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SOVEREIGN DEBT 1

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SOVEREIGN BORROWERS AND ISSUERS: RISKS AND RISK ASSESSMENT

Sovereign debt seems always to be in the news. The last time I taught this class, in the spring of 2019, we studied aspects of the political crisis in Venezuela, which was evidently connected to an economic and humanitarian crisis with over a year of hyperinflation, a populace suffering from hunger and malnutrition and shortages of medicine. Thousands of Venezuelans had migrated to other countries in search of better conditions.[2] Others who had protested against the Maduro regime had met with repression.[3]The US imposed sanctions on people and entities connected to the Maduro regime, and relating to trading in gold.[4] Venezuela sought to

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[2] *See, e.g.*, The Crisis in Venezuela Was Years in the Making. Here's How It Happened, New York Times (Jan. 23, 2019); Venezuela Crisis: How the Political Situation Escalated (Dec. 3, 2020) at https://www.bbc.com/news/world-latin-america-36319877; Amelia Cheatham & Rocio Cara Labrador, Venezuela: The Rise and Fall of a Petrostate (Jan. 22, 2021) at https://www.cfr.org/backgrounder/venezuela-crisis. CF. Organization of American States, Fostering Impunity: The Impact of the Failure of the Prosecutor of the International Criminal Court to Open an Investigation Into the Possible Commission of Crimes Against Humanity in Venezuela (Dec. 2, 2020) at https://bit.ly/CrimesVzla.

[3] *See, e.g.*, Venezuela: Arrests, Killings in Anti-Government Protests (Jan 25, 2019) at https://www.hrw.org/news/2019/01/25/venezuela-arrests-killings-anti-government-protests.

[4] *See* https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/venezuela-related-sanctions. There is a debate as to whether sanctions are an effective mechanism for changing States' behavior. For a discussion of sanctions see Daniel W Drezner, *Targeted Sanctions in a World of Global Finance*, 41 INTERNATIONAL INTERACTIONS 755 (2015).

evade existing and potential sanctions by establishing a cryptocurrency, the Petro,[5] and asked the Bank of England to return Venezuelan gold reserves,[6] which the Bank declined to do, leading to litigation in the English courts which is now going to the UK Supreme Court.[7] Russia and China made significant loans to Venezuela.[8] And investors in Venezuela's sovereign debt have been concerned to protect their interests.[9]

During 2020 and the Covid-19 pandemic, it became clear that debt levels in advanced and developing economies were increasing, as countries faced financial challenges caused by the pandemic. The IMF has a Catastrophe Containment and Relief Trust which provides debt service relief on debt owed to the IMF for the poorest countries,[10] and the IMF has also been reviewing its approach to evaluating sovereign debt sustainability for lower income countries,[11] and calling for reforms of the international debt architecture.[12] The World Bank and the International Monetary Fund urged G20 countries to establish the Debt Service Suspension

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[5] *See, e.g.*, Nathaniel Popper & Ana Vanessa Herrero, The Coder and the Dictator, New York Times (Mar. 20, 2020); Executive Order 13827, Taking Additional Steps to Address the Situation in Venezuela, 83 Fed. Reg. 12469 (Mar. 21, 2018) (prohibiting dealings in any digital currency issued by for or on behalf of the Government of Venezuela).

[6] The Bank of England stores gold reserves for the UK and for central banks of other countries. It has the largest store of gold after the US Federal Reserve. *See* https://www.bankofengland.co.uk/gold.

[7] For the judgment of the Court of Appeal see "Maduro Board" of the Central Bank of Venezuela v "Guaido Board" of the Central Bank of Venezuela [2020] EWCA Civ 1249 (05 October 2020) at http://www.bailii.org/ew/cases/EWCA/Civ/2020/1249.html.

[8] Henry Foy, Jonathan Wheatley & Lucy Hornby, Venezuela's Political Turmoil Sparks Investor Fears, Financial Times (Jan. 25, 2019).

[9] *Cf*. Rodrigo Campos, Karin Strohecker, Venezuela's Political Crisis Spells Opportunity for Bond Investors (Jan 24, 2019) at https://www.reuters.com/article/us-venezuela-bonds-markets/venezuelas-political-crisis-spells-opportunity-for-bond-investors-idUSKCN1PI1IW. See https://venezuelacreditors.com/ .

[10] https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/49/Catastrophe-Containment-and-Relief-Trust

[11] IMF Policy Paper, Review of the Debt Sustainablity Framework for Market Access Countries (Jan. 2021) at https://www.imf.org/-/media/Files/Publications/PP/2021/English/PPEA2021003.ashx .

[12] IMF, The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors—Recent Developments, Challenges, And Reform Options (Oct. 1, 2020) at https://www.imf.org/-/media/Files/Publications/PP/2020/English/PPEA2020043.ashx .

Initiative, and the G20 has adopted a Common Framework to move beyond the DSSI.[13] During 2020 Ecuador, Lebanon, Belize, Suriname, Argentina and Zambia defaulted, restructured or began the process of restructuring their debts in 2020. In 2021 Chad has sought restructuring under the Common Framwork.[14]

States fund their operations in part through borrowing, often by issuing debt securities in their domestic markets.[15] The investors who buy government securities may be domestic or foreign. US Treasury securities have been particularly attractive to foreign investors,[16] partly because the US dollar is the reserve currency, and investors want to hold US dollar denominated securities. US government securities have also attracted investors because of the strength of the US economy and the unlikeliness of a US default - US Treasuries seemed to be risk-free assets. However, it is now clear that sovereign debt is not a risk free asset.[17]

At the end of 2005, **Alan Greenspan** commented:

"The rise of the U.S. current account deficit over the past decade appears to have coincided with a pronounced new phase of globalization that is characterized by a major acceleration in U.S. productivity growth and the decline in what economists call home bias. In brief, home bias is the parochial tendency of persons, though faced with comparable or superior foreign opportunities, to invest domestic savings in the home country. The decline in home bias is reflected in savers increasingly reaching across national borders to invest in foreign assets. The rise in U.S. productivity growth attracted much of those savings

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[13] G20, Common Framework for Debt Treatments beyond the DSSI (Nov. 2020).

[14] See https://www.theafricareport.com/62933/chad-1st-country-in-covid-era-to-ask-for-restructuring-of-its-debt/.

[15] *See*, *e.g.*, http://www.treasurydirect.gov/indiv/products/products.htm.

[16] For information on foreign holdings of US assets, including Treasuries, *see, e.g.*, Department of the Treasury, Federal Reserve Bank of New York, and Board of Governors of the Federal Reserve System, Foreign Portfolio Holdings of U.S. Securities as of June 28, 2019 (Apr. 2020). At page 5 the Report notes that "At $19,622 billion, foreign holdings of U.S. long-term securities reached a new high, but as the total outstanding grew at roughly the same rate, the proportion of U.S. long-term securities outstanding held by foreigners was about unchanged from the previous survey at 20 percent, about the same share held since 2011. The proportion of U.S. Treasury securities owned by foreigners remains higher than that for other long-term securities largely because of the significant holdings of foreign official institutions... Notwithstanding the relative stability in the overall share of U.S. long-term securities held by foreigners, the composition of these holdings relative to the amounts outstanding has gradually shifted over the last decade. Relative to 2008, foreigners own a smaller share of Treasuries and agency securities outstanding, and a larger share of corporate debt and equities outstanding. Despite having ticked up from 42.6 percent to 43.2 percent since the previous survey, the foreign-owned share of marketable long-term Treasuries has generally trended down since 2008, as foreign purchases of Treasuries has not kept pace with issuance."

[17] *See, e.g.*, BIS, Sovereign Risk: a World Without Risk-free Assets?, BIS Papers No. 72 (Jul. 2013) at http://www.bis.org/publ/bppdf/bispap72.htm .

toward investments in the United States. The greater rates of productivity growth in the United States, compared with still-subdued rates abroad, have apparently engendered corresponding differences in risk-adjusted expected rates of return and hence in the demand for U.S.-based assets.

Home bias implies that lower risk compensation is required for geographically proximate investment opportunities; when investors are familiar with the environment, they perceive less risk than they do for objectively comparable investment opportunities in far distant, less familiar environments...

...starting in the 1990s, home bias began to decline discernibly, the consequence of a dismantling of restrictions on capital flows and the advance of information and communication technologies that has effectively shrunk the time and distance that separate markets around the world. The vast improvements in these technologies have broadened investors' vision to the point that foreign investment appears less risky than it did in earlier times....

Home bias, of course, is only one of several factors that determine how much a nation actually saves and what part of that saving, or of foreign saving, is attracted to fund domestic investment. Aside from the ex ante average inclination of global investors toward home bias, the difference between domestic saving and domestic investment--that is, the current account balance--is determined by the anticipated rate of return on foreign investments relative to domestic investments as well as the underlying propensity to save of one nation relative to that of other nations...

...What is special about the past decade is that the decline in home bias, along with the rise in U.S. productivity growth and the rise in the dollar, has engendered a large increase by U.S. residents in purchases of goods and services from foreign producers. The increased purchases have been willingly financed by foreign investors with implications that are not as yet clear.

Typically, current account balances, saving, and investment are measured for a specific geographic area bounded by sovereign borders. Were we to measure current account balances of much smaller geographic divisions, such as American states or Canadian provinces, or of much larger groupings of nations, such as South America or Asia, the trends in these measures and their seeming implications could be quite different than those extracted from the conventional national measures of the current account balance.

The choice of appropriate geographical units for measurement depends on what we are trying to ascertain. I presume that in most instances, we seek to judge the degree of economic stress that could augur significantly adverse economic outcomes. To make the best judgment in this case would require current account measures obtained at the level of detail at which economic decisions are made: individual households, businesses, and governments. That level is where stress is experienced and hence where actions that may destabilize economies could originate. Debts usually represent individual obligations that are not guaranteed by other parties. Consolidated national balance sheets, by aggregating together net debtors and net creditors, accordingly can mask individual stress as well as individual strength.

Indeed, measures of stress of the most narrowly defined economic units would be unambiguously the most informative if we lived in a world where sovereign or other borders did not affect transactions in goods, services, and assets. Of course, national borders do matter and continue to have some economic significance...

...some U.S. domestic businesses previously purchasing components from domestic suppliers switched to foreign suppliers. These companies generally view domestic and foreign suppliers as competitive in the same way that they view domestic suppliers as competing with each other. Moving from a domestic to a foreign source altered international balance bookkeeping but arguably not economic stress...
If economic decisions were made without regard to currency or cross-border risks, then one could argue that current account imbalances were of no particular economic significance, and the accumulation of debt would have few implications beyond the solvency of the debtors themselves. Whether the debt was owed to domestic or foreign lenders would be of little significance.
But national borders apparently do matter. Debt service payments on foreign loans, for example, ultimately must be funded disproportionately from exports of tradable goods and services, whereas domestic debt has a broader base from which it can be serviced. Moreover, the market adjustment process seems to be less effective across borders than domestically. Prices of identical goods at nearby locations, but across borders, for example, have been shown to differ significantly even when denominated in the same currency.12 Thus cross-border current account imbalances have implications for the market adjustment process and the degree of economic stress that are likely greater than those for domestic imbalances. Cross-border legal and currency risks are important additions to normal domestic risks.
But how significant are those differences? Globalization is changing many of our economic guideposts. It is probably reasonable to assume that the worldwide dispersion of the balances of unconsolidated economic entities as a share of global GDP noted earlier, will continue to rise as increasing specialization and the division of labor spread globally.
...Regrettably, we do not as yet have a firm grasp of the implications of cross-border financial imbalances. If we did, our forecasting record on the international adjustment process would have been better in recent years. I presume that with time we will learn."[18]

At the beginning of 2011, **Dominique Strauss-Kahn, then Managing Director of the IMF** wrote:
"Over the last quarter century, the global economy enjoyed a remarkably long period of high growth and low and stable inflation. This extraordinary period in economic history lulled many people into a false sense of security, and made policymakers too complacent about their ability to manage the economy and cope with financial crises. Managing developed economies seemed deceptively straightforward. A simple doctrine gradually emerged, comprising a few common-sense rules (fiscal and monetary) underpinned by the idea that markets were infallible.
But this illusion of stability was shattered by the global financial crisis. Almost overnight, the Great Moderation turned into the Great Recession.

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[18] Alan Greenspan, International Imbalances, Remarks before the Advancing Enterprise Conference, London, England (December 2, 2005) *available at* http://www.federalreserve.gov/boarddocs/speeches/2005/200512022/default.htm Alan Greenspan was Chairman of the Federal Reserve of the United States from 1987 to 2006.

In retrospect, there were many fault lines beneath the old economic model, and the financial crisis ripped them open. The global growth model turned out to be unbalanced and unsustainable. It relied too much on excess borrowing by some countries, made possible by excess saving by others. Many countries also saw large increases in inequality that tugged at the social fabric. In the United States, for example, inequality on the eve of the crisis was back where it was just prior to 1929." [19]

For a government to rely on foreign owners of its securities can be risky - even if those investors have overcome their initial home bias to make the investment they may be more nervous about holding those securities in the face of adverse economic conditions:

"The domestic government bond market has expanded rapidly in Mexico since the mid-1990s. In part, this has reflected a conscious effort by the authorities to develop domestic sources of financing as a means of reducing the country's dependence on external capital flows. The abrupt withdrawal of external capital in late 1994, in what became widely known as the "tequila crisis", resulted in a deep economic and financial crisis in Mexico. This made policymakers acutely aware of the vulnerabilities associated with a heavy reliance on external financing....

...The tequila crisis of late 1994 was a good example of the risks of relying heavily on dollar-indexed securities. The early 1990s had been characterised not only by a substantial appreciation of the Mexican peso but also by a significant deterioration of the country's current account in spite of steadily improving public sector finances ... The rapid growth in Mexico's external liabilities created rising fears among investors that the country would have to devalue and/or default on its obligations. During the course of 1994, investors became increasingly reluctant to roll over their short term peso-denominated cetes and instead shifted their funds to short-term dollar-indexed tesobonos. This provided a temporary respite for the government, but the short-term nature of outstanding securities also meant that the transformation in the structure of debt towards tesobonos was extremely rapid. Whereas tesobonos had accounted for about 4% of domestic debt at the beginning of 1994, they accounted for most of that debt at the end of that year. The sudden withdrawal of foreign investment from the domestic market at the end of 1994 and the ensuing sharp drop in the Mexican peso resulted in an explosive growth in the peso value of dollar-indexed government liabilities, thereby adding a fiscal dimension to the external crisis. The withdrawal of foreign investment led to severe financial instability, followed by a protracted recession."[20]

The financial crisis meant that many banks around the world faced insolvency and

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[19] Dominique Strauss-Kahn, New Policies for a New World (Jan. 4, 2011) at http://www.imf.org/external/np/vc/2011/010411.htm .

[20] Serge Jeanneau & Carlos Pérez Verdia, *Reducing Financial Vulnerability: the Development of the Domestic Government Bond Market in Mexico*, BIS Quarterly Review 95 (December 2005) available at http://www.bis.org/publ/qtrpdf/r_qt0512h.pdf

governments stepped in to bail them out.[21] Financial support for banks imposed additional financial burdens on governments which were dealing with other aspects of the great recession, and other issues, such as aging populations. Private risks shifted to sovereign balance sheets: "Public interventions and fiscal stimulus packages have inevitably led to an increased supply of sovereign debt, most notably in advanced economies. So far, this has been absorbed fairly smoothly, but future conditions could prove more challenging. The risk of continuing recession poses a significant vulnerability to sovereigns, with those countries with high (current) debt-to-GDP levels and significant contingent liabilities to the financial sector most vulnerable to adverse global developments. Therefore, countries need to ensure that such policy initiatives do not pose substantial solvency risks. Anchoring medium-term expectations of fiscal sustainability should help to contain borrowing cost pressures, while ensuring continued access to global savings and underpinning investor risk appetite."[22]

In many countries governments discussed and implemented austerity measures. In some European countries the EU and IMF required the implementation of austerity measures as a condition of financial support to sovereign debtors in crisis.[23]

Sovereigns and sovereign-owned entities can be investors in as well as issuers of debt securities, and this too leads to concerns. In the US there has for some time been concern about the security implications of foreign ownership of businesses. Congress enacted the Foreign Investment Risk Review Modernization Act of 2018 (replacing earlier rules) which provides for a Committee on Foreign Investment in the United States (CFIUS) process to assess and address national security-related concerns related to foreign investment into the United States.[24] Concerns about a perceived increase in investment by sovereign wealth funds[25]

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[21] Although *cf, e.g.*, Michael Lewis, Beware of Greeks Bearing Bonds, Vanity Fair, (Oct. 1, 2010) at http://www.vanityfair.com/business/features/2010/10/greeks-bearing-bonds-201010?printable=true ("In Greece the banks didn't sink the country. The country sank the banks.").

[22] IMF, Global Financial Stability Report: Navigating the Financial Challenges Ahead (Oct. 2009) Chapter 1: The Road to Recovery, p. 42 at http://www.imf.org/external/pubs/ft/gfsr/2009/02/pdf/chap1.pdf .

[23] For information on the IMF and Europe, *see, e.g.*, http://www.imf.org/external/region/eur/index.aspx

[24] See https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius. Cf. OECD/UNCTAD, 24th Report on G20 Investment Measures (Nov. 18, 2020). And see generally https://www.oecd.org/daf/inv/investment-policy/foi.htm .

[25] *See, e.g.*, Robert M Kimmitt, *Public Footprints in Private Markets*, 87:1 Foreign Affairs119-130 (2008) (There are also non-national-security issues associated with the potential increase in foreign public ownership of private firms. First, the U.S. economy is built on the belief that private firms allocate capital more efficiently than governments. Second, foreign governments could conceivably employ large pools of

also led the funds to establish an International Working Group of Sovereign Wealth Funds which developed a set of principles and practices for such funds (the Santiago Principles).[26] The principles and practices have four objectives :

i. To help maintain a stable global financial system and free flow of capital and investment;

ii. To comply with all applicable regulatory and disclosure requirements in the countries in which they invest;

iii. To invest on the basis of economic and financial risk and return-related considerations; and

iv. To have in place a transparent and sound governance structure that provides for adequate operational controls, risk management, and accountability.[27]

The OECD, issuing a Declaration on Sovereign Wealth Funds and Recipient Country Policies in 2008:

• Welcomed the constructive contribution that Sovereign Wealth Funds (SWFs) make to the economic development of home and host countries. To date they have been reliable, long-term, commercially-driven investors and a force for global financial stability.

• Recognised that if SWF investments were motivated by political rather than commercial objectives, they could be a source of concern, and that legitimate national security concerns could arise.

• Welcomed international discussions involving SWFs, their governments and recipient governments. These increase understanding, contribute to mutual trust and confidence, and help avoid protectionist responses that could undermine economic growth and development.

• Noted that the home countries of SWFs and SWFs themselves can enhance confidence by taking steps to strengthen transparency and governance in the SWFs.

• Supported the work of the IMF on best practices for SWFs as an essential contribution and the continuing coordination between the OECD and the IMF.

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capital in noncommercially driven ways that are politically sensitive even if they do not have a direct impact on national security. Examples would include investment decisions made to promote a given foreign or social policy. Third, there is the potential for perceived or actual unfair competitive advantages relative to the private sector. For instance, a government could use its intelligence or security services to gather information that is not available to a commercial investor. With a sovereign guarantee, a SWF could also obtain or extend financing (if needed) at interest rates that a commercial investor could not.")

[26] International Working Group of Sovereign Wealth Funds, Generally Accepted Principles and Practices for Sovereign Wealth Funds (Santiago Principles) (Oct. 2008) *available at* https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf . In 2009 the IWG formed an International Forum of Sovereign Wealth Funds. See http://www.ifswf.org..

[27] Santiago Principles at 4. The principles themselves are more detailed than this, but not particularly specific. The principles set out a number of areas where the funds should disclose information about their policies and standards.

• Noted that the OECD for its part has been working on best practices for recipient countries. Together the IMF and OECD will help preserve and expand an open international investment environment for SWFs while safeguarding essential security interests.
• Welcomed the Report by the OECD Investment Committee on SWFs and Recipient Country Policies, which reflects inputs from both OECD and emerging economies, and looked forward to future work, including peer monitoring of policy developments and broader consideration of foreign-government controlled investments.
• Based on this Report, Ministers endorsed the following policy principles for countries receiving SWF investments. These principles reflect long-standing OECD commitments that promote an open global investment environment. They are consistent with OECD countries' rights and obligations under the OECD investment instruments.
- Recipient countries should not erect protectionist barriers to foreign investment.
- Recipient countries should not discriminate among investors in like circumstances. Any additional investment restrictions in recipient countries should only be considered when policies of general application to both foreign and domestic investors are inadequate to address legitimate national security concerns.
- Where such national security concerns do arise, investment safeguards by recipient countries should be:
- transparent and predictable,
- proportional to clearly-identified national security risks, and
- subject to accountability in their application.[28]

Despite the risks associated with having foreign investors, countries often want to make the securities they issue attractive to foreign investors. Countries other than the US have made their own debt securities more attractive to foreign investors than they would otherwise be by issuing US dollar denominated securities.[29] Issuing foreign currency denominated securities

[28] *See* http://www.oecd.org/officialdocuments/displaydocumentpdf/?cote=C/MIN%282008%298/FINAL&doclanguage=en. See also, e.g., OECD Guidance on Sovereign Wealth Funds at http://www.oecd.org/document/19/0,3343,en_2649_34887_41807059_1_1_1_1,00.html.

[29] International organizations may also issue US$ denominated securities. The IBRD stated "To raise funds, IBRD issues debt securities in a variety of currencies to both institutional and retail investors. During FY 2012, IBRD raised medium- and long-term debt of $38,406 million, an increase of $9,616 million from FY 2011, in part reflecting Management's decision to bolster IBRD's liquidity levels. IBRD raised debt in FY 2012 in 23 different currencies." Information Statement (Sep. 2012) at p. 8. Cf. Final Terms dated January 9, 2013, International Bank for Reconstruction and Development Issue of USD 1,500,000,000 Floating Rate Notes due January 14, 2015 under the Global Debt Issuance Facility . Foreign corporates issue dollar denominated debt securities. Sovereigns outside the euro area, such as Venezuela and China, have issued euro denominated debt. *See, e.g.*, European Central Bank, Review of the International Role of the Euro, 15-16 (December 2005) *available at* http://www.ecb.int/pub/pdf/other/euro-international-role200512en.pdf . But issuance of euro-denominated

also allows countries to build their foreign exchange reserves.[30]

The currency in which a debt security is denominated is only one factor investors need to consider. Some sovereign issuers are economically more sound than others. The pricing of debt securities should reflect their risk as an investment: economically sound issuers do not need to offer as high an interest rate to attract investors as issuers in a weaker financial position. But there may be a risk that a sovereign issuer will not in fact make the payments of interest or principal it has committed to make. This risk is called "**country risk"**. Investors in foreign government securities need to understand the level of risk they will be exposed to in investing. The FDIC, looking at country risk from the perspective of the banks it is involved in regulating,[31] has described country risk as: "the risk that economic, social and political conditions in a foreign country might adversely affect a bank's financial interests."[32] Country risk "includes the possibility of deteriorating economic conditions, political and social upheaval, nationalization and expropriation of assets, government repudiation of external indebtedness, exchange controls, and currency depreciation or devaluation."[33]

Ratings agencies such as Moodys, Standard & Poors and Fitch Ratings assign ratings to sovereigns as they do to bonds issued by corporates.[34] In December 2013, the European

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securities has sometimes been less attractive. European Central Bank, The International Role of the Euro (Jul. 2012).

