



Global Financial Crisis

Navigating and Understanding the Legal
and Regulatory Aspects

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Table of contents

Introduction _____ 7	Regulation of financial institutions, financial crises and rescue packages in Europe: the Iceland case _____ 109
Eugenio A Bruno	Ze'-ev D Eiger
Nicholson y Cano	James R Tanenbaum
The Institute Global	Morrison & Foerster LLP
Part I: Financial and banking systems – current financial crises and rescue packages	
Restructuring US financial institutions: Fannie Mae and Freddie Mac, Lehman Brothers and AIG _____ 13	The Netherlands: the financial crisis and the government's response _____ 131
Jose Bermudez	Willem (Pim) Rank
Eduardo Vidal	NautaDutilh
Hughes Hubbard & Reed LLP	
Central banking, financial regulation and property rights _____ 29	Part II: M&A, restructuring and liquidation of financial institutions
Tim Congdon	Law and practice of restructuring financial institutions in emerging markets: Argentina _____ 145
International Monetary Research Ltd	Eugenio A Bruno
US responses to the 2008 financial crisis: the Emergency Economic Stabilisation Act and related measures _____ 41	Nicholson y Cano
Michael Bopp	The Institute Global
Robert C Eager	
Nikesh Jindal	Acquisition and restructuring of Brazilian banks _____ 159
Cantwell F Muckenfuss III	José Eduardo Queiroz
Gibson Dunn & Crutcher LLP	Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados
The current financial crisis and rescue packages in Germany _____ 97	
Christina Ungeheuer	
Latham & Watkins LLP	

M&A, restructuring and liquidation of financial institutions: Germany _____ 163

Marc Benzler
Anja Breilmann
Clifford Chance

M&A of financial institutions in India after the financial crisis _____ 175

Cyril S Shroff
Amarchand & Mangaldas & Suresh
A Shroff & Co

M&A, restructuring and liquidation of financial institutions in Italy _____ 187

Maria Chiara Cieri
Marcello Gioscia
Gianluigi Pugliese
Ughi e Nunziante Studio Legale

Russia _____ 201

Max Gutbrod
Baker & McKenzie – CIS Limited

Restructuring and liquidation of financial institutions: Spain _____ 205

Jesús Mardomingo Cozas
Fernando Mínguez
Cuatrecasas, Gonçalves Pereira

M&A, restructuring and liquidation of financial institutions in the United Kingdom _____ 217

Chris Ashworth
Consultant

Restructuring and liquidation of US financial institutions _____ 229

John L Douglas
Randall D Guynn
Davis Polk & Wardwell LLP

Part III: Intermediaries, investment managers and private investment funds

The ties that bind: the prime brokerage relationship _____ 245

Melissa Beck
Anna T Pinedo
Morrison & Foerster LLP

The financial crisis in Bermuda _____ 259

Alex Potts
Paul Smith
Anthony Whaley
Conyers Dill & Pearman

The main issues affecting Luxembourg investment funds _____ 275

Isabelle Lebbe
Myriam Moulla
Arendt & Medernach

Main offshore issues in a financial crisis _____ 285

Martin Litwak
Nadia Menezes
Ogier

Law of US broker-dealer insolvency and liquidation _____ 293

Elliott R Curzon
Dechert LLP

Part IV: Restructuring and insolvency

The impact of current market conditions on covenants under senior secured credit arrangements _____ 305

Michael S Baker
Jinho Joo
Maura E O'Sullivan
Steven E Sherman
Shearman & Sterling LLP

