

# Contractual Landmines

Robert E. Scott,<sup>†</sup> Stephen J. Choi<sup>††</sup> & Mitu Gulati<sup>†††</sup>

*Conventional wisdom is that the standardized boilerplate terms used in large commercial markets survive unchanged because they are an optimal solution to the contracting problems facing parties in these markets. As Smith and Warner explained, “harmful heuristics, like harmful mutations, will die out.” But an examination of a sample of current sovereign bond contracts reveals numerous instances of harmful landmines—some are deliberate changes to standard language that increase a creditor’s nonpayment risk, others are blatant drafting errors, and yet others are inapt terms that have been carelessly imported from corporate transactions. Moreover, these landmines differ from each other in important respects: deliberate changes to the standard form reflect strategic lawyering on behalf of sovereign clients, while errors that only benefit subsequent activists reflect haste in adapting precedents to new transactions. Using both quantitative data and interviews with market participants, we find that the conventional view fails to recognize the unique and distorting role that lawyers play in the drafting of standard form contracts. Systematic asymmetries in the market for the lawyers who negotiate and draft these contracts explain why real-world contracts depart from the efficient contract paradigm.*

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<sup>†</sup> Alfred McCormack Professor Emeritus of Law at Columbia Law School.

<sup>††</sup> Bernard Petrie Professor of Law and Business and Director, Pollack Center at the NYU School of Law.

<sup>†††</sup> Perre Bowen Professor of Law and John V. Ray Research Professor of Law at the University of Virginia School of Law. Thanks to thirty-one sovereign debt experts for generously sharing their insights with us. Having promised them anonymity and to not attribute specific comments to them, we do not thank them by name. We are also grateful for comments on earlier drafts of this Article from Jennifer Arlen, Patrick Bolton, Mike Gilbert, Ron Gilson, Kevin Davis, Barry Friedman, Talia Gilles, Clay Gillette, Victor Goldberg, Rich Hynes, Marcel Kahan, Kim Krawiec, Paul Mahoney, Geoff Miller, Julian Nyarko, Larry Solum, Paul Stephan, Mike Simkovic, George Triantis, Eric Talley, and participants at faculty workshops at Yale, Stanford, Columbia, Virginia, Florida and New York University Law Schools.

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## I. Introduction

Commercial contracts used in sovereign bond and other large debt markets contain boilerplate terms that are standardized and slow to change in response to changes in the legal or economic environment.<sup>1</sup> Resistance to change reflects the conventional view that standardized terms take their current form and have survived because they represent the optimal contractual solution to the contracting problems that parties face in that market.<sup>2</sup> To be sure, commercial parties are sometimes able to coordinate market-wide changes in these boilerplate terms, but these revisions occur slowly and only after considerable delay.<sup>3</sup> Given this resistance to purposeful, coordinated revisions, it is puzzling that we also observe that changes in boilerplate terms occur regularly, are apparently uncoordinated, and render previously clear contractual language ambiguous and susceptible to an interpretation that clearly favors the interests of only one of the contracting parties. These uncoordinated additions to the standard form create linguistic “landmines”—embedded language that lies dormant, sometimes for many years, until payment is resisted, default is declared, and the harmful mutation is used as leverage in a subsequent dispute.<sup>4</sup>

In theory, a landmine can benefit either party to the contract, but the risk that a landmine will benefit debtors is acute in liquid markets, like the markets for corporate and sovereign bonds. In these markets, the

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1. See Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 715 (1997); Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1, 19-21 (2017) [hereinafter, Choi, Gulati & Scott, *The Black Hole Problem*]; MITU GULATI & ROBERT E. SCOTT, *THE 3 ½ MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 24-30 (2012); Robert E. Scott, Stephen J. Choi & Mitu Gulati, *Revising Boilerplate: A Comparison of Private and Public Company Transactions*, 2020 WIS. L. REV. 629, 629.

2. Clifford W. Smith & Jerald B. Warner, *On Financial Contracting*, 7 J. FIN. ECON. 117, 123 (1979). This is sometimes referred to as the efficient contracting paradigm: if a standard form contract exists, it must be due to survivorship bias (only the efficient forms survive competition). See Bruce R. Lyons, *Empirical Relevance of Efficient Contract Theory: Inter-Firm Contracts*, 12 OXFORD REV. ECON. POL’Y 27, 27 (1996) (calling for, and conducting, an empirical test of the optimal/efficient-contract paradigm). As some have pointed out, versions of the paradigm underlie assumptions that often drive how courts tackle cases involving contracts among commercial parties with problematic end results. See Elisabeth de Fontenay, *Complete Contracts in Finance*, 2020 WIS. L. REV. 533, 547-48.

3. Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 13-16 (noting that coordination on market-wide change takes multiple years following a legal shock).

4. In designating a mutation to the standard form as a harmful landmine we rely on a single criterion: has the aberrant language been used by at least one party in a subsequent negotiation as leverage in their demand for a pricing concession? These landmines have been part of the discussions over sovereign restructurings in multiple recent debt crises, including Greece, Cyprus, Venezuela, Ukraine, Zambia, Sri Lanka, and Russia. See, e.g., Lee C. Buchheit & Mitu Gulati, *How to Restructure Greek Debt* 1 (Duke L., Working Paper No. 47, 2010), [https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2959&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2959&context=faculty_scholarship) [https://perma.cc/A2MN-JW5X]; Lee C. Buchheit & Mitu Gulati, *Walking Back From Cyprus* 1 (Mar. 18, 2013) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2235359](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235359) [https://perma.cc/RZU8-FM9C]; Lee C. Buchheit & Mitu Gulati, *How to Restructure Venezuelan Debt*, (Duke L. Sch. Pub. L. & Legal Theory Series, Working Paper No. 2017-52, 2017), <https://ssrn.com/abstract=3006680> [https://perma.cc/J8SJ-XMW4]. We discuss three exemplars of these landmines in Part II *infra* and the entire set are described in detail in the Appendix.

debtors' lawyers are primarily responsible for producing the contract language. When drafting the contract's terms, these lawyers are motivated to advance the interests of their clients by shifting some of the default risk from the debtor to the creditors who purchase the bonds. At the same time, the investment bankers, who nominally represent the interests of the largely anonymous creditors, are primarily interested in marketing the bonds and not in evaluating the risks of a default that may come, if at all, in the distant future.<sup>5</sup> Moreover, the stickiness of the standard language in boilerplate contracts increases the likelihood that once a landmine is introduced into the pool of boilerplate terms in the market it will persist and eventually become part of a new standard form.<sup>6</sup> By simply opening a range of new interpretive possibilities, often years after a contract is executed, these modifications of standard language expose the contracting parties to unexpected litigation risk.<sup>7</sup>

The most salient example of the cost of dangerously ambiguous language in standard form boilerplate is the *pari passu* clause found in virtually all sovereign bond contracts.<sup>8</sup> The *pari passu* clause had been viewed indulgently by practitioners for many years. Although practitioners did not know the origins of the clause, their common understanding was that *pari passu* was an inconsequential clause in the agreement simply specifying how much the creditor would be repaid. Drafters speculated that the clause may have been imported into sovereign bonds as a result of having been

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5. Choi, Gulati, & Scott, *The Black Hole Problem*, *supra* note 1, at 54.

6. Commercial attorneys rarely draft contract clauses from scratch. Contracts are drafted based on prior contract language. Few problems arise when a commercial party uses prior language to draft the same type of contract as the precedents they are relying on. This standardization of commonly used language allows contracts to reflect the intent of contracting parties at lower cost than if each contract were drafted *ab initio*. To be sure, shocks may occur—such as a court interpreting a particular term contrary to the intent of the contracting parties—that require a change in the contract language. Unfortunately, individual drafting attorneys are unlikely to respond to the shock by revising standard terms unless they can coordinate with others. This creates a collective action problem: contracting parties worry that any change they make unilaterally will be viewed negatively by the market if the rest of the market has not changed the boilerplate language. *See, e.g.*, Alan Schwartz & Robert E. Scott, *Obsolescence: The Intractable Production Problem in Contract Law*, 121 COLUM. L. REV. 1659, 1702 (2021) (discussing why contracts continue to use obsolete boilerplate terms).

7. Landmines are formulations that contracting parties would not typically agree to voluntarily and that can have both distributional and social welfare consequences. In the sovereign context, some landmines favor the sovereign and some favor activist creditors. For any given bond contract, the overall balance between sovereign and activists will vary, resulting in different distributional outcomes in a restructuring that were not bargained for *ex ante*. In every one of the bonds in our data set there are both pro-sovereign and pro-activist landmines in the same contract. This results in disputes that pit landmines against each other whenever the sovereign loan is in distress. These enhanced litigation costs increase expected contracting costs without any corresponding benefit. Once a country nears default and seeks a restructuring, the search to find landmines, the disputes over the meaning of those landmines, and the resulting delay that impedes successful negotiations over restructuring will all negatively affect social welfare (while also having distributional consequences).