[30] Countries may use foreign exchange reserves for different purposes, including buying their own currency in the international financial markets, and thus increasing the price of their own currency. See generally Christopher J Neely, Are Changes in Foreign Exchange Reserves Well Correlated with Official Intervention?, Federal Reserve Bank of St. Louis, 17, 18 Sept/Oct 2000, *available at* http://research.stlouisfed.org/publications/review/00/09/0009cn.pdf See also, e.g., Y V Reddy, Deputy Governor of the Reserve Bank of India, India's foreign exchange reserves - policy, status and issues, available at http://www.bis.org/review/r020510f.pdf

[31] See, e.g., Donald E. Powell, Chairman, Federal Deposit Insurance Corporation, South America and Emerging Risks in Banking, Speech to the Florida Bankers Association, Orlando, Florida (Oct. 23, 2002) *available at* http://www.fdic.gov/news/news/press/2002/pr11202.html ("Florida banks alone hold almost $18 billion worth of foreign assets, most of which are from South America")

[32] http://www.fdic.gov/news/news/financial/2002/fil0223.html .. The FDIC has also noted that when banks offshore functions this "introduces an element of country risk to the outsourcing process". See FDIC, Offshore Outsourcing of Data Services by Insured Institutions and Associated Consumer Privacy Risks, 2 (Jun. 2004).

[33] Guide to the Interagency Country Exposure Review Committee Process, 1 (Nov.1999). The US Federal Banking Regulators issued a revised version of the Guide In November 2008. See http://www.fdic.gov/regulations/safety/guide/Icerc.pdf .

[34] Cf.
https://www.spglobal.com/ratings/en/research/articles/210202-sizing-sovereign-debt-and-the-great-fiscal-u

Securities Markets Authority (ESMA) issued a report which criticised the procedures Fitch Ratings, Moody's Investors Service and Standard & Poor's used to generate sovereign ratings.[35] Credit ratings may affect the investment decisions of investors, and the pricing of sovereign debt:

Sovereign credit ratings reflect a country's willingness and ability to repay its sovereign debts. More broadly, a country's sovereign credit rating is a key indicator of its financial system development and openness. Indeed, sovereign credit ratings are strong predictors of a country's equity market returns and valuations .... And... sovereign credit ratings are (not surprisingly) also strongly related to the cost of government borrowing...

We find strong support for our views that macroeconomic, development, and legal environment variables affect country credit ratings, but little support for a "legal origin" effect. We find that, ceteris paribus, GDP per capita, inflation, foreign debt, our underdevelopment index, and each legal environment variable all have a strongly significant statistical relationship with sovereign credit ratings. Higher GDP per capita, lower inflation, lower foreign debt per GDP, better development, and higher scores for voice of the people, political stability, government effectiveness, regulatory quality, rule of law, and corruption control all relate to better credit ratings. After controlling for other factors, legal origin indicators do not have a significant impact on credit ratings.[36]

Sovereigns do default, and foreign investors in their debt suffer losses as a result. This is how **Donald Powell** (at the time Chairman of the FDIC) described Argentina's crisis in 2002:

> Argentina's problems originated with overspending. After three years of rising fiscal deficits and unemployment, in 1999 foreign investors began to seriously question Argentina's ability to rein in its spending and repay its obligations under the peso-dollar peg. Argentina's country risk premium began to rise, leading domestic and foreign investors to pull money out of the country in massive country-wide bank runs. After IMF loan packages and debt swaps proved ineffective in stemming the exodus... the Argentine government resorted to restrictions on bank withdrawals and the largest sovereign default

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nwind-11824774 ; The Uses and Abuses of Sovereign Credit Ratings, in IMF, Global Financial Stability Report (2010) at p 86.

[35] ESMA, Credit Rating Agencies: Sovereign Ratings Investigation, ESMA's Assessment of Governance, Conflicts of Interest, Resourcing Adequacy and Confidentiality Controls, ESMA/2013/1775 (Dec. 2, 2013).

[36] Alexander W. Butler & Larry Fauver, Institutional Environment and Sovereign Credit Ratings, 35(3) Financial Management 53, at 53-4 (2006).

in history. Finally, in January 2002, Argentina suspended the peso-dollar peg. [37]

Where sovereign debtors find difficulty in meeting their commitments on existing debt obligations they may reschedule or restructure their debt, negotiating for changes in the terms of the debt. Ecuador announced in December 2008 that it planned to default on debt which it regarded as immoral.[38] Some argue that such defaults should sometimes be regarded as legitimate, and there is a literature on "odious debt".[39] A paper on this issue by Gulati and Panizza, focusing on Venezuela, but also making a more general argument, suggests that "if opposition parties in countries with despotic governments today were to monitor and make public the potential problems with debt issuances by their despotic rulers under their own local laws, it would raise the cost of capital for those despots.[40]

After Argentina declared a moratorium which affected bond issues, bondholders[41] sued Argentina in federal district court in the US and moved to certify a class action.[42] Argentina argued that "the only really effective way to resolve a sovereign debt crisis ... is through voluntary debt restructuring." and that " to the extent bond litigation is expanded from suits by individual bondholders ... into one or more class actions, this will serve as a disincentive to

[37] Powell speech, note 31 above.The bank freeze was relaxed in December 2002. See, e.g., http://news.bbc.co.uk/1/hi/business/2535539.stm . Argentina has defaulted on its sovereign debt nine times since independence in 1816.

[38] Ecuador defaults on foreign debt, BBC (Dec. 13, 2008) at http://news.bbc.co.uk/2/hi/business/7780984.stm .

[39] See, e.g., Seema Jayachandran & Michael Kremer , Odious Debt, 96 Am. Econ. Rev. 82 (2006); Robert Browne, The Concept of Odious Debt in Public International Law, UNCTAD Discussion Papers No. 185 (Jul. 2007).

[40] Mitu Gulati & Ugo Panizza, *Maduro Bonds* at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6594&context=faculty_scholarship.

[41] Or owners of beneficial interests in bonds. See *Martinez* v. *Republic of Argentina*, 2006 U.S. Dist. LEXIS 59977 (SDNY 2006): "The court notes the distinction between bonds and beneficial interests. In some previous opinions, the court has simply referred to the plaintiffs as owners of "bonds," when in fact plaintiffs are technically owners of "beneficial interests in bonds." The Republic actually issues "a bond" to a depository. The depository, in some form, issues "participations" to brokers, who sell "beneficial interests" to purchasers. These beneficial interests are identified by reference to the underlying bond (CUSIP or ISIN number or both; date of issuance and maturity; rate of interest) and the principal amount of the beneficial interest."

[42] Many of the investors were Italian. See http://www.tfargentina.it/english.php . Italian investors pursued claims against Argentina via ICSID. *See, e.g.,* http://italaw.com/cases/35

participating in the debt restructuring effort and will interfere with that effort."[43] Despite this argument the court certified the class.

In 2004 Argentina announced proposed terms of a restructuring of its debt and the debt restructuring plan was carried out in early 2005.[44] Many bondholders were unhappy about Argentina's offer.[45] A number of lawsuits involving bondholders persisted after the restructuring,[46] but creditors had difficulty finding assets to attach in the US.[47] The English Court of Appeal rejected one attempt to enforce a US judgment on sovereign immunity grounds,[48] although the UK Supreme Court overturned that decision holding that Argentina had waived State Immunity.[49] By late 2009, Argentina was still excluded from the financial markets as a result of the moratorium and restructuring, and the Argentinean Senate acted to open the debt restructuring process for holdout creditors.[50] Meanwhile, President Fernández de Kirchner issued an emergency decree for the establishment of a Bicentennial Fund to pay foreign creditors. The Governor of the Central Bank refused to agree to pay monies from the bank's reserves into this fund, and although the President sought to fire him in response the Court held

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[43] *H.W. Urban GmbH* v *Republic of Argentina* 2003 U.S. Dist. LEXIS 23363 at p 4 (SDNY 2003).

[44] *See, e.g.*, IMF, Argentina: 2005 Article IV Consultation—Staff Report; Staff Supplement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Argentina, IMF Country Report No. 05/236 (Jul. 2005) at 13.

[45] One paper on the default and restructuring explains the concerns as follows: "In 2005, the government issued a take-it-or-leave-it plan with the worst terms ever offered in a sovereign debt restructuring – a bond swap worth less than 25-cents on the dollar and repudiation of all past due interest payments. When nearly one-quarter of its lenders holding $19.4 billion in Argentine bonds declined the offer, including U.S. lenders holding $2.1 billion in Argentine debt, the Argentine government repudiated its obligations to those lenders, an unprecedented act in sovereign finance." Robert J. Shapiro & Nam D. Pham, Argentina's 2001 Debt Default and 2005 Debt Restructuring: An Update on the Costs to Bondholders, Taxpayers and Investors (Sept. 2008).

[46] As of April 2005 there were about 50 Argentina bondholder cases, involving over 285 plaintiffs, pending in the Southern District of New York.

[47] *See, e.g.*, Aurelius Capital Partners v Republic of Argentina 584 F.3d 120 (2d. Cir 2009) cert. denied 130 S. Ct. 1691 (2010) (holding that Argentinean social security funds were immune from attachment by under the Foreign Sovereign Immunities Act.).

[48] NML Capital Ltd v Republic of Argentina [2010] EWCA Civ 41. NML Capital is a hedge fund subsidiary of Elliott Capital.

[49] NML Capital Ltd v Republic of Argentina [2011] UKSC 31.

[50] http://en.mercopress.com/2009/11/19/argentine-senate-reopens-debt-restructuring-process-for-bond-holdouts.

that she could not do so.[51] In January 2010 creditors obtained a restraining order against the Argentinean Central Bank and Argentina in the Southern District of New York.[52] In March 2010 President Kirchner announced that she would repeal the Bicentennial decree, and in January 2011 she announced that Argentina would pay $9 billion to the Paris Club of sovereign creditors.[53] In 2016 Argentina settled with creditors and went back into the market selling new bonds to international investors.[54] In 2017 Argentina sold a 100 year bond (a bond where the investors will not receive a return of their principal for 100 years).[55] But in 2018 Argentina needed to seek financial support from the IMF,[56] and in 2020 Argentina again sought to restructure its debt.[57]

In the 2004-5 restructuring, some of Argentina's creditors objected to Argentina's proposal to include a "most favoured creditors" clause in the restructuring documentation which would allow Argentina to pay creditors who did not join in the restructuring. The clause read as follows:

> "Argentina reserves the right, in its absolute discretion, to purchase, exchange, offer to purchase or exchange, or enter into a settlement in respect of any Eligible Securities that are not exchanged pursuant to the Offer (in accordance with their respective terms) and, to the extent permitted by applicable law, purchase or offer to purchase Eligible Securities

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[51] *See* Jude Webber, Argentina woes will prove costly for comeback, FT (Jan. 14, 2009).

[52] Aurelius Capital Partners v Republic of Argentina, 2010 U.S. Dist. LEXIS 3280 (SDNY 2010). News reports which refer to this decision refer to the creditors as "vulture funds" (as to which see below).

[53] For the Paris Club see http://www.clubdeparis.org/ .

[54] *See, e.g.*, Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute With Hedge Funds*, New York Times Dealbook (Apr. 25, 2016) ("Last week, Argentina successfully sold $16.5 billion in bonds to international investors, a record amount for any developing country. And on Friday, Elliott and the other bondholders finally received their reward in the form of billions of dollars in repayment, representing returns worth multiple times their original investments.")

[55] *See, e.g.*, Benedict Mander & Robin Wigglesworth, How Did Argentina Pull off a 100-year Bond Sale?, Financial Times (Jun. 20, 2017).

[56] *See, e.g.*, IMF, IMF Executive Board Completes Second Review Under Argentina's Stand-By Arrangement, Approves US$7.6 Billion Disbursement (Dec. 19, 2018).

[57] *See, e.g.*, IMF Staff Technical Statement on Argentina (Jun. 1, 2020) at https://www.imf.org/en/News/Articles/2020/06/01/pr20228-argentina-imf-staff-technical-statement; Argentina Ministry of Economy, Argentina and Three Creditor Groups Reach a Deal on Debt Restructuring (Aug. 4, 2020) at https://www.economia.gob.ar/en/argentina-and-three-creditor-groups-reach-a-deal-on-debt-restructuring/. And see https://www.sec.gov/Archives/edgar/data/0000914021/000119312520221606/d68512d424b5.htm for the terms (including reference to collective action clauses).

in the open market, in privately negotiated transactions or otherwise. Any such purchase, exchange, offer to purchase or exchange or settlement will be made in accordance with applicable law. The terms of any such purchases, exchanges, offers or settlements could differ from the terms of the Offer. Holders of New Securities will be entitled to participate in any voluntary purchase, exchange, offer to purchase or exchange extended to or agreed with holders of Eligible Securities not exchanged pursuant to the Offer as described below..."[58]

The Global Committee of Argentina Bondholders objected to this provision, saying: "There are two important ambiguities to point out with respect to the language used in the MFC Clause. First, Argentina has deliberately left out the word "settlement" in the final sentence of the paragraph although the word appeared in a prior draft of the Prospectus Supplement. Argentina could make a strong argument that any "settlement" would not have to be extended to holders of New Securities. Given the significant amount of litigation and arbitration against Argentina, this loophole is considerable. A "settlement" would certainly include agreements reached in the context of litigation or arbitration, but Argentina also could argue for a much broader interpretation. For example, Argentina could assert that a privately negotiated exchange or purchase on more favorable terms that is labeled a "settlement" would not trigger the MFC Clause.

Second, the inclusion of the word "voluntary" in the last sentence allows Argentina broad discretion to argue that any requirement by the official sector, such as by the International Monetary Fund that Argentina enter into a subsequent exchange or purchase on terms that are more favorable than the Offer would not trigger the MFC Clause. Argentina could claim that the arrangement with the official sector is not "voluntary" and, therefore, any exchange required by the official sector - even on better terms than the Offer - is not subject to the MFC Clause.

Finally, there are practical problems with relying on the MFC Clause. There is a serious question as to how creditors will ever know of side deals. If creditors do learn of side deals, the issue arises as to whether they will have access to enough information to demonstrate that the MFC Clause should apply notwithstanding the ambiguities described above.

These ambiguities and practical challenges give Argentina the ability to enter into a wide variety of side deals without necessarily triggering the MFC Clause. ..

Even if holders of the New Securities believe that the MFC Clause has been triggered, enforceability of the MFC Clause will be very difficult and onerous. According to the Prospectus Supplement, if Argentina breaches the MFC Clause and does not cure the breach within 90 days after it receives written notice thereof, the holders of New Securities can declare an event of default. To declare an event of default, holders of at least 25% of the aggregate principal amount of the debt securities of that series may, by written notice, declare the debt securities of that series to be immediately due and payable and such

[58] See http://www.tfargentina.it/download/GCAB%20Most%20Favored%20Creditor%20Clause%20paper%201-31-05.pdf .

amounts will become immediately due and payable provided that the event of default is materially prejudicial to the interests of the holders of the debt securities of that series. Even if holders of the New Securities organize the requisite 25% threshold, actually stating a claim may be extremely difficult because of the ambiguity of the MFC Clause. In addition, due to the difficulties in organizing holders representing at least 25% of the aggregate principal amount of the debt securities, declaring an event of default under the New Securities will be a challenging process. Furthermore, even if an event of default is declared and the New Securities are accelerated, there is no guarantee that Argentina will actually pay. Finally, even if holders of New Securities organize and can prove a violation of the MFC Clause, Argentina has already shown its willingness to render itself immune from the enforcement of judgments in all major financial jurisdictions. As a result, if Argentina refuses to pay, then the holders that participate in the Offer will end up in the same position as they are today."[59]

The example of Argentina illustrates how litigation and restructuring (contract) as mechanisms for dealing with sovereign defaults may conflict. In a restructuring, a debtor will contract to pay its creditors less than they were entitled to under the original agreement. In litigation, creditors seek to enforce their original rights.

At the end of 2005 Argentina announced that it would repay its debt to the IMF in full.[60] In mid-2006 the World Bank announced a new program of financial assistance to Argentina (adding to existing outstanding loans to Argentina). The World Bank said:

> Notwithstanding the debt restructuring of June 2005 and the overall improvement in Argentina's debt profile, debt sustainability will remain a concern and an important source of risk. Even after the debt restructuring and repayment to the IMF, Argentina's total public debt remains high and the public debt service burden in the medium term significant, in the US$13 billion range per year. The US$24 billion in holdouts, US$3 billion in Paris club arrears, and contingent liabilities arising from the cases before ICSID all represent sources of potential increases in the debt service burden in the future, although the timetable for their resolution remains unclear. The 35 percent reduction in international reserves resulting from the early repayment of the IMF reduced the country's external liquidity, but reserves remain adequate to cover 100 percent of the money base and are again accumulating with continued Central Bank purchases of foreign exchange. Under the Government's medium-term macroeconomic framework, the public debt to

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[59] *Id.*

[60] *See, e.g.*, IMF, Argentina Announces its Intention to Complete Early Repayment of its Entire Outstanding Obligations to the IMF, (Dec. 15, 2005) at http://www.imf.org/external/np/sec/pr/2005/pr05278.htm ; IMF Survey, 9 (Jan 9, 2006) available at http://www.imf.org/external/pubs/ft/survey/2006/010906.pdf (Announcing Argentina's repayment of its IMF loans).

GDP ratio is projected to decline steadily over the medium-term.[61]

In 2013 the IMF took the unusual step of censuring Argentina for failures to address defects in data reported to the IMF.[62] In December 2013 the IMF noted that Argentina was working on addressing the issue[63] although the IMF subsequently noted data limitations with respect to Argentina's financial situation.[64] During 2018 the IMF was involved in evaluating Argentina's economy and governance in the context of an IMF financing program (a Standby Facility) conditioned on economic reform,[65] and the 2020 restructuring also involved IMF evaluations of Argentina's economic plans and policies.[66]

Some commentators have written about "catalytic finance" suggesting that "the provision of official assistance to a country undergoing a financial crisis spurs other interested parties to take actions that mitigate the crisis. In particular, it rests on the premise that, under the right conditions, official assistance and private sector funding are strategic complements. That is, the provision of official assistance galvanizes the private sector creditors into rolling over short term loans, and thereby alleviating the funding crisis faced by the debtor country."[67] Others argue that the intervention of the IMF can increase moral hazard.[68] The picture of Argentina paying off the

[61] World Bank, Country Assistance Strategy for the Argentine Republic 2006-2008, 66-7 (May 4, 2006).

[62] IMF, Statement by the IMF Executive Board on Argentina, Press Release No. 13/33 (Feb. 1, 2013) at http://www.imf.org/external/np/sec/pr/2013/pr1333.htm.

[63] IMF, Statement by the IMF Executive Board on Argentina, Press Release No. 13/497 (Dec. 9, 2013) at http://www.imf.org/external/np/sec/pr/2013/pr13497.htm .

[64] *See, e.g.*, IMF, Argentina: Selected Issues, IMF Country Report No. 16/347 (Nov. 2016) at p. 8. Cf. IMF, Argentina : Technical Assistance Report-Report of the Technical Assistance Mission on External Sector Statistics (April 17–28, 2017), IMF Country Report No. 19/18 (Jan. 2019) .

[65] *See, e.g.*, Argentina : Second Review under the Stand-By Arrangement; Financing Assurances Review; and Request for Modification of Performance Criterion-Press Release; and Staff Report, IMF Country Report No. 18/374 (Dec. 2018).

[66] IMF Staff Statement on Argentina (Oct. 12, 2020) at https://www.imf.org/en/News/Articles/2020/10/12/pr20312-argentina-imf-staff-statement.

[67] Stephen Morris & Hyun Song Shin, *Catalytic Finance: When Does it Work?*, 70 J. OF INT'L ECON. 161-177, 161 (2006)

[68] *Id.* at 162. *See also e.g.*, Cary Deck and Javier Reyes, *An Experimental Analysis of Catalytic Finance,* Draft: Feb. 15, 2005 *available at* https://www.researchgate.net/profile/Javier_Reyes5/publication/266454373_An_Experimental_Analysis_of

IMF in full when private sector creditors were offered only a portion of what was owed to them raises some questions.

A 2019 paper identifies three fundamental problems that can arise in sovereign debt restructuring negotiations: asymmetric information (the debtor knows more about its financial condition than creditors do, but creditors know what they will accept, and the debtor does not);debtors and creditors may have reasons not to achieve resolution quickly (e.g. a confrontational debtor may have support from domestic constituencies); and there are conflicts of interest, including between creditors (the holdout problem).[69] Sovereigns have more scope to force a restructuring of debt governed by local law,[70] although sovereign debt will commonly not be governed by local law precisely becaus it is within the control of the sovereign issuer, and therefore less attractive to investor/creditors.

Corporates may also reschedule their debt if they have financial problems, but corporates do so in the shadow of domestic insolvency and administration regimes which do not exist for sovereigns.[71] Nearly 20 years ago IMF proposed an insolvency regime for sovereigns, designated a Sovereign Debt Restructuring Mechanism (or SDRM), but the proposal was

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_Catalytic_Finance/links/56560c3508ae4988a7b35930/An-Experimental-Analysis-of-Catalytic-Finance.pdf (“There is also the debate about how IMF support to crisis or crisis-prone countries can introduce the issues of moral hazard distortions. The resources made available (or readily available) to a country in distress may have undesired effects on the behavior and/or incentives of debtor countries and creditors. A debtor country that can avoid or alleviate a crisis by implementing costly (political or economic) reforms may decide not to do so as long as they can be substituted by readily available IMF support packages (debtor moral hazard). Also investors do not have the right incentives to diversify their risk and avoid investments in riskier countries when IMF support is readily available (creditor moral hazard).”

[69] Lee Buchheit, Guillaume Chabert, Chanda DeLong & Jeromin Zettelmeyer, How to Restructure Sovereign Debt: Lessons from Four Decades, Peterson Institute for International Economics Working Paper 19-8 (May 2019) at p. 2. The paper includes a useful examination of the restructuring process.

[70] *See, e.g.*, Sebastian Grund, *Restructuring Government Debt Under Local Law: the Greek Case and Implications for Investor Protection in Europe*, 12 Capital Markets Law Journal 253 (2017). The article discusses legal challenges to Greece’s restructuring of local law governed bonds.

[71] Lee Bucheit, Sovereign Debt Restructurings: the Legal Context, in Sovereign Risk: A World Without Risk-Free Assets, BIS Papers No. 72 (Jul. 31, 2013) at https://www.bis.org/publ/bppdf/bispap72.htm (“Sovereigns are unique debtors. Unique in two senses: they are uniquely vulnerable and they are uniquely protected. They are uniquely vulnerable in that, unlike a corporate debtor or an individual debtor, there is no bankruptcy code that applies to a sovereign. They are not subject to their own bankruptcy codes, nor anyone else’s. That means that an over-extended sovereign confronted with a maturing debt obligation has only two choices: pay it or face the prospect of a lawsuit and be compelled to pay it. To put it differently, a sovereign cannot seek the protection of bankruptcy courts; there is no Chapter 11 for a sovereign. In that sense, of all the debtors in the world, sovereigns are uniquely vulnerable.” (Uniquely protected by sovereign immunity))

controversial and lapsed,[72] although the IMF tried to revive the idea in 2013,[73] and again in 2020.[74] In the EU some have advocated for a mechanism to restructure sovereign debt in an orderly way.[75] Later on in this chapter there are materials on the IMF's sovereign debt restructuring proposal and collective action clauses, a market-based solution which a G10 working group endorsed[76] as an alternative, and which have been included in many sovereign bond issues.

Some creditors will engage in negotiations with sovereign borrowers/issuers to change the rights and obligations of sovereign borrowers and their creditors. Other firms will invest (or speculate) in the distressed debt of sovereigns (or corporates). These firms are sometimes described as "vulture" funds or investors.[77] Aurelius Capital, one of the plaintiffs in the Argentina cases cited above, has been described as such a fund. The firm was established by Mark

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[72] *See*, *e.g.*, Communique of the International Monetary and Financial Committee of the Board of Governors of the International Monetary Fund, April 12, 2003, at http://www.imf.org/external/np/sec/pr/2003/pr0350.htm ("The Committee, while recognizing that it is not feasible now to move forward to establish the SDRM, agrees that work should continue on issues raised in its development that are of general relevance to the orderly resolution of financial crises. These issues include inter-creditor equity considerations, enhancing transparency and disclosure, and aggregation issues.")

