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Litigators of the Week: A \$16B Win for Energy Company Shareholders in Expropriation Suit Against Argentina

By Ross Todd

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There are worse ways to spend \$50 million. That’s the ballpark tally that litigation funder Burford Capital has said it’s spent on attorney fees so far pursuing claims on behalf of investors burned by Argentina’s 2012 nationalization of energy company YPF.

Back in April, U.S. District Judge Loretta Preska in Manhattan granted summary judgment to the plaintiffs in the litigation—Petersen Energia and Eton Park Capital Management—on the question of liability. The judge found “no question of fact” about whether Argentina breached two key sections of YPF’s bylaws when retaking control of the company.

At a three-day bench trial in July, plaintiffs turned to **Paul Clement** of **Clement & Murphy**, **Mark Hansen** and **Derek Ho** of **Kellogg, Hansen, Todd, Figel & Frederick**, and **Reggie Smith** of **King & Spalding** to put on their damages case.

This past week Preska issued a ruling siding with the Burford-backed plaintiffs on both the appropriate date for the tender offer and the issue of pre-judgment interest, putting total damages in the case at about \$16 billion.

Lit Daily: It’s easy to tell from the numbers involved that there was a lot at stake economically here. But what, from your perspective, were the broader legal principles at issue?

Paul Clement: At the end of the day, this is a case about whether a sovereign nation needs to



(Top L-R) Paul Clement of Clement & Murphy, Mark Hansen and (Bottom L-R) Derek Ho of Kellogg, Hansen, Todd, Figel & Frederick, and Reggie Smith of King & Spalding.

Courtesy photos

keep its word in its commercial dealings. When Argentina decided to privatize its state-owned oil firm YPF back in 1993, the only way that it could convince investors to take a chance on buying into YPF was to give those investors a clear guarantee that if Argentina ever decided to retake control of the firm, they could count on a compensated exit through a tender offer at a fixed price set by the YPF bylaws. That commitment allowed Argentina to raise over a billion dollars on the NYSE, and Argentina kept its promise for almost two decades.

But when Argentina retook control of YPF in 2012, it consciously chose not to make the tender offer that the bylaws required, breaking its unambiguous commitment to investors and depriving them of the protections that they were promised. It has been a long journey for our clients since then, but the court's summary judgment and post-trial decisions have been a resounding affirmation of the basic principle that even sovereign nations must keep their word and honor their contractual commitments.

What sorts of obstacles have the plaintiffs had to overcome—procedural and otherwise—to get to this point?

Derek Ho: Judge Preska put it well when she wrote that Argentina has “spared no expense in its defense.” Argentina erected every roadblock it could to avoid paying plaintiffs what they were owed under the YPF bylaws. It unsuccessfully moved to dismiss twice. After the district court granted summary judgment to plaintiffs on liability, Argentina repeatedly tried to undercut that ruling, first by offering a brand new expert report in a reply brief in support of a motion for reconsideration and then by making completely new arguments for the first time at trial. We also had to weather defendants' attacks on plaintiffs' financing of their cases through Burford Capital. Judge Preska rejected those attacks as irrelevant. That's a big win for Burford and the legal finance industry.

How did this team come together and how have your firms divided the labor throughout the case?

Mark Hansen: Starting more than eight years ago, **Jon Molot** and **Chris Bogart** of Burford began carefully piecing together the team for this case, not only lawyers but leading experts from Argentina and the U.S. It has been a privilege to work with the many talented professionals at Burford, as well as able colleagues from King & Spalding and, more recently, Clement & Murphy. Working together with remarkable collegiality and coordination, everyone made contributions to this successful outcome.

Counsel from all three firms are listed here:

- Clement & Murphy: Paul Clement, **Harker Rhodes** and **Nick Gallagher**
- Kellogg, Hansen, Todd, Figel & Frederick: Mark Hansen, Derek Ho, **Andrew Goldsmith**, **Eden Bernstein**, **Travis Edwards**, **Christopher Goodnow** and **Carla Massobrio**
- King & Spalding: Reggie Smith, **Roberto Aguirre Luzi**, **Laura Harris**, **Israel Dahan**, **Chelsea Corey**, **Leah Aaronson**, **Sam Diamant**, **Marcio Vasconcellos** and foreign legal consultant **Esteban Sanchez**

How, in particular, did you divide up the issues to try the damages portion of the proceedings before Judge Preska earlier this year?

