

November 29, 2012

The Sky is Not Falling: Why Judge Griesa's Decision will *Not* Bring the Apocalypse to Argentina or the Worldwide Financial System

There has been a great deal of talk regarding the Second Circuit Court of Appeals decision in October as well as Judge Griesa's recent order requiring Argentina to pay the so-called vulture fund bondholders. Whether or not the pronouncements by the trial and appellate courts are correct is a topic that has been exhausted by commentators both in and out of Argentina. The speculation, however, that this will lead to an Argentine default or force the banks to decline to pay settling bondholders is misplaced.

When payments of any kind (except cash payments) are made in U.S. dollars they almost always clear through the New York financial system. A payment in dollars that is made, for example, by Argentina to a bondholder in Japan will almost certainly electronically pass through New York, either through the Fedwire service or the CHIPS system. *Trillions* of dollars pass through this process every day. Given that the U.S. dollar remains the world's reserve currency, the ease with which it occurs aids the worldwide financial system. Thus, billions of dollars of payments to bondholders have already transited through New York and will continue to do so.

To date the so-called vulture funds have been unsuccessful in their efforts to collect money from Argentina. The seizure of the *Fragata Libertad* in Ghana may have attracted a great deal of media attention, but it does not presage a fundamental transformation of the status quo. Argentina has used a combination of sovereign rights and clever financial maneuvering to avoid paying on those judgments. The most recent decision of the Second Circuit Court of Appeals affirmed the principle that the vulture funds have the *right* to collect on their awards although it left open many questions regarding whether as a practical matter they will be able to do so. A recent article posted on Forbes.com bore the headline "Fed's \$2.6 [Trillion] Payments System Risks Paralysis ...". The concern is that Judge Griesa's order leaves open the possibility that financial institutions acting as intermediate clearing banks (who simply process payments from one bank to another) could be liable to the vulture funds if they are part of the chain of payments through New York by which Argentina satisfies its obligations to the restructured bondholders. The theory goes that if a bank is concerned that it could face such liability it will have to slow down drastically the clearance of payments in order to search for payments that could violate Judge Griesa's order. This could grind the worldwide financial system to a halt.

Of course this is not going to happen. Why? Because the Second Circuit has already indicated that it will not accept such a situation. Toward the end of its 29-page opinion, the appellate court relied on Section 4A-503 of New York's commercial code, stating that "... intermediary banks, which have no obligation to any party with whom they do not deal directly, are not subject to injunctions relating to payment orders." The appellate court stated that such an order would impose unacceptable costs on intermediary banks and suggested that Judge Griesa needed to explain more clearly how he believed such injunctions could be enforced without affecting intermediary banks.

Judge Griesa's subsequent order has raised concerns such as those expressed in the Forbes piece but New York law is well settled in its protection of intermediary banks. There is no reason to believe that in this instance New York will be moved to change its law (which protects the lifeblood of its financial services industry) or that the Second Circuit will back-track on its very recent, and practically verbatim, endorsement of the New York law. In many different contexts New York courts have expressed the paramount importance of protecting the New York financial system, and the likelihood that the Second Circuit will make a clean break from settled law including its most recent pronouncements is practically nil. Whether or not Judge Griesa has reached a point of frustration that may cause him to order extraordinary measures, the Court of Appeals has made clear that it will not. Argentina may need to adjust its trust and payment arrangements and structure its payments to avoid the direct debiting or crediting of accounts in New York. While this will present its own set of challenges, as long as the intermediary bank system is immune from Judge Griesa's injunctions, there is very little that the vulture funds can do to stop the flow of dollar transactions to the restructured bondholders and thus there is a very small threat of default on the restructured bonds.

Argentina, and the various banks and U.S. regulatory agencies likely to file friend-of-the-court briefs, will undoubtedly continue to fight this fight. But given the express provisions of New York law, it seems likely that the sky will not fall, the worldwide financial system will be safe, and the stalemate between Argentina and the vulture funds will likely continue as it has for the last decade.

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