Argentina's 'Offer' To Settle Held Unenforceable for Lack of Countersignature

by Thomas E.L. Dewey

In another entry in the long-running series of cases surrounding the Republic of Argentina's 2001 default on certain bonds, five bondholders sought to enforce settlement agreements with the Republic even though it was undisputed that the Republic never countersigned those agreements. *Attestor Value Master Fund v. Republic of Argentina*, 940 F.3d 825 (2d Cir. Oct. 18, 2019). The court found the Republic was not bound, over a sharply worded dissent by Judge Ralph Winter.

Background

The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement, and during a financial crisis in 2001 defaulted on those bonds, which "spawned extensive litigation." Id. at 827-28 (citing cases). In 2012—relying on a "pari passu" clause in the 1994 agreement that debt held under those bonds would "rank at least equally" with certain bonds issued by the Republic in the future—the district court issued injunctions prohibiting the Republic from making payments on certain other bonds unless payments were also made on the defaulted bonds.

The effect of these rulings effectively precluded the Republic from participating in international capital markets. Id. at 836 (Winter, J., dissenting). Accordingly, following negotiations mandated by the district court (Griesa, J.) and supervised by a special master, the Republic in 2016 issued a settlement proposal to the holders of the defaulted bonds. Id. The Republic included a Master Settlement Agreement, Instructions for Bondholders to Accept its Settlement Proposal, and an Agreement Schedule on its website in furtherance of this proposal. Id. (Winter, J., dissenting).

The proposal was ultimately successful. The Republic passed legislation that was required to pursue the settlement payments, paid out $6.2 billion to its bondholders, and thereafter successfully sought to have the pari passu injunctions lifted by the district court. Id. 829; id. at 835 (Winter, J., dissenting).

Plaintiffs were among the bondholders who submitted agreement schedules pursuant to the Republic's instructions. The Republic acknowledged receipt but never countersigned the agreement schedules and eventually rejected them. Plaintiffs filed a declaratory judgment action, seeking a declaration that they had entered into binding agreements and that the Republic was obligated to pay them.

Judge Thomas Griesa dismissed plaintiffs' case, and they appealed.

The Majority's Decision

In the U.S. Court of Appeals for the Second Circuit, the majority found the case straightforward, issuing a per curiam decision. In analyzing whether there was a binding settlement agreement, the Second Circuit began with the background principle that, "'if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed.'" Id. at 830 (quoting *Scheck v. Francis*, 311 N.Y.S.2d 841 (1970) (emphasis supplied by Second Circuit)).

The court then applied the four-factor test it set forth in *Winston v. Mediafare Entertainment Corp*., 777 F.2d 78, 80 (2d Cir. 1985), "'to help determine whether the parties intended to be bound in the absence of a document executed by both sides.'" *Attestor*, 940 F.3d at 830 (quoting *Winston*, 777 F.2d at 80).

First, regarding "'whether there has been an express reservation of the right not to be bound in the absence of a writing,'" the court noted that the documentation provided by the Republic to the bond holders "unambiguously require[d] the Republic's countersignature and exchange of executed copies of an agreement schedule before either party is bound." Id. at 830 (quoting *Winston*, 777 F.2d at 80).

Second, the court rejected plaintiffs' argument that "'there ha[d] been partial performance of the contract,'" id. at 831 (quoting *Winston*, 777 F.2d at 80), where the plaintiffs had represented to the district court that the parties had settled and the Republic had sought to vacate the pari passu injunctions due to its settlement with other bondholders.

Third, the court found that "all of the terms of the alleged contract [had not] been agreed upon," id. at 830 (quoting *Winston*, 777 F.2d at 80), noting that this requires there be "'*literally nothing* left to negotiate.'" Id. at 831 (emphasis added) (quoting *Winston*, 777 F.2d at 82). Although plaintiffs noted that the terms of the settlement were set out fully in the in the Republic's proposal and were not open to negotiation, the court found that "the Republic was not aware of how much money plaintiffs believed they should be paid or which bonds would be covered by any agreement." Id. Because the Republic "disagreed with them about these essential terms[,] … there was still much left to negotiate." Id. at 832.

