



***NML v. Argentina* and the Ratable Payment
Interpretation of the *Pari Passu* Clause**

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I. INTRODUCTION

In 2001, Argentina defaulted on more than ninety-five billion dollars in external debt.¹ At the time, this constituted the largest sovereign default in history.² Argentina initiated two restructurings in 2005 and 2010, allowing holders of defaulted bonds to exchange their bonds for new debt at a rate of twenty-five to twenty-nine cents on the dollar, thus restructuring more than ninety-one percent of the foreign debt on which it had defaulted in 2001.³ Hedge funds specializing in trading distressed sovereign debt, such as Elliott Associates, purchased large amounts of Argentinian debt at a significant discount on the secondary market, and “held out”—they refused to join the restructurings and sought full collection of their debt.

In February 2012, Judge Griesa of the District Court for the Southern District of New York issued orders enjoining Argentina from making payments on its restructured 2005 and 2010 debt without making ratable payments⁴ to NML Capital, a distressed-debt hedge fund affiliated with Elliott Associates.⁵ In October 2012, a unanimous panel of the Second Circuit substantially affirmed the orders.⁶ Argentina was not to make full payment on its restructured debt without also making full payment to the holdout plaintiffs.

According to commentators, Judge Griesa’s orders constituted an attempt at reviving an infamous and supposedly long-dead doctrine: the “ratable payment”⁷

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1. CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 10, 12 (2009).
2. *Id.*
3. See *infra* notes 17-22 and accompanying text.
4. For clarification on the notion of ratable payment, see *infra* notes 34-36 and accompanying text.
5. Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Feb. 23, 2012) (granting specific performance and permanent injunctions).
6. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012).
7. See *infra* notes 54-56 and 62-66 and accompanying text.

interpretation of the *pari passu* clause.⁸ *Pari passu* is a latin phrase meaning “by equal step,”⁹ or “[p]roportionally; at an equal pace; without preference.”¹⁰ The “ratable payment” interpretation consists in reading the *pari passu* clause as requiring ratable payment of all creditors.¹¹ When the Second Circuit affirmed Judge Griesa’s orders, many commentators announced the end of sovereign debt restructuring as we know it.¹² Central to any sovereign debt restructuring is resumption of payment to restructured bondholders *only*, and the ratable payment interpretation of the *pari passu* clause makes this selective resumption of payment impossible. The decision, therefore, would seem to doom consensual sovereign debt restructuring.¹³

This Essay argues that such an alarmist interpretation of the Second Circuit’s decision is incorrect. The Second Circuit actually decided two very distinct questions: (1) Did Argentina breach the *pari passu* clause contained in the bonds? (2) Is a ratable payment injunction a proper *remedy* for this breach? The issue of breach should not be very controversial. Under any reading of the *pari passu* clause, Argentina breached it. The interesting question in this case is the remedial issue. It raises controversial and difficult questions concerning sovereign immunity and the power of a court to enjoin third-party financial intermediaries. *NML v. Argentina* is not about *pari passu*; it is, rather, about the remedial powers of a court in the sovereign debt context.

This Essay proceeds in five Parts. The first Part provides factual background. The second Part presents the ongoing proceedings, the intricacy of orders and appeals in the Southern District of New York and the Second Circuit. The third Part highlights reactions to the Second Circuit’s decision. The fourth Part is a genealogy of the debate surrounding *pari passu* clauses in the sovereign debt context. It explains how the Second Circuit’s decision was incorrectly framed. The fifth Part is a close reading of Judge Griesa’s orders and of the Second Circuit’s opinion. It demonstrates that the decision is quite narrow and that its significance for the sovereign debt restructuring world is probably limited to its facts.

The Second Circuit did not adopt the ratable payment interpretation of the *pari passu* clause; its decision does not constitute the end of sovereign debt restructuring as we know it.