8. *See* GULATI & SCOTT, *supra* note 1, at 119; Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 6; Lachlan Burn, *Pari Passu Clauses: English Law After NML v. Argentina*, 9 CAP. MKTS L.J. 2, 2 (2014); Lee C. Buchheit & Jeremiah Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 869 (2004).

used as a precedent in secured sovereign loans and corporate bonds.<sup>9</sup> The meaning of the clause was unclear in the sovereign bond context, but it was seen as harmless and not worth the costs of deletion once it had become part of the standard form.

Then, in 2011, activist creditors successfully held out from a debt restructuring offer by Argentina after asserting a novel—and widely condemned—interpretation of the clause.<sup>10</sup> Relying on an expert opinion from a law professor and an earlier court opinion from a commercial court in Brussels,<sup>11</sup> the holdout creditors successfully claimed that the clause was an agreement among the creditors that would be breached if some but not all of the creditors accepted the debtor's settlement offer.<sup>12</sup> The creditors who objected thus could enjoin the consenting creditors from receiving any payment under the restructuring agreement. The ambiguous language in the clause thus permitted opportunistic creditors to force a multi-billion-dollar settlement in their favor, even though the aberrant interpretation was wholly inconsistent with current market practice and understanding.<sup>13</sup>

In this Article, we explore the origins of landmines, like the *pari passu* clause, that occur in commercial boilerplate contracts. Our subject is the world of sovereign bond contracts, where all parties are represented by highly compensated counsel. The stakes are high: debt obligations are issued for billions of dollars. There is also a premium on the tradability and liquidity of these assets, which means that contract terms cannot be unduly idiosyncratic. New contracts are drafted using precedents from prior contracts, and deviations from the market standard are resisted.<sup>14</sup>

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9. This speculation ignores the long history of the *pari passu* clause and its apparent utility in the era of gunboat diplomacy. See GULATI & SCOTT, *supra* note 1, at 134-38; Benjamin Chabot & Mitu Gulati, *Santa Anna and His Black Eagle: The Origins of Pari Passu?*, 9 CAP. MKTS. L.J. 216, 235-36 (2014). For an alternate history that traces the clause to the London Stock Exchange in the eighteenth century, see Marc Flandreau, *Pari Passu Lost and Found: The Origins of Sovereign Bankruptcy 1798-1873*, 47 (Inst. for New Econ. Thinking, Working Paper No. 186, 2022), [https://www.ineteconomics.org/uploads/papers/WP\\_186-Flandreau-Pari-Passu-Final.pdf](https://www.ineteconomics.org/uploads/papers/WP_186-Flandreau-Pari-Passu-Final.pdf) [https://perma.cc/7DR6-TK2W].

10. Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 6.

11. Elliott Assocs., L.P., General Docket No. 2000/QR/92, ¶ 8 (Court of Appeal of Brussels, 8th Chamber, Sept. 26, 2000).

12. Holdouts from Argentina's efforts to restructure its debt claimed that the *pari passu* clause, which provided that "[t]he bonds rank, and will rank, *pari passu* in right of payment with all of the Issuer's present and future unsubordinated External Indebtedness," was an inter-creditor agreement that entitled a creditor who was not paid its pro rata share to an injunction against other creditors who were paid that share. Bonds worth many billions of dollars were sold with the litigated language unchanged for years after the first challenge by the holdouts was mounted. See Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 27.

13. For discussions of that inconsistency with market understandings and practice, see, e.g., Charles G. Berry, *'Pari Passu' Means What Now?*, N.Y. L.J., Mar. 6, 2006, at 1; Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 871, 874-76 (2004); Rodrigo Olivares-Caminal, *To Rank Pari Passu or Not to Rank Pari Passu: That Is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga*, 15 L. & BUS. REV. AMS. 745, 769 (2009).

14. For a discussion of the variations that do arise and whether they are random mutations rather than the product of rational design, see Stephen J. Choi, Mitu Gulati & Robert E.