[73] *See, e.g.*, IMF, IMF Launches Discussion of Sovereign Debt Restructuring (May 23, 2013) at http://www.imf.org/external/pubs/ft/survey/so/2013/pol052313a.htm; Robert Kahn, Drawing the Wrong Lessons From Argentina's Debt Mess (Jan. 10, 2013) at http://www.economonitor.com/blog/2013/01/drawing-the-wrong-lessons-from-argentinas-debt-mess/ ("The Financial Times has joined the chorus of those calling for a new statutory sovereign debt restructuring mechanism (SDRM), citing Argentina's legal battle with holdout creditors as evidence of a broken system for restructuring sovereign debt. The SDRM, as most commonly understood, envisages a formal restructuring process, analogous to national bankruptcy law, to deal with the debt of distressed countries. It was an impractical and unnecessary idea when first raised by the IMF in 2001, and it remains so today.")

[74] IMF, The International Architecture for Resolving Sovereign Debt Involving Private-Sector Creditors—Recent Developments, Challenges, And Reform Options (Oct. 1, 2020) at https://www.imf.org/-/media/Files/Publications/PP/2020/English/PPEA2020043.ashx .

[75] *See, e.g.*, Juha Sipilä, Eurozone's Tragic Flaw: Too Much Public Debt (Jan. 30, 2019) at https://www.politico.eu/article/eurozone-tragic-flaw-too-much-public-debt/ .

[76] Report of the G10 Working Group on Contractual Clauses (Sept. 26, 2002) *available at* http://www.bis.org/publ/gten08.pdf

[77] Vulture investors swoop down on financially troubled issuers or borrowers and buy up interests in their debt at a discount hoping that they will find ways to make a profit in an insolvency or otherwise. Cf. Abner Dennis, The 21 Vulture Funds Stalking Puerto Rico's Central Government: Legal Challenges, Investments, Insider Trading (Aug. 5, 2020) at https://public-accountability.org/report/the-21-vulture-funds-stalking-puerto-ricos-central-government-legal-challenges-investments-insider-trading/.

Brodsky, who previously worked at Elliot Associates and who has been visible as an investor in the defaulted debt of sovereign-related borrowers.[78]

VULTURE FUND CASES:

Elliott Associates, L.P.* v *The Republic of Panama (see page 21)

Elliott Associates, L.P.* v *Banco De La Nacion (see page 28)

The following two cases arose out of purchases of sovereign debt by a vulture fund. The cases are included partly because they contain descriptive material on international financial activity. The Brady Plan, described in both cases was a plan to facilitate restructuring of sovereign debt.[79] The cases are also included because they illustrate behavior of holdout creditors and the debtors' attempt to block the holdout's attempt to receive payment. Notice how Elliott Associates acts in the context of this plan. Do you approve of Elliott Associates' actions? The first case (Panama) raises a number of different legal issues; the second case (Peru) is more focused. Both cases illustrate how international financial transactions take place in a context where the relevant applicable legal rules are rules of domestic legal systems, rather than international rules. Consider the analysis of the application of the New York statute in both cases. Do you agree with the courts' interpretation of the statute? Do you agree with the Second Circuit's description of the policy reasons for allowing Elliott to enforce the debt in the Peru case? Are there any policy reasons that might point in the opposite direction?

Some of the issues raised by international financial transactions will be issues of interpretation of the contract(s) (see the Panama case), but other issues will be non-contractual (both cases). Parties to a transaction can negotiate the terms of their relationship, but their contracts exist within a legal environment which includes other rules. Parties to the transaction can negotiate which law is to be the proper law of the contract, and, if the court upholds this choice of law, that law will govern questions such as how to interpret the contract. However rules of another legal system may apply to decide other questions (e.g. tort liability, liability for

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[78] *Cf.* Jesse Barron, The Curious Case of Aurelius Capital v. Puerto Rico, NY Times Magazine (Nov. 26, 2019)

[79] *See*, *e.g.*, Ian Vásquez, *The Brady Plan and Market-based Solutions to Debt Crises*, 16 CATO J. 233, 234 (1996) ("When the Bush administration assumed office in 1989, the new Secretary of the Treasury, Nicholas Brady, announced that the only way to address the sovereign debt crisis was to encourage the banks to engage in "voluntary" debt-reduction schemes. Countries were to implement market liberalizations in exchange for a reduction of the commercial bank debt, and, in many cases, new money from commercial banks and multilateral agencies.")

breach of fiduciary duties, statutes which disable a person from enforcing a contract under certain circumstances). So, if a firm such as Elliott Associates sued to enforce a debt in another jurisdiction (because the debtor had assets there) that other jurisdiction might have rules about champerty which were different from those in New York.

***Elliott Associates, L.P.* v *The Republic of Panama*[80] (Judge Chin:)**

In the 1980's, a number of countries -- including the defendant Republic of Panama ... encountered serious difficulties in servicing their foreign debt. As a consequence, and because of growing concern over the continued stability of the international financial system, United States Treasury Secretary Nicholas Brady announced a plan (the "Brady Plan") in 1989 encouraging bank creditors to reduce the debt obligations of lesser developed countries by restructuring old debt and providing new loans. Panama took advantage of the Brady Plan and restructured much of its external debt in 1995 pursuant to what became known as the "1995 Financing Plan." The restructured debt included balances due under loan agreements entered into with certain banks and financial institutions in 1978 for $ 300 million (the "1978 Agreement") and in 1982 for $ 225 million (the "1982 Agreement").

At issue in the instant case is a portion of the 1982 debt. In late 1995, two of the banks that had participated in the 1982 loan, Citibank, N.A. ("Citibank") and Swiss Bank Corporation ("Swiss Bank") (together, "the Banks"), assigned their interest in $ 12,242,018.21 of the debt to plaintiff Elliott Associates, L.P. ("Elliott") for approximately $ 8 million. After the assignments, Panama (through its Agent) made some interest payments to Elliott, but the payments eventually stopped. For its part, Elliott refused to restructure its debt in accordance with the 1995 Financing Plan, even though all the other creditors under the 1982 Agreement agreed to do so.

Instead, on July 15, 1996, Elliott commenced this breach of contract action, seeking judgment against Panama for the amounts due under the 1982 Agreement. Panama responded by asserting a counterclaim against Elliott for tortious interference with Panama's contractual relations with the Banks. Before the Court is Elliott's motion for summary judgment, both for judgment on its breach of contract claim and for dismissal of Panama's counterclaim for tortious interference with contract. Elliott's motion is premised in part on its contention that Panama is collaterally estopped by the decision of Justice Gammerman in Elliott Assocs., L.P. v. Republic of Panama, No. 603615/96 (N.Y. Sup. Ct. May 16, 1997), a case virtually identical to this one, except that it involved the 1978 Agreement. After Panama defaulted on that loan as well, Elliott purchased some portion thereof from certain of the participating banks. Justice Gammerman granted summary judgment in favor of Elliott and entered judgment against Panama in the amount of $31,441,197. He also dismissed Panama's counterclaim.

Panama contends that summary judgment must be denied because the assignments of the loans to Elliott were improper under the terms of the 1982 Agreement and the 1995 Financing Plan. It also argues that because Elliott purchased the loans with the sole or primary intent to sue, the assignments are void under New York's anti-champerty law.

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[80] 975 F. Supp. 332 (SDNY 1997)

Although I conclude that the doctrine of collateral estoppel does not bar Panama from asserting its defenses in this case, I also conclude that the defenses must be rejected as a matter of law. The assignments to Elliott were permitted by the agreements in question, and the assignments -- arms-length trades of foreign debt -- were not champertous. Accordingly, Elliott's motion for summary judgment is granted.

BACKGROUND

A. The Agreements

In moving for summary judgment, Elliott argues that it has a valid assignment of the Banks' interests under the 1982 Agreement, that Panama thus has a contractual obligation to Elliott, and that Panama is in breach of that obligation by failing to repay its debt. Panama argues that the 1982 Agreement has been amended by the 1995 Financing Plan (which was agreed to by both Citibank and Swiss Bank, among others) to prohibit the assignment of debt in the manner in which the loans in question were assigned to Elliott. Moreover, Panama asserts that Elliott tortiously interfered with the implementation of the 1995 Financing Agreement by knowingly seeking assignment of debt contrary to its terms.

Section 14.08 of the 1982 Agreement provides that the Agreement can be "amended, modified or waived" upon the written consent of "the Borrower, the Agent and the Majority Lenders." ... Section 1.01 defines "the Majority Lenders" as those "Lenders" who "at any time on or prior to the Commitment Termination Date . . . have more than 50% of the aggregate amount of the Commitments and, at any time thereafter, Lenders who at such time hold 50% of the aggregate unpaid principal amount of the Loans." ... According to Panama, these conditions were met when Panama and Citibank, Swiss Bank, and other participating banks entered into the 1995 Financing Plan.

In general, the 1995 Financing Plan sets forth the terms of Panama's debt restructuring, including the exchange of principal for new bonds and new arrangements for interest payments. To maintain an orderly process pending its implementation, the Plan also included "Interim Measures," by which each creditor holding debt eligible for restructuring agreed not to "recognize or record any assignment of Eligible Principal or Eligible Interest made after the Final Trading Date" of October 20, 1995... Panama was particularly concerned with establishing a "Final Trading Date" so that it would have a firm date by which it would know which creditors had committed to the Plan. The settlement of such assignments made before the Final Trading Date was to be completed on or before November 10, 1995...

The 1995 Financing Plan also required that all creditors participating in the debt restructuring submit a Commitment Letter to Panama no later than November 14, 1995, agreeing: (1) not to assign any debt eligible for restructuring after October 20, 1995; (2) to complete the settlement of all such assignments on or before November 10, 1995; and (3) not to assign any such debt after signing the Commitment Letter except to an assignee who (a) completed the settlement of the assignment on or before November 10, 1995 and (b) agreed (i) to assume the obligations under the Commitment Letter and (ii) to submit a Commitment Letter on or before November 14, 1995... The Commitment Letter also required that each Lender consent to the Interim Measures described in Part V of the Financing Plan.

According to Panama, after receiving Commitment Letters from "institutions holding more than 50 percent of the then-outstanding amounts under the 1982 Agreement," the 1982 Agreement was amended and modified retroactively to prohibit any assignments after October 20, 1995... It is undisputed that Citibank and Swiss Bank each submitted a Commitment Letter to Panama on November 14, 1995... In fact, Panama alleges that it received Commitment Letters from all of the other banks that held interests in the 1982 Agreement debt... Thus, the 1982 Agreement was amended to include the terms of the 1995 Financing Plan.

B. Procedural History

Elliott originally brought two suits in state court on July 15, 1996, one involving the 1978 Agreement and the other -- the instant case -- involving the 1982 Agreement. Panama removed both cases to this Court pursuant to 28 U.S.C. § 1441(d). Elliott moved to remand the action involving the 1978 Agreement. I granted that motion, holding that an amendment to the 1978 Agreement, which eliminated Panama's right to remove any state court action to federal court, did not apply to that case because the amendment was made after the suit was brought...The instant case had been commenced after the amendment was made and thus Elliott did not seek remand of this case.

In the remanded state court action, Elliott raised issues similar to those in this suit, alleging breach of contract and seeking approximately $ 30 million from Panama due under the 1978 Agreement... As in this case, Panama asserted a number of affirmative defenses as well as a counterclaim for tortious interference with its contractual relationships with the assignor banks. The principal defenses were: (1) the purported assignments to Elliott were void because they took effect after the Final Trading Date of October 20, 1995; (2) Elliott was not a proper assignee under the 1982 Agreement because assignments were only permitted to banks or financial institutions, and Elliott, according to Panama, was neither a bank nor a financial institution; and (3) Elliott acquired its purported interest in the 1978 Agreement in violation of New York's law against champerty. Elliott then moved for summary judgment, both with respect to its breach of contract claim as well as Panama's counterclaim.

On May 16, 1997, Justice Gammerman dismissed the counterclaim, holding that Panama had not alleged sufficient facts to substantiate a claim for tortious interference. Justice Gammerman also granted Elliott's motion for summary judgment on its breach of contract claim, holding, among other things, that (1) there was no basis to void the assignments to Elliott and (2) there was insufficient evidence to establish that Elliott acquired its interest in the 1978 Agreement in violation of New York's champerty law...

A. Collateral Estoppel

Elliott argues that Panama is collaterally estopped from asserting the champerty defense and its tortious interference with contract counterclaim because Panama has already had a full and fair opportunity to litigate these issues before Justice Gammerman and lost. This argument is rejected.

The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue in the prior proceeding and the decision of the issue was necessary to support a valid and final judgment on the merits... The party seeking to invoke the doctrine of collateral estoppel bears the burden of establishing the identity of issues between the prior and present actions. The opposing party has the burden of establishing the absence of a full and

fair opportunity to litigate the issue in the prior action...
The state court case involved only the 1978 Agreement; hence, the issues relating to the 1982 Agreement were not directly before Justice Gammerman... as the issue of Elliott's intent with respect to the 1982 Agreement was not "actually decided" in the state court proceeding, and resolution of that issue was not "necessary to support a valid and final judgment on the merits," ... Panama is not collaterally estopped by Justice Gammerman's decision from pressing its defenses in the instant case. Nonetheless, because the issues presented are closely related, Justice Gammerman's decision must be given serious consideration.

B. Elliott's Breach of Contract Claim
Elliott's entitlement to recover the amounts due under the 1982 Agreement turns on the validity of the assignments of the debt to Elliott from the Banks. Panama contends that the assignments were invalid because: (1) they were obtained after the Final Trading Date established in the 1995 Financing Plan; (2) Elliott is not a proper assignee under the 1982 Agreement; and (3) the assignments were obtained in violation of New York's champerty law. Panama also argues that summary judgment is improper at this time because it has not had a full and fair opportunity for discovery...

1. The Timing of the Assignments
Under the 1995 Financing Plan, banks could not "recognize or record" any assignments of debt "made after the Final Trading Date" of October 20, 1995... The 1995 Financing Plan gave the banks until November 10, 1995 to complete the "settlement" of assignments made by October 20, 1995... As summarized in Annex B:
Pursuant to the Commitment Letter, each Lender will agree not to assign any of its Eligible Debt after October 20, 1995 (the "Final Trading Date") and to complete the settlement of all such assignments on or before November 10, 1995 . . . .
Hence, the 1995 Financing Agreement contemplated two different dates for trading -- or assigning -- eligible debt: the date the trade was made and the date the trade was settled.
The evidence submitted by Elliott shows unequivocally that the assignments were timely because both dates were met. That evidence includes the following: Jay H. Newman stated under oath that the Swiss Bank assignment was made on October 17, 1995 and the Citibank assignment on October 19, 1995... His sworn statement is corroborated by hand-written trade tickets and confirmatory documents... He also stated under oath that these trades were "settled" by the two "Assignment Notices" dated October 31, 1995 and November 6, 1995, respectively... In addition, Elliott submitted copies of letters written to Justice Gammerman by counsel for Citibank and Swiss Bank in the state court case confirming that the trades were made before October 20, 1995 and settled before November 10, 1995... Moreover, it is undisputed that after Panama was notified in December 1995 by the Agent that Citibank and Swiss Bank assigned their interests to Elliott, the Agent acknowledged Elliott's assignments and registered Elliott as a creditor of Panama under the 1982 Agreement... The Agent further demonstrated its acknowledgement of the validity of the assignments by subsequently paying, with Panama's knowledge, $ 973,289 in interest on the 1982 debt to Elliott... Finally, Panama has not disputed that all 48 trades

involving the 1982 Agreement were settled by assignment notices that were "effective" after October 20, 1995 and that all of these assignments -- except for the two involving Elliott -- were accepted by the Agent and Panama... On this record, a reasonable factfinder could only conclude that the assignments were timely: that they were made before October 20, 1997 and that they were "settled" before November 10, 1997.

Panama's contention that the assignments to Elliott at issue in this case were not made until after October 20, 1995 is based solely on the two "Assignment Notices" submitted to Panama and the Agent from the Banks and Elliott... Both of these Assignment Notices are dated after October 20, 1995 and state that the assignments to Elliott take effect on dates after the Final Trading Date... The assignment from Swiss Bank is dated October 31, 1995 and states that the assignment "is effective October 31, 1995." The assignment from Citibank is dated November 6, 1995 and states that it "is effective from November 6, 1995." Panama argues that these documents show that Elliott and the Banks acknowledge that "they had assigned an interest in the 1982 Agreement after October 20, 1995." ...

The two assignment notices are insufficient to raise a genuine issue of fact, for the record shows clearly that the dates of the assignment notices are the dates the assignments were "settled." The dates of both notices, of course, precede the November 10, 1995 "settlement" date. A reasonable factfinder could only conclude that the assignment notices merely consummated -- or made effective -- trades that were made before the Final Trading Date.

Panama also argues that the Agent was "misled" into registering Elliott as a creditor under the 1982 Agreement and paying it interest. But Panama has submitted no evidence to support this contention; rather, its argument that the Agent was misled is based solely on its contention that because the assignment was not made prior to October 20, 1995 it was misleading for Elliott to have represented otherwise. The difficulty with this argument, of course, is that it assumes the assignments were made after October 20th when clearly they were not.

Panama also alleges that even if the assignments were, completed before the Final Trading Date, Elliott would then be required to restructure because it would then be bound by the 1995 Financing Plan... This argument, however, is simply wrong, as the plain language of the Commitment Letters makes clear. Citibank and Swiss Bank both executed Commitment Letters on November 14, 1995 stating in pertinent part:

We further agree that after the date of this Commitment Letter, we will only assign our Eligible Debt to an assignee that . . . agrees . . . to assume our commitment and related obligations [under the 1995 Financing Plan]...

As the underscored language makes clear, this obligation existed only with respect to assignments made "after the date of [the] Commitment Letter[s]." Because the assignments were made to Elliott and settled before the Commitment Letters were executed, Elliott was not required to assume the Banks' obligations under the 1995 Financing Plan and thus Elliott was not bound to restructure.

2. Financial Institution

Under section 14.07 of the 1982 Agreement,

> Each Lender may at any time sell, assign, transfer . . . or otherwise dispose of . . . its

> Loans . . . to other banks or financial institutions...

Panama argues that Elliott is not a "bank" or "financial institution" and that therefore Elliott is not a proper assignee.

Panama's contention is rejected, for two reasons. First, Elliott is a "financial institution" for purposes of the 1982 Agreement as a matter of law. The 1982 Agreement does not define the term "financial institution." As an entity that trades in securities and loans, Elliott is at least arguably a "financial institution." Moreover, Panama has accepted assignments involving similar entities that do not perform "traditional banking functions."... Likewise, as noted above, the Agent accepted Elliott as a creditor under the 1982 Agreement and paid Elliott some interest. Hence, Elliott is a "financial institution" for these purposes and the assignment was proper..

Second, even assuming Elliott was not a financial institution (or a bank), it would still have been eligible under the 1982 Agreement to be an assignee. In affirming Judge Sweet's decision in Pravin Banker, the Second Circuit held that similar language in a loan agreement expressly permitting assignments to "any financial institution," without restricting assignments "expressly in any way," did not prohibit an assignment to an entity that was not a financial institution... The court noted that New York law provides that "only express limitations on assignability are enforceable." .. Here, section 14.07 of the 1982 Agreement contains permissive language only -- it does not expressly restrict assignments to banks and financial institutions. Consequently, Elliott was a proper assignee, even assuming it was not a bank or financial institution.

3. Champerty

Panama also argues that the assignments of the 1982 debt to Elliott were void because Elliott acquired the loans with the intent and purpose of bringing suit, in violation of the New York anti-champerty statute. Under section 489 of the New York Judiciary Law,

> no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and purpose of bringing an action or proceeding thereon . . . .

To void the assignments, Panama must prove that Elliott's purchases of the debt were made for the "sole" or "primary" purpose of bringing suit...

Section 489 is a criminal statute. Its purpose is to "prevent the resulting strife, discord and harassment which could result from permitting . . . corporations to purchase claims for the purpose of bringing actions thereon . . . ."... A plaintiff who acquires a claim in violation of this provision may not recover on the claim, for assignments made in violation of section 489 are void. ...

Elliott clearly had a "legitimate business purpose" in purchasing the debt... The purchases of the debt for $ 8 million from Citibank and Swiss Bank -- two established financial institutions -- were arms-length transactions. Foreign debt is actively traded in the market, and when Elliott bought the loans, there surely existed the possibility that it would re-trade them... Indeed, in opposing the motion Panama submitted a copy of a letter from Swiss Bank to Elliott offering to buy back the loan, stating that "we estimate that under current market conditions you will more than double the value of your investment." ... Hence, Elliott apparently had already doubled its investment in less than two years. Finally, there also existed the possibility that the economy of Panama would improve and that, as a consequence, Panama would have the ability to repay the loans in full or at a discount that Elliott would find acceptable.

Panama argues that the assignments are champertous because, as it contends additional discovery would show, Elliott bought the loans with the sole or primary intent to sue. Panama has submitted no evidence to support that claim, however, other than its counsel's affidavit alleging that Newman and one of Elliott's attorneys have been engaging in a "pattern and practice" of buying defaulted debt on the secondary market and bringing suit on such debt... According to Panama, Elliott first purchased the debt at issue shortly after Paul Singer, Elliott's general partner, was solicited by Newman, and Newman has an oral agreement with Elliott by which he will obtain an undisclosed percentage of any profits Elliott wins in this suit... Even if all of these allegations are true, as Justice Gammerman held, they do not require an inference or determination that Elliott's actions were champertous...

I will assume, for purposes of this motion, that when Elliott purchased the loans, it had the intent to sue if necessary to collect on the loans. But as Judge Mukasey held in Banque de Gestion Privee-Sib v. La Republica de Paraguay, 787 F. Supp. 53, 57 (S.D.N.Y. 1992), "an intent to sue if necessary to enforce rights acquired pursuant to [an] assignment" does not by itself render the assignment champertous. Rather,

> for over a century, New York courts have recognized that the law does not prohibit discounting or purchasing bonds and mortgages and notes, or other choses in action, either for investment or profit, or for the protection of other interests, and such purchase is not made illegal by the existence of the intent . . . at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection... (quoting Moses v. McDivitt, 88 N.Y. 62, 65 (1882)...

It may be, as Panama alleges, that when Elliott purchased the loans, it had no intention of participating in the restructuring under the 1995 Financing Plan and that it hoped to gain an advantage thereby in negotiating with Panama for payment. Although one could reasonably quarrel with the seemliness of this investment strategy or the propriety in general of such "vulture fund" tactics as investing in distressed companies or loans, criminal statutes must be narrowly construed, and the purchase of a loan in the circumstances of this case surely does not rise to the level of criminal conduct.

Even assuming Elliott had no intention of participating in the 1995 Financing Plan, no reasonable factfinder could conclude that it spent $ 8 million just to enjoy the pleasures of litigation. To the contrary, clearly there were possibilities other than litigation when Elliott purchased the loans: (i) Elliott could have re-traded the loans on the market; (ii) Panama could have re-paid the loans in full; and (iii) Elliott and Panama could have agreed on a discount that would still have permitted Elliott to turn a profit. The fact that Elliott was prepared to file suit if none of these possibilities materialized did not render the assignments champertous....

Because no genuine issue of material fact exists to be tried with respect to any of Panama's defenses, Elliott's motion for summary judgment on its breach of contract claim is granted.