II. THE FACTS

Beginning in 1994, Argentina issued bonds pursuant to a Fiscal Agency Agreement.¹⁴ In 2001, Argentina defaulted on these bonds¹⁵ and subsequently declared a “temporary moratorium” on its external debt.¹⁶

8. See *infra* notes 48-51 and accompanying text.

9. BLACK’S LAW DICTIONARY 1225 (9th ed. 2009).

10. *Id.*

11. See *infra* notes 54-56 and 62-66 and accompanying text.

12. See *infra* notes 40-45 and accompanying text.

13. See *infra* notes 75-77 and accompanying text.

14. Point Appendix (Fiscal Agency Agreement Between the Republic of Argentina and Bankers Trust Co.) at A-157, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d. Cir. 2012) (No. 12-105) [hereinafter Fiscal Agency Agreement], available at <http://www.shearman.com/files/upload/Fiscal-Agency-Agreement.pdf>.

15. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 250-51 (2d Cir. 2012).

16. *Id.* at 251.

In 2005, Argentina initiated a restructuring.¹⁷ It allowed holders of defaulted bonds to exchange their bonds for new debt at a rate of twenty-five to twenty-nine cents on the dollar.¹⁸ That same year, Argentina enacted Law 26,017 (the “Lock Law”), declaring that “[t]he national Executive Power may not, with respect to the bonds . . . reopen the swap process established in the [2005 exchange offer],” that “[t]he national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to the bonds,” and that “[t]he national Executive Power must . . . remove the bonds . . . from listing on all domestic and foreign securities markets and exchanges.”¹⁹ The 2005 exchange offer “closed in June 2005 with a seventy-six percent participation rate.”²⁰

In 2010, Argentina initiated a second restructuring of its debt, with an offer similar to the 2005 offer.²¹ After the two restructurings, Argentina had restructured more than ninety-one percent of the foreign debt on which it had defaulted in 2001.²²

Argentina has made all payments due on its 2005 and 2010 restructured debt.²³ It has made no payments to the holdout bondholders—the holders of defaulted bonds who did not participate in the 2005 and 2010 restructurings. Currently, Argentina has almost forty billion dollars in official reserve assets.²⁴

Holders of defaulted debt sued Argentina in the Southern District of New York.

III. THE PROCEEDINGS

On December 7, 2011, Judge Griesa of the Southern District of New York granted NML Capital, Ltd.—a holder of defaulted Argentinian bonds—summary judgment on its claim that the Republic of Argentina breached the *pari passu* clause contained in the bonds because Argentina “relegat[ed] NML’s bonds to a non-paying class.”²⁵ The *pari passu* clause in the bonds states:

The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and 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.²⁶

17. *Id.* at 252.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 253.

23. *Id.*

24. See Argentina: International Reserves/Foreign Currency Liquidity, INTERNATIONAL MONETARY FUND (May 2013), <http://www.imf.org/external/np/sta/ir/IRProcessWeb/data/arg/eng/curarg.pdf>.

25. Order, NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ. 6978(TPG) (S.D.N.Y. Dec. 7, 2011), 2011 WL 9522565, at *2.

26. Fiscal Agency Agreement, *supra* note 14, at A-157.

On February 23, 2012, the court fashioned an equitable remedy and enjoined Argentina from making payments to the exchange bondholders—holders of 2005 and 2010 exchange bonds—without making ratable payments to NML.²⁷ Additionally, the court ordered Argentina to give notice of the order to “all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds,”²⁸ and indicated that the order would bind them.²⁹ Finally, the court enjoined Argentina from “altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds.”³⁰ Argentina appealed.

On October 26, 2012, a unanimous panel of the Second Circuit substantially affirmed the orders.³¹ The court remanded for clarification of two issues: “how the injunctions’ payment formula is intended to function” and “how the injunctions apply to third parties such as intermediary banks.”³² On November 13, 2012, Argentina petitioned for panel rehearing and rehearing en banc of the October 26, 2012 decision. The United States filed an *amicus curiae* brief in support of rehearing.³³

On November 21, 2012, the district court issued an opinion clarifying the two above-mentioned issues and amending the February 23, 2012 order containing the injunctions.³⁴ Argentina was scheduled to make a payment of \$42 million on the exchange bonds on December 2, for a total of about \$3.14 billion for the month of December 2012.³⁵ Assuming Argentina intended to pay all of what it owed to the exchange bondholders on December 2, Argentina, according to the court’s order, had to concurrently pay NML and the other plaintiffs all of what it owed to them, that is, approximately \$1.33 billion. To ensure compliance, the order binds “the indenture trustee, the registered owners, and the clearing system, whoever they are.”³⁶ Given that these third parties will almost certainly comply with a court order, this means that Argentina will not be able to make payments to exchange bondholders without making payments to NML and the other holdout plaintiffs.

