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# PAST DUE: AN INTRODUCTION TO SOVEREIGN DEBT, THE ONGOING DISPUTE BETWEEN NML CAPITAL AND ARGENTINA, AND POSSIBLE RAMIFICATIONS OF THE DISPUTE'S OUTCOME

Jamison Joiner\*

## I. INTRODUCTION

IF money is borrowed on credit and not repaid, then creditors come knocking. This is not a foreign proposition, and almost everyone has had some experience with it, either directly or indirectly. People and companies are not the only ones that feel the creditor's pinch when funds become scarce; countries can also default on their debt obligations.<sup>1</sup> Argentina is no stranger to this fact, and has defaulted seven times over the past 200 years.<sup>2</sup> Further, Argentina's 2001 default was "the largest sovereign default ever at the time."<sup>3</sup>

The impacts of such an occurrence are not short-lived, and it appears that Argentina defaulted for an eighth time this July when it "missed a coupon payment on its restructured sovereign bonds."<sup>4</sup> Argentina hotly

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1. While sovereign debt defaults do occur, they are not are not overly frequent and only forty occurred between 1970 and 2010. John A. E. Pottow, *Mitigating the Problem of Vulture Holdout: International Certification Boards for Sovereign-Debt Restructurings*, 49 TEX. INT'L L.J. 221, 223 (2014). Moreover, there are different standards for what constitutes a sovereign default. "According to Moody's, a sovereign default occurs whenever a country defaults on any of its bonds." Joy Dey, *Collective Action Clauses Sovereign Bondholders Cornered?*, 15 L. & BUS. REV. AM. 485, 493 (2009). "Standard & Poor's (S&P) defines default as the failure of a borrower to meet principal or interest payment of its debt obligations on the due date." *Id.*
2. Shane Roming, *Argentina's Long History of Economic Booms and Busts*, WALL ST. J. MONEYBEAT (July 30, 2014, 7:43 PM), <http://blogs.wsj.com/moneybeat/2014/07/30/argentinas-long-history-of-economic-booms-and-busts/>.
3. *Id.*
4. Hugh Bronstein, *Default? What Default? Argentina slams U.S. for using 'D' Word*, REUTERS (Sep. 16 2014, 3:14 PM), <http://www.reuters.com/article/2014/09/16/us-argentina-debt-idUSKBN0HB2B520140916>.

contests that any default took place, and instead argues that it attempted to make the payment, but could not because of rulings by U.S. courts in ongoing proceedings between it and holdout creditors from the 2001 default.<sup>5</sup> In response, Argentina recently passed legislation that allows it to bypass U.S. judicial decisions and repay holders of restructured sovereign debt without conceding to holdout creditors.<sup>6</sup>

The ongoing developments between Argentina, its creditors (both those that agreed to restructured debt exchanges and those that held out), and the United States will have far reaching implications.<sup>7</sup> In Argentina, the immediate effect of another default could cripple the nation's ability to obtain credit.<sup>8</sup> On a grander scale, the precedent set in this dispute could determine the course taken in the Eurozone's resolution of Greece's 2012 default, the largest in history, and, in effect, shape the future of sovereign debt defaults and restructurings.<sup>9</sup>

## II. LEGAL BACKGROUND AND DEVELOPMENT

When considering sovereign defaults, it is important to keep in mind some key differences between the credit defaults of people and those of corporations. The most apparent difference is the vastly grander scope of a sovereign default than a personal or corporate default.<sup>10</sup> The impact of a sovereign default affects not only that nation, but, given the interconnectedness of global economies, countries and people the world over.<sup>11</sup> A less obvious, but arguably more important divergence between the two lies in the fact that sovereign debt defaults are not governed by a single, universally applicable and statutorily recorded bankruptcy code.<sup>12</sup> Instead of filing for bankruptcy, sovereign states "restructure their debt to prevent or resolve financial and economic crises and to achieve debt sustainability levels."<sup>13</sup>

This approach presents a number of challenges, chiefly holdout credi-

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5. *Id.*

6. Julie Deisher, *Argentina passes law circumventing US Court ruling limiting debt repayments*, JURIST (Sept. 12, 2014, 8:44 AM), <http://jurist.org/paperchase/2014/09/argentina-passes-law-circumventing-us-court-ruling-limiting-debt-repayments.php>.

7. Daniel Huang, *Don't Cry for Them: The World's Biggest Sovereign Defaults Since 2000*, WALL ST. J. MONEYBEAT (July 2, 2014, 1:59 PM), <http://blogs.wsj.com/moneybeat/2014/07/02/dont-cry-for-them-the-worlds-biggest-sovereign-defaults-since-2000/>.

8. *Id.*

9. *Id.*

10. Dey, *supra* note 1, at 493.

11. *Id.*

12. *Id.* at 495.

