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Is a Signature Necessary? A New Second Circuit Decision.

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Businesses negotiating new deals should be reminded by a recent Second Circuit decision to be careful to avoid entering into a contract before they know it. The case, *Attestor Value Master Fund v. Republic of Argentina*,[1] concerns a very public dispute. It is Argentina against holders of bonds on which Argentina prominently defaulted in 2001. The case involves basic principles of contract law, with a dissenting opinion invoking a famous 1892 English case. And there is drama: According to the dissenting judge, the majority's opinion in favor of Argentina "suggests a massive fraud intended by the Republic, and on, or perhaps even by, the district court."[2]

Background: The law of preliminary agreements

Preliminary agreements

As unusual as the default of a major sovereign state may be, the contract issue involved in this case arises frequently. Suppose you are negotiating a contract. Your goal is a polished document (perhaps with the legend "EXECUTION COPY" in the upper margin) signed by you and the other party. Now suppose that, after exchanging many drafts, the other side walks away. You have no signature. This is the type of case in which the contract issue involved here arises.

After one side walks away from the negotiations, the question is whether the negotiations ever resulted in an enforceable contract – perhaps an oral contract – notwithstanding the parties' failure to sign a writing. New York contract law's answer to this question: *Naturally, it depends.* Sometimes a court will find that the parties, during their negotiations, have already formed a contract. While the agreement is "preliminary" in the sense that the parties had hoped later to embody it in a polished, signed writing, the failure to take that final step does not alter the fact that a contract was already formed. On the other hand, if it can be inferred that the parties intended not to be bound by anything other than a signed writing, then the "preliminary agreements" do not bind them.

The test for whether a contract was formed

On the subject of contract formation, New York courts espouse two seemingly conflicting principles. The first is that contract law is about what the parties intended.[3] The second is New York's "objective" test of contract formation. According to New York's highest court: "[T]he

[1] --- F.3d ---, 2019 WL 5275550 (2d Cir. 2019).
[2] 2019 WL 5275550, at *8.
[3] Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 849 N.Y.S.2d 47, 50 (N.Y. App. Div. 1st Dep't 2010) ("In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound … ." (internal quotation marks omitted)).

existence of a binding contract is not dependent on the subjective intent of [the parties]. … [I]t is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds."[4] What matters is whether "a *reasonable* person," observing their words and deeds, "could conclude that the parties have demonstrated their intent to be bound."[5] Putting the two principles together: The law says that parties will enter only the contracts they intend to; but the law will deem the parties to have had the intent that their observable words and deeds would reasonably be construed, in context, to indicate.

The upshot is that it may not be immediately obvious whether a contract was formed. Someone who is not careful can unwittingly enter into a binding "preliminary agreement" notwithstanding that no writing was ever signed. Seeking to impose order on the endless variety of circumstances, the federal courts, when applying New York contract law, have formulated different categories of preliminary agreements[6] and have listed factors that should be weighed when assessing whether the parties intended to be bound.[7] The courts of New York State may or may not find the federal courts' categories and lists helpful.[8]

"Agreements to agree"

Other principles of contract law often come into play. For example, "a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to."[9] While immaterial terms may be left to future negotiations, all the material terms need to have been made definite.

A corollary is that an agreement to come to some future agreement on material terms does not amount to a contract. It is too indefinite. As New York courts often say, a "mere agreement to agree" will not be enforced. On the other hand, if a material term of an agreement is unspecified but the parties have agreed on "an objective method for supplying [the] missing term," then this can be definite enough to create an enforceable contract.[10]

The putative agreement in *Attestor Value Master Fund*

Argentina's inability to borrow

Following Argentina's 2001 default, many of the jilted bondholders – the so-called "holdouts" – sued Argentina in the U.S. District Court for the Southern District of New York. The holdouts succeeded: Starting in 2012, that court issued injunctions requiring Argentina to pay the holdouts

[4] Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 361 N.E.2d 999, 1001 (N.Y. 1977) (citations omitted).
[5] Carter Steel and Fabricating Co. v. Ajax Constr. Co., No. 93-CV-4387, 1997 WL 1048900, at *5 (E.D.N.Y. May 1, 1997) (emphasis added).
[6] *See, e.g.*, Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 547-548 (2d Cir. 1998) (distinguishing two types of preliminary agreement).
[7] *See* Winston v. Mediafare Entm't Corp., 777 F.2d 78, 80 (2d Cir. 1985) (listing four factors).
[8] *Cf.* IDT Corp. v. Tyco Group, S.a.r.l., 918 N.E.2d 913, 915 (N.Y. 2009) ("While we do not disagree with the reasoning in federal cases, we do not find the rigid classifications into 'Types' useful.").
[9] 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 575 N.E.2d 104, 105 (N.Y. 1991).
[10] *Id.* at 106.

if Argentina paid anything to any other bondholder. Argentina continued to refuse to pay the holdouts. The injunctions then empowered the holdouts to block any new loans to Argentina.