The Second Circuit, however, did not have “the strength to force the moment to its crisis.”³⁷ On November 28, 2012, it stayed the district court’s orders. Argentina was able to make payment to the exchange bondholders normally in December, 2012. Appeal of the November 21, 2012 order is pending in the Second Circuit.³⁸ Argentina’s petitions for panel rehearing and rehearing en banc of the October 26, 2012 decision were both denied.³⁹

27. Order at 3-4, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Feb. 23, 2012).

28. *Id.* at 4.

29. *Id.* at 4-5.

30. *Id.* at 5.

31. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 250 (2d Cir. 2012).

32. *Id.*

33. Brief for the United States of America as *Amicus Curiae* in Support of Argentina’s Petition for Panel Rehearing and Rehearing En Banc, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 28, 2012), 2012 WL 6777132.

34. *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012).

35. *Id.* at *3.

36. *Id.* at *5.

37. T.S. ELIOT, *COLLECTED POEMS, 1909-1962*, at 3-8 (Faber & Faber 1974) (1915).

38. The Second Circuit heard oral argument on February 27, 2013. Oral Argument Statement, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Feb. 1, 2013),

IV. REACTIONS TO THE SECOND CIRCUIT'S DECISION

For many, the October 26, 2012 decision and its immediate aftermath came as a shock. On July 25, 2012, after oral argument in the Second Circuit, Reuters financial blogger Felix Salmon posted a piece entitled “Why Argentina’s likely to beat Elliott Associates.”⁴⁰ On October 27, 2012, he blogged: “To the astonishment of almost everybody I know . . . , the Second Circuit sided with Elliott Associates and ruled unanimously against Argentina today. It’s a hugely important decision, which will certainly have unintended consequences for many years to come.”⁴¹

Anna Gelpern shared this surprise. On October 28, 2012, she wrote that the Second Circuit’s “decision in *NML et al. v. Argentina* has clearly shaken the sovereign universe. . . . [T]he decision may spell the End of the World for sovereign immunity [and] sovereign debt as we know it.”⁴²

On December 27, 2012, the Global Law Intelligence Unit of Allen & Overy, headed by Philip Wood, noted that the decision “could have disruptive implications for work-outs and the resolution of financial difficulties in the case of sovereign debtors.”⁴³

Mark Weidemaier wrote that “[t]he Second Circuit adopted a sweeping interpretation of the *pari passu* clause, essentially reading the clause as a promise by Argentina to forego the traditional restructuring techniques that sovereigns have used for nearly a century.”⁴⁴ He added that the decision “may have significant implications for future sovereign restructurings.”⁴⁵

The decision has also found its way to securities disclosure for sovereign debt.⁴⁶ For instance, in the Risk Factors section of a recent prospectus, Colombia

- available at http://www.shearman.com/videos/podcast/second_circuit_2013. For recent developments, see, for example, Felix Salmon, *Argentina’s Desperate Exchange Proposal*, REUTERS (Mar. 30, 2013), <http://blogs.reuters.com/felix-salmon/2013/03/30/argentinas-desperate-exchange-proposal>.
39. Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Mar. 26, 2013) (denying Argentina’s petition for rehearing *en banc*); Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Feb. 28, 2013) (denying Argentina’s petition for panel rehearing).
40. Felix Salmon, *Why Argentina’s Likely To Beat Elliott Associates*, REUTERS (July 25, 2012), <http://blogs.reuters.com/felix-salmon/2012/07/25/why-argentinas-likely-to-beat-elliott-associates>.
41. Felix Salmon, *Argentina’s Stunning Pari Passu Loss*, REUTERS (Oct. 27, 2012), <http://blogs.reuters.com/felix-salmon/2012/10/27/argentinas-stunning-pari-passu-loss>.
42. Anna Gelpern, *Known Unknowns in Pari Passu . . . and More to Come*, CREDIT SLIPS: A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Oct. 28, 2012, 5:05 AM), <http://www.creditslips.org/creditslips/2012/10/unknown-unknowns-in-pari-passu-and-more-to-come.html>.
43. Global Law Intelligence Unit, *The Pari Passu Clause and the Argentine Case*, ALLEN & OVERY (Dec. 27, 2012), <http://www.allenoverly.com/SiteCollectionDocuments/The%20pari%20passu%20clause%20and%20the%20Argentine%20case.pdf>.
44. W. Mark C. Weidemaier, *Sovereign Debt After NML v. Argentina*, 8 CAP. MKTS. L.J. 123, 125 (2013).
45. *Id.* While Weidemaier correctly distinguishes between the issue of breach and the issue of remedy, he makes the mistake of blending these two issues when he asserts that only the ratable payment interpretation of the *pari passu* clause can justify the injunction issued in this case. *Id.* at 126.
46. See Anna Gelpern, *Don’t Fix It, Call It a Risk Factor! (Updated)*, CREDIT SLIPS: A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (Feb. 21, 2013, 8:45 PM), <http://www.creditslips.org/creditslips/2013/02/dont-fix-it-call-it-a-risk-factor-.html>.