13. In layman's terms, this typically involves a sovereign's creditors agreeing to new repayment terms as part of an effort to allow the sovereign to pay off its debts (or at least a mutually agreed upon portion of them) while mitigating the negative effect on its economy. Rodrigo Olivares-Caminal, *Understanding the Pari Passu Clause in Sovereign Debt Instruments: A Complex Quest*, 43 INT'L L.W. 1217, 1218 (2009).

tors.<sup>14</sup> In some cases, sovereign debt issues include a Collective Action Clause (CAC) that sets out “what percentage of a bond issue would have to agree to a restructuring for it to be possible to force that restructuring on the” rest of the bondholders, whether they agreed to it or not.<sup>15</sup> When debt issues do not include CACs, small groups of holdout creditors can delay or even prevent restructuring efforts.<sup>16</sup> Among holdout creditors, there exists a more contentious subset: vulture funds. Vulture funds buy sovereign debt at discounted rates from the original debt holder and then demand repayment at full value while refusing efforts at restructuring.<sup>17</sup> While vulture funds are legal and make good business sense, the approach strikes many as morally reprehensible, especially those associated with the nation in default.<sup>18</sup> Nevertheless, they are a part of the reality that a country must face when it defaults on its debt obligations.<sup>19</sup>

Argentina provides a prime example of just how confounding the prospect of default can be for a sovereign nation. In 1991, Argentina adopted an economic program called the “Convertibilidad” that linked the value of the Argentinean peso to the U.S. dollar as part of an effort to reduce debt and manage inflation.<sup>20</sup> While the Convertibilidad was initially effective, it also made the Argentinian “economy vulnerable to foreign crisis.”<sup>21</sup> The public was acutely aware of this fact and, in 2001, fear of a devaluation led to a bank run that caused Argentina’s financial system to spiral out of control. Ultimately, Argentina defaulted on over one-hundred billion U.S. dollars in external bond debt to its domestic and foreign creditors.<sup>22</sup>

In an effort to address “the \$102 billion debt that the country maintained with its domestic and foreign creditors, the government opened two debt exchanges in 2005 and 2010, through which it managed to get

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14. There are three basic parties involved in a sovereign debt restructuring: the sovereign, holders of original bonds, and holders of restructured bonds. The sovereign is the debtor on both types of bonds. “The old bonds are those held by the holdouts that did not participate in the exchange offer.” *Id.* “The new bonds are those that were issues to creditors as result of the exchange offer, i.e. as result of the tender of their old bonds for new bonds.” *Id.* Generally, holdouts (even when they are small in number or proportion) can hold up an entire restructuring agreement if they do not agree with it unless there is a collective action clause (CAC). *Id.* at 486.

15. Tim Wortsall, *Argentina’s Default, Vulture Funds, And The Little Secret That Not Many Understand*, FORBES (Aug. 2, 2014, 10:23 AM), <http://www.forbes.com/sites/timworstall/2014/08/02/argentinas-default-vulture-funds-and-the-little-secret-that-not-many-understand/>.

16. *Id.*

17. *Id.*

18. See *Cristina Fernandez Calls Vulture Funds ‘Economic Terrorists’*, TELESUR (Sept. 24, 2014), <http://www.telesurtv.net/english/Cristina-Fernandez-Calls-the-Vulture-Funds-Economic-Terrorists-20140924-0057.html>.

19. See *id.*

20. Joanna Somões, *Sovereign Bond Disputes Before ICSID Tribunals: Lessons from the Argentina Crisis*, 17 L. & BUS. REV. AM. 683 (2011).

21. *Id.*

22. During the bank run, “approximately one billion dollars were withdrawn daily.” *Id.* Although the Argentinian government placed heavy restrictions on the withdrawal and transfer of funds, such measures were ineffective. *Id.*

support from 93 percent of the investors by providing them with a settlement at a 65 percent discount on the dollar.”<sup>23</sup> The remaining 7 percent, however, consists of vulture funds that refused the restructuring offer.<sup>24</sup> These holdouts, led by U.S. hedge fund NML Capital, embody the vulture fund mantra and bought Argentinian debt when it “was on the verge of default at a discounted price,” then sued Argentina in the Southern District of New York “for the full amount owed on the debt, plus interest,” when it failed to make payments.<sup>25</sup> Almost unbelievably, it is Argentina’s conflict with this small remainder of its sovereign debt holders that has the world on edge.

### III. DEVELOPMENTS AND PROBLEMS

#### A. OVERVIEW OF ARGENTINA’S CONFLICT WITH NML CAPITAL AND OTHER VULTURE FUNDS

Argentina’s conflict with NML Capital is not a one-off case, but a string of disputes—collectively referred to here as the *NML v. Argentina* saga—centered on efforts at debt collection stretching across multiple years.<sup>26</sup> As stated above, “[t]he NML plaintiffs [collectively, NML], are a coalition of distressed debt funds and retail investors who sat out the restructuring, sued, and then launched a largely fruitless global search for Argentine assets.”<sup>27</sup> Although the initial cases between NML and Argentina began over a decade ago, discussion for the purposes of this analysis begins much more recently with a case decided in 2012 that set the social, political, and legal stage for how the *NML v. Argentina* saga will play out.