The injunctions were not lifted until 2016, when Argentina asked the district court to vacate them so that Argentina could proceed with a proposal it had recently published to settle the holdouts' claims. Of course, Argentina would need to borrow in order to perform its proposed settlement.

Argentina's proposed settlement agreements

According to Argentina's proposal, published on the government's website on February 5, 2016, bondholders favored with court injunctions – namely, the holdouts – could receive the amount of whatever their bonds' "accrued value" was, less 30% – or, if a holdout had obtained a money judgment against Argentina, then it could receive the amount of the money judgment less 30%.[11] (Holdouts that acted fast got a 27.5% rather than a 30% discount.) Because Argentina would have to borrow to make these settlement payments, the proposal stated that it was premised on the district court's vacating the injunctions.

Explaining to the district court that it wanted to proceed with its settlement proposal, Argentina requested that the court vacate the injunctions. But Argentina qualified its request, making it more modest: Argentina said it wanted no more than a *conditional* vacatur: The injunctions should be vacated *only if* any holdout "that enters into a settlement agreement with the Republic of Argentina on or before February 29, 2016" actually gets paid in accordance with its settlement agreement.[12] Why February 29, 2016? Because Argentina needed some cutoff date in order to know just how much it would have to borrow so that it could satisfy the condition for vacating the injunctions.[13]

The condition for vacating the injunctions

The district court then granted a "conditional" vacatur but used slightly different language. The district court's condition was: "For all plaintiffs that enter into *agreements in principle* with the Republic on or before February 29, 2016, the Republic must make full payment in accordance with the specific terms of each such agreement."[14] Argentina was also required to notify the district court once this condition had been satisfied.

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[11] Declaration of Michael A. Paskin at 170 (Exhibit J), NML Capital v. Republic of Argentina, No. 14-cv-8601 (S.D.N.Y. Feb. 11, 2016), ECF No. 47-1.

[12] Memorandum of Law in Support of the Republic of Argentina's Motion, by Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012, and October 30, 2015, at 11, No. 14-cv-8601 (S.D.N.Y. Feb. 11, 2016), ECF No. 46.

[13] Supplemental Memorandum of Law in Support of the Republic of Argentina's Motion, by Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012, and October 30, 2015, at 2, No. 14-cv-8601 (S.D.N.Y. Feb. 29, 2016), ECF No. 71 ("[A] specific date for the early payment obligation is necessary" to "fix[] the amount of money that Argentina will need to raise, through capital markets financing or otherwise, in order to meet its obligations under" the vacatur order.).

[14] Opinion and Order, at 5, No. 14-cv-8988 (S.D.N.Y. Mar. 2, 2016), ECF No. 85 (emphasis added).

Which holdouts formed an "agreement in principle" with Argentina?

Thus the stage was set. Under pressure, most of the holdouts entered into settlement agreements with Argentina by February 29, 2016, without any problem. A few holdouts, however, had a problem. They delivered to Argentina, by February 29, 2016, papers stating that they wanted to be part of the deal and to receive the accrued value of their bonds less the 30% discount. The papers were forms prepared and distributed by Argentina, with blank spaces for identifying the bondholder, for stating the "settlement amount," and for signatures by the bondholder and by Argentina. These particular holdouts completed the forms except, of course, for Argentina's signature. But after submitting the forms, they were informed by Argentina that their papers were rejected. According to Argentina, these holdouts failed to enter settlement agreements with Argentina as of February 29, 2016. Payment by Argentina to those holdouts, therefore, would *not* be part of the condition for vacating the injunctions.

Thus the issue: Had an "agreement in principle" been formed between these rejected holdouts and Argentina? New York law governed. And the rejected holdouts had no signature from Argentina. As they saw it, it was a case in which one party tried to walk away from a deal prior to signing when in fact the signature would merely have been a nicety and the contract was already formed.

The Second Circuit's decision

The rejected holdouts quickly filed a new lawsuit against Argentina to enforce the settlement agreements they alleged they had made. The district court disposed of this lawsuit at lightning speed. Just eighteen days after the lawsuit had been filed, the district court dismissed it, siding with Argentina and ruling that the rejected holdouts had never entered any sort of settlement agreement with Argentina.

