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Editorial

Cherry-Picking Vultures and Other Speculations

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On 9 September 2014, the UN General Assembly overwhelmingly voted a resolution deciding to elaborate a multilateral legal framework for sovereign debt restructuring processes (Resolution A/68/304); the United States, Germany, the United Kingdom, and Japan voted against (other EU Member States abstained). The resolution stresses *inter alia* the importance of principles that take into account the obligation of sovereign creditors to act in good faith and with a cooperative spirit to reach a consensual rearrangement of the debt of sovereign states. Evidently, this move was caused by the battle between Argentina and the American so-called vulture funds that had bought Argentine sovereign debt on the cheap and refused to take part in the deal between Argentina and the great majority of bondholders. On the basis of a curious interpretation of the *pari-passu* clause in the bonds, an American judge had decided that Argentina could not continue paying the bondholders having accepted the restructuring of their share in the debt (and thus a serious haircut) without paying to the vulture funds the full nominal value of the original bonds they had bought on the cheap. The battle is relevant not only for Argentina but also for a whole series of countries (most of them developing countries and some belonging to the so-called Heavily Indebted Poor Countries) having issued bonds to be paid in or through the United States or some other Western countries and not containing one of the safeguard measures that are stipulated in more recent emissions, such as collective action clauses.

Although the battle seems a matter of international law in the strict sense, it is interesting to see how much private law is involved: *pari-passu* clauses, collective action clauses, choice of law clauses, clauses on place of payment, etc. But apart from that, there are also traditions of state intervention in favour of or precisely against debt relief. Digging into American history delivers interesting information. The predecessors of contemporary vulture funds were American bond speculators in the 1780s who massively bought depreciated government bonds, especially those used to pay the soldiers of the Continental Army that ought the War of Independence. One of the best known of these bond speculators was Abigail Adams, the wife of John Adams (who himself criticized 'stockjobbing' and argued that speculators wrecked the economy). When the government started to pay again interests on the face value of these bonds, the profits were enormous.

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On the other hand, they opposed the legislation of individual states, allowing the farmers to pay their own debts in 'cheap' paper money. Abolishing the relief legislation of the states became an important motive to impose on these states a new Constitution. And indeed, Article I, section 10 of the Constitution they obtained, dictates that '*No State shall emit Bills of Credit; make any Thing but gold and silver Coin a Tender in payment of Debts (nor) pass any Law impairing the Obligation of Contracts*'. As usual, one needs the historical background to understand the real original meaning of documents like this one (this background is described at length by Woody HOLTON, *Unruly Americans and the Origins of the Constitution*, 2007). On the other hand, James Madison proposed in the House of Representatives a plan to combat the vultures. According to his plan, the government paying war bonds would discriminate against speculators and force them to share the proceeds with the original owners of their bonds. This would have constituted an interesting legal device, a kind of claw-back right for the original bond owners who had to sell them much below the nominal value. Madison's proposal was, however, rejected by 36 against 13.[1] There is at least some continuity in the dominant American position.

Contemporary proposals to protect developing countries against their creditors risk not to discriminate between *malafide* and *bonafide* creditors. A wide immunity for sovereign debtors risks to harm *bonafide* creditors even more and, on the other hand, overprotects also corrupt sovereigns. There is, however, another age-old legal device that may help to distinguish among creditors: the *lex Anastasiana*, if understood broad enough. If understood in the sense that it allows a debtor to liberate itself by paying the bondholder the price he has paid plus the costs incurred, it would be a powerful rule to protect good faith debtors and creditors and only them. Although the rule has been abolished or restricted very much in many continental jurisdictions, it's not too late to revive it. Who will be the new Anastasius?

Other forms of speculation than the one mentioned above are, however, tolerated and practiced in our *Journal*: some authors speculate on how the Succession Regulation will operate, others on the internal harmonization of intellectual property, the loss of chances, the comparative advantage of leasing or buying a home, or the usefulness of behavioural science for consumer law, and still others practice our favourite exercise: speculate how a foreign case recently decided by Court would have been solved in one's own jurisdiction. We thus wish you a fruitful reading!

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1 W. HOLTON, 'Abigail Adams, Bond Speculator', *William and Mary Quarterly* 2007, pp. 821 ff.