stated: “Recent federal court decisions in New York create uncertainty regarding the meaning of ranking provisions and could potentially reduce or hinder the ability of sovereign issuers to restructure their debt.”⁴⁷

Finally, in its *amicus curiae* brief in support of panel rehearing and rehearing *en banc*, the United States argued that the Second Circuit’s interpretation of the *pari passu* clause “threatens core U.S. policy regarding international debt restructuring” and that its effect could “extend well beyond Argentina.”⁴⁸ It went on to assert that the Second Circuit’s decision will unduly strengthen the legal position of holdout creditors in future sovereign debt restructurings and will “alte[r] and destabiliz[e] the landscape of sovereign debt restructuring.”⁴⁹ The United States argued that the Second Circuit’s interpretation “contradicts the settled market understanding of *pari passu* clauses.”⁵⁰ This “settled understanding,” in turn, is that “selective repayment does *not* violate the clause.”⁵¹ In other words, the Second Circuit’s interpretation would imply that selective repayment does violate the *pari passu* clause, that is, that the clause requires ratable payment.

A historical account of the debate surrounding the *pari passu* clause sheds light on these anxious reactions.

V. *PARI PASSU*: GENEALOGY OF A MISTAKE

The exact meaning of the *pari passu* clause in the sovereign debt context is, to say the least, unclear. As Lee Buchheit spiritedly noted in a 1991 article: “One sometimes encounters an inquisitive borrower who asks why this little breeze off the Tiber has ruffled through the pages of his loan agreement. This is when the fun starts.”⁵² The meaning of the clause is settled in the context of corporate loans. The clause serves as a protection against legal subordination.⁵³ This reading of the clause, however, does not make much sense in the sovereign debt context: *de facto*, the sovereign pays or does not.⁵⁴ If the notion of legal subordination has little meaning in the sovereign debt context, then the *pari passu* clause must be interpreted to protect against *de facto* subordination: this is the broad reading or “ratable payment” interpretation.⁵⁵ As Buchheit noted: “a goodly number of

47. *Id.*

48. Brief for the United States of America as *Amicus Curiae* in Support of The Republic of Argentina’s Petition for Panel Rehearing and Rehearing *En Banc* at 3, *NML Capital, Ltd. v. Republic of Argentina*, 12-105-cv(L) (2d Cir. Dec. 28, 2012), 2012 WL 6777132 at *3.

49. *Id.* at *4.

50. *Id.* at *1.

51. *Id.* at *2.

52. Lee C. Buchheit, *The Pari Passu Clause Sub Specie Aeternitatis*, 10 INT’L FIN. L. REV. 11, 11 (1991).

53. “Subordinate debt” is a “debt that is junior or inferior to other types or classes of debt.” BLACK’S LAW DICTIONARY 463 (9th ed. 2009). In other words, in the corporate context, the clause ensures that no creditor will be given “priority,” that no creditor has a legally enforceable “right to have a claim paid before other creditors of the same debtor receive payment.” *Id.* at 1313 (emphasis added).