In *NML I*, in addition to seeking money judgments that it worried would be uncollectable, NML also “held some Argentine bonds in reserve and returned to federal court in New York to demand specific performance of the underlying bond covenants.”<sup>28</sup> NML’s stance is based

23. *Argentina’s Debt Battle: Why the ‘Vulture Funds’ Are Circling*, Knowledge@Wharton, WHARTON SCH. U. PA. (July 3, 2014), <http://knowledge.wharton.upenn.edu/article/argentinas-debt-battle-vulture-funds-circling/>; see also Rodrigo Olivares-Caminal, *To Rank Pari Passu Or Not To Pari Passu: That Is The Question In Sovereign Bonds After The Latest Episode Of The Argentina Saga*, 15 L. & BUS. REV. AM. 745, 747–49 (2009); see also *NML Capital, Ltd. v. Republic of Argentina (NML I)*, 699 F.3d 246, 251–54 (2d. Cir. 2012), cert. denied, 134 S. Ct. 201 (2013).

24. Alexcia Chambers, *Moment: Implications of Argentina’s Default*, DIPLOMATIC COURIER (Sep. 9, 2014), <http://www.diplomaticcourier.com/blog/2362-moment-implications-of-argentina-s-default>.

25. *Id.*; see also *The Economist Explains: Why Argentina may default on its debts*, ECONOMIST (July 29, 2014, 11:50 PM), <http://economist.com/blogs/economist-explains/2014/07/economist-explains-22> (explaining that NML Capital, along with the other vulture funds, “scooped up cheap defaulted debt in order to chase payment of full principal plus interest in the New York courts, under whose law the original bonds were written.”).

26. W. Mark C. Weidemaier & Anna Gelpern, *Injunctions in Sovereign Debt Litigation*, 31 YALE J. ON REG. 189, 190–91 (2014).

27. Courts and academics generally refer to the plaintiff vulture funds as a single entity, NML. *Id.*

28. *Id.*

upon a quirky boilerplate provision called a *pari passu* clause.<sup>29</sup> The *pari passu* clause in Argentina's bonds stated that Argentina would "'rank at least equally' with all its other indebtedness," which, at its core, means that if a debtor cannot pay all of its creditors then it must pay them equally as opposed to paying some and not others.<sup>30</sup> Conversely, Argentina argued that the injunctive relief sought would violate the Foreign Sovereign Immunities Act (FSIA), which provides that "the property in the United States of a foreign state shall be immune from attachment arrest and execution."<sup>31</sup> Judge Griesa of the Southern District of New York was not persuaded by Argentina's argument and issued an injunction in 2012, whereby "Argentina may no longer pay the holders of its restructured bonds . . . unless it pays NML in full, an amount now estimated at around \$1.4 billion."<sup>32</sup> The Second Circuit affirmed Judge Griesa's ruling based on the rationale that Argentina breached a contractual duty "when it prioritized paying holders of its restructured debt over the bondholders who held its defaulted debt."<sup>33</sup> In other words, "whenever Argentina pays on the bonds or other obligations that it issued in 2005 or 2010 exchange . . . , the Republic must also make a 'ratable payment' to plaintiffs who hold defaulted bonds."<sup>34</sup>

To be sure, *NML I* and *NML II* seem like cut and dry cases: Argentina owes the holders of its sovereign debt and should treat each of them equally.<sup>35</sup> Argentina, however, views the outcomes in a different light. As an initial matter, there is some debate whether *pari passu* clauses are

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29. *NML I*, 699 F.3d at 263 – 64.

30. *Id.*; Felix Salmon, *Hedge Fund vs. Sovereign: How U.S. Courts Are Radically Upending International Finance*, FOREIGN AFF. (June 24, 2014), <http://www.foreignaffairs.com/articles/141588/felix-salmon/hedge-fund-vs-sovereign>.

31. Foreign Sovereign Immunities Act, 28 U.S.C. § 1609 (2014). While the FSIA directly addresses judicial "seizure and control over specific property . . . courts are also barred from granting 'by injunction, relief which they may not provide by attachment.'" *NML I*, 699 F.3d at 262, quoting *S & S Machinery Co. v Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983).

32. Basically, "the injunction allows Argentina to keep stiffing NML, but only if it also stiffes the exchange bondholders." Weidemaier & Gelpert, *supra* note 26 at 191; see also *NML I*, 699 F.3d at 262 – 65 (explaining that the injunctions sought are not barred by FSIA because "[t]hey affect Argentina's property only incidentally to the extent that the order prohibits Argentina from transferring money to some bondholders and not others), *NML Capital, Ltd. v. Republic (NML II)*, No. 08 Civ. 6978 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012), *aff'd*, 2013 WL 4487563 (2d. Cir. 23, 2013), *cert. denied*, 134 S. Ct. 2819 (2014).