C. Panama's Counterclaim
The final issue is the viability of Panama's counterclaim for tortious interference with contract. Under New York law, to establish a claim of tortious interference with contract, a plaintiff must prove: (1) the existence of a contract; (2) defendant's knowledge thereof; (3) defendant's intentional inducement of a breach of that contract; and (4) damages...
Elliott argues that Panama's claim for tortious interference must be dismissed because Panama has failed, among other things, to demonstrate the existence of a genuine issue of fact with respect to the intent aspect of the third element. I agree. Hence, Elliott's motion for summary judgment is granted.
The intent required to sustain a claim for tortious interference with contract is "exclusive malicious motivation." ...The action must have been taken by the defendant "without justification, for the sole purpose of harming the plaintiffs."...
Here, a reasonable factfinder could only conclude that Elliott was not acting with "exclusive malicious motivation" or for the "sole purpose" of harming Panama. To the contrary, Elliott spent some $ 8 million. It did that not because it wanted to hurt Panama or interfere with Panama's contracts, but because of the most basic of motivations -- it wanted to make money. Elliott invested in the foreign debt because it was hoping to turn a profit.
Hence, no genuine issue of material fact exists as to the third element of tortious interference with contract and the counterclaim must be dismissed.

In another case involving Elliott Associates the Second Circuit held that Elliott Associates' acquisition of Peru's debt was primarily to enforce it, and to resort to litigation to the extent necessary to accomplish the enforcement. The intent to litigate was incidental and contingent and did not violate § 489.

Elliott Associates, L.P.* v *Banco De La Nacion[81]

Plaintiff-Appellant Elliott Associates, L.P. ("Elliott") appeals from the amended final judgments entered by the United States District Court for the Southern District of New York on September 3 and 15, 1998. The district court, after a bench trial, dismissed with prejudice Elliott's complaints seeking damages for the non-payment of certain debt by Defendants-Appellees The Republic of Peru ("Peru") and Banco de la Nacion ("Nacion") (together, the "Debtors") because it found that Elliott had purchased the debt in violation of Section 489 of the New York Judiciary Law ("Section 489"). See Elliott Assocs. v. Republic of Peru, 12 F. Supp. 2d 328 (S.D.N.Y. 1998). Because, contrary to the district court's interpretation, the pertinent case law demonstrates that Section 489 does not preclude relief in lawsuits, such as Elliott's, seeking primarily to collect on lawful debts and only filed absent satisfaction, we reverse the judgments of the district court.

[81] 194 F.3d 363 (2d. Cir, 1999).

BACKGROUND

Elliott is an investment fund with its principal offices located in New York City. Elliott was founded by Paul Singer in 1977 and he remains its sole general partner. One of the primary types of instruments that Elliott invests in is the securities of "distressed" debtors, that is, debtors that have defaulted on their payments to creditors. Singer testified that he invests in debt when he believes that the true or "fundamental" value of the debt is greater than the value accorded by the market. Elliott characterizes its approach to its investments as "activist." Thus, despite sometimes accepting the terms offered to other creditors, Elliott explains that it frequently engages in direct negotiations with the debtor and argues that, as a result, it has occasionally received a greater return than other creditors.

In August or September of 1995, Singer was approached by Jay Newman to discuss investing in distressed foreign sovereign debt. Newman, an independent consultant, had worked in the emerging market debt field at major brokerage houses Lehman Brothers, Dillon Read, and Morgan Stanley, as well as managing his own offshore fund, the Percheron Fund. The secondary market for such debt first developed in the early 1980s when the original lender banks began selling the non-performing debt of countries that had ceased servicing their external debt to other investors, including brokerage firms, in order to reduce the banks' exposure and to permit them to lend additional funds to developing countries. The Debtors submitted evidence at trial that, from 1993 onwards, Newman had acted with attorney Michael Straus to solicit investors and provide advice to offshore fund Water Street Bank & Trust Company, Ltd. ("Water Street"). The Debtors alleged that, at Water Street, Newman and Straus purchased the sovereign debt of Poland, Ecuador, Ivory Coast, Panama, and Congo, and filed lawsuits seeking full payment of the debt with Straus acting as the trial counsel. The Debtors' contention at trial in the instant case was that Newman and Straus moved to Elliott from Water Street because it was a good "substitute plaintiff" in that it specialized in the purchase of distressed assets, had funds available to invest, and, unlike Water Street, which had refused in discovery to disclose the names of its individual investors, was unconcerned about exposing the identity of its principals.

I. At Newman's recommendation, in October 1995, Elliott purchased approximately $ 28.75 million (principal amount) of Panamanian sovereign debt for approximately $ 17.5 million. In July 1996, Elliott brought suit against Panama seeking full payment of the debt. Elliott obtained a judgment and attachment order and, with interest included, ultimately received over $ 57 million in payment.

At the time of Elliott's purchase of Panamanian debt, Panama was finalizing its Brady Plan debt restructuring program. The term "Brady Plan" derives from a March 1989 speech by Nicholas Brady, then Secretary of the United States Treasury, urging commercial lenders to forgive some of the debt that they were owed by less developed countries, restructure what remained, and continue to grant those countries additional loans. See generally, Ross P. Buckley, The Facilitation of the Brady Plan: Emerging Markets Debt Trading From 1989 to 1993, 21 Fordham Int'l L.J. 1802 (1998). Brady Plans contemplate that, in return for such voluntary partial debt forgiveness, the less developed country will submit to an economic austerity program supervised and monitored by the International Monetary Fund (the "IMF"). The purpose of implementing Brady Plans is to avoid the recurrence of debt defaults by less developed countries that have occurred from 1982 onwards. Typically, the terms of a Brady Plan are negotiated with the debtor country by an ad hoc committee of the nation's largest institutional creditors, generally known as the "Bank Advisory Committee." The members of the Bank Advisory Committee commit to restructuring the debt that they hold on the agreed terms and those terms are also offered to other creditors. However, while the members of the Bank Advisory Committee usually agree to be bound by the negotiated terms, the other creditors are under no such obligation to accept those terms.

In January 1996, Newman recommended that Elliott purchase Peruvian sovereign debt. Newman testified at trial that he believed that Peruvian sovereign debt was a good investment because of the sweeping economic reforms implemented by President Alberto Fujimori following his election in November 1990 in the wake of a severe six-year recession. Newman testified that he viewed Peru's Brady Plan, announced in October 1995, as undervaluing Peru's outstanding debt. In particular, Newman contended that the large commercial bank creditors that made up the Bank Advisory Committee had institutional incentives to accept reduced terms for the debt they held, such as the desire to make additional loans and to operate domestically within the country, and that he believed that the Bank Advisory Committee had not been privy to all material financial information, including Peru's rumored repurchase of a significant proportion of its debt.

Between January and March 1996, Elliott purchased from international banks ING Bank, N.V. ("ING") and Swiss Bank Corporation ("Swiss Bank") approximately $ 20.7 million (in principal amount) of the working capital debt of Nacion and Banco Popular del Peru ("Popular"), a bankrupt Peruvian bank. The debt was sold under a series of twenty-three letter agreements (the "Letter Agreements"). Elliott paid approximately $ 11.4 million for these debt obligations and all of the debt was guaranteed by Peru pursuant to a written guaranty dated May 31, 1983 (the "Guaranty"). Under their express terms, both the Letter Agreements and the Guaranty were governed by New York law. In connection with this transaction, Elliott executed two separate assignment agreements with ING and Swiss Bank, dated March 29, 1996, and April 19, 1996, respectively.

The Peruvian sovereign debt purchased by Elliott was working capital debt, rather than syndicated bank debt. Working capital debt does not involve an agent bank, but instead consists of direct loans between single lenders and borrowers, whereas syndicated bank debt is debt syndicated by a lead bank, which maintains books and records for all holders. Because the buyer has to rely upon the seller, rather than an agent bank, to convey good title, working capital debt typically trades at a discount of several percentage points from syndicated debt. The Debtors argued at trial that Elliott chose to purchase working capital debt because it sold at a greater discount to value than syndicated debt and thus would have more value in a lawsuit seeking full payment of the debt, despite being more difficult to trade on the secondary market due to its illiquidity.

The district court found that the timing of Elliott's purchases of Peruvian debt and the closing of the assignment agreements paralleled key events in Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, Civ. No. 93-0094 (S.D.N.Y.). See Elliott Assocs., 12 F. Supp. 2d at 336. Pravin Banker, an investment fund, had filed suit on two 1983 letter agreements of Popular, which at that time was being liquidated under Peru's IMF austerity plan. After eighteen months of stays, on August 24, 1995, the district court entered summary judgment for Pravin Banker and, on January 19, 1996, the district court issued its damages ruling. The Debtors argued at trial in the instant case that Elliott did not begin purchasing

Peruvian debt until the Pravin Banker decision in order that there would be no defense to a quick judgment. In support of this, the Debtors elicited testimony from Singer and Newman that they had followed and discussed the Pravin Banker case, although Newman claimed that Elliott's decision to purchase Peruvian debt shortly after the damages ruling was "just a coincidence." The Debtors further argued that Elliott avoided closing on the trades until after April 12, 1996, on which date a full stay pending appeal was denied by this court in the Pravin Banker case. Pravin Banker Assocs Ltd. v. Banco Popular del Peru, Order No. 96-7183 (2d Cir. Apr. 12, 1996). The Debtors supported this allegation by contending that Elliott refused to close using standard Emerging Markets Traders Association forms, but instead delayed by requesting provisions in the agreements that were not customary in the trade.

On May 1, 1996, Elliott delivered joint notices of the assignments to the Debtors' reconciliation agent, Morgan Guaranty, to register the debt it had purchased in order that it could obtain its pro rata share of the interest payments the Debtors had promised to make to all creditors. The following day, Elliott notified Nacion, Popular, and Peru by letter that it was now one of their creditors and that it wished to initiate discussions regarding repayment. Although a telephone conference call between counsel followed, no negotiations on repayment terms occurred. Rather, the Debtors took the position that Elliott was not a proper assignee because it was not a "financial institution" within the scope of the assignment provision of the Letter Agreements and that Elliott should either transfer the debt to an eligible "financial institution" or else participate in the Brady Plan with the other creditors...

On June 25, 1996, after a continued impasse in the parties' discussions, Elliott formally requested repayment by sending the Debtors a notice of default. The Debtors pointed out at trial that this notice was sent during the voting period on the Term Sheet of Peru's Brady Plan. The Debtors also noted that, although the Brady Plan negotiations took place from January to June 1996, Elliott did not contact the Bank Advisory Committee to express its views. Ultimately, Peru's Brady Plan was agreed upon by 180 commercial lenders and suppliers, and entailed, inter alia, an Exchange Agreement under which old Peruvian commercial debt, including the 1983 Letter Agreements, would be exchanged for Brady bonds and cash.

II. On October 18, 1996, ten days before the Exchange Agreement was scheduled to be executed, Elliott filed suit against the Debtors in New York Supreme Court and sought an ex parte order of prejudgment attachment. The Debtors subsequently alleged at trial that the reason for Elliott filing suit at that time was that the collateral for the Brady bonds was United States Treasury bonds, which were held at the Federal Reserve Bank of New York, and thus made suitable assets for attachment. The Exchange Agreement was finally executed on November 8, 1996.

Elliott's suit was subsequently removed to federal district court pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1441(d) (1994), where the district court denied Elliott's motion for prejudgment attachment on December 27, 1996, and its motion for summary judgment on April 29, 1997. After discovery, the case was tried in a bench trial from March 17 to March 25, 1998, and final argument was heard on May 26, 1998.

On August 6, 1998, the district court issued its opinion dismissing Elliott's complaint on the ground that Elliott's purchase of the Peruvian debt violated Section 489 of the New York Judiciary Law. The district court found as a fact that "Elliott purchased the Peruvian debt with the intent and purpose to sue." ... The district court noted that Elliott had no familiarity with purchasing sovereign debt until it met Newman, who together with Straus, had "a long history" in purchasing sovereign debt and suing on it... The district court further found that Elliott intentionally "delayed closing its purchases of Peruvian debt until the Second Circuit had clarified the litigation risks."... Moreover, the district court found that "Elliott did not seriously consider alternatives to bringing an action," including holding and reselling the debt, participating in Peru's privatization program, participating in the Brady Plan, or negotiating separately with the Debtors to obtain terms more favorable than the Brady terms... The district court found that "none of these alternatives was realistically considered by Elliott when it purchased Peruvian debt" and that "from the start, Elliott intended to sue and the testimony to the contrary was not credible." .. With respect to the letters sent by Elliott to the Debtors after purchasing the debt, the court found that these letters and the other accompanying steps to negotiate "were pretextual and never demonstrated a good faith negotiating position." ...

After making its "Findings of Fact," the court set forth its "Conclusions of Law." Applying basic contract law principles, the court first concluded that Nacion had breached the Letter Agreements by failing to pay Elliott the amounts due and owing and that Peru had breached the Guaranty by not paying Elliott the amounts due and owing under the Letter Agreements following Nacion's default...

The court then turned to the Debtors' defense that Elliott's claim should be dismissed because the assignments were in violation of Section 489 of the New York Judicial Law, which prohibits the purchase of a claim "with the intent and for the purpose of bringing an action or proceeding thereon." The court explained that while "Elliott's position is strong as a matter of policy in the world of commerce . . . the Court's role here is not to make policy assessments -- to rank its preferences among contract, property, and champerty doctrines." ... The court noted the case law holding that the intent to sue must be primary, not merely contingent or incidental... Examining the legislative history, the court explained that, while Section 489 was originally aimed at attorneys, subsequent revisions indicated an intent to cover "corporations" and "associations." .... Moreover, the court observed that "[Section] 489's roots in the Medieval law of champerty and maintenance provides support for the conclusion that, while not all assignments with the intent to bring suit thereon are barred, assignments taken for the purpose, or motive, of stirring up litigation and profiting thereby are prohibited." ...

The district court then rejected Elliott's arguments that the statute was only aimed at: (1) suits which have the purpose of obtaining costs; or (2) suits where corporations engage in the unauthorized practice of law by taking claims with the intent to sue on them pro se without hiring counsel... The court also rejected Elliott's argument that the statute does not apply when all right, title, and interest are conveyed by the assignor... Finally, the court rejected as without merit Elliott's arguments that: (1) Elliott, as a limited partnership, is not an "association" within the meaning of the statute; (2) the Debtors' interpretation of the statute would render it in violation of the Commerce Clause; and (3) the Debtors lacked standing to raise the Section 489 defense because they were not parties to the assignment agreement... Consequently, because Elliott purchased the debt with the intention to bring suit thereon, the court concluded that Elliott's contracts violated Section 489 and were unenforceable...

Turning to other arguments and defenses, although Section 3 of Peru's Guaranty provided that Peru

shall pay all guaranteed amounts "regardless of any law, regulation or order now or hereafter in effect in any jurisdiction," the court rejected Elliott's argument that this waived Peru's Section 489 defense, reasoning that Section 489 is a penal law directed at the public interest that cannot be waived... Finally, although not necessary to its disposition, the court rejected Nacion's argument that it was excused from performance due to impossibility as a result of a Peruvian government decree purportedly removing Nacion as a debtor under the Letter Agreements...
The district court entered its judgment dismissing Elliott's complaint on August 26, 1998. Amended judgments were then issued on September 3 and 15, 1998. Elliott timely filed its notices of appeal on September 18 and 24, 1998. After briefing from the parties, as well as the filing of five amicus curiae briefs, this appeal was submitted for our decision following oral argument on May 5, 1999. We have jurisdiction to decide this appeal under 28 U.S.C. § 1291 (1994).

I. A. As an initial matter, while in agreement that the district court's findings of fact are reviewed for clear error... the parties dispute the appropriate level of deference to be given to the district court's interpretation of Section 489 of the New York Judiciary Law. The Debtors urge that we follow this court's statement in Ewing v. Ruml, 892 F.2d 168 (2d Cir. 1989), that "[where] the interpretation of state law is made by a district judge sitting in that state, it is entitled to great weight and should not be reversed unless it is clearly wrong.".... Both Ewing and the other case relied upon by the Debtors for this proposition, Lomartira v. American Auto. Ins. Co., 371 F.2d 550 (2d Cir. 1967), were decided before the Supreme Court's decision in Salve Regina College v. Russell, 499 U.S. 225, 113 L. Ed. 2d 190, 111 S. Ct. 1217 (1991), which resolved a split among the Circuits on this very issue. In Salve Regina College, the Supreme Court expressly held that "a court of appeals should review de novo a district court's determination of state law." ... Subsequent appeals decided by this Circuit have thus accorded no deference to district court interpretations of state law, nor will we...
In determining the law of the State of New York, "we will consider not only state statutes but also state decisional law." ... "Where the law of the state is uncertain or ambiguous, we will carefully predict how the highest court of the state would resolve the uncertainty or ambiguity." ... Indeed, "a federal court is free to consider all of the resources to which the highest court of the state could look, including decisions in other jurisdictions on the same or analogous issues."...

B. Besides arguing for reversal, Elliott has moved for the alternative relief of certifying the issue of the interpretation of Section 489 to the New York Court of Appeals pursuant to Second Circuit Rule § 0.27. See also New York Court of Appeals Rule 500.17 (permitting that court to accept and decide such certified questions). This court has explained that "issues of state law are not to be routinely certified to the highest court[] of New York . . . simply because a certification procedure is available... In the instant appeal... we conclude that there is sufficient case law for us to determine that Elliott's conduct, as found to have occurred by the district court, was not proscribed by Section 489 of the New York Judiciary Law. Accordingly, we deny Elliott's alternative motion for certification as moot in light of our disposition.

II. A. The pivotal issue upon which this appeal necessarily turns is whether, within the meaning of

Section 489 of the New York Judiciary Law, Elliott's purchase of Peruvian sovereign debt was "with the intent and for the purpose of bringing an action or proceeding thereon," thereby rendering the purchase a violation of law. Because the proper interpretation of Section 489 is at the heart of our decision, we quote it in its entirety below:

> § 489. Purchase of claims by corporations or collection agencies
>
> No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise. Nothing herein contained shall affect any assignment heretofore or hereafter taken by any moneyed corporation authorized to do business in the state of New York or its nominee pursuant to a subrogation agreement or a salvage operation, or by any corporation organized for religious, benevolent or charitable purposes.
>
> Any corporation or association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars; any person or co-partnership, violating the provisions of this section, and any officer, trustee, director, agent or employee of any person, co-partnership, corporation or association violating this section who, directly or indirectly, engages or assists in such violation, is guilty of a misdemeanor. ..

In interpreting Section 489, we are guided by the principle that we "look First to the plain language of a statute and interpret it by its ordinary, common meaning." Luyando v. Grinker, 8 F.3d 948, 950 (2d Cir. 1993).... "Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous." Lee v. Bankers Trust Co., 166 F.3d 540, 544 (2d Cir. 1999). Indeed, "where the language is ambiguous, we focus upon the broader context and primary purpose of the statute." Castellano v. City of New York, 142 F.3d 58, 67 (2d Cir. 1998)... At all times, we are cognizant of the Supreme Court's admonition that "statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." American Tobacco Co. v. Patterson, 456 U.S. 63, 71, 71 L. Ed. 2d 748, 102 S. Ct. 1534 (1982)...

B. Parsing the plain language of Section 489 offers little helpful guidance as to the intended scope of the provision. The statutory language simply provides that certain types of people or entities are prohibited from soliciting, buying or taking by assignment, particular types of debt instruments "with the intent and for the purpose of bringing an action or proceeding thereon." On its face, this statutory command might appear to be remarkably broad in scope, forbidding essentially all "secondary" transactions in debt instruments where the purchaser had an intent to enforce the debt obligation through litigation. However, ambiguity resides in the term "with the intent and for the purpose of bringing an action or proceeding thereon." The nature of the proscribed intent and purpose is unclear. After reviewing the pertinent New York state decisions interpreting Section 489, we are convinced that, if the New York Court of Appeals, not us, were hearing this appeal, it would rule that the acquisition of a debt with intent to bring suit against the debtor is not a violation of the statute where, as here, the primary purpose of the suit is the collection of the debt acquired. Consequently we must reverse the judgment of the district court.

C. The predecessor statute to Section 489 of the New York Judiciary Law was enacted at least as early as 1813. However, its origins are even more archaic. New York courts have recognized that " § 489 [is] the statutory codification of the ancient doctrine of champerty." Ehrlich v. Rebco Ins. Exch., Ltd., 649 N.Y.S.2d 672, 674, 225 A.D.2d 75, 77 (1st Dep't 1996)... Commentators have traced the doctrine of champerty, and its doctrinal near-cousins of maintenance and barratry, back to Greek and Roman law, through the English law of the Middle Ages, and into the statutory or common law of many of the states... As explained by the Supreme Court, "put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty."...

While New York courts have not been unwilling to characterize Section 489 as a champerty statute, it is apparent that they have consistently interpreted the statute as proscribing something narrower than merely "maintaining a suit in return for a financial interest in the outcome." Indeed, far from prohibiting the taking of a financial interest in the outcome of a lawsuit, payment of attorneys by fees contingent upon the outcome of litigation is expressly permissible in New York by statute and court rule...

A strong indication of the limited scope of the statute is provided by several early New York cases discussing Section 489's predecessor statutes. In Baldwin v. Latson, 2 Barb. Ch. 306 (N.Y. Ch. 1847), the Court of Chancery rejected the argument that the statute was violated when an attorney purchased a bond and mortgage and brought a foreclosure suit thereupon. The court reasoned that the statute was intended to curtail the practice of attorneys filing suit merely to obtain costs, which at that time included attorney fees. As the court explained, "the object of the statute was to prevent attorneys and solicitors from purchasing debts, or other things in action, for the purpose of obtaining costs from a prosecution thereof, and was never intended to prevent the purchase for the honest purpose of protecting some other important right of the assignee."...

The statute was also at issue in Mann v. Fairchild, 14 Barbour 548 (Sup. Ct. Kings Gen. Term 1853). In what would appear to be a reference to the scourge of attorneys using such debt instruments to obtain costs, as described in Baldwin, the Mann court stated that "the main object of the statute in question was to prevent litigation by prohibiting the purchase of choses in action by those whose pecuniary interests might be peculiarly advanced by instituting suits upon them, and who, in consequence of their position, might conduct such suits upon unequal terms."....

An even clearer indiction of the limited purpose of the statute is provided by the opinions of the two justices writing in Goodell v. The People, 5 Parker Crim. R. 206 (Sup. Ct. Broome Gen. Term 1862), a case concerning whether the statute covered the situation where an attorney purchased a promissory note with the intent or purpose to bring suit in the justices' court, in which tribunal costs were not granted to the prevailing party. In discussing the purpose of the statute, Justice Campbell wrote:

> That the law of 1818, and previous laws on the subject, were intended to reach a class of men who make a practice, either directly or indirectly, of buying small notes of fifty dollars and upwards, and then prosecuting them in courts of record, in the old common pleas, or in the Supreme Court, and make the defendants pay large bills of costs, even when the suit was undefended, there can be, I think, no doubt. Hence, it was entitled an act to prevent abuses, and to regulate costs. The law was aimed at attorneys in courts of record, who were the parties receiving the costs, and who thus oppressed debtors by unexpected and unnecessary prosecutions...

Justice Parker, writing separately, agreed that the statute was intended to prevent attorneys from buying debts as an expedient vehicle for obtaining costs. As he explained:

> The purchasing of debts by attorneys, with the intent to bring suits upon them in justices' courts, does not seem to me to be within the mischief which the statute was intended to guard against. No costs being allowed to an attorney in a justice's court, he has no object in buying debts to sue in that court, and I can see neither opportunity nor temptation for him to advance his pecuniary interests by so doing. As he has no temptation to litigate, as a party, in justices' courts, no litigation is induced by his freedom from restraint in that direction . . . .