54. Legal subordination has meaning only against the backdrop of bankruptcy law, or at least some rules governing debt collection. There is no bankruptcy regime for sovereigns and debt collection against sovereigns is generally thwarted by the doctrine of sovereign immunity. *See* Buchheit, *supra* note 52, at 11.

55. The clause would ensure that the debtor does not give priority in fact, through preferential payments, to certain creditors over others.

bankers (and more than a few sovereign borrowers) seem to believe that the *pari passu* covenant is there to compel the borrower to pay all of its external debt on a ratable basis.”⁵⁶ He rejected this interpretation on the basis of two arguments. First, this interpretation would render other standard clauses—like the mandatory prepayment clause, the sharing clause, and the negative pledge clause—useless.⁵⁷ Second, this interpretation would render useless drafting variations of the *pari passu* clause itself.⁵⁸

Buchheit, therefore, reverted to the legal-subordination interpretation: “if a sovereign borrower intends as a practical matter to discriminate among its creditors in terms of payments, the *pari passu* undertaking will at least prevent the sovereign from attempting to legitimize the discrimination.”⁵⁹ As he himself lightly conceded, “[i]n terms of protection for the lenders, this may strike some folks as rather thin”⁶⁰:

The apparent moral for the sovereign borrower is this: you can do pretty much whatever you want in discriminating among creditors (in terms of who gets paid and who does not), but do not try to justify your behavior by taking steps⁶¹ that purport to establish a legal basis for the discrimination.

This is the cynical way of phrasing what has come to be known as the narrow reading or “legal subordination” interpretation of the *pari passu* clause.

The legal dispute that “unleashed”⁶² the “ratable payment” interpretation of the *pari passu* clause unfolded in a Belgian court in 2000. Elliott Associates held defaulted debt from 1983 that was guaranteed by the Republic of Peru. Peru did not make payments to Elliott, but it made payments to the holders of its 1996 restructured debt. Elliott attempted to intercept funds going from Peru to the 1996 bondholders through Brussels. In *ex parte* proceedings, Elliott convinced a Belgian Court of Appeals that Peru’s payments to the 1996 bondholders and non-payments to Elliott violated the *pari passu* clause contained in the 1983 debt documents.⁶³ On September 26, 2000, the Belgian court issued an opinion stating that the *pari passu* clause “in effect provides that the debt must be repaid pro rata among all creditors.”⁶⁴ Elliott relied on the expert testimony of distinguished international-law scholar Andreas Lowenfeld, who used a vivid and bonhomous example:

I have no difficulty in understanding what the *pari passu* clause means: it means what it says—a given debt will rank equally with other debt of the borrower, whether that borrower is an individual, a company, or a sovereign state. A borrower from Tom, Dick, and Harry can’t say “I will pay Tom and Dick in full, and if there is anything left over I’ll pay

56. Buchheit, *supra* note 52, at 11-12.

57. *See id.* at 12 (explaining what each of these three clauses do).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 52 EMORY L.J. 869, 879 (2004).

63. *See* Buchheit & Pam, *supra* note 62, at 877 (citing Elliott Assocs., L.P., General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chamber, Sept. 26, 2000), at 2).

64. *Id.*

Harry.” If there is not enough money to go around, the borrower faced with a *pari passu* provision must pay all three of them on the same basis.⁶⁵

Peru, faced with the prospect of being unable to make payment on its restructured 1996 debt, shortly settled with Elliott for \$56.3 million.⁶⁶

This significant victory for Elliott led to “proliferation”⁶⁷ of *pari passu* litigation. Elliott and others attempted to replicate the same strategy in various fora⁶⁸—but were generally unsuccessful.⁶⁹ Until the proceedings discussed in this Essay, the *pari passu* clause had not been invoked since January 2004, when Judge Griesa ruled that the question of the proper interpretation of the *pari passu* clause was not ripe for review.⁷⁰

In parallel, a stark debate concerning the proper interpretation of the *pari passu* clause was unfolding in academic circles. In an important article published shortly after the Peru case, Mitu Gulati and Kenneth Klee criticized the Belgian court’s decision.⁷¹ Their article is important for two reasons. It is the first article that clearly articulates a major policy argument against the “ratable payment” interpretation of the *pari passu* clause.⁷² Their article makes another major contribution to the literature: it argues that the clause is a “boilerplate” clause.⁷³