33. Max Slater, *Federal appeals court orders Argentina to pay more than \$1 billion to investors*, JURIST (Oct. 27, 2012, 11:11 AM), <http://jurist.org/paperchase/2012/10/federal-appeals-court-orders-argentina-to-pay-more-than-1-billion-to-investors.php>; See also *NML I*, 699 F.3d at 264 – 65 (2nd Cr. 2012).

34. John R. Crock, *Contemporary Practice of the United States Relating to International Law, Second Circuit Affirms Orders Requiring Argentina to Treat Restructured and Holdout Bond Holders Equally; Argentina Seeks Certiorari in Related Extraterritorial Discovery Case*, 107 AM. J. INT'L L., 930, 930 – 31 (2013). In *NML II*, the court clarified that the ratable payment requirements means "that whenever Argentina pays a percentage of what is due on the Exchange Bonds, it must pay plaintiffs the same percentage of what is then due on the FAA bonds." *Id.* at 931; see also *NML II*, 2012 WL 5895786 at \*2.

35. See generally *NML I*, 699 F.3d 246 (2nd Cr. 2012); *NML II*, 2012 WL 5895786.

at all binding during sovereign default proceedings.<sup>36</sup> Argentina, framing the issue within that context, views *NML I* and *NML II* as judicial malpractice and a “counterintuitive interpretation of a boilerplate provision [that] upsets settled financial market expectations and threatens all future sovereign debt restructurings.”<sup>37</sup> In addition, Argentina already made efforts to treat all of its creditors equally “[i]n September 2013, [when] it suspended indefinitely its Lock Law (which was designed to ensure that holdouts would not be treated better than exchange bondholders).”<sup>38</sup> Moreover, NML has “doggedly pursued Argentina for assets abroad” since *NML I* and has made attempts to repossess everything from Belgian diplomatic accounts; to the presidential helicopter, *Tango 1*; to an actual Argentinian warship, the *ARA Fragata Libertad*.<sup>39</sup> Taken as a whole, *NML I*, *NML II*, and their ripples “turn[ed] the natural order of debt on its head.”<sup>40</sup> These cases did not, however, mark the last time that NML would prevail against Argentina in a U.S. court.

#### B. WHERE’S MY MONEY? ARGENTINA, NML, AND POSTJUDGMENT DISCOVERY UNDER THE FSIA

On June 16, 2014, the U.S. Supreme Court issued its most recent opinion in the *NML v. Argentina* saga, this time dealing with post-judgment discovery of extraterritorial assets.<sup>41</sup> NML, in an effort to “accurately identify the places and times when [Argentina’s] assets might be subject to attachment and execution . . . served subpoenas on two nonparty banks, Bank of America (BOA) and Banco de la Nación Argentina (BNA), an Argentinian bank with a branch in New York City.”<sup>42</sup> Both Argentina and BOA moved to quash NML’s subpoena on BOA, and NML subsequently moved to compel compliance.<sup>43</sup> NML then narrowed its subpoenas to exclude the names of some officials during its search and “agreed to treat as confidential any documents that the bank so designates.”<sup>44</sup> While “NML and BOA later negotiated additional changes to the BOA subpoena . . . BNA neither engaged in negotiation

36. Salmon, *supra* note 30; see generally, Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869 (2004).

37. *10 Reasons Why NML v. Argentina Matters to All*, Embassy of Argentina, [embassyofargentina.us/embassyofargentina.us/argentinamonthly/10reasonswhynlmvargentinamatters.pdf](http://embassyofargentina.us/embassyofargentina.us/argentinamonthly/10reasonswhynlmvargentinamatters.pdf), <http://www.mecon.gov.ar/DESENDEUDAR/en/doc/reports-folleto16.pdf> (lasted visited Feb. 23, 2015).

38. *Id.*

39. *Id.*; Pottow, *supra* note 1, at 225. Argentina’s war “ship was released only after a ruling from the International Tribunal for the Law of the Sea.” Salmon, *supra* note 30.

40. See Salmon, *supra* note 30. “It used to be that having a bond was good but that having a judgment was much better. Now, however, it’s the other way around: judgments will get you nowhere, while bonds, if they have a *pari passu* clause, can make you all-powerful.” *Id.*

41. See generally *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).

42. *Id.* at 2253.

43. *Id.* at 2253.