The seminal New York Court of Appeals case of Moses v. McDivitt, 88 N.Y. 62 (1882), confirmed that the mischief Section 489 was intended to remedy did not include the acquisition of debt with the motive of collecting it, notwithstanding that litigation might be a necessary step in the process... In Moses, the plaintiff, an attorney, had purchased an assignment of a bond and mortgage that had been executed by the defendant and brought suit for collection of the debt. As a defense, the defendant alleged that the plaintiff's purchase was in violation of the then-in-force predecessor statute to Section 489 because it was a purchase by an attorney of a chose in action "with the intent and for the purpose of bringing any suit thereon." ... In particular, the defendant produced evidence that the purpose of the plaintiff's purchase was

> to compel the defendant, as a condition of the extension of the time of payment, to assign to him certain stock in a publishing company in which he was interested, in order that the plaintiff might thereby control an election of directors of the company, which was about to take place, or to elect plaintiff president of the company at such election...

The trial judge charged the jury, as paraphrased by the Court of Appeals:

> that if the plaintiff purchased the bond simply for the purpose of obtaining the control of the stock, and not for the purpose of bringing suit upon it, he had not violated the statute; but that, if they found that he had bought it with the intention of bringing suit upon it, then, whatever else there might be about it, or however necessary he might have considered it that he should thus fortify himself, he violated the statute. . . . [Moreover,] if his intention in buying it was to use it to compel the defendant to do a particular thing, as to assign stock for instance, and if he would not comply with his wishes to sue [on] it, that would be a

> violation of the statute...

The Court of Appeals reversed, explaining that:

> a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose. As the law now stands, an attorney is not prohibited from . . . purchasing bonds . . . or other choses in action, either for investment or for profit, or for the protection of other interests, and such purchase is not made illegal by the existence of the intent on his part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection. To constitute the offense the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent. The object of the statute . . . was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee...

Consequently, even though the "primary purpose" of the plaintiff was to induce the defendant to assign his stock, the court concluded that:

> this purpose, whether honest or reprehensible, was not within the prohibition of the statute. The intent to sue upon the bond was secondary and contingent . . . . Under these circumstances it cannot be said that the purpose of the purchase of the bond was to bring a suit upon it. This purpose did not enter into the purchase any more than it would have done had the plaintiff bought the bond as an investment, but with the intention of collecting it by suit if compelled to resort to that means for obtaining payment. The real question upon which the case turned was, whether the main and primary purpose of the purchase was to bring a suit and make costs, or whether the intention to sue was only secondary and contingent, and the suit was to be resorted to only for the protection of the rights of the plaintiff, in case the primary purpose of the purchase should be frustrated...

The continuing vitality of the distinction drawn in Moses between cases involving an impermissible "primary" purpose of bringing suit and those where the intent to sue is merely "secondary and contingent" is confirmed by the post-Moses case law. There are only two Court of Appeals cases decided after Moses discussing the interpretation of Section 489 or any of its predecessors... In Sprung v. Jaffe, 3 N.Y.2d 539, 147 N.E.2d 6, 169 N.Y.S.2d 456 (1957), the Court of Appeals reversed the grant of summary judgment to the plaintiff assignee of a debt instrument on the grounds that the debtor's defense that the assignee had violated a predecessor statute to Section 489 was not a "sham or frivolous" and presented a genuine factual dispute, with respect to the intent and purpose of the assignee, that required resolution by the trier of fact... Nevertheless, the Sprung court did not say that the plaintiff, an attorney who purchased a $ 3,000 debt for one dollar and subsequently brought suit, had violated the statute; rather, it found that fact-finding at trial was necessary since, for the purpose of summary judgment, he had failed to provide sufficient proof of a purpose for acquiring the debt other than bringing suit... In so ruling, the Court of Appeals cited to Moses and reiterated its central holding that "the statute is violated only if the primary purpose of the purchase or taking by assignment of the thing in action is to enable the attorney to commence a suit thereon. The statute does not embrace a case where some other purpose induced the purchase, and the intent to sue was merely incidental and contingent." ...

The Moses approach was again followed in Fairchild Hiller Corp. v. McDonnell Douglas Corp., 28 N.Y.2d 325, 270 N.E.2d 691, 321 N.Y.S.2d 857 (1971), the most recent Court of Appeals case addressing Section 489. In Fairchild Hiller, the Court of Appeals affirmed the dismissal of a debtor's affirmative defense that an agreement between two corporations to split the proceeds of any recovery on the disputed claim was in violation of Section 489. The court cited Moses and explained that "we have consistently held that in order to fall within the statutory prohibition, the assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose." ... Because in Fairchild Hiller the claim was assigned as "an incidental part of a substantial commercial transaction," specifically, the acquisition of a corporation's entire assets, the Court of Appeals concluded that the assignment was not prohibited by Section 489... Thus, both Sprung and Fairchild Hiller demonstrate that the principles set forth in Moses continue to be followed by the New York Court of Appeals...

In Limpar Realty Corp. v. Uswiss Realty Holding, Inc., 492 N.Y.S.2d 754, 112 A.D.2d 834 (1st Dep't 1985) (mem.), the Appellate Division, First Department, also examined Section 489. In that case, it rejected the debtor's argument that the assignee's acquisition of a note, mortgage and guarantee followed by the commencement of foreclosure proceedings twenty-seven days later without affording the debtor an opportunity to cure constituted a violation of Section 489. The court reasoned that the debtor could have cured the default at any time during the previous eighteen months, but chose not to do so... Noting the prohibition in Moses against such acquisitions for the "primary purpose" of bringing suit, the Limpar court concluded that that was not the assignee's primary purpose, finding a "legitimate business purpose" evidenced by the acquisition of other real estate on the same city block by the real estate developer on whose behalf the assignee was acting, which negated the inference of acquisition merely to bring suit... In addition the court reasoned that the commencement of foreclosure proceedings less than a month after the acquisitions was not determinative since the debtor had the opportunity to cure the default before the assignment...The district court distinguished Limpar on the grounds that in Limpar

> "there was no contention that the prior debtholder had reached an agreement in principle to settle the dispute," whereas in the instant case Peru's Brady Plan was essentially finalized. Elliott Assocs., 12 F. Supp. 2d at 355. We do not find the district court's distinction compelling. First, Limpar makes no such distinction between on-going and settled or almost settled disputes. Second, Peru's Brady Plan was not binding on all creditors, such as Elliott, that were not members of the Bank Advisory Committee. Thus, given that the Brady system purposefully does not create such a binding obligation, there was no settlement and, consequently, unlike the district court, we do not condemn Elliott merely because "its purpose was to stand apart from the lenders who had agreed to the Brady restructuring, and to use judicial process to compel full payment." ....

....there would appear to be a general uniformity of precedent among the Appellate Divisions of New York's four judicial Departments with respect to the interpretation of Section 489.

D. The cases, spread over more than a century, are not always entirely clear or plainly consistent. Thus the district court found some basis for its construction of the coverage of Section 489 to include Elliott's purchase of the Peruvian debt. We do not agree, however, with this interpretation. Furthermore, in light of the case law surveyed above, we do not agree with the district court that Moses in conjunction with later New York case law "provides little guidance for construing the statute's proper scope." ... To the contrary, New York courts have stated that Moses "undoubtedly correctly states the objects and limitations of the statute."... As Moses itself makes plain, violation of Section 489 turns on whether "the primary purpose of the purchase [was] . . . to bring a suit," or whether "the intent to bring a suit [was] . . . merely incidental and contingent."... The district court reasoned that here "Elliott intended to collect 100% of the debt not by negotiating, participating in a debt-for-equity swap, trading, or going along with the Brady Plan, but rather by suing. Unlike Moses, the intent Peru established was the intent to sue, and that intent was not contingent or incidental." ... We believe the district court misunderstood Moses. The Moses court made clear that where the debt instrument is acquired for the primary purpose of enforcing it, with intent to resort to litigation to the extent necessary to accomplish the enforcement, the intent to litigate is "merely incidental and contingent" and does not violate the statute. Indeed, the Moses court made precisely this point when it explained that "the object of the statute . . . was to prevent attorneys, etc., from purchasing things in action for the purpose of obtaining costs by the prosecution thereof, and it was not intended to prevent a purchase for the purpose of protecting some other right of the assignee." ... Elsewhere, the Court of Appeals in Moses specifically stated that conduct not prohibited by the statute included where "the plaintiff bought the bond as an investment, but with the intention of collecting it by suit if compelled to resort to that means for obtaining payment." ... While Moses does not set forth a complete taxonomy of conduct prohibited by Section 489 (and neither do we), it plainly sets forth certain conduct that is not made unlawful by Section 489.

Even accepting as correct the facts as found by the district court, we see no meaningful distinction between Elliott's conduct and the conduct Moses expressly states to be outside of the scope of the statute. Here, the district court found that Elliott was the lawful assignee of Nacion's Letter Agreements, that Peru had guaranteed those Letter Agreements, and that both Peru and Nacion are liable to Elliott as a result of Nacion's failure to pay the amounts due and owing under the Letter Agreements... Far from being a trivial claim that might serve, for example, as the illegitimate vehicle for the recovery of attorney fees, the district court expressly found that "Elliott has suffered damages in excess of $ 7,000,000 as a result [of the breach]."...

In purchasing the Peruvian debt the district court found that Elliott's principal aim was to obtain full payment. As it expressly found, "Elliott's primary goal in investing in Peruvian debt was to be paid in full." ... Moreover, the district court found that if the Debtors did not pay in full, it was Elliott's intent to sue for such payment. Thus, the district court quotes twice the statement of Singer, Elliott's president, that "Peru would either . . . pay us in full or be sued." ... The district court reasoned that Elliott's "investment strategy . . . to be paid in full or sue . . . equated to an intent to sue because [it] knew Peru would not, under the circumstances, pay in full." ... We cannot agree with the district court's equating of Elliott's intent to be paid in full, if necessary by suing, with the primary intent to sue prohibited by Section 489 as delineated by Moses and the related case law.

First, any intent on Elliott's part to bring suit against the Debtors was "incidental and contingent" as those terms are used in Moses and the New York case law. It was "incidental" because, as the district court acknowledges, Elliott's "primary goal" in purchasing the debt was to be paid in full. That Elliott had to bring suit to achieve that "primary goal" was therefore "incidental" to its achievement. Elliott's suit was also "contingent" because, had the Debtors agreed to Elliott's request for the money that the district court found Elliott was owed under the Letter Agreements and the Guaranty, then there would have been no lawsuit. Elliott's intent to file suit was therefore contingent on the Debtors' refusal of that demand. Although the district court found that Elliott "knew Peru would not, under the circumstances, pay in full," ... this does not make Elliott's intent to file suit any less contingent. As acknowledged by counsel at oral argument, the Debtors could have paid but chose not to pay in order to avoid jeopardizing Peru's Brady Plan.

Second, Moses specifically states that conduct not proscribed by the statute includes where "the plaintiff bought the bond as an investment, but with the intention of collecting it by suit if compelled to resort to that means for obtaining payment." ... Indeed, Moses categorically declares that purchase of debt obligations "is not made illegal by the existence of the intent on [the purchaser's] part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection." .... As found by the district court, this was Elliott's intent here. Indeed, the district court characterizes Elliott's intent as "to be paid in full or sue."... This is precisely the intent that the Court of Appeals in Moses determined to be clearly not prohibited by the statute. Thus, here, Elliott possessed "a legitimate business purpose . . . [because Section 489] is 'violated only if the primary purpose of taking the assignment was to commence a suit' and not 'where some other purpose induced the purchase, and the intent to sue was merely incidental and contingent.'" Limpar ... Like that of the plaintiff in Limpar, Elliott's primary purpose in acquiring the debt was a "legitimate business purpose," ... in this case: turning a profit, rather than a collateral purpose prohibited by Section 489, as construed.

As is often the case in complex and well-argued appeals such as this, there are competing policy interests at stake. However, in Pravin Banker Associates, Ltd. v. Banco Popular del Peru, 109 F.3d 850 (2d Cir. 1997), another appeal involving an enforcement action on Peruvian sovereign debt, this court set forth and reconciled those differing interests. Although the Pravin Banker analysis was made in the context of a comity determination and so examined the interests of the United States rather than New York, those interests are equally applicable to New York's interests as a global financial center in the context of interpreting Section 489. As the court reasoned:

First, the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures under the Brady Plan. Second, the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders. This second interest limits the first so that, although the United States advocates negotiations to effect debt reduction and continued lending to defaulting foreign sovereigns, it maintains that creditor participation in such negotiations should be on a strictly voluntary basis. It also requires that debts remain enforceable throughout the negotiations...

The district court's statutory interpretation here would appear to be inconsistent with this analysis. Rather than furthering the reconciled goal of voluntary creditor participation and the enforcement of valid debts, the district court's interpretation of Section 489 effectively forces creditors such as Elliott to participate in an involuntary "cram-down" procedure and makes the debt instruments unenforceable in the courts once the Bank Advisory Committee has reached an "agreement in principle" in the Brady negotiations. Undermining the voluntary nature of Brady Plan participation and rendering otherwise valid debts unenforceable cannot be considered to be in New York's interest, as made plain by this court in Pravin Banker.

Given the mandate that "whenever possible, statutes should be interpreted to avoid unreasonable results," ... we also take note of the unreasonable results that might ensue were we to accept the district court's interpretation of Section 489. While the district court's rule might benefit the Debtors in the short run, the long term effect would be to cause significant harm to Peru and other developing nations and their institutions seeking to borrow capital in New York. The district court's interpretation would mean that holders of debt instruments would have substantial difficulty selling those instruments if payment were not voluntarily forthcoming. This would therefore add significantly to the risk of making loans to developing nations with poor credit ratings. The additional risk would naturally be reflected in higher borrowing costs to such nations. It could even make loans to some of them unobtainable in New York. A well-developed market of secondary purchasers of defaulted sovereign debt would thereby be disrupted and perhaps destroyed even though its existence provides incentives for primary lenders to continue to lend to high-risk countries.

The interpretation posited by the district court would also create "a perverse result" because it "would permit defendants to create a champerty defense by refusing to honor their loan obligations." Banque de Gestion Privee-SIB v. La Republica de Paraguay, 787 F. Supp. 53, 57 (S.D.N.Y. 1992). An obligor could simply declare unwillingness to pay, thereby making it plain that no payment would be received without suit. Under such circumstances, prospective purchasers would not be able to acquire the debt instruments without opening themselves up to the defense that their purchase or assignment necessarily was made "with the intent and for the purpose of bringing an action or proceeding thereon," as barred by Section 489. The risk that a debtor might seek to manufacture such a defense by making such a public pronouncement could be expected to add significantly to the cost of borrowing in New York.

Although all debt purchases would be affected by the district court's expansive reading of Section 489, high-risk debt purchases would be particularly affected because of the increased likelihood of non-payment in such transactions leading to the likely necessity of legal action to obtain payment. As ably pointed out by Elliott and the various amici curiae, such increased risks could be expected to increase the costs of trading in high-risk debt under New York law and thereby encourage potential parties to such transactions to conduct their business elsewhere. Moreover, the increased risks are particularly onerous because they premise the validity of the transaction on no more than the buyer's subjective intent, which intent is not always readily ascertainable by the seller, and can only be conclusively resolved by ex post facto litigation. While the Debtors argue that the district court's interpretation of Limpar creates an "on-going dispute safe harbor" that would limit these effects, as explained above we do not find this interpretation of Limpar compelling and, in any event, such a safe harbor would not eliminate the enhanced risks but merely reduce them...

We hold that, in light of the pertinent New York precedent and compelling policy considerations, the district court erroneously interpreted Section 489 of the New York Judiciary Law. In particular, we hold that Section 489 is not violated when, as here, the accused party's "primary goal" is found to be satisfaction of a valid debt and its intent is only to sue absent full performance. Given that, notwithstanding the Section 489 issue, the district court found the Letter Agreements and Guaranty to have been breached by the Debtors, we remand only for the purpose of calculating damages more accurately than the approximate figures given in the district court's opinion and the possible resolution of other attendant damages-related issues.

In 2004 the New York Champerty statute (NY Judiciary Law §489) was amended to create a safe harbor for:

any assignment, purchase or transfer hereafter made of one or more bonds, promissory notes, bills of exchange, book debts, or other things in action, or any claims or demands, if such assignment, purchase or transfer included bonds, promissory notes, bills of exchange and/or book debts, issued by or enforceable against the same obligor (whether or not also issued by or enforceable against any other obligors), having an aggregate purchase price of at least five hundred thousand dollars.

But since this amendment there has been more litigation over the statute. For example, in litigation arising out of securitization transactions where the Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. Mortgage Pass-through Certificates sued a loan originator for breach of a contractual provision in which the originator, Love Funding, had represented that the conveyed mortgage notes contained no default, breach, violation, or event of acceleration. Love Funding countered with a champerty defense. In a decision in January 2010, after a remand to the New York Court of Appeals,[82] the Second Circuit found that the transaction was not champertous.[83] But the case does illustrate uncertainty about the application of the statute (the decision also describes some features of the securitization process):

Trust v. Love Funding

Because of ambiguities in the scope of New York's statutory proscription of champerty, see N.Y. Judiciary Law § 489, we certified certain questions to the New York Court of Appeals... Having received the Court of Appeals' response, see Trust v Love Funding, 13 N.Y.3d 190 ...(2009), we now conclude, as a matter of law, that the trial record does not permit a finding of champerty...

In April 1999, Love Funding entered into a "conduit lending" arrangement with Paine Webber, which was

[82] See Trust v. Love Funding 556 F.3d 100, 114 (2d Cir. 2009); Trust v Love Funding 918 N.E.2d 889 (Court of Appeals, NY 2009).

[83] Trust v. Love Funding 591 F.3d 116 (2d. Cir. 2010).

memorialized in an April 23, 1999 mortgage loan purchase agreement (the “Love MLPA”). Under the Love MLPA, Love Funding represented to Paine Webber that no underlying mortgage loan was in default. In the event that Love Funding breached this, or any other, representation, the Love MLPA provided for certain remedies, including the “repurchase [of the] Mortgage Loan at the Repurchase Price,” .. and indemnification “from and against all demands, claims or asserted claims, liabilities or asserted liabilities, costs and expenses, including reasonable attorneys’ fees, incurred by an Indemnified Party, in any way arising from or related to any breach of any representation, warranty, covenant or agreement . . . hereunder,” ..

In July 1999, pursuant to the Love MLPA, Love Funding arranged a $6.4 million mortgage loan (the “Arlington Loan”) to Cyrus II Partnership (“Cyrus”), which was secured by a mortgage on Louisiana property known as the Arlington Apartments. On November 1, 1999, Paine Webber sold and assigned 36 loans, including the Arlington Loan, to Merrill Lynch Mortgage Investors, Inc. (“Merrill Lynch”), pursuant to the Merrill Lynch mortgage loan purchase agreement (the “Merrill Lynch MLPA”). In the Merrill Lynch MLPA, Paine Webber represented, as Love Funding had in the Love MLPA, that none of the mortgage loans was in default.

The loans were then securitized through a process that involved the creation of the plaintiff Trust. On November 1, 1999, Merrill Lynch assigned to the Trust all of its “right[s], title and interest . . . in, to and under (i) the Mortgage Loans [including the loans sold by Paine Webber], (ii) each Mortgage Loan Purchase Agreement and (iii) all other assets included or to be included” in the Trust. .. Commercial mortgage-backed securities, entitling their holders to interest payments generated on the underlying mortgages including the Arlington Loan, were then issued and sold to investors.

B. Arlington Loan Default and Resulting Litigation

On March 8, 2002, the Trust declared the Arlington Loan to be in default and accelerated payment on the full amount of the loan. The Trust then commenced a mortgage foreclosure action in Louisiana state court, securing a ruling that Cyrus had committed fraud to obtain the Arlington Loan and that such fraud constituted an event of default. As a consequence, the Arlington Apartments were sold for approximately $6.5 million in net proceeds, of which the Trust received $5.9 million. The Trust also obtained a judgment of more than $10 million against Cyrus and its principals. In September and October 2002, the Trust brought several actions against UBS related to the sale of loans by Paine Webber to the Trust. With respect to the Arlington Loan, the Trust’s theory was that, because Cyrus’s fraud put the Arlington Loan in default from the outset, Paine Webber (and, therefore, its successor UBS) necessarily breached its representation in the Merrill Lynch MLPA that “there is no material default.” ... On September 13, 2004, after two years of vigorous litigation, the Trust and UBS reached a settlement releasing the Trust’s claims as to 33 loans. While UBS paid the Trust $19.375 million in consideration for releases on 32 loans, the sole consideration for the Trust’s release on the Arlington Loan was UBS’s assignment of its rights under the Love MLPA.

C. District Court Proceedings

In November 2004, the Trust commenced this action against Love Funding for breach of the Love

MLPA. On October 11, 2005, the district court granted summary judgment in favor of the Trust on its claim that Love Funding had breached its representation that the Arlington Loan was not in default; nevertheless, it allowed Love Funding to amend its answer to assert the affirmative defense of champerty.

On February 27, 2007, after a bench trial, the district court ruled that Love Funding had proved champerty because "the Trust's primary purpose in accepting the Assignment was to buy a lawsuit against Love Funding." ... The district court relied on the fact that the Trust "carve[d] out . . . a single loan from a group of loans that were settled," ... and thereby "negotiated for itself 'a whole new lawsuit,' with the intent to 'basically . . . continu[e] a microcosm of the litigation that ha[d] already been going on for the last three years with UBS,'"... In reaching this conclusion, the district court further found that the Trust was motivated by a perception that it could recover more on the Arlington Loan by suing Love Funding than by pursuing a cash settlement because it would be able to recoup "millions of dollars in simple and default interest that have been accruing on the loan for years" and because it "could also potentially recover indemnification damages." ...

D. Certification of Questions to the New York Court of Appeals

On appeal, the Trust argued that New York's champerty law did not apply to this lawsuit because the relevant statute "was never intended to prohibit assignments in complex commercial transactions where the assignee has a substantial interest at stake." ... Recognizing ambiguities in New York law, we certified the following questions to the New York Court of Appeals:

1. Is it sufficient as a matter of law to find that a party accepted a challenged assignment with the "primary" intent proscribed by New York Judiciary Law § 489(1), or must there be a finding of "sole" intent?

2. As a matter of law, does a party commit champerty when it "buys a lawsuit" that it could not otherwise have pursued if its purpose is thereby to collect damages for losses on a debt instrument in which it holds a pre-existing proprietary interest?

3. (a) As a matter of law, does a party commit champerty when, as the holder of a defaulted debt obligation, it acquires the right to pursue a lawsuit against a third party in order to collect more damages through that litigation than it had demanded in settlement from the assignor?

(b) Is the answer to question 3(a) affected by the fact that the challenged assignment enabled the assignee to exercise the assignor's indemnification rights for reasonable costs and attorneys' fees?...

E. New York Court of Appeals' Response

The New York Court of Appeals accepted our certification and answered the second question and both parts of the third question in the negative, rendering it unnecessary to answer our first inquiry.... In responding to our second question, the Court of Appeals emphasized that New York's prohibition of champerty "has always been 'limited in scope and largely directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs.'" ... The Court of Appeals distinguished between "acquiring a thing in action in order to obtain costs," which constitutes champerty, "and acquiring it in order to protect an independent right of the assignee," which does not.... "[I]f a party acquires a debt instrument for the

purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation." ....
Noting our observation that the Trust had a preexisting proprietary interest in the Arlington Loan, the Court of Appeals concluded that, "[i]f, as a matter of fact, the Trust's purpose in taking assignment of UBS's rights under the Love MLPA was to enforce its rights, then, as a matter of law, given that the Trust had a preexisting proprietary interest in the loan, it did not violate Judiciary Law § 489(1)."...
Our third question asked whether the Trust's intent either to recover more in damages from a lawsuit than from a potential settlement or to be indemnified for reasonable costs and attorneys' fees evidenced champerty. The New York Court of Appeals concluded that it did not.
To acquire indemnification rights to the costs of past litigation is not to acquire a thing in action in order to obtain costs from prosecution thereon. Similarly, no New York case has been brought to our attention that stands for the proposition that it is champerty to settle a dispute by accepting a transfer of rights that has the potential for a larger recovery than one had demanded as a cash settlement...