First, Gulati and Klee make a strong policy argument against the “ratable payment” interpretation of the *pari passu* clause.⁷⁴ They claim that the ratable payment interpretation of the *pari passu* clause empowers holdout creditors and makes sovereign debt restructurings more difficult.⁷⁵ The argument is simple: if a creditor knows that the *pari passu* clause is going to force the sovereign debtor to pay him in full if the sovereign debtor wants to pay in full the restructured bondholders, he has no reason to accept a haircut. Second, Gulati and Klee argue that the *pari passu* clause is boilerplate. The Second Circuit emphasizes the “need for uniform interpretation of boilerplate provisions, irrespective of the intent of the parties, based on public policy interests in protecting the efficiency of financial markets.”⁷⁶ The policy argument and the boilerplate argument are thus connected: if one accepts that the *pari passu* clause is a boilerplate provision, the text itself becomes quite irrelevant. The decisive question is “the efficient working of capital markets.”⁷⁷ The boilerplate argument transforms a problem of

65. *Id.* at 878 (quoting Declaration of Andreas F. Lowenfeld at 11-12, Elliott Assocs., L.P. v. Banco de la Nacion, No. 96 Civ. 7916 (RWS), 2000 WL 1449862 (S.D.N.Y. Sept. 29, 2000)).

66. *See* G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 636 (2001).

67. Buchheit & Pam, *supra* note 62, at 880.

68. For a summary of the various disputes, *see id.* at 880-82, 920-22.

69. For a helpful account of how “[t]he tide began to turn,” *see* Jonathan I. Blackman & Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROBS. 47, 56-57 (2010).

70. *Id.* at 57 n.56 (citing Transcript of Conference Before Judge Thomas P. Griesa at 9, *Applestein v. Republic of Argentina*, No. 02 CV-1773 (TPG), 2010 U.S. Dist. LEXIS 14083 (S.D.N.Y. Jan. 15, 2004)).

71. *See* Gulati & Klee, *supra* note 66, at 638.

72. *Id.* at 641-43.

73. *Id.* at 647.

74. *Id.* at 641-43.

75. *Id.*

76. *Id.*; *see* *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039 (2d Cir. 1982).

77. *Sharon Steel*, 641 F.2d at 1048.

contract interpretation—a bond is a contract—into a global financial policy problem.

If the ratable payment interpretation is incorrect, what role does the *pari passu* clause play? Lee Buchheit and Jeremiah Pam answered this question in a 2004 article,⁷⁸ which they describe as the “story of the *pari passu* clause.”⁷⁹ The authors call their “hunt for *pari passu*” a “small exercise in legal paleontology.”⁸⁰ They maintain that the only role for the clause is to protect against legal subordination, not *de facto* subordination. Unable to rationally justify the existence of the clause, the authors causally explain it: the clause in sovereign debt instruments is a precaution against obscure laws providing for involuntary subordination in countries such as Spain and the Philippines.⁸¹

Thus, in 2004, the ratable payment interpretation of the *pari passu* clause seemed to be dead. Judge Griesa had held that the issue of the proper interpretation of the *pari passu* clause was not ripe for review and a scholarly “paleontological” piece had eventually explained the presence of the “boilerplate” clause in sovereign debt contracts. As Blackman and Mukhi noted in 2010: “the Elliott *pari passu* strategy seems to have receded from the forefront of creditor enforcement strategies.”⁸²

This genealogy of the fierce debate surrounding the *pari passu* clause explains how the Second Circuit’s decision was framed in the mind of most commentators. Judge Griesa’s orders that Argentina make “ratable payments” were seen as an incongruous attempt to revive the ratable payment interpretation. If Judge Griesa had indeed attempted to do so, and if the Second Circuit had condoned such attempt, the consequences would have been far-reaching. First, it would have prevented sovereign debtors from discriminating among private creditors. This discrimination problem has become rampant with the rise of bond debt.⁸³ Second, it would arguably have made sovereign debt restructurings more difficult.⁸⁴ This is because the very notion of non-unanimous debt restructuring presupposes that the sovereign debtor will not voluntarily pay the holdout creditors, but will voluntarily pay the restructured creditors.⁸⁵

A close reading of Judge Griesa’s orders and the Second Circuit’s opinion shows that they did not revive the ratable payment interpretation, as will be shown in the next Part of this Essay.