Fourth, as plaintiffs acknowledged, this was "the type of contract that is usually committed to writing." Id.

The court also rejected the plaintiffs' argument that the Republic made an irrevocable offer or "option contract" through its proposal to settle; the proposal was not "irrevocable" or signed by the Republic, as required by N.Y. Gen. Oblig. L. §5-1109. *Attestor*, 940 F.3d at 832.

Judge Winter's Dissent

Judge Winter wrote a lengthy dissent, arguing that the majority had "broadly and adventurously [held]

that the detailed 'offer,' as labeled by the Republic itself, was not an 'offer' but rather merely an invitation to bondholders to each make their own offer, each of which the Republic was free to accept or refuse." Id. at 833 (Winter, J., dissenting).

Winter wrote that the Republic's settlement offer, as accepted by plaintiffs' performance, was a unilateral contract, and that *Winston* did not apply to such agreements. Id. (Winter, J., dissenting) (noting that "[s]uch an offer is binding and enforceable … even though there is no meeting of the minds as in a bilateral contract") (internal citation omitted). Winter noted that the offer was incredibly detailed, contained mathematical formulae for determining the amounts owed, and "was conditioned only upon the passage of Argentinean legislation allowing the payments and the lifting by the federal courts of pari passu injunctions." Id. at 834 (Winter, J., dissenting) (emphasis in original). Winter further noted that the enforceability of the Republic's offer "was the explicit basis for the district court's lifting of the [pari passu] injunction. Id. at 835 (Winter, J., dissenting).

Judge Winter observed that the majority's holding that the Republic had not partially performed—when it had passed legislation in furtherance of the offers, paid $6.2 billion to other bondholders, and successfully lifted "an injunction barring a large nation from international capital markets"—"lacks logic" and "surely qualifies as a Guinness record." Id. He went on, arguing that the Republic's position that it could repudiate the offer by withholding its countersignature "suggests a massive fraud intended by the Republic and on, or perhaps even by, the district court." Id. Finally, he noted that the majority had "unmistakably violate[d] the doctrines of stare decisis and judicial estoppel" by ignoring positions the Republic had taken in seeking to lift the injunctions. Id.

In Winter's view, the countersignature requirement in the instructions document gave the Republic the right to dispute only the eligibility of bonds submitted for settlement, claims of ownership, and the result of a claimant's application of the mathematical formulae—with all such disputes to be resolved by the district court. He argued, however, that the countersignature requirement did not allow the Republic to repudiate the entire offer. Id. at 839 (Winter, J., dissenting). He noted that "[u]ntil the *pari passu* injunction as lifted, no one on the planet, so far as I can tell, stated the settlement offer to be anything but enforceable." Indeed, the Republic had honored other settlement agreements that it had not countersigned.

Given the foregoing, Judge Winter would have remanded only to determine whether plaintiffs were eligible to accept the proposal.

Conclusions

Despite the unusual factual backdrop of this case, it has lessons for practitioners. *Attestor* reconfirms the

significance of language in settlement documents that suggests a settlement is not binding until signed by both parties. In Attestor, this reservation trumped the detail of the Republic's "proposal" and the clear instructions for "acceptance," and the Republic's characterization of the proposal as enforceable in its successful efforts to lift the pari passu injunctions. Instead, principles governing parties' intention not to be bound absent a countersigned writing were paramount.

In other applications, practitioners on both sides of a settlement agreement—those making an offer and those believing they are accepting a clear unilateral offer—would be wise to heed the importance of language reserving the right not to be bound until both parties have signed. Thus, practitioners drafting a detailed settlement offer can protect their clients' position by maintaining the right to countersign an accepted offer. And practitioners whose clients are contemplating a written settlement offer should explain to their clients the unenforceability of that offer until it is countersigned.

This article first appeared in the *New York Law Journal* on January 24, 2020. Angela L. Harris, an associate at the firm, assisted with the preparation of this article.