Notwithstanding the stability of the boilerplate terms in these markets, it is not surprising that over time occasional errors may appear in contracts that rely on standardized language. Drafting attorneys sometimes will tailor the language of a standard form contract to fit the circumstances of the specific contracting parties, providing the opportunity for linguistic irregularities to make their way into the contract. But it is shocking when, as we have discovered, novel contract terms that create a significant litigation risk for one of the parties are numerous and ubiquitous. In compiling a unique data set examining a random sample of sovereign bond contracts, we document seventeen examples of aberrant language that transforms the meaning of previously clear terms: some examples have the effect of converting a clause that had functioned as a clear, bright-line rule into a vague standard that offers opportunities for one of the parties to behave opportunistically; others are errors in drafting that alter the meaning of formerly clear clauses.<sup>15</sup> These drafting irregularities often are repeated in multiple contracts.

These contractual landmines are typically not discovered until much later when the debtor faces the prospect of a default. A salient example of the shift in perspective that a default provides occurred recently with Russia's sovereign bonds in the wake of the Ukrainian invasion in early 2022. Russian bonds at the time were trading at or above par—Russia was a strong credit. But the invasion and resulting Western sanctions, including constraints on Russia's ability to make payments to foreign creditors, meant that Russia was sure to default. Thus, there now was reason to focus on the contract terms in the Russian bonds that had previously been given little attention. To the shock of many, more than a half dozen landmines were discovered in the Russian bond contracts—many of which had the potential to damage the interests of either the creditors or the debtor.<sup>16</sup>

The Article proceeds as follows. In Part II, we present three exemplars that illustrate a confounding fact: the landmines are not all the same type. First, a large number appear to be deliberate changes to well-understood standard terms that effectively give new leverage to sovereigns should they attempt to restructure their debt. Second, juxtaposed against the seemingly calculated addition of vague language are a number of

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Scott, *Variation in Boilerplate: Rational Design or Random Mutation?*, 20 AM. L & ECON. REV. 1, 1-4 (2018). For a discussion of how different interpretations of the *pari passu* clause shape creditor incentives, see Marcel Kahan & Shmuel Leshem, *Sovereign Debt and Moral Hazard: The Role of Collective Action and Contractual Uncertainty*, 65 J. L & ECON. 311 (2022).

15. See *infra* Part II.

16. See Mark Weidemaier & Mitu Gulati, *Subversive Drafting or Goofs*, CLAUSES AND CONTROVERSIES, at 3:42, 32:22 (Mar. 14, 2022), [https://podcasts.apple.com/us/podcast/ep-65-ft-mitu-mark/id1528208049?i=1000553946109\[https://perma.cc/XS3Z-Z7PA\]](https://podcasts.apple.com/us/podcast/ep-65-ft-mitu-mark/id1528208049?i=1000553946109[https://perma.cc/XS3Z-Z7PA]) (discussing the alternative payments clause and *pari passu* clause in Russian bond contracts); Mark Weidemaier & Mitu Gulati, *Russia's Perplexing Sovereign Bonds*, JUSTMONEY.ORG (Apr. 22, 2022), <https://just-money.org/mark-weidemaier-and-mitu-gulati-russias-perplexing-sovereign-bonds> [https://perma.cc/T23B-7LB]; Mitu Gulati, *Putin's Booby Trapped Bonds*, FIN. TIMES (Apr. 28, 2022), <https://www.ft.com/content/a0b41150-78aa-490d-a3eb-4e8bd7bcf155> [https://perma.cc/79LJ-52JT].

apparently inadvertent drafting errors (e.g., introducing conflict between two clauses, failing to properly define critical terms). These latter changes to the standard form increase the nonpayment risk for the majority of bondholders by providing opportunities for activist creditors to oppose a restructuring proposal. Finally, a third group are terms and concepts that have been borrowed either from corporate bond transactions or from a prior generation of sovereign deals when the modern sovereign bond contract was created in the early 1990s.<sup>17</sup> Here, the failure to recognize the critical differences in authority between corporate debtors and sovereigns creates unintended litigation risk. Given the variation in these exemplars, we explore two questions: first, are these different types of landmines prevalent in large numbers in sovereign bond contracting; second, what explains their differences? Answering these questions requires an investigation of the relationship between contract design and market structure.