Paul Clement: While the teams from all three firms worked seamlessly to prepare for the damages hearing, the division of labor at the bench trial itself seemed obvious. The issues that remained after Judge Preska's summary judgment ruling were largely legal, and so the opening and closing arguments were much like an appellate argument, which I handled. As for everything in between, we had the world class trial lawyers at Kellogg Hansen in the lead with Mark and Derek expertly handling the experts on both sides.

Reggie, I'll be honest: As a court-watcher, prejudgment interest isn't usually the most exciting issue to see litigated. What made it so important here?

Reggie Smith: While I would certainly agree that prejudgment interest is rarely the most compelling issue in litigation of this complexity, here the rate of prejudgment interest was critically important because Argentina's breach of contract took place over a decade ago, and as a result interest ultimately comprised close to half of the total damages awarded. Argentine law governed the appropriate rate of prejudgment interest, which was ultimately within the court's discretion to set using Argentine commercial cases as her guide. While Argentina argued for zero or nominal prejudgment interest,

the clear weight of Argentine commercial cases pointed to a customary rate between 6% and 8%. The court appropriately opted for the higher end of that range both because that was the rate adopted by Argentina and Repsol on the bonds used to settle the expropriation of Repsol's shares in YPF, and because the weight of the equities strongly favored our clients.

What do you hope other sovereigns in Argentina's place take from this decision?

Smith: Having spent much of my career representing claimants in investment treaty disputes against sovereigns, I continue to be amazed by governments that repeatedly ignore the protections afforded to investors, whether in a contractual context—as in this case—or in the context of honoring investment treaty protections. Unfortunately, Argentina falls into that group of countries that routinely violates the commitments that they make to investors. This case is important because it sends a clear message to those sovereigns that if they want take advantage of the financial markets in the United States, as Argentina did here with respect to the privatization of YPF, they cannot hide behind the veil of sovereign immunity, and will be held accountable if they breach the commitments they make to investors.

The judge, in a footnote, rejected what she called "the Republic's effort to inject Burford Capital into these proceedings." How did you deal with that effort?

Clement: One of Argentina's strategies throughout this case has been to try to distract from its own flagrant breach by suggesting that our clients should somehow be less entitled to recover because they sought and obtained funding from Burford in order to continue this litigation. While that reality was legally irrelevant, we did not shy away from it, and made clear that given Argentina's strategy, only a well-funded adversary could undertake the enormous effort to get justice for investors. Fortunately,

Judge Preska had no difficulty seeing through Argentina's strategy. In fact, as Judge Preska recognized, the fact that our clients needed to obtain litigation funding in order to successfully continue their years-long campaign to hold Argentina to its obligations was all the more reason to insist that Argentina should pay our clients the full measure of their damages.

What will you remember most about getting this judgment in this case?

Ho: 1. My meetings with experts and co-counsel in Uruguay and Chile. We couldn't meet in Argentina because the government was criminally investigating plaintiffs' litigation team for bringing this case. 2. Paul Clement's masterful closing argument and Mark Hansen's surgical cross-examination of Argentina's economics expert at trial.

Clement: The sheer effort and teamwork that went into this bench trial, and Judge Preska's sustained attention and masterful control of the courtroom throughout. As an appellate lawyer, I am used to short arguments with long lead times. Watching the enormous effort put into this case by all involved gave me renewed appreciation for the challenges of trial litigation. As for the judgment itself, I got the news over in Burgundy, which definitely facilitated celebrating a great result.

Smith: While I have worked with co-counsel across the globe in investment disputes with sovereigns, I have never worked with a more talented and cohesive co-counsel team than in this case. It was a true delight. Each of our firms had a clearly defined role in addressing the jurisdictional, liability, and damages issues in the case, working against formidable opposing counsel. While we were certainly put through our paces with tedious, and sometimes vexatious, motion and discovery practice, our team never took its eye off the prize, and it was incredibly rewarding to obtain a judgment for our clients that was well-deserved.