44. *Id.*

nor complied with the subpoena.”<sup>45</sup> The district court subsequently granted NML’s motion to compel and “reaffirmed that it would serve as a ‘clearinghouse for information’ in NML’s efforts to find and attach Argentina’s assets.”<sup>46</sup> Of the three, Argentina was the only one to appeal the ruling.<sup>47</sup>

Similar to its position in *NML I*, Argentina argued “that the court’s order transgressed the Foreign Sovereign Immunities Act (FSIA) because it permitted discovery of Argentina’s extraterritorial assets” based on the rationale that, because the statute is silent as to post-judgment discovery, the court should interpret the statute as granting “absolute execution immunity to foreign-state property.”<sup>48</sup> The Court did not agree, and held that FSIA does not provide sovereign debtors with immunity from post-judgment discovery of extraterritorial assets, stating that U.S. courts lack the authority to execute against property in foreign countries and explaining that “even if Argentina were correct that § 1609 execution immunity implies coextensive discovery-in-aid-of-execution immunity, the latter would not shield from discovery of a foreign sovereign’s extraterritorial assets.”<sup>49</sup> Justice Scalia went on to clarify that NML’s subpoenas were permissible under both the FSIA and the Federal Rules of Civil Procedures, because “[t]hey ask for information about Argentina’s worldwide assets generally, so that NML can identify where Argentina may be holding property that *is* subject to execution.”<sup>50</sup> When such assets do turn up, any dispute between Argentina and NML regarding the immunity of specific assets will be settled by the district court.<sup>51</sup>

This much is clear—the Court’s ruling against Argentina did nothing to help Argentina’s struggle against NML. Arguably more important than the holding, however, is Scalia’s summary snippet buried in the middle of the opinion that states: “Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text. Or it must fall.”<sup>52</sup> Said differently, under the guise of simple four corners contract interpretation, the Court can punt issues like “the fate of international bond markets, or the sanctity of concepts such as sovereign immunity.”<sup>53</sup> The result has been pandemonium.<sup>54</sup> Coupled with its denial of certiorari from *NML II* on the same day, the Court has put Argentina between a rock and a hard place.<sup>55</sup> “Argentina wants to pay the exchange bondholders, but it can’t. Argentina doesn’t want to pay [NML],

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45. *Id.*

46. *See id.* at 2254.

47. *Id.*

48. *Id.* at 2254, 2256 – 58.

49. *Id.* at 2557.

50. *Id.* at 2258.

51. *Id.*

52. *Id.* at 2256.

53. Salmon, *supra* note 30.

54. *Id.*

55. *See generally NML II*, 134 S. Ct. 2819 (2014).



but it has to.”<sup>56</sup> Faced with two unappealing alternatives, Argentina opted for a third route and took matters into its own hands.

### C. ARGENTINA’S COUNTER MEASURES AND THEIR RECEPTION

After the U.S. Supreme Court ruled that the FSIA did not prevent post-judgment discovery actions against sovereign debtors and denied certiorari for *NML II*, Argentina felt that it was fighting NML on uneven ground, namely in an imperialist U.S. judiciary that favored the interests of a small group of investors over its sovereignty.<sup>57</sup> In response, Argentina took action on two fronts: (1) action in the International Court of Justice and (2) passage of domestic legislation that supersedes the U.S. judiciary’s authority to prevent payment to holders of restructured debt.<sup>58</sup>

Shortly after the U.S. Supreme Court’s most recent *NML v. Argentina* decision, Argentina filed suit “against the United States of America, regarding a ‘Dispute concerning judicial decisions of the United States of America relating to the restructuring of the Argentine sovereign debt.’”<sup>59</sup> In its submission, Argentina alleged that the United States “committed violations of Argentine sovereignty and immunities and other related violations as a result of judicial decisions adopted by U.S. tribunals concerning the restructuring of the Argentine public debt.”<sup>60</sup> While a strong symbolic gesture, proceedings in the ICJ are exceedingly unlikely to bring an end to Argentina’s woes because the United States must consent to jurisdiction for the suit to progress, something that has only occurred twenty-two times over the past seven decades.<sup>61</sup>

Argentina, sensing that an ICJ proceeding likely would not yield the desired result, took direct action, and on August 19, 2014, announced “that, in an effort to sidestep the U.S. Court ruling which blocked payments on restructured debt . . . , the government [would] submit a bill to the Argentine Congress that lets overseas debt holders swap into new bonds governed by Argentine law with the same terms.”<sup>62</sup> Despite receiving admonishments from Judge Griesa in the Southern District of

56. Salmon, *supra* note 30.

57. Corinne Ball & Veerle Roovers, *Eurosource-deals and debt-August 2014*, LEX-OLGY (September 3, 2014), <http://www.lexology.com/library/detail.aspx?g=f6312dfd-4c98-8ca7-c0c3ae9cff38>.

58. Press Release, International Court of Justice (I.C.J.), The Argentine Republic seeks to institute proceedings against the U.S. before the International Court of Justice. It requests US to accept the Court’s jurisdiction. (Aug. 7, 2014), *available at* <http://www.icj-cij.org/presscom/files/4/18354.pdf> [*hereinafter* I.C.J. Press Release]; Press Release, Embassy of Arg., A broad majority enacted into law the Sovereign Payment of the Debt (Sept. 11, 2014), *available at* <http://www.embassy-ofargentina.us/embassyofargentina.us/en/news/140911mecon.html> [*hereinafter* Arg. Embassy Press Release].