To begin to answer those questions, we report in Part III on a series of interviews with thirty-one expert lawyers who have practiced for many decades in the field. We invited each respondent to confirm our designation of the various irregularities as harmful mutations and asked: where do these problematic clauses come from, and why are these problems not corrected? While the respondents' answers to our questions were largely consistent, they did little to reveal a coherent story that we could test empirically. Claims by our respondents that many of the changes to the standard form are carefully negotiated seemed to conflict with claims that the market window for issuing bonds tends to be short, and there is little time to negotiate over language. Recognition on the part of some respondents that many of the landmines are inexplicable mistakes seemed inconsistent with statements by other respondents that the contract-production market works well and that incentives are aligned. Statements that many lawyers drafting bond contracts are inexperienced were juxtaposed against confident assertions that the respondents themselves understand the downstream risks of linguistic irregularities.

We turn in Part IV to the theory of incomplete contracts to better frame the problem. Contracts among sophisticated commercial parties are assumed to have a high degree of completeness,<sup>18</sup> but theory also recognizes that a fully specified state-contingent contract is an idealization. Contracts will necessarily fail to specify a solution to a contracting problem in every state of the world that might materialize. There are several reasons to expect some incompleteness in sovereign debt contracts. For one, the

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17. The sovereign bond market has had multiple incarnations. In the post-World War II era, there was initially a thin market in the period from 1960-1990 where the only issuers tended to be highly rated sovereigns doing small issuances. Then, after the Latin American debt crisis of the 1980s, syndicated loans were converted to "Brady" bonds and this set the basis for the modern bond market. For a description of the history, see Michael Bradley, Elisabeth de Fontenay, Irving de Lira Salvatierra & Mitu Gulati, *Pricing Sovereign Debt: Foreign Versus Local Parameters*, 24 EUR. FIN. MGT. 261, 265 (2018).

18. De Fontenay, *supra* note 2, at 535.

parties may be engaged in optimal contract design: choosing to avoid higher upfront bargaining costs and instead inviting a subsequent court to resolve any resulting ambiguities. Parties, for example, may rationally negotiate to change a strict repayment obligation into a vague standard in order to avoid more costly efforts to specify *ex ante* all exceptions to the debtor's duty to repay.<sup>19</sup> Alternatively, the parties may be satisficing—recognizing that expending additional negotiating costs to write better contracts would cause them to miss a more profitable opportunity.<sup>20</sup> Finally, contracts will be incomplete when agency costs—the misalignment of interests between drafting lawyers and their clients—leads to hyperbolic discounting of future risks in order to capture present returns.<sup>21</sup>

Initially, these theories of incompleteness appear to be in tension with each other. If drafters are motivated to satisfice or are plagued by agency costs, they would not make deliberate changes if they could avoid it: we would not expect to see purposeful substitution of vague language to mediate upfront conflict. Instead, we would assume that lazy attorneys would devote limited effort in drafting contract terms, leading to an increased possibility of harmful error. In contrast, if attorneys instead act purposefully in designing optimally vague contracts, we should not expect to see multiple error-driven landmines in the same contracts. The puzzle we address is what explains a market where we see both deliberate and inadvertent landmines often together in the same bond contract.

In Part V, we attempt to reconcile the tension among the possible theories of incompleteness and construct a coherent explanation for the different types of landmines that the dataset revealed. A modified version of the agency cost story explains the data by relying on an empirical claim, derived from the interviews, that there is a bifurcated market for sovereign debt lawyers consisting of two separate populations with different levels of experience and different motivations. In the first cohort are the “gurus” who are experienced both in issuing and restructuring sovereign debt, who represent their sovereign and banker clients faithfully, and negotiate modifications to standard terms that their clients request.<sup>22</sup> The “guru” group is small relative to the second cohort, the inexperienced lawyers (the “novices”), whose practice experience in the sovereign area is limited to issuing

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19. For discussion of the tradeoffs between front-end and back-end costs, see Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 835 (2006).

20. For discussion of satisficing as a reason for incompleteness, see Patrick Bolton & Antoine Faure-Grimaud, *Satisficing Contracts*, 77 REV. ECON. STUD. 937, 938 (2010).

21. For discussion of the agency costs in sovereign bond contracting, see GULATI & SCOTT, *supra* note 1, at 139; Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 59-66.