VI. A NARROW DECISION

In granting summary judgment to NML, Judge Griesa stated that “the Republic is required under [the *pari passu* clause] at all times to rank its payment obligations pursuant to NML’s Bonds at least equally with all the Republic’s [External Indebtedness].”⁸⁶ In this order, in which Judge Griesa ruled that

78. See Buchheit & Pam, *supra* note 62, at 870.

79. *Id.* at 871.

80. *Id.* at 891.

81. *Id.* at 914-17.

82. Blackman & Mukhi, *supra* note 69, at 57.

83. See HAL S. SCOTT & ANNA GELPERN, INTERNATIONAL FINANCE: TRANSACTIONS, POLICY, AND REGULATION 1219-20 (19th ed. 2012).

84. See *supra* note 75 and accompanying text.

85. SCOTT & GELPERN, *supra* note 83, at 1220-23.

86. Order, NML Capital, Ltd. v. Republic of Argentina, No. 08 Civ. 6978(TPG) (S.D.N.Y. Dec. 7, 2011), 2011 WL 9522565, at *2.

Argentina breached the *pari passu* clause, the notion of ratable payments did not even appear. What Judge Griesa held was that Argentina's systematic disregard of its obligations and policy of discrimination against the holdouts was a breach of the *pari passu* clause. It is only in the February 2012 order *on remedy* that the notion of ratable payment appeared.⁸⁷

On appeal, the Second Circuit stated that it had "little difficulty concluding that Argentina breached the *Pari Passu* Clause."⁸⁸ It reasoned that

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.⁸⁹

The Second Circuit did not rely on the notion of ratable payment when it held that Argentina breached the *pari passu* clause. It was the "combination" of Argentina's discriminatory actions and statements against the holdouts that constituted the breach.

The Second Circuit did not clearly articulate a test to determine whether Argentina breached the *pari passu* clause because under even the narrowest interpretation of the clause, Argentina was in breach. Indeed, the court held Argentina in breach by Argentina's own standard: "Thus, even under Argentina's interpretation of the [*pari passu* clause] as preventing only 'legal subordination' of the FAA Bonds to others, the Republic breached the Provision."⁹⁰ Yet, the Second Circuit's imprecision has fueled speculation. For instance, when it addressed the proper construction of the *pari passu* clause, the Second Circuit stated that the clause "prohibits Argentina, as bond payor, from paying on other bonds without paying on the FAA Bonds."⁹¹ While the word "ratable" does not appear, this statement could still be interpreted as implying that failure to pay ratably would be a breach of the clause. Yet, in the footnote that concludes the same paragraph, the Second Circuit clearly stated: "NML does not interpret . . . the *pari passu* clause as requiring 'ratable' payments—it proposed ratable payments as a *remedy* for Argentina's breach of the Provision."⁹² This is the crucial distinction that most commentators fail to appreciate: the distinction between the issue of breach and the issue of remedy. This distinction did not escape Judge Griesa, who, on remand, cited this footnote to support the following statement: "Of course, what is being done here is not literally to carry out the *Pari Passu* Clause, as would be done in a normal commercial situation, but to provide a remedy for Argentina's violation of the Clause."⁹³

In this case, the issue of breach is not complex. Argentina breached the *pari passu* clause under any reading of the clause. The remedial issue in this case,

87. Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Feb. 23, 2012).

88. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 260 (2d Cir. 2012).

89. *Id.*

90. *Id.*

91. *Id.* at 259 (emphasis omitted).

92. *Id.* at 259 n.10 (internal quotation marks omitted).