Holdouts in syndicated loan rescheduling	_____ 321	Current hot topics for lenders in Chapter 11 cases	_____ 405
Richard J Cooper		Adam J Goldberg	
Dalmau García		Michael J Riela	
Cleary Gottlieb Steen & Hamilton LLP		Robert J Rosenberg	
		Latham & Watkins LLP	
Restructuring corporate debt	___ 335	Cross-border jurisdiction of US bankruptcy law	_____ 419
Eugenio A Bruno		Mary Rose Brusewitz	
Nicholson y Cano		John Rogers	
The Institute Global		Strasburger & Price LLP	
Restructuring of a project finance transaction	_____ 351	Part V: Finance litigation	
Dino Barajas		Litigation caused by the financial crisis in Germany	_____ 431
Morgan, Lewis & Bockius LLP		Frank Herring	
Japan's lost decade and the emergence and decline of the structured finance market	_____ 359	Rüdiger Litten	
Tatsu Katayama		Norton Rose Frankfurt	
Anderson Mori & Tomotsune		Securities and banking litigation arising out of the financial crisis in the United Kingdom	_____ 447
Emerging market corporate debt: lessons from the 2002 to 2006 Argentine restructuring process	_____ 377	Clare Canning	
Eugenio A Bruno		Ruth Malone	
Nicholson y Cano		Mayer Brown International LLP	
The Institute Global		US securities litigation in the financial crisis	_____ 463
Restructuring structured products: Mexico	_____ 383	Ava J Borrasso	
Carlos Aiza		Hal M Lucas	
Rodrigo Castelazo		Astigarraga Davis Mullins & Grossman, PA	
Creel, García-Cuéllar, Aiza y Enríquez, SC		Sovereign debt – judicial cases in the United States	_____ 479
Debt restructurings and US securities laws: an overview	_____ 393	Oliver J Armas	
Juan G Giráldez		Thomas J Hall	
Carlos E von der Heyde		Chadbourne & Parke LLP	
Cleary Gottlieb Steen & Hamilton LLP		About the authors	_____ 493

Sovereign debt – judicial cases in the United States

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1. Introduction: history of sovereign debt litigation in the United States

Over the last several decades, there has been a proliferation of sovereign debt litigation in the United States. A principal cause of this has been US courts' willingness to enforce the terms of sovereign debt instruments and the narrow application of the sovereign debtor's jurisdictional and substantive defences. Over the last 10 years, sovereign debt litigation has even expanded to include class action suits, in which numerous creditors unite to seek the enforcement of their debt. However, creditors' increasing success in obtaining judgments against defaulting sovereigns has not always resulted in the satisfaction of such judgments. Judgment creditors must still navigate laws that limit and bar them from attaching or executing against certain sovereign assets.

1.1 Early sovereign debt: collective bargaining over litigation

Before the mid-1980s, default of sovereign debt almost always resulted in the renegotiation of such debt and rarely in litigation.¹ This was due to several factors, most notably that during this period the principal holders of sovereign debt were large commercial banks.² It was in their interests to settle disputes with foreign sovereigns in order to further their business relationships and also to avoid the accounting liabilities associated with having a large amount of defaulted sovereign debt on their balance sheets.³ The relatively homogeneous nature of these banks also limited the occurrence of litigation hold-outs.⁴

However, since the late 1990s a fundamental shift has taken place leading to sovereign debt being held by a variety of smaller financial institutions and individual investors.⁵ Among the factors enabling this transformation was the US government's decision to sponsor debt restructuring. This resulted in the conversion of sovereign debt from bank loans to securitised instruments,⁶ increasing the number and types

1 Jill E Fisch & Caroline M Gentile, "Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring", 53 *Em L J* 1047, 1068 (2004); see also James Thuo Gathii, "The Sanctity of Sovereign Loan Contracts and its Origins in Enforcement Litigation", 38 *Geo Wash Int'l L Rev* 251, 267 (2006).

2 Fisch & Gentile, *supra* note 2, at 1058-65.

3 Gathii, *supra* note 2, at 267; Fisch & Gentile, *supra* note 2, at 1061-63; see also Ronald J Silverman & Mark W Deveno, "Distressed Sovereign Debt: A Creditor's Perspective", 11 *Am Bank Inst L Rev* 179, 179 (2003).

4 *Ibid.*

5 Anna Gelpern, "Domestic Bonds, Credit Derivatives, and the Next Transformation of Sovereign Debt", 83 *Chi-Kent L Rev* 147, 148-49 (2008); Silverman & Deveno, *supra* note 4, at 183-84; Fisch & Gentile, *supra* note 2, at 1074-75.

6 Fisch & Gentile, *supra* note 2, at 1071, 1076-79; Silverman & Deveno, *supra* note 4, at 182-84.

of sovereign debt holders to include a variety of smaller financial institutions, as well as numerous scattered individual investors. Unlike in the 1980s, defaulting sovereigns now face collective action problems arising from a large number of heterogeneous creditors, many of which purchased their interests in the secondary market.⁷