II. Discussion
Upon receipt of the New York Court of Appeals' response, the parties filed supplemental papers with this court in which they effectively agree that the district court – operating without the benefit of the Court of Appeals' recent explication of New York champerty law – applied a more expansive definition of champerty than was warranted. Love Funding urges us to remand the case to allow the district court to determine whether it nevertheless still finds champerty proved under the standard set forth in the Court of Appeals' response decision. The Trust on the other hand argues for reversal, submitting that, as a matter of law, the record will not permit a finding of champerty. We agree with the latter argument and accordingly reverse the challenged judgment in favor of Love Funding.

A. The New York Court of Appeals' Decision Effectively Rejects the District Court's Finding of Champerty
New York's statutory prohibition against champerty states, in pertinent part: [N]o corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon . . . . N.Y. Judiciary Law § 489(1).
The district court found that the challenged assignment violated this statute because "the Trust's primary purpose in accepting the Assignment was to buy a lawsuit against Love Funding." ...
In answering our second certified question, however, the New York Court of Appeals clarified that such an intent to sue is insufficient, by itself, to violate the statute. As the Court of Appeals explained, New York's champerty statute "does not apply when the purpose of an assignment is the collection of a legitimate claim." ... Thus, "if a party acquires a debt instrument for the purpose of enforcing it, that is not champerty simply because the party intends to do so by litigation." ... Applying these principles to this case, the Court of Appeals concluded that "if, as a matter of fact, the Trust's purpose in taking assignment of UBS's rights under the Love MLPA was to enforce its rights, then, as a matter of law, given that the Trust had a preexisting proprietary interest in the loan, it did not violate Judiciary Law § 489(1)." ... This effectively rejects the district court's finding of champerty.

B. Because the Trial Evidence Will Not Permit a Finding of Champerty, No Remand Is Warranted in this Case

Love Funding submits that the conditional language at the start of the last quoted passage from the Court of Appeals' decision signals a need to remand this case to permit the district court to resolve a previously unconsidered fact question: whether the Trust's intent in taking the UBS assignment of rights was, in fact, to enforce its interest in the Arlington Loan. Such a remand is warranted, however, only if the trial record presents sufficient evidence on the point to allow a factfinder to resolve it in favor of Love Funding, i.e., to find that the Trust intended to sue not to enforce rights under the Love MLPA, but rather to generate and recover the costs of such litigation.... That is not this case.

At the outset, we note that undisputed evidence establishes that, even before the challenged UBS assignment, the Trust had a significant interest in the repayment of the Arlington Loan. As this court observed in our prior decision, "[t]he Trust was not . . . a party with no interest in the loans that Love Funding had transferred to PaineWebber pursuant to the Love MLPA. To the contrary, as the end holder of the Arlington Loan, the Trust was the party that would directly suffer the damages of any default on that instrument." ... The district court recognized that, by accepting the challenged UBS assignment of rights under the Love MLPA, the Trust acquired the right directly to enforce the Arlington Loan. Nevertheless, the district court denominated the assignment champertous because it determined that the Trust intended from the start to pursue its rights through litigation in order to achieve the greatest possible recovery.... As already noted, the Court of Appeals has now clarified that an assignment "is not champert[ous] simply because the party intends to [enforce its rights] by litigation." ...

Love Funding thus shifts its argument to contend that, on remand, the district court might conclude that the Trust's purpose in accepting the UBS assignment was "not to enforce its interests in the Arlington Loan, but to engage in a speculative litigation venture against Love Funding to generate and recover costs and damages far greater than its actual Arlington losses." ... To be sure, litigation for the purpose of generating and then recovering costs is the essence of champerty under New York law.... But the record evidence will not support such a characterization where, as here, the challenged assignment allowed the Trust directly to enforce its pre-existing interest in the Arlington Loan. Love Funding asserts that an inference of champerty can be drawn from the fact that the Trust originally estimated its losses from the Arlington Loan at $3 million. After assignment of UBS's interests, however, the Trust demanded that Love Funding cure its breaches or repurchase the loan for $10 million. The discrepancy is understandable. With UBS's rights under the Love MLPA, the Trust acquired claims to indemnification as well as to actual loan losses. Even if the $10 million demand was excessive under the Love MLPA, however, that fact cannot by itself demonstrate that the Trust's intent was to employ litigation to profit from the costs and fees generated therein rather than to recoup "the full value of its . . . contractual claims." ... As the New York Court of Appeals explained in response to our certified questions, it is not champerty "to settle a dispute by accepting a transfer of rights that has the potential for a larger recovery than one had demanded as a cash settlement." ...

To the extent Love Funding insists that the Trust's champertous purpose is evidenced by its efforts to use this action to recover litigation costs and fees previously incurred by itself and UBS in connection with the disputed loans, Love Funding conflates litigation instituted for the purpose of generating costs

therein, which constitutes champerty, and litigation to enforce contract rights to previously incurred costs, which is effectively an action on a debt instrument.... The Court of Appeals recognized as much in specifically rejecting Love Funding's argument that the Trust's intent to sue Love Funding "not only to be made whole on losses sustained from the Arlington Loan default, but also to profit from the past litigation" evidenced champerty. ... It explained that it is not champerty "to acquire . . . indemnification rights for reasonable costs and fees that were incurred in past legal actions."... In short, even if the Trust's entitlement to previously incurred costs and fees under the Love MLPA is sufficiently debatable to view that part of its pending claim as a "speculative litigation venture," ... the Trust's acquisition and pursuit of that claim cannot evidence champerty.
In expressing concern about the Trust's litigation to recover "millions of dollars more than the Trust had been prepared to accept from UBS on the Arlington Loan," the district court referenced only the "interest that [has] been accruing on the loan for years" and "indemnification damages from Love Funding under . . . the Love MLPA," ... neither of which can support a champerty finding in light of the Court of Appeals' responsive decision ... The district court made no finding that the Trust intended to generate new costs in this litigation. Because such cost-generation was the essence of champerty even at the time of the district court's decision ... we can hardly conclude that the district court inadvertently neglected to make such a critical finding while instead reaching for a broader construction of champerty. Because the record does not support a finding of intent to generate new costs, we conclude that remand for further factfinding is unnecessary in this case. Love Funding's champerty defense fails as a matter of law.

What scope remains for borrowers and issuers of debt securities to invoke champerty defenses after this decision? Although the cases suggests that champerty will be found very rarely, the courts in New York have been dealing with cases involving claims to champerty defenses since the Trust v Love Funding decision, and the issue came up in a case involving litigation finance in **Justinian Capital SPC v WestLB AG:**[84]

The concept of champerty dates back to French feudal times... In the English legal system, the word "champart" was used "as a metaphor to indicate a disapproval of lawsuits brought `for part of the profits' of the action" ... . As we have explained, the champerty doctrine was developed "to prevent or curtail the commercialization of or trading in litigation" ... New York's champerty doctrine is codified at Judiciary Law § 489 (1). As pertinent here, the statute prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit ... Justinian Capital SPC, a Cayman Islands company, brings this action against WestLB AG, New York Branch and WestLB Asset Management (US) LLC (collectively, WestLB), alleging that WestLB's fraud (among other malfeasance) in managing two investment vehicles caused a steep decline in the value of notes purchased by nonparty Deutsche Pfandbriefbank AG (DPAG). Justinian acquired the notes from DPAG days before it

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[84] Justinian Capital v. Westlb, 28 N.Y.3d 160 (2016), 65 N.E.3d 1253, 43 N.Y.S.3d 218 (NY CA 2016).

commenced this action.
In this appeal, we must first decide whether Justinian's acquisition of the notes from DPAG is champertous as a matter of law. If the answer is "yes," we must then decide whether the acquisition falls within the champerty statute's safe harbor provision codified at Judiciary Law § 489 (2). The safe harbor provides that the champerty doctrine of section 489 (1) is inapplicable when the notes or other securities are acquired for "an aggregate purchase price of at least five hundred thousand dollars" (Judiciary Law § 489 [2]).
As set forth below, we hold that Justinian's acquisition of the notes was champertous and, further, that Justinian is not entitled to the protection of the safe harbor provision. Therefore, the order of the Appellate Division should be affirmed.

I. In 2003, nonparty DPAG invested close to €180 million (approximately $209 million) in notes (the notes) issued by two special purpose companies, Blue Heron Funding VI Ltd. and Blue Heron Funding VII Ltd. (collectively, the Blue Heron portfolios). The Blue Heron portfolios were sponsored and managed by defendants WestLB. By January 2008, the notes had lost much (if not all) of their value.
After the value of the notes declined, DPAG considered its options. In the summer of 2009, DPAG's board of directors approved filing a direct lawsuit against WestLB. Both DPAG and WestLB are German banks and, at the time, DPAG was receiving substantial support from the German government and WestLB was partly owned by the government. Because of these relationships the DPAG board expressed concerns about pursuing a direct action to vindicate its rights for fear that the government would withdraw support from DPAG if it sued WestLB. This fear of repercussions from bringing a direct lawsuit led DPAG to consider another option in which a third party would bring the lawsuit and remit a portion of any proceeds to DPAG. In February 2010, DPAG discussed this option with plaintiff Justinian, a Cayman Islands shell company with few or no assets. A presentation submitted by Justinian in this action described Justinian's business plan as:
"(1) purchase an investment that has suffered a major loss from a company so that the company does not need to report such loss on its balance sheet; (2) commence litigation to recover the loss on the investment; (3) remit the recovery from such litigation to the company, minus a cut taken by Justinian; and (4) partner with specific law firms... to conduct litigation."
Ultimately, the DPAG board approved the option of having Justinian bring suit because it presented the "best risk return profile" for DPAG.
In April 2010, DPAG and Justinian entered into a sale and purchase agreement (the agreement). Pursuant to the agreement, DPAG would assign the notes to Justinian and Justinian would agree to pay DPAG a base purchase price of $1,000,000 (representing $500,000 for the Blue Heron Funding VI notes and $500,000 for the Blue Heron Funding VII notes). The notes were assigned to Justinian shortly after execution of the agreement. The assignment, however, was not contingent on Justinian's payment of the $1,000,000. Nor did Justinian's failure to pay the $1,000,000 constitute an event of default under section 9 of the agreement. According to Justinian's principal and chief negotiator of the agreement, Thomas Lowe, Justinian's failure to pay the $1,000,000 did not constitute a breach of the agreement. Under the terms of the agreement, the only consequences of Justinian's failure to pay by the selected due date

appear to be that interest would accrue on the $1,000,000 and that Justinian's share of any proceeds recovered from the lawsuit would be reduced from 20% to 15%. Justinian has not paid any portion of the $1,000,000 base purchase price, and DPAG has not demanded payment.

Within days after the agreement was executed and shortly before the statute of limitations was to expire, Justinian filed a summons with notice in Supreme Court commencing this action against WestLB. The subsequent complaint alleged causes of action in breach of contract, fraud, breach of fiduciary duty, negligence, negligent misrepresentation, and breach of the covenants of good faith and fair dealing, all in connection with WestLB's alleged purchase of ineligible assets for the Blue Heron portfolios that caused the value of the notes to deteriorate.

WestLB moved to dismiss, alleging that Justinian lacked standing to bring this action. ... Supreme Court dismissed the complaint, concluding that the agreement was champertous because Justinian had not made a bona fide purchase of the notes and was, therefore, suing on a debt it did not own. Supreme Court also concluded that Justinian was not entitled to the protection of the champerty safe harbor of Judiciary Law § 489 (2) because Justinian had not made an actual payment of $500,000 or more ... On appeal, the Appellate Division affirmed, largely adopting the rationale of Supreme Court ... This Court granted leave to appeal ... We affirm, although our reasoning is somewhat different.

II. ... The primary purpose test articulated in Moses has been echoed in our courts for well over a century. In Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp. ... we endorsed the distinction in Moses "between acquiring a thing in action in order to obtain costs and acquiring it in order to protect an independent right of the assignee" and opined that "the purpose behind [the plaintiff's] acquisition of rights" is the critical issue in assessing whether such acquisition is champertous. Similarly, in Bluebird Partners v First Fid. Bank ... we held that "in order to constitute champertous conduct in the acquisition of rights ... the foundational intent to sue on that claim must at least have been the primary purpose for, if not the sole motivation behind, entering into the transaction."

Here, the impetus for the assignment of the notes to Justinian was DPAG's desire to sue WestLB for causing the notes' decline in value and not be named as the plaintiff in the lawsuit. Justinian's business plan, in turn, was acquiring investments that suffered major losses in order to sue on them, and it did so here within days after it was assigned the notes. Contrary to the suggestion by the dissent, there was no evidence, even following completion of champerty -related discovery, that Justinian's acquisition of the notes was for any purpose other than the lawsuit it commenced almost immediately after acquiring the notes... Justinian's principal speculated at his deposition as to other possible sources of recovery on the notes — for example, that there "might have been" an insolvency or that there "might have been" a restructuring or distribution between the time of acquisition and 2047 when the notes were due. Such speculation does not suffice to defeat summary judgment. We have long held that "`[m]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" to defeat summary judgment .... Indeed, "[t]he moving party need not specifically disprove every remotely possible state of facts on which its opponent might win" to be entitled to summary judgment, particularly when the opponent's "theorizing" is "farfetched" ... Here, the lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. Justinian's sole purpose in acquiring the notes was to bring this action and hence, its acquisition was champertous.

III. Conduct that is champertous under Judiciary Law § 489 (1) is nonetheless permissible if it falls within the safe harbor provision of Judiciary Law § 489 (2). Section 489 (2) exempts the purchase or assignment of notes or other securities from the restrictions of section 489 (1) when the notes or other securities "hav[e] an aggregate purchase price of at least five hundred thousand dollars" (Judiciary Law § 489 [2]). Here, although the price listed in the agreement, $1,000,000, satisfies the threshold dollar amount for the safe harbor, Justinian has not actually paid any portion of that price. Justinian argues that a binding obligation to pay is sufficient to receive the protection of the safe harbor. WestLB argues that in order to come within the safe harbor an actual payment of at least $500,000 must have been made. The courts below endorsed WestLB's position. We do not agree. Actual payment of the purchase price need not have occurred to receive the protection of the safe harbor. Nonetheless, for the reasons set forth below, under the circumstances presented here, Justinian is not entitled to the protection of the safe harbor.

The parties disagree about whether the phrase "purchase price" in section 489 (2) is ambiguous. Justinian argues that it is unambiguous and means whatever amount is denominated the "purchase price" in a purchase agreement. WestLB argues that reading "purchase price" with "`absolute literalness'" would violate the safe harbor's "`purpose and intent'" ... We agree with that statement. Although the phrase "purchase price" may be unambiguous in some contexts, here it is not, and we must look to the legislative history to discern its meaning.... A review of draft versions of the safe harbor legislation introduced during the legislative session reveals that at least one version of the bill contemplated that the safe harbor would protect a purchaser of notes or securities if either the aggregate face amount of the notes or securities sued upon totaled at least $1,000,000 or the purchaser had paid, in the aggregate, at least $500,000 to acquire them (2003 NY Senate Bill S2992-A). The statute as enacted contained different language, requiring instead that the notes or securities have "an aggregate purchase price" of at least $500,000 (Judiciary Law § 489 [2]). The "purchase price" language effectively falls between the two earlier proposed safe harbor formulations — strong indication that the legislature did not intend either that actual payment necessarily had to have been made or that face value alone would suffice to obtain the protection of the safe harbor.

The legislative explanation of the safe harbor's purpose further supports our reading. New York has long been a leading commercial center, and our statutes and jurisprudence have, over many years, greatly enhanced New York's leadership as the center of commercial litigation. The safe harbor was enacted to exempt large-scale commercial transactions in New York's debt-trading markets from the champerty statute in order to facilitate the fluidity of transactions in these markets ... The participants in commercial transactions and the debt markets are sophisticated investors who structure complex transactions. Requiring that an actual payment of at least $500,000 have been made for these transactions to fall within the safe harbor would be overly restrictive and hinder the legislative goal of market fluidity. The phrase "purchase price" in section 489 (2) is better understood as requiring a binding and bona fide obligation to pay $500,000 or more for notes or other securities, which is satisfied by actual payment of

at least $500,000 or the transfer of financial value worth at least $500,000 in exchange for the notes or other securities. Such understanding conforms with the realities of these markets in which payment obligations may be structured in various forms, whether by exchange of funds, forgiveness of a debt, a promissory note, or transfer of other collateral. We emphasize that we find no problem with parties structuring their agreements to meet the safe harbor's requirements, so long as the $500,000 threshold is met, as set forth above.
However, as the dissent concedes, "[u]nquestionably, if the obligation to pay [at least $500,000] [i]s entirely contingent on a successful outcome in [the] litigation, it [does] not constitute a binding and bona fide debt" ... The legislative history reveals that a purchase price of at least $500,000 was selected because the legislature took comfort that buyers of claims would "not invest large sums of money" to pursue litigation unless the buyers believed in the value of their investments ... This comfort is lost when a purchaser of notes or other securities structures an agreement to make payment of the purchase price contingent on a successful recovery in the lawsuit; such an arrangement permits purchasers to receive the protection of the safe harbor without bearing any risk or having any "skin in the game," as the legislature intended. The legislature intended that those who benefit from the protections of the safe harbor have a binding and bona fide obligation to pay a purchase price of at least $500,000, irrespective of the outcome of the lawsuit.
That is precisely what is lacking here. The record establishes, and we conclude as a matter of law, that the $1,000,000 base purchase price listed in the agreement was not a binding and bona fide obligation to pay the purchase price other than from the proceeds of the lawsuit. The agreement was structured so that Justinian did not have to pay the purchase price unless the lawsuit was successful, in litigation or in settlement. The due date listed for the purchase price was artificial because failure to pay the purchase price by this date did not constitute a default or a breach of the agreement. The agreement permitted Justinian to exercise the option to let the due date pass without consequence and simply deduct the $1,000,000 (plus interest) from its share of any proceeds from the lawsuit.
In sum, we hold that because the notes were acquired for the sole purpose of bringing litigation, the acquisition was champertous. Further, because Justinian did not pay the purchase price or have a binding and bona fide obligation to pay the purchase price of the notes independent of the successful outcome of the lawsuit, Justinian is not entitled to the protection of the safe harbor. In essence, the agreement at issue here was a sham transaction between the owner of a claim which did not want to bring it (DPAG) and an undercapitalized assignee which did not want to assume the $500,000 risk required to qualify for the safe harbor protection of section 489 (2)
Accordingly, the order of the Appellate Division should be affirmed, with costs.

STEIN, J. (dissenting).
... until today, we have never found summary judgment appropriate to hold a transaction champertous as a matter of law. This hesitation is understandable because the intent and purpose of the purchaser or assignee is usually a factual question that cannot be decided on summary judgment...
In deciding summary judgment motions, courts should simply identify triable material issues of fact, and may not invade the province of the jury by making credibility determinations or weighing the probative

force of the evidence presented by each side... . On such a motion, the facts must be viewed in the light most favorable to the nonmoving party (here, plaintiff) ... Because champerty is an affirmative defense ... defendants bore the burden of demonstrating that the assignment was champertous ... . I believe that, in arriving at its definitive conclusion regarding plaintiff's sole purpose in acquiring the notes here, the majority has overlooked or disregarded these basic principles.

To be sure, the majority points to evidence in the record that would support a finding that plaintiff was a champertor, merely acting as a proxy to bring suit for DPAG. However, the record also contains evidence supporting plaintiff's argument that it procured the notes with an intent to enforce its rights in them in whatever way possible, not necessarily by way of litigation. In fact, plaintiff affirmatively alleges that it acquired the notes for the lawful purpose of enforcing rights under them and that, while litigation on the notes was a real possibility when it took the assignment, litigation was not the only option under consideration when it was negotiating for their acquisition. For example, plaintiff's principal testified that one possible avenue to recover on the notes was through bankruptcy proceedings. In addition, the funds at issue could potentially have been restructured with some amount paid to noteholders. Alternatively, a distribution could still be forthcoming on the notes because they are not due until 2047, leaving some possibility that the notes will regain value over time.

Contrary to the majority's assertion, discussion of these options did not constitute mere after-the-fact speculation. As relevant to the question of plaintiff's intent when acquiring the notes, plaintiff's principal testified that such options were among those considered as possibilities at the time plaintiff was negotiating with DPAG regarding the purchase of the notes. The principal's use of the words "might have been" in connection with several of the options did not necessarily indicate that their pursuit was speculative; instead, such words appropriately reflected his recognition that, as a practical matter, the outcome under any option was also dependent on defendants' responses to plaintiff's efforts. Thus, the record contains nonspeculative evidence that options other than litigation were under consideration before plaintiff acquired the notes, notwithstanding any uncertainty about whether plaintiff would actually be successful in obtaining a recovery by pursuing them. Such evidence was sufficient to create a question of fact precluding summary judgment.

Furthermore, litigation is a legitimate consideration when acquiring any distressed debt instrument. Plaintiff commenced this litigation soon after acquiring the notes, but explained that a hasty commencement was necessary because the statute of limitations was about to run shortly after the purchase agreement was executed; this did not mean that litigation was necessarily plaintiff's sole purpose or option. Indeed, due to the impending statute of limitations deadline, commencement of this action was necessary to protect plaintiff's rights while it explored its other options, in case its efforts thereunder were not fruitful. The action was commenced by a summons with notice, and there is evidence that plaintiff unsuccessfully attempted to contact defendants, prior to filing the complaint, to discuss options other than protracted litigation. While defendants may dispute having received such communications from plaintiff, the courts may not, for purposes of defendants' summary jjudgment motion, make credibility determinations and must view the evidence in plaintiff's favor.

Nor does an agreement to receive a percentage share in the recovery make a transaction champertous per se ... . Here, plaintiff explained that the agreement's adjustment to the purchase price — adding 80%

or 85% of the recovery in litigation or settlement, on top of the base purchase price of $1 million — was a commercially reasonable way of structuring the sale of distressed debt instruments that are difficult to value.
Thus, even if the majority is correct that the greater weight of the evidence would support a finding of champerty, because there is conflicting evidence regarding plaintiff's purpose in purchasing the notes, and because intent is generally a factual question, I believe it was error to grant summary judgment to defendants, finding this transaction champertous as a matter of law. I would, therefore, deny summary judgment on this factual issue and permit the parties to proceed to trial to resolve it.