22. Despite the presence of gurus on both the sovereign and investor side of a sovereign bond deal, we posit that gurus only utilize their expertise effectively on behalf of the sovereign. While both sovereigns and investment banks want to close deals rapidly, the focus of underwriters is primarily to close the deal while sovereigns balance closing the deal with the prospect of future restructurings. This asymmetry gives gurus on the sovereign side greater leeway to use their expertise to favor the sovereign.



the bonds and who do not bargain for any purposeful modifications of standard language. These less experienced lawyers, while not meaning to change substance, may introduce random errors through inexperience and haste.<sup>23</sup> The separation between the two cohorts undergirds the prediction that some landmines result from the efforts of gurus, who anticipate the risks of a downstream default, to provide client service, while other landmines—for example, careless importation of the wrong language from inapt precedents—result when inexperienced lawyers, unmindful of the downstream risks of litigation, are responsible for drafting the initial contract documents. Because the opportunities to assist in restructuring sovereign debt are limited and typically provided only to the most experienced sovereign debt attorneys, the number of gurus in the market at any given point in time is likewise limited.<sup>24</sup> This bifurcated market hypothesis is consistent with the evidence from the landmine dataset as well as with the assertions made by our interview respondents.<sup>25</sup>

The bifurcated market hypothesis provides an explanation for the origins of the three landmine exemplars that we have identified. First, the calculated changes to well-understood standard terms made by gurus, that we call “subversive accretions,” serve to provide leverage to sovereigns if they ever attempt to restructure the debt.<sup>26</sup> These subversive accretions are not necessarily opportunistic efforts to seek advantage. Vagueness may be

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23. When we characterize these lawyers as “less experienced” or “novices,” we mean to apply these labels only to the lawyers’ work in the context of sovereign debt. The partners on every deal for a sovereign are likely to be senior and experienced as a general matter (usually, with corporate deals).

24. The separation between gurus and novices is primarily a function of the nature of their practice experience. The interview respondents who we characterize as gurus practice at both ends of the sovereign debt market—restructuring distressed debt as well as issuing new bonds. Effectively, they have litigation experience as well as transactional expertise while novices only practice on the transactional end.

25. The empirical claim that the market for lawyers is divided between gurus and novices undergirds a coherent origin story. The landmines that gurus originate are a function of rational design. Gurus may find it cost effective to forgo lengthy disagreements over specifying exceptions to, say, an immunity waiver and instead substitute a vague standard that delegates that function to a later court. Moreover, gurus are experts in the contract terms and thus are less constrained by the cost of time when adding these purposefully vague clauses than are novices whose learning costs are high. Gurus are also less susceptible to agency problems; their longer-term interest in participating in restructuring arrangements motivates them to be more responsive to clients’ concerns. On the other side of the market divide, novices satisfice: they are too constrained by the timing considerations of issuing bonds in a liquid market to bargain for shifting costs to the back end. Since novices only represent clients at the issuance stage, there is a higher probability that agency costs impair their contracts. They rarely change terms purposefully, but their contracts will have a higher risk of careless errors and thoughtless importation of terms from other documents as they race to “fill in the blanks in the contract.” The satisficing story supports this prediction by introducing a time constraint that further explains the presence of sloppy errors. We discuss this origin story and its implications in Part V.

26. We have identified at least eight subversive accretion landmines: Manifest Error, Sovereign Immunity by Law, Fiscal Laws, *Pari Passu* Mandatory Law, Sovereign Immunity Exclusions, Governing Law Authorization-Execution, Prescription, and Jurisdiction. We discuss the Manifest Error landmine in Section II.A and Section V.A. We discuss the Sovereign Immunity by Law landmine in Section V.A. We describe all the subversive accretion landmines we identify in the Appendix.

introduced when there is a negotiating impasse between the investors' interest in holding the sovereign to strict repayment terms and the sovereign's interest in carving out reasonable exceptions to those duties.<sup>27</sup> Second, are errors that disfavor the sovereign and that arise from novice attorneys drafting contracts and making mistakes.<sup>28</sup> Some errors will arise, get cleaned up when noticed, and then arise again. We refer to these as "periodic errors."<sup>29</sup> The exercise of drafting a new clause may also lead to what we call "innovation errors." These errors occur immediately after a new clause is introduced and may initially accelerate and not find an equilibrium level for some time.<sup>30</sup> Third are "historical holdovers," terms and concepts hastily introduced when the current standard form debt contract was evolving from corporate transactions and all the lawyers handling the new debt instruments were novices.<sup>31</sup> Since these historical terms were imported at the start of the modern sovereign bond market in the 1990s, we posit that they have become embedded in the standard sovereign bond contract form and, therefore, persist.