This proliferation of holders of securitised sovereign debt has given greater incentive for smaller stakeholders to prefer litigation in US courts to settlement negotiations.⁸ Smaller stakeholders are less likely to have ongoing business relationships with the defaulting foreign sovereign and are less subject to regulatory pressure from the US government to accept a proposed renegotiation.⁹ Another recent development that has increased the likelihood of litigation in US courts is the rise of so-called ‘vulture funds’, which base financial strategies on the use of legal remedies to collect bad debts.¹⁰ Vulture funds purchase debt that is either already defaulted or in danger of defaulting at extremely low prices in the hopes of suing the debtor to gain a maximum return on the funds’ investment.¹¹

1.2 *Allied II: the sanctity of contracts doctrine*

The proliferation of foreign sovereign debt litigation in the United States was also spurred by a 1985 decision issued by the US Court of Appeals for the Second Circuit.¹² In *Allied Bank Int’l v Banco Credito Agricola de Cartago (Allied II)*, the Second Circuit rejected a number of defences raised by the defaulting foreign sovereign (discussed in greater detail in the following sections) and enforced the contractual terms of the debt instruments.¹³

The plaintiff in *Allied II* sued to enforce the contractual terms of bonds issued by the government of Costa Rica.¹⁴ On a motion for rehearing, the Costa Rican government raised numerous defences, including the act of state doctrine and the doctrine of comity. However, the Second Circuit found such defences inapplicable, in part because the Costa Rican government’s unilateral restructuring of its debt obligations violated US policy and in particular US contract law. Therefore, the court found that the Costa Rican regulations forbidding payment on the defaulted bonds should not be recognised by US courts and the bonds were thus effectively enforced.¹⁵

This holding is particularly significant because it promotes the sanctity of contracts doctrine. Commentators have observed that this decision “tilted sovereign debt litigation favorably towards creditors” by enforcing the terms of the bonds and refusing to allow Costa Rica to defend against the suits of its creditors by invoking the comity or act of state doctrines.¹⁶ The Second Circuit’s emphasis was thus

7 Fisch & Gentile, *supra* note 2, at 1078-79.

8 Fisch & Gentile, *supra* note 2, at 1078-79.

9 Gathii, *supra* note 2, at 267-68; Fisch & Gentile, *supra* note 2, at 1079.

10 Fisch & Gentile, *supra* note 2, at 1075-76.

11 *Id.*; Christopher C Wheeler & Amir Attaran, “Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation”, 39 *Stan J Int’l L* 253, 253-54 (2003).

12 See also Gathii, *supra* note 2.

13 757 F 2d 516 (2d Cir 1985).

14 *Allied II*, 757 F 2d at 518.

15 *Id.*

squarily placed on the importance of: “ensuring that creditors entitled to payment in the United States... may assume that, except under the most extraordinary circumstances, their rights will be determined... [by] recognized principles of contract law.”¹⁷

In so holding, the court asserted a general US policy against permitting sovereign debtors unilaterally to restructure debts held by private individuals and thus increased the likelihood that hold-out creditors will resort to litigation against sovereigns which are otherwise engaging in cooperative debt adjustment.¹⁸ *Allied II* also refocused the judicial inquiry in such cases on the language and terms of the contract rather than the circumstances of the sovereign debtor.

2. A sovereign’s defences against debt litigation in US courts

Sovereigns have raised a number of defences to claimed debt defaults, ranging from those unique to foreign sovereigns (eg, the act of state doctrine), to typical contract defences (eg, impossibility). While some of these defences have been successful in past cases, recent case law has increasingly foreclosed their availability.¹⁹

2.1 Jurisdictional defences: foreign sovereign immunity

In many circumstances, US courts are barred from exercising jurisdiction over foreign sovereigns pursuant to the Foreign Sovereign Immunities Act.²⁰ However, a number of broad exceptions to this immunity exist, which can be used to obtain jurisdiction over sovereign defendants that have defaulted on their debt.²¹ Particularly relevant in this context are the waiver and commercial activity exceptions.²²

Sovereign immunity can be waived either explicitly or implicitly.²³ Most sovereign bonds include terms that explicitly waive the sovereign’s rights to sovereign immunity and thus subject the sovereign to suit on that bond in a US court.²⁴ Therefore, in the majority of cases, no obstacle exists to the exercise of jurisdiction by US courts over a sovereign debtor.

Even if the sovereign has not waived the right to sovereign immunity in the terms of the bond issuance, creditors can initiate litigation in US federal district courts against foreign sovereign debtors on claims arising from the issuance of debt where this qualifies as a commercial activity under the Foreign Sovereign Immunities Act. The commercial activity exception applies where:

- the foreign sovereign engages in commercial activity in the United States;
- the foreign sovereign takes actions in the United States in connection with

16 Gathii, *supra* note 2.

17 *Allied II*, 757 F 2d at 521-22.