93. *NML Capital, Ltd. v. Republic of Argentina*, No. 1:08-cv-06978-TPG, 2012 WL 5895786, at *3 (S.D.N.Y. Nov. 21, 2012).

however, is complex. It involves difficult questions concerning the scope of the Foreign Sovereign Immunities Act and the equitable power of courts to bind third-party intermediaries for purposes of enforcement. While these issues are fascinating, their resolution is not going to transform the sovereign debt restructuring landscape.⁹⁴ Remedial issues are highly equitable and intensely fact-based.⁹⁵

The Second Circuit explicitly addressed the argument that the decision would “have the practical effect of enabling a single creditor to thwart the implementation of an internationally supported restructuring plan.”⁹⁶ It argued that this policy argument was preempted by the apparition of collective action clauses. This is incorrect, for two reasons. First, important amounts of external sovereign debt do not have collective actions clauses. Second, bonds are issued in series, and the collective action clauses have no effect at the inter-series level (only rare “aggregation clauses” do).⁹⁷ The Second Circuit should simply have said that the policy argument that the ratable payment interpretation of the *pari passu* clause would have undesirable consequences on sovereign debt restructurings was irrelevant, because this was really not a case about the interpretation of *pari passu*.

VII. CONCLUSION

The confusion surrounding the Second Circuit’s decision originates with the framing of the problem as one involving competing interpretations of the *pari passu* clause and the fear of witnessing the resurrection of the ratable payment interpretation. Gulati and Klee established the now-dominant approach to this issue. First, the *pari passu* clause is boilerplate, so it must be interpreted with a strong emphasis on policy and the efficiency of the financial markets. Second, the ratable payment interpretation of the clause would have catastrophic effects on the sovereign debt restructuring process.⁹⁸ Is this approach correct?

Pari passu clauses are not boilerplate clauses. “Boilerplate” means “[r]eady-made or all-purpose language that will fit in a variety of documents.”⁹⁹ *Pari passu* clauses are drafted in very different ways. Ironically, it was one of the original arguments of the opponents of the ratable payment interpretation that this

94. Felix Salmon eventually came to the conclusion that the Second Circuit’s decision is not so important after all, because it has limited precedential value. “[R]emedies aren’t precedents in the same way that rulings are.” See Felix Salmon, *Don’t Worry About an Elliott vs Argentina Precedent*, REUTERS (Jan. 11, 2013), <http://blogs.reuters.com/felix-salmon/2013/01/11/dont-worry-about-an-elliott-vs-argentina-precedent>. Again, the real reason why the Second Circuit’s decision will not fundamentally alter the sovereign debt landscape is that it is fundamentally not about *pari passu*.

95. See *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 261 (2d Cir. 2012) (“The performance required by a decree need not always be identical with that promised in the contract. The decree may be fashioned in such terms as justice required.” (citing *Greenspahn v. Joseph E. Seagram & Sons, Inc.*, 186 F.2d 616, 620 (2d Cir.1951))).

96. *Id.* at 263 (internal quotation mark omitted).

97. See Anna Gelpert, *Sovereign Restructuring After NML v. Argentina: CACs Don’t Make Pari Passu Away*, CREDIT SLIPS: A DISCUSSION ON CREDIT, FINANCE, AND BANKRUPTCY (May 3, 2012, 10:38 AM), <http://www.creditslips.org/creditslips/2012/05/sovereign-restructuring-after-nml-v-argentina-cacs-dont-make-pari-passu-go-away.html>.

98. See *supra* notes 71-77 and accompanying text.

99. BLACK’S LAW DICTIONARY 198 (9th ed. 2009).

interpretation would render superfluous language in some *pari passu* clauses.¹⁰⁰ One should not talk of “the *pari passu* clause.” There is no *pari passu* clause; only *pari passu* clauses. They should be read closely and discussed according to their own terms.¹⁰¹

The policy question is fundamental and difficult. Empowering holdouts may actually increase the efficiency of the sovereign debt restructuring process and of the sovereign debt market.¹⁰² This issue, however, is beyond the scope of this Essay and requires separate treatment.

100. See Buchheit, *supra* note 52, at 12.

101. To the extent the Second Circuit interprets the *pari passu* clause in the case discussed in this Essay, it does pay close attention to its language: it actually faults Argentina’s interpretation for failing to account for the difference in effects between the two sentences of the clause. See *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 258 (2d Cir. 2012).

102. For a balanced assessment, see William W. Bratton, *Pari Passu and a Distressed Sovereign’s Rational Choices*, 53 EMORY L.J. 823 (2004).