59. I.C.J. Press Release, *supra* note 58.

60. *Id.*

61. *Sovereign Debt Update*, JONES DAY (Sept./Oct. 2014), [http://www.jonesday.com/Sovereign-Debt-Update-10-01-2014/?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.jonesday.com/Sovereign-Debt-Update-10-01-2014/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original).

62. *Id.*

New York, the Argentine government continued to push the bill onto its Senate floor.<sup>63</sup> These efforts proved fruitful, and on September 11, 2014, the Argentine Legislature enacted the Sovereign Payment of the Restructured Debt Law.<sup>64</sup> This law addressed three main issues: replacing the existing trustee (BNY Mellon, Corp.) with an Argentine trustee; granting creditors the option to voluntarily switch the governing law of their bonds to another jurisdiction; and validating the *pari passu* clause by making “deposits for 7.6 [percent] of the bondholders that did not participate in either of the restructuring processes carried out by Argentina in 2005 and 2010.”<sup>65</sup> The net effect of these changes is to “encourage” investors to move their Argentine debt from the United States to Argentina or France.”<sup>66</sup>

Although the Sovereign Payment of the Debt Law is a recent development, Argentina put it to work immediately by depositing \$161 million in a local bank, Nación Fideicomisos, to act as trustee and “make good on an interest payment due Sept. 30.”<sup>67</sup> That effort was thwarted, at least temporarily, when the district court foreseeably found Argentina in contempt of court for making an end around effort on its ruling.<sup>68</sup> A less apparent effect of the court’s ruling, however, could indefinitely prevent the Sovereign Payment of the Debt Law from coming into effect.<sup>69</sup> Argentina’s sovereign “bond contracts state that the [trustee] role must be fulfilled by a bank that’s in good standing with U.S. federal and state law.”<sup>70</sup> As such, it is unclear whether Nación Fideicomisos would be precluded from serving “as a legally valid trustee”<sup>71</sup> due to Argentina being held in contempt of court. The resulting confusion has left debt holders and banks with an unappealing decision to make: whether to be penalized by the U.S. judiciary or by an aggressive Argentine administration.<sup>72</sup>

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63. *Id.*

64. Arg. Embassy Press Release, *supra* note 58.

65. *Id.*

66. Deisher, *supra* note 6.

67. Katia Porzecanski, *How to Collect Argentina Bond Payment is Unresolved Riddle*, BLOOMBERG (Oct. 2, 2014, 10:04 AM), <http://www.bloomberg.com/news/2014-10-02/how-to-collect-argentina-bond-payment-is-unsolved-riddle.html>.

68. Alison Sacriponte, *US judge declares Argentina in contempt of court*, JURIST (Sept. 30, 2014, 2:18 PM), <http://jurist.org/paperchase/2014/09/us-judge-declares-argentina-in-contempt-of-court.php>.

69. *See* Porzecanski, *supra* note 67.

70. *Id.*

71. *Id.*

72. On one hand, those that try to orchestrate payments or debt swaps could face penalty at the hands of U.S. courts for cooperating with Argentina while it is held in contempt. Porzecanski, *supra* note 67. Conversely, banks that comply with the U.S. court’s order and refuse to make payments risk Argentina revoking their “permission to operate a local representative office.” *Sovereign Debt Update*, *supra* note 61. Argentina has gone so far as to threaten banks with “severe civil, regulatory and criminal risks” if they do not comply with its demands. Nicole Hong, *Judge Thomas Griesa Rules Against NML Capital in Argentina Debt Case*, WALL ST. J. (Sept. 10, 2014, 4:34 PM), <http://www.wsj.com/articles/judge-thomas-griesa-rules-against-nml-capital-in-argentine-debt-case-1410381252> (citing Citibank, N.A.’s Memorandum of Law in Opposition to Plaintiff’s Motion for Partial

Where this catch-22 leaves the situation going forward is anyone's guess.<sup>73</sup> As expected though, guesses are not in short supply.

IV. COUNTDOWN TO DEBT-ONATION: POSSIBLE  
REPERCUSSIONS OF THE NML  
V. ARGENTINA SAGA

To be clear, there is little doubt that the outcome of *NML v. Argentina* will impact the future of sovereign debt issues.<sup>74</sup> How significant that impact will be remains a question. As in every other aspect of this dispute, the answer depends on which of two drastically divergent viewpoints one subscribes to.