We test elements of the bifurcated market hypothesis in Part VI and present a preliminary study of landmines in sovereign bond contracts. We find that both historical-holdover clauses and subversive accretions tend to persist and are widely prevalent in contemporary contracts. By contrast, landmines that result from sloppiness or inartful efforts to draft a new clause are less prevalent. Since gurus are assumed to be knowledgeable and faithful agents, they are motivated to eliminate errors that might impair the interests of their clients but have no incentive to remove subversive accretions that benefit those clients or historical clauses that were present at the origin of the standard contract. We predict, therefore, that the incidence of human errors should decline as the proportion of gurus

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27. In addition, gurus working on behalf of the sovereign may purposefully elect not to correct mistakes made by novice lawyers that favor the sovereign, leading to pro-sovereign errors accumulating over time. *See infra* discussion at text accompanying notes 96-107.

28. Gurus working on behalf of the sovereign will work to correct such errors. At the beginning of the modern sovereign debt market in the early 1990s, few if any attorneys were gurus. However, as attorneys gained expertise in restructuring sovereign deals, the cohort of gurus increased over time. In equilibrium, the fraction of bonds with these periodic errors will depend on the balance between the number of novices introducing new errors and the number of gurus correcting such errors. This equilibrium may shift over time as the ratio of novices and gurus changes. As discussed above, the number of gurus will be limited by the relatively few opportunities for attorneys to participate in restructurings; even as the ratio of novices and gurus changed over the years from the early 1990s, there have always been novices in the market.

29. We have identified at least three periodic error landmines: Cross-Default Scope, Negative Pledge Scope, and Pari Passu Scope. We discuss the Cross-Default Scope landmine in Section II.B and Section V.B.1. We discuss the Negative Pledge Scope and Pari Passu Scope landmines in Section V.B.1. We describe all the periodic error landmines we identify in the Appendix.

30. We have identified at least three innovation-error landmines: CAC Strategy Disclosure, Governing Law Always, and Reverse Acceleration. We discuss the Reverse Acceleration landmine in Part V.B.2, *supra*. We describe all the innovation-error landmines we identify in the Appendix.

31. We have identified at least three historical-holdover-error landmines: Buy Back, Negative Pledge, Pari Passu. We discuss the Negative Pledge landmine in Section II.C and Section V.C. We describe all the historical holdover landmines we identify in the Appendix.

increased in the sovereign bond market from the start of the modern market in the early 1990s to the present. The data in Part VI supports this prediction.

We conclude that the conventional assumption that contracts in standardized markets accurately embody the ex-ante bargain between the contracting parties is false.<sup>32</sup> Theories of efficient contract design fail to account for the unique influence of agency costs in contract production. In particular, there are systematic asymmetries in the market for the lawyers who negotiate and draft these contracts: these distortions produce contractual landmines that can disrupt the efficiency of contract renegotiation and settlement. While our empirical results are preliminary, they nonetheless support the claim that any useful theory of contract design must necessarily account for the inefficiencies that impair the process of producing standardized commercial contracts.

## II. The Landmines

This project developed from research on a single contractual landmine—the *pari passu* clause—that was the source of intense study by numerous scholars a decade ago.<sup>33</sup> A surprising discovery was that the clause was included unchanged in hundreds of bond contracts well after the risk of significant losses for a sovereign was well understood in the market. This prompted a common question: was *pari passu* idiosyncratic? Finding one such landmine that persisted despite widespread knowledge of the risks it presented was itself surprising enough. But the question of whether there were more remained unresolved. Scholars had found the *pari passu* landmine because it had blown up in a case familiar to everyone in the industry that was also extensively reported on in the financial press.<sup>34</sup> Finding more landmines required much more exploration since most disputes settle, and full-scale litigation in this market is rare. Yet, in the wake of the *pari passu* drama, as we studied subsequent debt crises (for example, those in Greece, Cyprus, Ukraine, Zambia, Sri Lanka, and Russia), evidence of

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32. If the wording differences between the standard forms and the landmine variants add meaningful risk to one side or the other, one might expect in an efficient market that the differences would appear in the bond price. If priced through, these are not landmines. To test the pricing question, we utilize a series of pieces in the *Financial Times* on these landmines that one of us has done with co-authors over the past two years where, for a set of countries in distress, we've reported on some of the landmines in their contracts and sketched out implications. If the market already knew about these, we'd expect no effect. Conversely, if there is a pricing effect from the publication of the pieces, that's consistent with the markets not being aware of the landmines. We find a significant price bump in every case (preliminary results available from authors).

