]			
(5) Pro rata remedy effect on future restructurings, on IMF seniority, on NY's standing as a global financial center	YES. A fatal threat to debt restructurings [ARG], [AK]	NO. CACs reduce risk holdouts frustrate restructurings [KD], already upheld by AC ruling ("law of the case")			

ORDER #2 (REMANDED): Third parties ³ are enjoined from processing Argentina's restructured debt payments if holdouts are not on a ratable basis - <u>ORDERS STAYED</u>			Affirm DC	Revoke DC	Partial ²
Arguments involving ALL 3rd parties	Argentina's and/or third parties' position	Holdout's position	Hostile Arg / Receptive holdouts	Receptive Arg / Hostile holdouts	Receptive 3rd part. / Hostile holdouts
(1) Injunctions violate the Federal Rules of Civil Procedures (F.R.Civ.P. 65 d.2.c.)	YES. 3rd parties are not Argentina's "paying agents", nor in "active concert" with it [ARG, BNY, FIN, CH, ABA, EC]; improperly comandeers intermediaries [CH]	NO. Intermediaries processing payments are "aiding and abetting" and in "active concert" with Argentina [MP/WC, WLF] "substantially assisting" Argentina [AC]			
(2) Injunctions Violate Uniform Commercial Code (U.C.C. Art 4A)	YES. The breath of 3rd parties enjoined, including intermediary banks, is excessive [ARG, FIN, EC]	NO. Injunctions are compatible with law of funds transfer [EM, RM]			
(3) Injunctions impose irreparable harm / violate of 5th Amendment of the US Constitution	YES. An unreasonable burden on restructured creditors [ARG]; Improper use of creditors as "bait"/"pawns" [EBG]; Injunctions deprive bondholders of property [EBG]; an illegitimate "taking" of bondholder property [EBG, FIN]	NO. Argentina, not injunctions, may harm creditors; it is improper to assume Arg will not comply [NML]; already upheld by DC ruling ("law of the case"); Injunctions are not a "taking" of bondholder property [WLF]			
(4) Injunctions violate Fed R. Civ. P. (19 & 60)	YES. Lack of due process for and no adequate notice to 3rd parties [EBG, BNY, PH]; Impact on 3rd parties not assessed by DC [FIN]	NO. BNY due process concerns are misplaced [AC, MP/WC, WLF]			
Arguments involving SPECIFIC 3rd parties	Third parties' position	Holdout's position			
(5) Exclude BNY from injunctions	YES. Undermine indenture trustee [ABA, BNY]; not in "active concert" with Arg [BNY]; contrary to public interest; threatens to trigger added litigation [BNY]	NO. Intermediaries processing payments are "aiding and abetting" and in "active concert" with Argentina [MP/WC, WLF] "substantially assisting" Argentina [AC]			
(6) Exclude Euroclear Bank from injunctions	YES. Improper extraterritorial impact [EUR, ICE, EC, PH]	...			
(7) Exclude payments to EUR bonds and/or EUR GDP warrants from injunctions	YES. Claims improper extraterritorial impact [EUR, ICE, EC, PH]; claims EUR assets not paid through NY and warrants are not indebtedness	...			

ORDER #3: Third parties are enjoined from assisting Argentina in re-routing restructured debt payments - <u>ORDERS NOT STAYED</u>	Affirm DC	Revoke DC
	YES	

1. Refers to the possibility that the Appeals Court considers reaffirming the full (300%) claim from holdouts (accelerated principal and past due interest) but requires payments in installments rather than cash—a low probability event in our view
 2. Refers to the possibility that payment processing by certain intermediaries (trustees or clearing systems) and payments directed to certain beneficiary holders (EUR or GDP) are excluded from the injunction—likely, in our view, for clearing systems but not for the trustee and not likely for EUR or GDP holders on purely technical grounds (payment routing) - but very likely assuming the court wishes to mitigate repercussions on third parties where extraterritoriality might be controversial
 3. Parties enjoined include: Indenture trustee (BNY), registered holders (Cede & Co and BNY Depository nominee), clearing system banks (DTC, Clearstream, Euroclear) but NOT beneficiary banks (brokers) or bondholders
 Labels above refer to the following parties:
 Opposing holdouts: Argentina [ARG]; Exchange Bondholder Group (EBG); Fintech Advisory [FIN]; Bank of New York Mellon [BNY]; Clearing House Assoc. (brokers) [CH]; Anne Kruger [AK]; Eurobondholders [EUR]; Ice Canyon [ICE]; Puente Hermanos [PH]/American Bankers Assoc [ABA]; Euroclear
 Opposing Argentina/third parties: NML Capital [NML]; Aurelius Capital [AC]; EM Ltd [EM]; Duane Morris Individual Plaintiffs [DM]; Italian Bondholders [IB]; Ronald Mann [RM]; Montreux Partners and Wilton Capital [MP/WC]; Washington Legal Foundation [WLF]; Kenneth Dam [KD]

Appendix 1

Rule 65. Injunctions and Restraining Orders

(a) PRELIMINARY INJUNCTION.

(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) TEMPORARY RESTRAINING ORDER.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

83 FEDERAL RULES OF CIVIL PROCEDURE Rule 65.1

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) SECURITY.

The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

(1) *Contents.* Every order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) OTHER LAWS NOT MODIFIED.

These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. § 2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) COPYRIGHT IMPOUNDMENT.

This rule applies to copyright-impoundment proceedings.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 2001, eff. Dec. 1, 2001; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Appendix 2

N.Y. UCC. LAW § 4-A-502: Creditor Process Served on Receiving Bank; Set Off by Beneficiary's Bank

(1) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(2) This subsection applies to creditor process with respect to an authorized account of the sender of a payment order if the creditor process is served on the receiving bank. For the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order.

(3) If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply:

(a) The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(b) The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(c) If creditor process with respect to the beneficiary's account has been served and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process.

(4) Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process.

N.Y. UCC. LAW § 4-A-503: Injunction or Restraining Order With Respect to Funds Transfer

For proper cause and in compliance with applicable law, a court may restrain: (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

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