

Sovereign Debt Update

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On February 18, 2014, the Republic of Argentina filed a petition with the U.S. Supreme Court (available at <http://blogs.reuters.com/alison-frankel/files/2014/02/argentina-paripassucertpetition.pdf>) seeking review of a pair of lower-court rulings that, among other things, construed *pari passu*, or equal footing, clauses of a bond indenture to prohibit Argentina from making payments to bondholders who participated in 2005 and 2010 debt restructurings before it pays \$1.3 billion to distressed debt investors who refused to exchange their defaulted bonds.

In *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012), the U.S. Court of Appeals for the Second Circuit upheld a lower court's orders barring Argentina from paying holders of restructured debt without also paying holdout bondholders in full. On October 7, 2013, the Supreme Court denied Argentina's petition for the court to review the nonfinal ruling.

In *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013), the Second Circuit upheld a lower court's order directing Argentina to pay holdout bondholders \$1.3 billion. On November 1, 2013, a three-judge panel of the Second Circuit refused to lift a stay of execution of its ruling, pending possible en banc or Supreme Court review.

Argentina has now petitioned for review of both Second Circuit rulings. The petition marks the latest and, most likely, the last chance for Argentina to avoid paying holdout bondholders. In its

petition for certiorari, Argentina argues, among other things, that: (i) because the defaulted bond indenture is governed by New York law and because a New York court has never decided the issue, the Supreme Court should refer to New York State's highest court the question of whether a foreign sovereign is in breach of a *pari passu* clause when it makes periodic interest payments on performing debt without also paying on its defaulted debt; and (ii) the Second Circuit's rulings upend the "carefully-crafted regime" of foreign sovereign immunity, upsetting the compromise that the U.S. Congress and the U.S. Executive Branch struck between the interests of foreign sovereigns and their creditors in the Foreign Sovereign Immunities Act.

If the Supreme Court agrees to review the rulings, Argentina will have two cases before the Court involving its sovereign debt restructuring. On January 10, 2014, the Supreme Court agreed to resolve a court-of-appeals split over the scope of discovery orders aimed at enforcing judgments against foreign states. In *Argentina v. NML Capital, Ltd.*, No. 12-842, 2014 BL 7274 (Jan. 10, 2014), the Court granted a petition for a writ of certiorari to hear an appeal stemming from a decision by the Second Circuit upholding a lower court's order forcing two banks to disclose information concerning assets that Argentina owns outside the U.S. See *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012). This ruling, however, put the Second Circuit at odds with three of its sister circuits.