18 *Id* at 522.

19 See generally Gathii, *supra* note 2; Silverman & Deveno, *supra* note 4.

20 Codified at 28 USC §1601 *et seq*. See 28 USC §1604.

21 See, for example, Silverman & Deveno, *supra* note 4, at 187; see also 28 USC §1605 (listing general exceptions to sovereign immunity).

22 28 USC §1605(a)(1) & (a)(2).

23 28 USC §1605(a)(1).

24 Silverman & Deveno, *supra* note 4, at 186; Theodore Allegaert, “Recalcitrant Creditors against Debtor Nations, or How to Play Darts”, 6 *Minn J Global Trade* 429, 437 (1997); see also *Nat’l Union Fire Ins Co v Congo*, 729 F Supp 936, 940 (SDNY 1989).

commercial activity elsewhere; or

- the foreign sovereign acts outside the United States in connection with commercial activity undertaken elsewhere, but that activity has a direct effect in the United States.²⁵

In *Argentina v Weltover*, the US Supreme Court ruled that a default on sovereign debt qualifies under the third prong of the commercial activity test.²⁶ In *Weltover*, Argentina issued bonds to the creditors of certain domestic enterprises in an ongoing effort to stabilise its currency, thereby giving its domestic businesses greater access to international markets.²⁷ When the bonds began to mature, Argentina found itself without sufficient foreign currency reserves to retire the debt, which was payable in US dollars.²⁸ The Argentine government responded to this shortfall by unilaterally changing the terms of the bonds to extend the time for repayment.²⁹ Two corporations and a bank, which collectively held \$1.3 million of these bonds, refused to accept the unilateral amendments to the bond terms and sued for enforcement of the debt contract in the US District Court for the Southern District of New York.³⁰

Argentina moved to dismiss the suit for lack of subject matter jurisdiction, lack of personal jurisdiction and *forum non conveniens*.³¹ The district court denied these motions and the Second Circuit Court of Appeals affirmed.³² Argentina petitioned for *certiorari* to the US Supreme Court; the court granted the petition to consider whether the Foreign Sovereign Immunities Act was a proper basis for federal courts to assert jurisdiction over Argentina.³³

Construing the Foreign Sovereign Immunities Act consistently with its text and the understanding of sovereign immunity prevailing at the time it was promulgated, the Supreme Court determined that the scope of the commercial activity exception should be determined by reference to the nature rather than the purpose of the acts claimed to be commercial.³⁴ Therefore, the court held that the issuance and management of bonds is commercial in nature, as these actions could be undertaken by a private party in the same manner as they were undertaken by the government of Argentina.³⁵

Although the court refrained from explicitly creating a *per se* rule that all issuance of debt is a commercial activity, it nonetheless virtually eliminated the possibility that a foreign sovereign could claim that its issuance of sovereign debt was not commercial. It held that: “it is irrelevant why Argentina participated in the bond market in the manner of a private actor; it matters only that it did so.”³⁶

25 28 USC §1605(a)(2); see also Paul L Lee, “Central Banks and Sovereign Immunity”, 41 *Colum J Transnat’l L* 327, 340-41 (2003).

26 *Argentina v Weltover*, 504 US 607, 609 (1992).

27 *Id.*

28 *Id.* at 610.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 614.

35 *Id.* at 615.

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Mr Douglas was general counsel of the Federal Deposit Insurance Corporation from 1987 to 1989 at the height of the US savings and loan crisis. He is also a director of the Financial Services Volunteer Corps, a non-profit organisation assisting countries to develop strong banking and capital markets systems. In that capacity he has advised the governments of Russia, Indonesia and Egypt, among others.

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Mr Guynn and his colleagues have played a leading role during the financial crisis. His representations have included Freddie Mac on its conservatorship and financial assistance from the US government, the Federal Reserve Bank of New York and the US Treasury on AIG, Citi on its financial crisis-related matters and Royal Bank of Scotland on the financial assistance received from Her Majesty's Treasury.

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Mr Katayama was appointed by the Japan Financial Supervisory Agency as the administrator for a failed credit union in 2001. He counselled a number of restructurings of financial, securities and insurance companies, and has collaborated with the firm's litigation group in advising financial institutions in relation to disputes involving complicated financial transactions. He is a member of the Banking Commission, the International Chamber of Commerce and the Japanese Association for Business Recovery. He is also a director of the Japan Federation of Bar Associations' Office of International Affairs.