From NML's perspective, the outcome of the Argentine default will be limited to just that: Argentina's default. Indeed, the American Task Force in Argentina, an organization supported by Elliott Associates, L.P., NML's parent company, portrays the entire conflict as a threat to normalcy in the international sovereign debt market, with Argentina disrupting order and casting flux into the system.<sup>75</sup> The Second Circuit also believes that its decisions will be of limited impact because of the *pari passu* clause's "added provision that no creditor shall be subject to subordination, which the court presumed is not included in other sovereign debt contracts," and Argentina's firm stance to never pay its holdout creditors.<sup>76</sup> "The court's implicit suggestion [seems to be] that a debtor who was less brazen in its refusal to meet contractual obligations and less vocal about its general disregard for the orders of U.S. courts might not warrant the same treatment as Argentina."<sup>77</sup>

In contrast, Argentina asserts that its fate will "have consequences for almost every sovereign that has issued international debt over the past

Reconsideration of the June 27, 2014 Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978, 2014 WL 3867736 (S.D.N.Y. July 17, 2014).

73. "It is too early to predict the long-term consequences of NML [b]ut it would be a mistake to dismiss the case as completely *sui generis*." Weidemaier & Gelpern, *supra* note 26, at 192.
74. "Although sovereign bond agreements drafted after Argentina's default contain more safeguard clauses meant to protect the debtor-sovereigns, the Second Circuit's opinion will likely make restructuring more expensive, if parties attempt it at all." Jack Jrada, *Closing the Book on Argentina's Sovereign Debt Default: The Second Circuit's Decision and its Ramifications for Sovereign Debt Restructuring in the Eurozone*, 32 REV. BANKING & FIN. L. 222, 231 – 23 (2013). Even if none of the far-fetched predictions come to fruition, "[a]t the very least, the court injected more uncertainty into the sovereign debt market by giving new meaning to the *pari passu* clause, different from the interpretation that sovereign debtors held for so many years." *Id.*
75. Robert J. Shapiro and Nam D. Pham, *Discredited - The Impact of Argentina's Sovereign Debt Default and Debt Restructuring on U.S. Taxpayers and Investors*, AM. TASK FORCE ARGENTINA, 26, [http://www.atfa.org/wp-content/uploads/2012/09/atfa\\_1006.pdf](http://www.atfa.org/wp-content/uploads/2012/09/atfa_1006.pdf) (last visited Feb. 20, 2015).
76. Brett M. Neve, Note and Comment, *NML Capital, LTD. v. Republic of Argentina: An Alternative to the Inadequate Remedies Under the Foreign Sovereign Immunities Act*, 39 N.C. J. INT'L & COM. REG. 631, 657 – 58 (2014); see also *NML 1*, 699 F.3d at 264 – 65.
77. Neve, *supra* note 76, at 658.

[thirty] years” and *NML v. Argentina* might set dangerous precedent for remedies against sovereign debtors in the future.<sup>78</sup> The United States has submitted two amicus briefs in support of this position, arguing that the Second Circuit’s opinion runs contrary to U.S. interests and could undermine decades of work towards stability in sovereign debt restructurings.<sup>79</sup> Much of the international community—both sovereign nations and institutions like the International Monetary Fund (IMF)—has aligned with this stance as well.<sup>80</sup>

Despite both sides’ rancorous contentions, however, the true implications of *NML v. Argentina* remain unclear. One factor that could mitigate negative consequences is the growing prevalence of CACs, which “have been included in 99 [percent] of the aggregate value of New York law bonds issued since 2005.”<sup>81</sup> This could be misleading, though, and many commentators argue “that [CACs], when present, can only affect restructuring where a supermajority of creditors agrees to ‘take a haircut.’”<sup>82</sup> Relying on creditors to act so altruistically is a hairy proposition and many may prefer attempting “to emulate the success of Argentina’s holdouts in other courts.”<sup>83</sup> If “[t]he copycat lawsuit brought by Taiwan to collect on Grenada’s defaulted debt less than sixth months after the Second Circuit’s *NML* ruling” is any indication, following in *NML*’s footsteps instead of “taking a haircut” appears to be the more likely outcome.<sup>84</sup> Indeed, many “[p]rivate claimants also have pressed for injunctions or similar relief against foreign sovereigns outside the debt context.”<sup>85</sup>

Of particular importance is *NML v. Argentina*’s effect on Greece’s default in the Eurozone. The prevailing fear is that, even though “New York law does not govern the bond agreements at issue in the Eurozone’s sovereign debt crisis, and the agreements include [CACs],” if *NML* succeeds in forcing Argentina to pay its holdout creditors, holders of other sovereign debt will have a greater impetus to act similarly, which “will seriously hamper efforts to restructure sovereign debt in the Eurozone if . . . enough bondholders . . . take a risk and hold out.”<sup>86</sup> “It may be hasty, however, to conclude that the crises in Argentina and Greece are comparable.”<sup>87</sup> While there are some similarities between the two situations, namely that both defaults came from inflexible monetary policies tied to a currency that neither sovereign could independently control, “the reality is that the Argentine trajectory could not have applied to

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78. *10 Reasons Why NML v. Argentina Matters to All*, *supra* note 37.