II. Safe Harbor
Regardless of whether the transaction is champertous as a matter of law (as the majority has determined), or there is a question of fact regarding its allegedly champertous nature (as I have concluded), we must decide whether the safe harbor provision of Judiciary Law § 489 (2) is applicable. That provision exempts the purchase or assignment of notes or other securities from being champertous under subdivision (1) when they have "an aggregate purchase price of at least [$500,000]." I agree with the majority that this statutory language is ambiguous, and that the "purchase price" in subdivision (2) can include either actual payment of, or a binding and bona fide legal obligation to pay, at least $500,000. However, I disagree with the majority's application of that provision to find, as a matter of law, that the purchase price set forth in the agreement here did not constitute a binding and bona fide obligation on plaintiff's part.
It is generally inadvisable for courts to look beyond the four corners of a contract to ferret out whether the parties actually intended to pay the purchase price set forth therein... Otherwise, courts could regularly become mired down in an attempt to discern the parties' intent when entering a contract, rather than simply applying the language employed in the contract. However, in those circumstances in which a contract is ambiguous on its face and it becomes necessary to determine the parties' intent by resorting to extrinsic evidence, the issue becomes one for the jury and summary judgment is inappropriate... . Such is the case here.
The agreement at issue contains arguably inconsistent provisions, and it is unclear on its face as to whether the parties ever intended that DPAG would be able to collect the $1 million base purchase price from plaintiff absent recovery from defendants in this action. Unquestionably, if the obligation to pay was entirely contingent on a successful outcome in this litigation, it would not constitute a binding and bona fide debt. However, the agreement requires plaintiff to pay the $1 million base purchase price by a date certain, without regard to the success of this action. Although that date was five months after the execution of the agreement, the delay was arguably designed to provide plaintiff with an opportunity to raise that sizeable amount. The majority's reference to plaintiff as a "shell company" with virtually no assets ... , ignores the possibility that plaintiff was capable of raising capital, which it had apparently succeeded in doing for other similar transactions. Moreover, under the contract, plaintiff's failure to timely pay the base purchase price carried consequences, including the accrual of interest until full payment, and an increase in the purchase price adjustment from 80% to 85% of any recovery.
The majority correctly notes that the failure to timely pay the base purchase price was not designated in

the contract as a default event. Contrary to the majority's conclusory statement, however, neither this omission, nor any provision of the contract — nor even DPAG's failure to enforce plaintiff's obligation to pay thus far — necessarily means that the failure to pay does not constitute a breach of the agreement. A failure to perform one's promise or contractual obligation — such as the payment of $1 million — is the very definition of a breach of contract ... breach of contract) and, therefore, need not be — and rarely is — explicitly identified as such in the contract, itself. The deposition testimony cited by the majority, wherein one of DPAG's principals indicated that he did not think plaintiff's failure to timely pay would be a breach, is irrevelant unless the contract language is ambiguous so as to require the courts to consider extrinsic evidence to ascertain the parties' intent. If it is necessary to review extrinsic evidence regarding intent, factual questions exist that a jury must resolve. Even then, courts interpreting the contract are not bound by that one individual's personal opinion, but may consider it as merely some evidence of DPAG's intent.

Here, the contract's provision concerning the base purchase price is susceptible to an interpretation that would create an unqualified, bona fide obligation to pay $1 million. Nevertheless, as the majority points out, other provisions of the contract, such as certain limitations on DPAG's remedies, raise questions as to whether DPAG intended to enforce its rights in the event of plaintiff's breach of the payment provision, including whether DPAG is feasibly able to do so. In my view, these factual questions, which stem from contractual provisions that cannot fully be read in harmony, would permit the Court to look beyond the four corners of the agreement. However, I cannot agree with the majority's conclusion that this was a "sham transaction" as a matter of law...

Finally, the majority correctly notes this state's leadership role in promoting and supporting large-scale, complex commercial markets and transactions, and recognizes that participants in such transactions are "sophisticated investors" .. However, in my view, the majority's decision discourages transactions aimed at fostering accountability in commercial dealings, generally, and, in this particular case, successfully forecloses litigation against parties that are alleged to have committed fraud against all of the investors in more than one portfolio.

In sum, resolution of the questions of whether the transaction was champertous and, if so, whether the parties' contract included a bona fide obligation for plaintiff to pay $1 million for the notes, such that the safe harbor provision would apply, requires a factfinder to ascertain the parties' intent, a determination that is inappropriate on a motion for summary judgment.

These materials have generally focused on issues associated with investments in assets where the prospect for a return on the assets depends on litigation, but litigation funding may also involves legal challenges, as the Justinian Capital case illustrates.[85]

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[85] *See, e.g.*, William J. Harrington, *Champerty, Usury, and Third-Party Litigation Funding*, 49 The Brief 54 (2020). *Cf.* Maslowski v. Prospect Funding Partners LLC, 944 NW 2d 235 (Minnesota Supreme Court 2020)(abolishing common law doctrine of champerty); Report of the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration (Apr. 2018).

THE PARI PASSU CLAUSE IN BOND DOCUMENTATION

Collective action clauses may constrain bondholders from holding out in a restructuring by depriving them of the possibility of recourse through litigation. Investors have also looked to the pari passu clause as the basis for arguing that issuers should not treat some bondholders better than others by making full payment to holdout creditors when other creditors have accepted the terms of a restructuring, and even that this pari passu constraint operates on creditors and not just on the borrower. Here is an example of a pari passu clause:

> The Notes rank, and will rank, pari passu in right of payment with all other present and future unsecured and unsubordinated External Indebtedness of the Issuer.[86]

The clause was traditionally interpreted as restricting borrowers/issuers from incurring new obligations that would rank more highly than the obligations to which the clause applied, but investors have argued that it should be interpreted to apply not just to the creation of new obligations but to payments of money to other creditors more generally. Buchheit and Pam suggest that the pari passu clause became a feature of unsecured loan agreements with sovereign borrowers because in some jurisdictions there was a risk that other debts might end up taking precedence over the loan.[87]

Buchheit and Pam identify other purposes of the clause:

"We now come to the most intriguing question of all: what motivated modern drafters to include a pari passu provision (of the "pari passu in priority of payment" variety) in their unsecured credit instruments with sovereign borrowers. The motivation must have been something other than a desire to protect the lender against involuntary subordination in bankruptcy, for the simple reason that sovereigns are not subject to bankruptcy regimes.

Our research suggests that had they been asked at the time (the 1970s onward) to justify the presence of a pari passu clause in an unsecured cross-border credit instrument with a sovereign borrower, contract drafters would have given three reasons: a lingering concern about the earmarking of assets, the danger that a foreign sovereign decree altering the legal ranking of existing debts might be given effect by a court outside of the debtor country and the risk of involuntary subordination through action by another lender. The opacity of the clause is explained by the fact that in the minds of the early Euromarket drafters, it was intended to protect lenders against all three, very different, risks. They thus saw a positive virtue in the vagueness of the phrase "pari passu in priority of payment." As the decades moved on, one of these concerns (earmarking) was addressed through an expanded negative pledge clause in most cross-border credit instruments. A second risk (the effect of sovereign decrees) was addressed by judicial decisions. But the third (involuntary subordination through action by another

[86] Lee C. Buchheit, Jeremiah S. Pam, The *Pari Passu* Clause in Sovereign Debt Instruments, 1 (Working Paper 2003).

[87] Id. at 26-7

lender) remains a serious concern for the cross-border lender, and the pari passu clause persists as the contractual mitigant for that risk."[88]

Buchheit and Pam do not find support in the history of the clause for the interpretation that some investors have argued for recently:
"...how could a fallacious interpretation of a boilerplate clause -- without a basis in law, or practice or commentary -- have taken even a shallow root in the minds of some market participants?....We believe that the ratable payment interpretation of the pari passu clause had an intuitive, almost an emotional, appeal to some people because it only seems fair that debtors not discriminate among similarly-situated creditors when faced with financial difficulties. And if a practice of differential payments just feels wrong, these people reasoned, then surely there must be something in the underlying instruments that forbids it? When a thorough search of the underlying instruments turned up no express prohibition against the making of differential payments, the last resort was to read such a prohibition into ...the pari passu clause.
The truth is that creditors do sometimes worry about cash-strapped borrowers discriminating among similarly-situated creditors in terms of payments and, when they do, there are a variety of documentary techniques for dealing with the problem. For example
• Sharing clauses are a nearly invariable feature of syndicated commercial bank loan agreements. The clauses were motivated by a concern that participating banks without an on-going business relationship with the borrower might be the first to feel a payment default, while the borrower's "house" banks continued to be paid. The sharing clause constitutes an intercreditor agreement among the banks in the syndicate to share any disproportionate payments or recoveries among themselves on a ratable basis.
• In many bond issues (including all publicly-issued corporate bond issues in the United States), the securities are issued pursuant to a trust indenture (in English practice, a trust deed). The trustee is obliged to distribute all payments or recoveries among bondholders on a strictly ratable basis. Indeed, in U.S. trust indenture practice most, and in English practice all enforcement actions against the borrower are centralized in the trustee so that the goal of ratable sharing of recoveries is preserved.
• Many project finance transactions, where several different types of lenders participate, call for an intercreditor agreement among the lenders to ensure ratable sharing of payments and losses.
• Intercreditor agreements are also frequently used in corporate debt workouts where the parties wish to keep the borrower out of a formal bankruptcy proceeding. Equal treatment of similar-situated creditors is, of course, a fundamental premise of most bankruptcy systems. Creditors desiring to replicate this feature in an out-of-court debt workout can do so by means of an intercreditor agreement that provides for ratable sharing of payments or recoveries.
• Subordination agreements are the instruments of choice when lenders to the same borrower want to establish legally-enforceable priorities that will take effect in, and sometimes out of, bankruptcy. These agreements come in many different varieties, but they all have one thing in common: they establish

[88] Id. at 31

contractual payment priorities among creditors that would otherwise have equally-ranking claims against the borrower...."

The UK's Financial Markets Law Committee looked at the pari passu issue and wrote:

Recently an.. interpretation has found favour in court decisions in California and Belgium.. that the clause in effect requires that, once the debtor is actually insolvent, the debtor will in fact pay all its claims pro rata and could thus be prevented from paying one creditor in full if the obligations concerned went unpaid.

This report asserts that, so far as English law is concerned, the wide "payment" interpretation is incorrect and that the "ranking" interpretation is the proper construction. There are three reasons which support this assertion:

• The principal reason is that the "payment" interpretation would not be acceptable to debtors and indeed to creditors, and would be unworkable. In short, it would offend the "business commonsense" principle used by English courts when construing a contract. In particular, it would lead to the result that once the debtor actually became insolvent the debtor would not be able to make any ordinary course of business payments necessary to enable the debtor to maintain its business. Hold-out creditors in pursuit of a bargaining position against other creditors could prevent payments and bring the business to a premature halt. An action of this type could be used to seriously disrupt payment systems through which the debtor made its payments and securities settlement systems through which the debtor paid for investments. Hence if the payment interpretation were correct, the pari passu clause would be prejudicial not only to debtors but also to creditors by making it impracticable for all creditors to sustain the debtor's business if only one of them objected.

• Another reason is based on the principles of English rules of contract construction that the words used be given their ordinary and natural meaning and that they should be considered in the context of the entire transaction. The language itself on the most literal interpretation requires a "rank" of the claims, i.e. a legal rank. It does not require pari passu "payment". In addition, other provisions are typically found in debt obligations which do require equal payment and this suggests that the pari passu clause was not intended to require equal payment.

• The final reason is based on an analysis of English case law which provides persuasive authority against the payment interpretation.[89]

Note that it is possible to specify by contract that creditors who are parties to a particular contract will not seek to put themselves in a better position than other creditors or that they will share any benefit they obtain with other creditors.

In one of the lawsuits against Argentina investors invoked the pari passu clause:

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[89] Financial Markets Law Committee, Issue 79 – Pari Passu Clauses (March 2005) *available at* http://www.fmlc.org/papers/fmlc79mar_2005.pdf .

NML Capital v. Republic of Argentina (2d. Cir. 2012)[90]

In 1994, Argentina began issuing debt securities pursuant to a Fiscal Agency Agreement ("FAA Bonds"). A number of individual plaintiffs-appellees bought FAA Bonds starting around December 1998. The remaining plaintiffs-appellees, hedge funds and other distressed asset investors, purchased FAA Bonds on the secondary market at various times and as recently as June 2010.1 The coupon rates on the FAA Bonds ranged from 9.75% to 15.5%, and the dates of maturity ranged from April 2005 to September 2031.

The FAA contains provisions purporting to protect purchasers of the FAA Bonds from subordination. The key provision, Paragraph 1(c) of the FAA, which we refer to as the "Pari Passu Clause," provides that:

> [t]he Securities will constitute . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness .

.. ("External Indebtedness" is limited to obligations payable in non-Argentine currency..We refer to the second sentence of the Pari Passu Clause as the "Equal Treatment Provision." Following the 2001 default on the FAA Bonds, Argentina offered holders of the FAA Bonds new exchange bonds in 2005 and 2010 (the "Exchange Bonds"). Argentina continued to make payments to holders of those Exchange Bonds while failing to make any payments to persons who still held the defaulted FAA Bonds.

After Argentina defaulted, its President in December 2001 declared a "temporary moratorium" on principal and interest payments on more than $80 billion of its public external debt including the FAA Bonds. Each year since then, Argentina has passed legislation renewing the moratorium and has made no principal or interest payments on the defaulted debt. Plaintiffs estimate that, collectively, their unpaid principal and prejudgment interest amounts to approximately $1.33 billion.

The plaintiffs allege that Argentina's conduct violated the Pari Passu Clause by both subordinating their FAA Bonds to the Exchange Bonds and lowering the ranking of their FAA Bonds below the Exchange Bonds. The primary issues on appeal are whether Argentina violated the Pari Passu Clause, and if so, whether the remedy the district court ordered was appropriate.

Argentina's Restructurings

In 2005, Argentina initiated an exchange offer in which it allowed FAA bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar. In exchange for the new debt, participants agreed to forgo various rights and remedies previously available under the FAA. To induce creditors to accept the exchange offer, Argentina stated in the prospectus under "Risks of Not Participating in [the] Exchange Offer" the following:

> Existing defaulted bonds eligible for exchange that are not tendered may remain in default indefinitely. As of June 30, 2004, Argentina was in default on approximately U.S. $102.6

[90] 699 F. 3d 246 (2d Cir. 2012).

> billion of its public indebtedness . The Government has announced that it has no intention of resuming payment on any bonds eligible to participate in [the] exchange offer . that are not tendered or otherwise restructured as part of such transaction. Consequently, if you elect not to tender your bonds in an exchange offer there can be no assurance that you will receive any future payments in respect of your bonds....

That same year, in order to exert additional pressure on bondholders to accept the exchange offer, the Argentine legislature passed Law 26,017 (the "Lock Law") declaring that:

> Article 2—The national Executive Power may not, with respect to the bonds ., reopen the swap process established in the [2005 exchange offer].
>
> Article 3—The national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to the bonds.
>
> Article 4—The national Executive Power must . remove the bonds . from listing on all domestic and foreign securities markets and exchanges.

The 2005 exchange offer closed in June 2005 with a 76% participation rate, representing a par value of $62.3 billion. Plaintiffs did not participate.

In 2010, Argentina initiated a second exchange offer with a payment scheme substantially identical to the 2005 offer. To overcome the Lock Law's prohibition against reopening the exchange, Argentina temporarily suspended the Lock Law (the "Lock Law Suspension") Like the 2005 prospectus, the 2010 exchange offer prospectus also warned of "Risks of Not Participating in the [2010 restructuring]":

> Eligible Securities that are in default and that are not tendered may remain in default indefinitely and, if you elect to litigate, Argentina intends to oppose such attempts to collect on its defaulted debt.
>
> Eligible Securities in default that are not exchanged pursuant to the Invitation may remain in default indefinitely. In light of its financial and legal constraints, Argentina does not expect to resume payments on any Eligible Securities in default that remain outstanding following the expiration of the Invitation. Argentina has opposed vigorously, and intends to continue to oppose, attempts by holders who did not participate in its prior exchange offers to collect on its defaulted debt through . litigation . and other legal proceedings against Argentina. Argentina remains subject to significant legal constraints regarding its defaulted debt.
>
> Consequently, if you elect not to tender your Eligible Securities in default pursuant to the Invitation there can be no assurance that you will receive any future payments or be able to collect through litigation in respect of your Eligible Securities in default.

..As with the 2005 exchange offer, plaintiffs did not participate in the 2010 restructuring. After the two exchange offers, Argentina had restructured over 91% of the foreign debt on which it had defaulted in 2001.

An important new feature of the Exchange Bonds was that they included "collective action" clauses. These clauses permit Argentina to amend the terms of the bonds and to bind dissenting bondholders if a sufficient number of bondholders (66 2/3% to 75% of the aggregate principal amount of a given series) agree. With the inclusion of collective action clauses, the type of "holdout" litigation at issue here is not

likely to reoccur.
Argentina has made all payments due on the debt it restructured in 2005 and 2010. Under the indentures for the 2005 and 2010 Exchange Bonds, Argentina makes principal and interest payments to a trustee in Argentina that in turn makes an electronic funds transfer (“EFT”) to U.S.-registered exchange bondholders. The EFTs are made from the trustee's non-U.S. bank to the registered holder's U.S. bank, often routed through one or more intermediary banks.

Proceedings Below
Plaintiffs sued Argentina on the defaulted FAA Bonds at various points from 2009 to 2011, alleging breach of contract and seeking injunctive relief, including specific performance of the Equal Treatment Provision. The FAA is governed by New York law and further provides for jurisdiction in “any state or federal court in The City of New York.” ... However, Argentina's courts have held that the Lock Law and the moratoria on payments prevent them from recognizing New York judgments regarding the FAA Bonds. In SEC filings, Argentina has stated that it has classified unexchanged FAA Bonds as a category separate from its regular debt and that, since 2005, it has “not [been] in a legal . position to pay” that category. ..
In December 2011, the district court granted plaintiffs partial summary judgment (the “Declaratory Orders”). The court observed that the Republic violates the Equal Treatment Provision “whenever it lowers the rank of its payment obligations under [plaintiffs'] Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness.” The district court then held that Argentina “lowered the rank” of plaintiffs' bonds in two ways: (1) “when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under [plaintiffs'] Bonds” and (2) “when it enacted [the Lock Law] and [the Lock Law Suspension].” ..As the court explained:

> it's hard for me to believe that there is not a violation of the [Equal Treatment Provision] accomplished by the congressional legislation in ‘05 and ‘10, simply saying that the Republic will not honor these judgments. It is difficult to imagine anything would reduce the rank, reduce the equal status or simply wipe out the equal status of these bonds under the [Equal Treatment Provision] [more than the Lock Law and the Lock Law Suspension]. [The Equal Treatment Provision] can't be interpreted to allow the Argentine government to simply declare that these judgments will not be paid, and that's what they have done...

In January 2012, the district court issued a temporary restraining order enjoining Argentina

> from altering or amending the processes or specific transfer mechanisms (including the use of specific firms) by which it makes payments due to holders of bonds or other securities issued pursuant to its 2005 and 2010 exchange offers, including without limitation by using agents, financial intermediaries and financial vehicles other than those used at the time of this Order.

The District Court's Injunctions

In February 2012, the district court granted injunctive relief, ordering Argentina to specifically perform its obligations under the Equal Treatment Provision (the “Injunctions”)... The Injunctions provide that “whenever the Republic pays any amount due under the terms of the [exchange] bonds,” it must “concurrently or in advance” pay plaintiffs the same fraction of the amount due to them (the “Ratable Payment”). We are unable to discern from the record precisely how this formula is intended to operate. It could be read to mean that if, for example, Argentina owed the holders of restructured debt $100,000 in interest and paid 100% of that amount then it would be required to pay the plaintiffs 100% of the accelerated principal and all accrued interest. Or it could be read to mean that, if such a $100,000 payment to the exchange bondholders represented 1% of the principal and interest outstanding on the restructured debt, then Argentina must pay plaintiffs 1% of the amount owed to them. We cannot tell precisely what result the district court intended. On remand the district court will have the opportunity to clarify precisely how it intends this injunction to operate.

Anticipating that Argentina would refuse to comply with the Injunctions and in order to facilitate payment, the district court ordered that copies of the Injunctions be provided to “all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds.” These could include Argentina's agent-banks located in New York that hold money in trust for the exchange bondholders and process payments to them under the terms of those bonds. Under Rule 65(d)(2), parties, their “officers, agents, servants, employees, and attorneys,” as well as “other persons who are in active concert or participation with” them, are bound by injunctions. Furthermore, the Injunctions expressly prohibit Argentina's agents from

> aiding and abetting any violation of this ORDER, including any further violation by [Argentina] of its obligations under [the Equal Treatment Provision], such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a ratable payment to [plaintiffs].

..To give effect to this provision, the Injunctions prevent Argentina from “altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds” without approval of the court (the “Preliminary Injunction”).. Finally, the Injunctions require Argentina to certify to the court, concurrently or in advance of making a payment on the Exchange Bonds, that it has satisfied its obligations under the Injunctions.

In justifying the remedy ordered, the court reasoned that

> [a]bsent equitable relief, [plaintiffs] would suffer irreparable harm because the Republic's payment obligations to [plaintiffs] would remain debased of their contractually-guaranteed status, and [plaintiffs] would never be restored to the position [they were] promised that [they] would hold relative to other creditors in the event of default.

... Further, there was no adequate remedy at law “because the Republic has made clear—indeed, it has codified in [the Lock Law] and [the Lock Law Suspension]—its intention to defy any money judgment issued by this Court.”...

The court further reasoned that the balance of the equities tipped in plaintiffs' favor because of (1) Argentina's “unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of” the Equal Treatment Provision and (2) Argentina's ability to “violate [that Provision] with impunity” in the absence of injunctive relief. ..The district court also stated that “if there was any belief that the Republic would honestly pay its obligations, there wouldn't be any need for these kinds of paragraphs” in the Injunctions... The court noted that the Injunctions “require[ ] of [Argentina] only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase [Argentina's] bonds.” The court further observed that Argentina now “has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and [to the exchange bondholders].”..As to the exchange bondholders, the Injunctions do not “jeopardiz[e] [their] rights” because “all that the Republic has to do” is “honor its legal obligations.” .. Finally,

> [t]he public interest of enforcing contracts and upholding the rule of law will be served by the issuance of th[ese] [Injunctions], particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations....

Argentina's Appeal from the Injunctions

In March 2012, Argentina timely appealed from the Injunctions and the Declaratory Orders. We have jurisdiction over the Injunctions under 28 U.S.C. § 1292(a)(1). The Declaratory Orders are also properly before us because they are “inextricably intertwined” with the Injunctions. Lamar Adver. of Penn, LLC v. Town of Orchard Park, N.Y., 356 F.3d 365, 371 (2d Cir.2004).

Argentina advances a host of reasons as to why the district court erred. First, the Republic argues that it has not violated the Equal Treatment Provision because it has not given the exchange bondholders a legally enforceable preference over the FAA Bonds in the event of default on the Exchange Bonds—even if it has favored the exchange bondholders by honoring their payment rights while violating plaintiffs'. Argentina contends that plaintiffs' bonds have always remained “direct, unconditional, unsecured and unsubordinated obligations of the Republic” with the same legal “rank” as any other debt—which is all the Equal Treatment Provision requires. .. In any event, even if the Provision had been violated, Argentina argues the contractually agreed upon remedy is acceleration, which has already occurred.

Second, Argentina argues that the Injunctions violate the FSIA by ordering the Republic to pay plaintiffs with immune property located outside the United States...

Third, the Republic contends that the assets the Injunctions restrain are not property of the Republic, but are held in trust for exchange bondholders, and therefore, under New York law, may not be reached by creditors. Moreover, the Injunctions, which by their terms apply to “indirect facilitators” of payments on the Exchange Bonds .. violate the U.C.C., which prohibits injunctive relief against “intermediary banks” responsible for processing fund transfers. U.C.C. § 4–A–503 cmt. Since subjecting exchange bondholder money to process in U.S. courts is improper, Argentina argues, the court erroneously restricted it from utilizing other methods to service its debt.

Fourth, because the only harm plaintiffs suffer is monetary, Argentina argues that the district court incorrectly concluded that such harm was irreparable.

Fifth, Argentina argues that the hardship to exchange bondholders and to the Republic stemming from the Injunctions far outweighs the purported prejudice to “holdouts,” who bought their debt at or near default with full knowledge of the limitations on their ability to collect. The Injunctions “will thrust the Republic into another economic crisis and undermin[e] the consensual [sovereign debt] restructuring process the United States has been at pains to foster for the past several decades.” ..

Sixth and finally, Argentina argues that plaintiffs' claims are barred by laches.

We review a district court's decision to grant equitable relief for abuse of discretion... We review de novo a district court's grant of partial summary judgment.