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Ms Lebbe is a regular conference speaker. She is chairman or member of a number of committees and sub-committees established by the Association of the Luxembourg Fund Industry, and by the *Commission de Surveillance du Secteur Financier*, the regulatory authority of the financial sector in Luxembourg.

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Ms Menezes graduated from Keele University, United Kingdom with an LLB (honours) in law and psychology in 1999. She subsequently obtained a master's in EU law from the *Katholieke Universiteit Leuven*, Belgium, and obtained her legal practice course from the College of Law in London, United Kingdom. Ms Menezes was admitted as a solicitor in England and Wales in 2003 and a solicitor of the High Court of the British Virgin Islands in 2006.

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A graduate of Oxford University with a BA in law (1977), Mr Smith obtained his MA from Oxford in 1981. He was called to the Bar of England and Wales in 1978 and then practised in London for over 20 years at the commercial Bar. He moved to Bermuda in October 2000. He is also a member of the Bermuda Bar Association.

Mr Smith is a fellow of the Chartered Institute of Arbitrators and a member of the London Court of International Arbitration.

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James R Tanenbaum is a partner at Morrison & Foerster's New York office and chairs the firm's global capital markets practice. He specialises in corporate finance and the structuring of complex domestic and international capital markets transactions. Mr Tanenbaum represents issuers, including some of the nation's largest financial institutions, underwriters, agents and other financial intermediaries, in public and private offerings of securities as well as issuers, investment banks, and purchasers in hybrid, mortgage-related and derivative securities transactions. He has developed some of the most widely used hybrid techniques for the placement and distribution of securities.

Mr Tanenbaum works closely with leading investment banks to formulate new methodologies for securities offerings and to structure innovative financial products. He has also represented many technology-based companies, including biotech and medical device companies. In addition, he is a frequent lecturer on capital markets topics.

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Christina Ungeheuer is a partner in the Frankfurt office of Latham & Watkins LLP. She has also worked in the legal department of a major German bank. In addition to her German legal qualifications, which include a PhD, she studied law at Keele University and is a trained banker. Dr Ungeheuer speaks German, English and French. She was admitted to the Frankfurt Bar in 1996.

Dr Ungeheuer represents financial institutions, companies and sponsors in acquisition finance and other non-recourse or limited-recourse transactions, and other areas of corporate finance. She further advises financial institutions regarding a broad array of financial products, such as the issue of warrants and certificates.

She has been recognised by the *JUVE Handbook of German Commercial Law Firms 2008/2009* as a Leading Name for bank lending and acquisition finance and by *Chambers Global 2009* as a Leading Individual for acquisition finance and syndicated lending.

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Eduardo Vidal is co-chairman of the Latin America practice group at the law firm of Hughes Hubbard & Reed LLP in New York. He has experience in international corporate transactions, including capital markets offerings, cross-border mergers and acquisitions, syndicated loan financings, private equity investments and financial restructurings. Mr Vidal has advised local companies, multinational corporations and international financial institutions throughout Latin America.

He received his BA in 1978 and his JD in 1981 from the University of Chicago; he is fluent in

Spanish and has a reading knowledge of Portuguese. He is listed in Euromoney's *Expert Guide to the World's Leading Capital Markets Lawyers*, and in *Chambers* as a leading lawyer in Latin America investments. He is a frequent guest commentator on *CNN en Español*.

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Anthony Whaley joined Conyers Dill & Pearman in 1991. He has been a partner in the corporate department since 1995. His practice includes all aspects of corporate and commercial law, with expertise in securities law and the establishment of hedge funds, mutual funds, unit trusts, partnerships and other investment funds. Mr Whaley is also actively involved in developing the firm's anti-money laundering policies.

Mr Whaley received a BA in law from the University of Kent at Canterbury and a bachelor of civil law degree from Oxford University in 1987. He was admitted to the Bar of England and Wales in 1987 and to the Bermuda Bar in 1991. He is chairman of the Bermuda International Business Association (BIBA) legislative change committee, a member of BIBA's investment funds subcommittee, a board member of the Financial Intelligence Agency and a justice of the peace. Mr Whaley also served on the board of the Bermuda Monetary Authority for over 10 years.



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