79. *Id.*

80. *Id.*

81. Jrada, *supra* note 74, at 231 (quoting *NML 1*, 699 F.3d at 264).

82. *Id.*

83. *Id.*

84. Weidemaier & Gelpern, *supra* note 26, at 192.

85. *Id.*

86. Jrada, *supra* note 74, at 231 – 33.

87. Chambers, *supra* note 24.

Greece.”<sup>88</sup> This is largely the result of one key difference—Argentina’s debt reformation efforts are controlled by the IMF, whereas Greece’s are led by a confluence of the European Union, the European Central Bank, and the IMF.<sup>89</sup> Although *NML v. Argentina* may affect future debt holder expectations and strategy, it is unlikely to have the widespread impact that many have feared.<sup>90</sup>

The international community is also doing its part to ensure that *NML v. Argentina* does not have a systemic impact on the international sovereign debt market.<sup>91</sup> In particular, the International Capital Market Association has proposed a plan meant to limit holdout creditors’ ability to prevent restructuring efforts, the IMF has promulgated “a series of new proposals” meant to address collected actions problems like those faced by Argentina, and the United Nations has passed a resolution “to begin an ‘intergovernmental negotiation process aimed at increasing the efficiency, stability, and predictability of the international financial system.’”<sup>92</sup> In addition, the United Nations Human Rights Council passed a resolution condemning vulture funds like NML Capital.<sup>93</sup> These measures, however, are in the fledgling stages of their development and may not have a direct short-term effect.<sup>94</sup>

Until international efforts prove to be effective, one recent and two pending decisions are likely to shape the outcome of the *NML v. Argentina* saga. To further complicate the matter, more creditors are joining NML as holdouts every day.<sup>95</sup> The recent decision, issued by a federal magistrate judge in Nevada, compelled 123 nonparty corporations to comply with NML’s post-judgment efforts to discover Argentine assets.<sup>96</sup> Of the pending decisions, a relatively minor one that was filed in Dallas addresses NML’s efforts to compel company documents from energy companies engaged in joint ventures with Argentina.<sup>97</sup> As of February 2015, both parties were engaged in good faith negotiations regarding the scope of the subpoenas and the motions to compel, and the company doc-

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88. *Id.*

89. *Id.*

90. *Id.*; cf. Jrada, *supra* note 74, at 231 – 33.

91. *Special Sovereign Debt Edition: EuroResource-Deals and Debt*, JONES DAY (Oct. 2014), <http://www.jonesday.com/EuroResourceDeals-and-Debt—Special-Sovereign-Debt-Edition-10-27-2014/>.

92. *Id.*

93. *Id.*

94. *See id.*

95. Katia Porzecanski, *Owl Creek Said to Seek Group to Accelerate Argentine Debt*, BLOOMBERG (Oct. 29, 2014, 1:28 PM), <http://www.bloomberg.com/news/2014-10-29/owl-creek-said-to-seek-group-to-accelerate-argentine-debt>; Sheelah Kolhatkar, *A New Twist in the Argentina Debt Saga*, BUSINESSWEEK (Oct. 29, 2014), <http://www.businessweek.com/articles/2014-10-28/a-surprise-appearance-in-the-argentine-debt-drama>.

96. *See NML Capital Ltd. v. Republic of Argentina*, No. 2:14-CV-492-RFB-VC, 2014 WL 3898021 at \*12 (D. Nev. Aug. 11, 2014).

97. Khadijah M. Britton, *NML, Argentina Fight Over Energy Co. Subpoenas*, LAW360 (Oct. 28, 2014, 4:17 PM), <http://www.law360.com/internationaltrade/articles/590733/nml-argentina-fight-over-energy-co-subpoenas->

uments were stayed pending those negotiations.<sup>98</sup> The other decision addresses “whether or not Citigroup . . . can process an expected interest payment by Argentina,” and will have direct implications on the conflict in U.S. courts and the Argentine legislature.<sup>99</sup>

## V. CONCLUSION

The conflict between NML and Argentina presents a quandary. The way out of the quandary and its larger implications, however, are unknown. While fears that Argentina’s fate could be transposed onto Greece are largely misplaced, the precedent set by the result of the *NML v. Argentina* saga could set the path for many future conflicts between sovereign debtors and holdout creditors, especially with regard to the interpretation of *pari passu* clauses.<sup>100</sup>

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98. Order Staying Action, *NML Capital, Ltd. v. Republic of Argentina*, No. 3:12-MC-00080, (Order Staying Action Feb. 2, 2015).

99. Nate Raymond, *Citigroup to revisit U.S. Court over Argentina Bond Payments*, REUTERS (Oct. 23, 2014, 1:28 PM), <http://www.reuters.com/article/2014/10/23/us-argentina-debt-citigroup/idUSKNC0IC1NW20141023>.

100. See Jrada, *supra* note 74, 231 – 33.



# Updates