I. We first address Argentina's argument that the district court erred in its interpretation of the Equal Treatment Provision. The district court held that Argentina violated the Provision when it made payments currently due under the Exchange Bonds while persisting in its refusal to satisfy its payment obligations to plaintiffs and when it enacted the Lock Law and the Lock Law Suspension.

“In New York, a bond is a contract.”.. Thus, the parties' dispute over the meaning of the Equal Treatment Provision presents a “simple question of contract interpretation.”.. Argentina argues that the Pari Passu Clause is a boilerplate provision that, in the sovereign context, “has been universally understood for over 50 years . to provide protection from legal subordination or other discriminatory legal ranking by preventing the creation of legal priorities by the sovereign in favor of creditors holding particular classes of debt.”..

We are unpersuaded that the clause has this well settled meaning. Argentina's selective recitation of context-specific quotations from arguably biased commentators and institutions notwithstanding, the preferred construction of pari passu clauses in the sovereign debt context is far from “general, uniform and unvarying,” Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp., 595 F.3d 458, 466 (2d Cir.2010) (quotation marks omitted). Argentina's primary authorities and Argentina itself appear to concede as much. See Appellant's Reply Br. 21 n. 9 (“[N]o one knows what the clause really means” (emphasis in Appellant's Reply Br.)); Lee C. Buchheit, The Pari Passu Clause Sub Specie Aeternitatis, 10 Int'l Fin. L.Rev. 11, 11 (1991) (“[N]o one seems quite sure what the clause really means, at least in the context of a loan to a sovereign borrower.”); G. Mitu Gulati & Kenneth N. Klee, Sovereign Piracy, 56 Bus. Law 635, 646 (2001) (“[I]n the sovereign context there is at least disagreement about the meaning of the clause.”); Stephen Choi & G. Mitu Gulati, Contract As Statute, 104 Mich. L.Rev. 1129, 1134 (2006) (“The leading commentators on sovereign contracts acknowledged that there exists ambiguity as to the meaning of this clause.”); Philip R. Wood, Project Finance, Subordinated Debt and State Loans 165 (1995) (“In the state context, the meaning of the clause is uncertain because there is no hierarchy of payments which is legally enforced under a bankruptcy regime.”). In short, the record reveals that Argentina's interpretation of the Pari Passu Clause is neither well settled nor uniformly acted upon.

Once we dispense with Argentina's customary usage argument, it becomes clear that the real dispute is over what constitutes subordination under the Pari Passu Clause. Argentina contends the clause refers only to legal subordination and that none occurred here because “any claims that may arise from the Republic's restructured debt have no priority in any court of law over claims arising out of the Republic's

unrestructured debt.” Appellant's Br. 47. Plaintiffs, on the other hand, argue that there was “de facto” subordination because Argentina reduced the rank of plaintiffs' bonds to a permanent non-performing status by passing legislation barring payments on them while continuing to pay on the restructured debt and by repeatedly asserting that it has no intention of making payments on plaintiffs' bonds.
We disagree with Argentina because its interpretation fails to give effect to the differences between the two sentences of the Pari Passu Clause. See Singh v. Atakhanian, 31 A.D.3d 425, 818 N.Y.S.2d 524, 526 (N.Y.App. Div.2d Dep't 2006) (“A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect.” (internal quotation marks and citation omitted)). Instead, we conclude that in pairing the two sentences of its Pari Passu Clause, the FAA manifested an intention to protect bondholders from more than just formal subordination. See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404, 892 N.Y.S.2d 303, 920 N.E.2d 359 (2009). The first sentence (“[t]he Securities will constitute . direct, unconditional, unsecured, and unsobrdinated obligations .”) prohibits Argentina, as bond issuer, from formally subordinating the bonds by issuing superior debt. The second sentence (“[t]he payment obligations . shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.”) prohibits Argentina, as bond payor, from paying on other bonds without paying on the FAA Bonds. Thus, the two sentences of the Pari Passu Clause protect against different forms of discrimination: the issuance of other superior debt (first sentence) and the giving of priority to other payment obligations (second sentence).
This specific constraint on Argentina as payor makes good sense in the context of sovereign debt: When sovereigns default they do not enter bankruptcy proceedings where the legal rank of debt determines the order in which creditors will be paid. Instead, sovereigns can choose for themselves the order in which creditors will be paid. In this context, the Equal Treatment Provision prevents Argentina as payor from discriminating against the FAA Bonds in favor of other unsubordinated, foreign bonds.
The record amply supports a finding that Argentina effectively has ranked its payment obligations to the plaintiffs below those of the exchange bondholders. After declaring a moratorium on its outstanding debt in 2001, Argentina made no payments for six years on plaintiffs' bonds while simultaneously timely servicing the Exchange Bonds. Argentina has renewed that moratorium in its budget laws each year since then. It declared in the prospectuses associated with the exchange offers that it has no intention of resuming payments on the FAA Bonds. 2005 Prospectus, J.A. at 465; 2010 Prospectus, J.A. at 980. It stated in SEC filings that it had “classified the [FAA Bonds] as a separate category from its regular debt” and is “not in a legal . position to pay” them.... Its legislature enacted the Lock Law, which has been given full effect in its courts, precluding its officials from paying defaulted bondholders and barring its courts from recognizing plaintiffs' judgments. By contrast, were Argentina to default on the Exchange Bonds, and were those bondholders to obtain New York judgments against Argentina, there would be no barrier to the Republic's courts recognizing those judgments. Thus, even under Argentina's interpretation of the Equal Treatment Provision as preventing only “legal subordination” of the FAA Bonds to others, the Republic breached the Provision...
In short, the combination of Argentina's executive declarations and legislative enactments have ensured that plaintiffs' beneficial interests do not remain direct, unconditional, unsecured and unsubordinated

obligations of the Republic and that any claims that may arise from the Republic's restructured debt do have priority in Argentinian courts over claims arising out of the Republic's unstructured debt. Thus we have little difficulty concluding that Argentina breached the Pari Passu Clause of the FAA.

We are not called upon to decide whether policies favoring preferential payments to multilateral organizations like the IMF would breach pari passu clauses like the one at issue here. Indeed, plaintiffs have never used Argentina's preferential payments to the IMF as grounds for seeking ratable payments. Far from it; they contend that “a sovereign's de jure or de facto policy [of subordinating] obligations to commercial unsecured creditors beneath obligations to multilateral institutions like the IMF would not violate the Equal Treatment Provision for the simple reason that commercial creditors never were nor could be on equal footing with the multilateral organizations.”..

Moreover, plaintiffs' claims are not barred by laches. Argentina argues that, after it sought to resolve the meaning of the Equal Treatment Provision in December 2003 (and the court deemed the issue unripe for adjudication), plaintiffs “sat silent as the Republic restructured over 91 % of its defaulted debt and made regular biannual payments to holders of its restructured debt.” ... In the face of this “inexcusable delay,” Argentina argues, “plaintiffs cannot now rely on ‘equity’ to interfere with payments to third parties who have obviously developed a reasonable expectation of that regular source of income.” ..

This contention has no merit. Under New York law, the equitable defense of laches requires: (1) conduct giving rise to the situation complained of, (2) delay in asserting a claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert the claim, and (4) injury or prejudice to the offending party as a consequence relief granted on the delayed claim...

Argentina's laches argument fails because it had not yet violated the Equal Treatment Provision when it sought a declaration in 2003 that plaintiffs could not invoke the Provision to impede its restructuring efforts. It violated the Provision later by persisting in its policy of discriminatory treatment of plaintiffs, for example, by passing the Lock Law. In any event, we do not see how Argentina can claim prejudice by plaintiffs' purported delay. Argentina has known since 2004 that NML retained the option to pursue the claim. Moreover, because equitable relief was not granted until 2012, Argentina was able to hold its 2005 and 2010 exchange offers unimpeded.

II. We turn now to Argentina's challenges to the Injunctions and their requirement that it specifically perform its obligations under the FAA. Specific performance may be ordered where no adequate monetary remedy is available and that relief is favored by the balance of equities, which may include the public interest...

Once the district court determined that Argentina had breached the FAA and that injunctive relief was warranted, the court had considerable latitude in fashioning the relief. The performance required by a decree need not, for example, be identical with that promised in the contract...Where “the most desirable solution” is not possible, this Court may affirm an order of specific performance so long as it achieves a “fair result” under the “totality of the circumstances.” ..

Argentina's first contention is that, even assuming it breached the Pari Passu Clause, plaintiffs are limited to the “contractually agreed upon remedy of acceleration.”.. This argument is easily dispensed with. While paragraph 12 of the FAA specifies acceleration as one remedy available for a breach of the Equal Treatment Provision, the FAA does not contain a clause limiting the remedies available for a breach of the agreement. Nor does the FAA contain a provision precluding specific performance or injunctive relief. Under New York law the absence of the parties' express intention in the FAA to restrict the remedies available for breach of the agreement means that the full panoply of appropriate remedies remains available. ..

Moreover, it is clear to us that monetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach. Argentina will simply refuse to pay any judgments. It has done so in this case by, in effect, closing the doors of its courts to judgment creditors. In light of Argentina's continual disregard for the rights of its FAA creditors and the judgments of our courts to whose jurisdiction it has submitted, its contention that bondholders are limited to acceleration is unpersuasive. Insofar as Argentina argues that a party's persistent efforts to frustrate the collection of money judgments cannot suffice to establish the inadequacy of a monetary relief, the law is to the contrary... In this context, the district court properly ordered specific performance.

Next, we conclude that because compliance with the Injunctions would not deprive Argentina of control over any of its property, they do not operate as attachments of foreign property prohibited by the FSIA. Section 1609 of the FSIA establishes that “the property in the United States of a foreign state shall be immune from attachment arrest and execution.” 28 U.S.C. § 1609. Each of these three terms refers to a court's seizure and control over specific property.13 However, courts are also barred from granting “by injunction, relief which they may not provide by attachment.” ...

The Injunctions at issue here are not barred by § 1609. They do not attach, arrest, or execute upon any property. They direct Argentina to comply with its contractual obligations not to alter the rank of its payment obligations. They affect Argentina's property only incidentally to the extent that the order prohibits Argentina from transferring money to some bondholders and not others. The Injunctions can be complied with without the court's ever exercising dominion over sovereign property. For example, Argentina can pay all amounts owed to its exchange bondholders provided it does the same for its defaulted bondholders. Or it can decide to make partial payments to its exchange bondholders as long as it pays a proportionate amount to holders of the defaulted bonds. Neither of these options would violate the Injunctions. The Injunctions do not require Argentina to pay any bondholder any amount of money; nor do they limit the other uses to which Argentina may put its fiscal reserves. In other words, the Injunctions do not transfer any dominion or control over sovereign property to the court. Accordingly, the district court's Injunctions do not violate § 1609.14

Nor does the FSIA create any other impediment to the injunctive relief ordered by the district court. Argentina voluntarily waived its immunity from the jurisdiction of the district court, and the FSIA imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign, at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by § 1609. A “federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere.” ..

Turning to Argentina's argument that the balance of equities and the public interest tilt in its favor, we see no abuse of discretion in the district court's conclusion to the contrary. The FAA bondholders contend with good reasons that Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the Injunctions.

Moreover, nothing in the record supports Argentina's blanket assertion that the Injunctions will “plunge the Republic into a new financial and economic crisis.” ... The district court found that the Republic had sufficient funds, including over $40 billion in foreign currency reserves, to pay plaintiffs the judgments they are due. ... Aside from merely observing that these funds are dedicated to maintaining its currency, Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous.

Nor will the district's court's judgment have the practical effect of enabling “a single creditor to thwart the implementation of an internationally supported restructuring plan,” as the United States contends... It is up to the sovereign—not any “single creditor”—whether it will repudiate that creditor's debt in a manner that violates a pari passu clause.16 In any event, it is highly unlikely that in the future sovereigns will find themselves in Argentina's predicament. Collective action clauses—which effectively eliminate the possibility of “holdout” litigation—have been included in 99% of the aggregate value of New York-law bonds issued since January 2005, including Argentina's 2005 and 2010 Exchange Bonds. Only 5 of 211 issuances under New York law during that period did not include collective action clauses, and all of those issuances came from a single nation, Jamaica..Moreover, none of the bonds issued by Greece, Portugal, or Spain—nations identified by Argentina as the next in line for restructuring—are governed by New York law.

However, we do have concerns about the Injunctions' application to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds. Under Article 4–A of the U.C.C., intermediary banks, which have no obligations to any party with whom they do not deal directly, are not subject to injunctions relating to payment orders. See, e.g., N.Y. U.C.C. § 4–A–503 cmt. Any system that seeks to force intermediary banks to stop payments by a particular entity for a particular purpose imposes significant costs on intermediary banks and risks delays in payments unrelated to the targeted Exchange Bond payments. Grain Traders, Inc. v. Citibank, N.A., 160 F.3d 97, 102 (2d Cir.1998). Plaintiffs claim that the Injunctions do not encompass intermediaries, but they fail to offer a satisfactory explanation for why intermediary banks would not be considered “indirect[ ] . facilitat[ors]” apparently covered by the Injunctions...

Our concerns about the Injunctions' application to third parties do not end here. Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged order will apply to third parties generally. Consequently, we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable. Accordingly, we remand the Injunctions to the district court under United States v. Jacobson, 15 F.3d at 22, for such further proceedings as are necessary to address the Injunctions' application to third parties including intermediary banks and to address the operation of their payment formula.

CONCLUSION For the reasons stated, the judgments of the district court (1) granting summary judgment to plaintiffs on their claims for breach of the Equal Treatment Provision and (2) ordering

Argentina to make "Ratable Payments" to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt are affirmed. The case is remanded to the district court pursuant to United States v. Jacobson, 15 F.3d 19, 22 (2d Cir.1994) for such proceedings as are necessary to address the operation of the payment formula and the Injunctions' application to third parties and intermediary banks. Once the district court has conducted such proceedings the mandate should automatically return to this Court and to our panel for further consideration of the merits of the remedy without need for a new notice of appeal.

Mark Weidemaier says this decision:

> caused turmoil in the sovereign debt markets, raising fears that Argentina will default on its restructured debt and prompting the US government, the exchange bondholders, and a number of financial institutions to ask the court to change course and to overturn or limit the injunction. Remedies of the sort approved in NML v. Argentina may also have broader systemic consequences for the sovereign debt markets. Most notably, if made broadly available to creditors, injunctions of this sort would increase bondholders' incentives to hold out from a debt restructuring and complicate efforts to provide debt relief to financially distressed sovereigns.[91]

NML Capital v. Argentina (2d. Cir. 2013) was considered by the Second Circuit again in 2013 after Judge Griesa clarified the terms of his injunctions as requested by the Second Circuit. After Argentina objected to this the Second Circuit allowed Argentina to propose an alternative payment formula. But By August 2013 the Second Circuit said that "no productive proposals" had resulted:

To the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2013 oral argument, counsel for Argentina told the panel that it "would not voluntarily obey" the district court's injunctions, even if those injunctions were upheld by this Court. Moreover, Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree. It is within this context that we review the amended injunctions for abuse of discretion and, finding none, we affirm. However, in view of the nature of the issues presented, we will stay enforcement of the injunctions pending resolution of a timely petition to the Supreme Court for a writ of certiorari.[92]
In its opinion, the district court first explained that its "ratable payment" requirement meant that whenever

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[91] Mark C Weidemaier, S*overeign Debt after NML v. Argentina* (January 11, 2013). Capital Markets Law Journal, Forthcoming; UNC Legal Studies Research Paper No. 2199655. Available at SSRN: http://ssrn.com/abstract=2199655 . Published at 8:2 Capital Markets Law Journal 123 (2013).

[92] The Supreme Court denied cert.

Argentina pays a percentage of what is due on the Exchange Bonds, it must pay plaintiffs the same percentage of what is then due on the FAA Bonds.Under the express terms of the FAA, as negotiated and agreed to by Argentina, the amount currently due on the FAA Bonds, as a consequence of its default, is the outstanding principal and accrued interest... Thus, as the district court explained, if Argentina pays Exchange Bondholders 100% of what has come due on their bonds at a given time, it must also pay plaintiffs 100% of the roughly $1.33 billion of principal and accrued interest that they are currently due....

Second, the district court explained how its injunctions would prevent third parties from assisting Argentina in evading the injunctions. Though the amended (and original) injunctions directly bind only Argentina, the district court correctly explained that, through the automatic operation of Federal Rule of Civil Procedure 65(d), they also bind Argentina's "agents" and "other persons who are in active concert or participation" with Argentina... Those bound under the operation of Rule 65(d) would include certain entities involved in the system through which Argentina pays Exchange Bondholders.... the amended injunctions cover Argentina, the indenture trustee(s), the
28 registered owners, and the clearing systems.... The amended injunctions explicitly exempt intermediary banks, which enjoy protection under Article 4A of New York's Uniform Commercial Code (U.C.C.), and financial institutions receiving funds from the DTC...

Argentina argues that the amended injunctions unjustly injure it in two ways. First, Argentina argues that the amended injunctions violate the Foreign Sovereign Immunities Act ("FSIA") by forcing Argentina to use resources that the statute protects. As discussed in our October opinion, the original injunctions—and now the amended injunctions—do not violate the FSIA because "[t]hey do not attach, arrest, or execute upon any property" as proscribed by the statute.... Rather, the injunctions allow Argentina to pay its FAA debts with whatever resources it likes. Absent further guidance from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA.

Second, Argentina argues that the injunctions' ratable payment remedy is inequitable because it calls for plaintiffs to receive their full principal and all accrued interest when Exchange Bondholders receive even a single installment of interest on their bonds. However, the undisputed reason that plaintiffs are entitled immediately to 100% of the principal and interest on their debt is that the FAA guarantees acceleration of principal and interest in the event of default.... As the district court concluded, the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing. The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract... Because the district court's decision does no more than hold Argentina to its contractual obligation of equal treatment, we see no abuse of discretion....

Argentina, BNY, Euro Bondholders, and ICE Canyon raise additional issues concerning the amended injunctions and their effects on the international financial system through which Argentina pays Exchange Bondholders. The arguments include that (1) the district court lacks personal jurisdiction over payment system participants and therefore cannot bind them with the amended injunctions, (2) the amended injunctions cannot apply extraterritorially, (3) payment system participants are improperly bound because they were denied due process, and (4) the amended injunctions' application to financial system participants would violate the U.C.C.'s protections for intermediary banks. None of these arguments, numerous as they are, has merit. First, BNY and Euro Bondholders argue that the district court erred by purporting to enjoin payment system participants over which it lacks personal jurisdiction. But the district court has issued injunctions against no one except Argentina. Every injunction issued by a district court automatically forbids others—who are not directly enjoined but who act "in active concert or participation" with an enjoined party—from assisting in a violation of the injunction...

Euro Bondholders and ICE Canyon next argue that the amended injunctions are improper or at a minimum violate comity where they extraterritorially enjoin payment systems that deliver funds to Exchange Bondholders. But a "federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere."... And federal courts can enjoin conduct that "has or is intended to have a substantial effect within the United States."...

If ICE Canyon and the Euro Bondholders are correct in stating that the payment process for their securities takes place entirely outside the United States, then the district court misstated that, with the possible exception of Argentina's initial transfer of funds to BNY, the Exchange Bond payment "process, without question takes place in the United States." ... But this possible misstatement is of no moment because, again, the amended injunctions enjoin no one but Argentina, a party that has voluntarily submitted to the jurisdiction of the district court....

Argentina and the Euro Bondholders warn that Argentina may not be able to pay or that paying will cause problems in the Argentine economy, which could affect the global economy. But as we observed in our last opinion, other than this speculation, "Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous."...

Argentina and amici next assert that, by forcing financial institutions and clearing systems to scour all of their transactions for payments to Exchange Bondholders, the amended injunctions will delay many unrelated payments to third parties. But the financial institutions in question are already called on to navigate U.S. laws forbidding participation in various international transactions...

Argentina and various amici assert that the amended injunctions will imperil future sovereign debt restructurings. They argue essentially that success by holdout creditors in this case will encourage other bondholders to refuse future exchange offers from other sovereigns. They warn that rather than submitting to restructuring, bondholders will hold out for the possibility of full recovery on their bonds at a later time, in turn causing second- and third-order effects detrimental to the global economy and especially to developing countries. ..

But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all pari passu clauses or the obligations of other sovereign debtors under pari passu clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its pari passu clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights. .. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular pari passu clause found in the FAA...

We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor and because newer bonds almost universally include collective action clauses ("CACs") which permit a super-majority of bondholders to impose a restructuring on potential holdouts. ... Argentina and amici respond that, even with CACs, enough bondholders may nonetheless be motivated to refuse restructurings and hold out for full payment—or that holdouts could buy up enough bonds of a single series to defeat restructuring of that series. But a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt. And, as one amicus notes, "if transaction costs and other procedural inefficiencies are sufficient to block a super-majority of creditors from voting in favor of a proposed restructuring, the proposed restructuring is likely to fail under any circumstances." ..

Ultimately, though, our role is not to craft a resolution that will solve all the problems that might arise in hypothetical future litigation involving other bonds and other nations. The particular language of the FAA's pari passu clause dictated a certain result in this case, but going forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do. They may also draft different pari passu clauses that support the goal of avoiding holdout creditors. If, in the future, parties intend to bar preferential payment, they may adopt language like that included in the FAA. If they mean only that subsequently issued securities may not explicitly declare subordination of the earlier bonds, they are free to say so. But none of this establishes why the plaintiffs should be barred from vindicating their rights under the FAA.

For the same reason, we do not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace. On the contrary, our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms. We believe that the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts.

What does this litigation suggest for possible future invocations of pari passu clauses by holdout creditors? Here is one view:

In the end, it appears that a primary driver of Judge Griesa's ruling, and the Second Circuit's affirmance, were the unique equitable factors at play in NML. Indeed, a number of commentators have argued that equitable considerations likely had a significant, if not determinant, role in the outcome of the Argentina litigation. The Second Circuit court noted that Argentina had been a 'uniquely recalcitrant' debtor, failing to abide by international norms governing sovereign restructuring negotiations and instead adopting a unilateral and coercive approach. Judge Griesa's holding, affirmed by the Second Circuit, detailed that Argentina breached its contract with bondholders by its course of conduct and 'extraordinary behavior', stating that '[t]here is no adequate remedy at law [emphasis added] for the Republic's ongoing violations . . . of the FAA because the Republic has made clear—indeed, it has codified [the Lock Law]— its intention to defy any money judgment issued by this Court'. Accordingly, Judge Griesa's interpretation of the pari passu clause in the Argentina litigation was viewed widely as a novel way to provide a powerful injunctive remedy. This reading appears consistent with the view of the Second Circuit to affirm a limited, unique, injunctive remedy, holding that '[w]e simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular pari passu clause found in the FAA'. Said differently, if the rulings are about equitable remedies—which by definition are specific to the facts in front of the court—the general applicability of the Argentine case may be quite limited.[93]

Moreover, in more recent documentation the drafting of the documentation is different, either excluding the pari passu language or specifying that there is no equal payment obligation.[94]

Some concluding thoughts for this section of the materials:

We have begun to learn about the issue of holdout creditors, who have been able to disrupt the ability of sovereigns to restructure debt effectively.

We have learned something about the assignment of interests in sovereign debt, and the trading of financial claims.

With respect to assignment of debt and champerty we have seen that New York law is favorable to financial transactions (the rules facilitate assignment and also restrict the availability of the champerty defense). This may help to explain why New York law is commonly chosen as a governing law for financial transactions.

We have also learned something about standard form contracting, where standard language may be used without the contracting parties thinking too carefully about what the provisions mean (the pari passu clause).

[93] Sergio Galvis, *Solving the Pari Passu Puzzle: the Market Still Knows Best*, 12 Capital Markets Law Journal 204, 209 (2017)

[94] *Id*. at 213.