The district court's alacrity may have been motivated by a desire to insulate the earlier conditional vacatur order from a potential avenue of attack. That earlier order was moving quickly through expedited appeal proceedings, and the Second Circuit had set April 13, 2016, to hear oral argument. If Argentina's willingness to satisfy the condition for vacating the injunctions were in doubt, then that might impact the Second Circuit's willingness to affirm the conditional vacatur order. It was April 12, 2016, when the district court dismissed the rejected holdouts' new lawsuit. On the same day, the Second Circuit was notified of the district court's ruling that the rejected holdouts had no settlement agreements with Argentina. The next day, when oral argument was heard in the appeal of the earlier, conditional vacatur order, the Second Circuit ruled from the bench, affirming the conditional vacatur order. The following week, all the holdouts who had been confirmed as having entered settlement agreements with Argentina were paid, and the district court announced that the conditions for vacating its injunctions were satisfied.

As for the appeal of the district court's lightning-fast dismissal of the rejected holdouts' new lawsuit, that appeal did not move so quickly. On October 18, 2018, the Second Circuit handed down its decision affirming the district court's finding that, as a matter of New York contract law, the rejected holdouts never entered into settlement agreements with Argentina.

The panel of Second Circuit judges was split. The majority identified four factors to be considered when deciding whether, in this case, Argentina's countersignature was necessary to form a settlement agreement. They considered first whether Argentina had expressly stated that its signature was required; they considered next whether Argentina had rendered any partial performance; they considered third whether there was anything left for the parties to negotiate; and lastly they considered whether this type of agreement typically is embodied in a writing. They found each of those four factors to favor Argentina's claim that its signature was necessary to form a contract: First, the form had a space for Argentina to sign; second, Argentina had rendered no performance; third, the amount that the rejected holdouts would be paid remained indefinite; and, lastly, settlement agreements are typically made in writing. There was no need to weigh one factor against another, because they all leaned the same way.

Judge Winter's dissent

On the four factors weighed by the majority

In contrast, the dissenting opinion by Circuit Judge Ralph Winter went through the same four factors and found each of the four to favor the rejected holdouts' claim that a contract had already been formed. According to Judge Winter: First, Argentina had expressly indicated it would be bound by any acceptance of its settlement offer; second, Argentina had rendered partial performance by procuring the district court's vacatur of all the injunctions and by paying the holdouts whose papers were not rejected; third while Argentina and the rejected holdouts may have disagreed on the amount those holdouts would have to be paid, there was an objective method for supplying the missing term; and the last factor – whether such agreements are typically embodied in a writing – did not help Argentina because these settlement agreements were, in fact, written out. Thus Judge Winter agreed with the majority that there was no need to weigh one factor against any others – but he saw none of them leaning the way the majority saw them.

Judge Winter's alternate grounds

Judge Winter's dissent went on to provide alternate grounds on which to side with the rejected holdouts. He invoked the classic 1892 English case *Carlill v. Carbolic Smoke Ball Co.*,[15] usually studied in the first year of law school. In that case, a snake oil seller's advertisement promising a reward to anyone who found the snake oil ineffective became an enforceable contract between the seller and any disappointed purchasers who claimed the reward. According to Judge Winter's dissent, Argentina's settlement proposal was analogous to the Carbolic Smoke Ball Company's advertisement. Therefore the law relating to preliminary agreements had no relevance.

And finally, the drama – the suggestion of "a massive fraud intended by the Republic, and on, or perhaps even by, the district court."[16] According to Judge Winter, the history of this particular case created yet another ground for siding with the rejected holdouts. According to Judge Winter, when Argentina had sought the conditional vacatur of the injunctions, Argentina represented to the district court that it would respect any holdout's acceptance of its settlement offer. That

[15] 1. Q.B. 256 (1892).
[16] 2019 WL 5275550, at *8.

representation succeeded in procuring the conditional vacatur order. After having obtained that success, Argentina was now benefitting from a "reversal of its position."[17] "The injustice," in Judge Winter's view, "is clear."[18]

Takeaway

The disagreement between the majority of the Second Circuit panel and the dissent demonstrates how difficult it can sometimes be to predict what a court will conclude. In this case, the conclusion was that Argentina and the rejected holdouts had no settlement agreements, but that conclusion was not foregone. As it is often said, litigation is inherently uncertain. Minimizing the risk of a dispute should be every prudent business's goal.

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[17] 2019 WL 5275550, at *17.
[18] *Id.*