33. See Umakanth Varottil, *Sovereign Debt Documentation: Unravelling the Pari Passu Mystery*, 7 DE PAUL BUS. COM. L.J. 119 (2008); Anna Gelpern, *Courts and Sovereigns in the Pari Passu Goldmines*, 11 CAP. MKTS. L.J. 1 (2016); Leland Goss, *NML v. Argentina: The Borrower, the Banker and the Lawyer—Contract Reform at a Snail's Pace*, 9 CAP. MKTS. L.J. 287 (2016).

34. The *Financial Times* itself published almost 100 articles, blog posts and recordings about the “*pari passu* saga.” See, e.g., Joseph Cotterill & Cardiff Garcia, *Argentina Debt: What is the Pari Passu Saga?*, FIN. TIMES (Apr. 19, 2013), <https://www.ft.com/video/564422aa-ed58-3782-96af-1ed4cb6eb743> [<https://perma.cc/3UVK-DQ22>].

additional contractual landmines emerged from the arguments raised during restructuring negotiations by parties seeking pricing concessions.<sup>35</sup> By tracking these restructuring negotiations for a decade, we assembled a collection of seventeen instances of problematic language that form the backbone of our analysis here. The concern is that these same contractual irregularities will be found prevalent in other bond contracts, thus tempting parties to those contracts to persuade a court to superimpose on the prior understanding of a boilerplate term a new meaning favorable to them.<sup>36</sup>

We report in Part VI on the prevalence of the seventeen landmines in a dataset of one hundred sovereign contracts from 2020-22: each contract in our sample contains, on average, nine of the landmines we have identified.<sup>37</sup> In this Part, we focus on three exemplars of those landmines that have dramatically different characteristics. The first, the Manifest Error landmine, appears to be the product of calculated changes that favor the sovereign. The second, the Cross Default Scope landmine, does not favor the sovereign and appears to be the product of inadvertence. The third, the Negative Pledge landmine, illustrates the problem of thoughtlessly importing terms common in corporate transactions into sovereign debt contracting.

#### A. *The Sovereign's Right to Correct a "Manifest Error"*

The manifest error clause is common in sovereign bond contracts as part of the standard modification provision that every bond contains. The typical manifest error clause provides:

The Trustee may agree, without the consent of, or sanction from, the Noteholders, to any modification of the Notes . . . which in the opinion of the Trustee is of a formal, minor or technical nature, is made to correct a manifest error or . . . is not materially prejudicial to the interests of the Noteholders.<sup>38</sup>

This seemingly innocuous clause allows the trustee for the bonds to modify the Notes if necessary to “correct a manifest error” as well as other modifications so long as “in the opinion of the Trustee” it is not materially

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35. In each case of sovereign distress over the past decade, we have followed the negotiations and collected examples of the landmines that were identified during those negotiations. On some occasions, one of us was involved in aiding this process. *See, e.g.*, Joseph Cotterill, *The Buchheit Bat-Signal, a Few Days on*, FT ALPHAVILLE (March 21, 2013), <https://www.ft.com/content/d9a473b4-1c16-39f2-a82b-f25908ec6858> [<https://perma.cc/AYF2-MYSN>]; Matt Levine, *Lucky Investors and Venezuelan Bonds*, BLOOMBERG (July 24, 2017), <https://www.bloomberg.com/opinion/articles/2017-07-24/lucky-investors-and-venezuelan-bonds?sref=wwv74VD0> [<https://perma.cc/A76N-M7PN>].

36. This risk of an aberrant interpretation is not fanciful. As was discussed earlier, this risk was realized in the litigation and subsequent multibillion dollar settlement surrounding the fourteen-year battle over the meaning of the *pari passu* clause. *See supra* text accompanying notes 8-13. Yet the clause persisted unchanged for years after the litigation and settlement had revealed that few, if any, market participants understood either the historic or contemporary meaning of the clause. *See Choi, Gulati & Scott, The Black Hole Problem, supra* note 1, at 19-21.

37. We describe each of the landmines in detail in the Appendix.

38. Republic of Argentina 2020 issuance (on file with authors).

prejudicial to the interest of the Noteholders. Because the trustee, at least in theory, acts in the best interests of the noteholders, giving the trustee such authority works to protect the interests of the noteholders.

But, variations to the manifest error clause exist. One reads as follows:

The Notes . . . may be amended by the Issuer and the Principal Paying Agent without the consent of the Noteholders . . . either (i) for the purpose of curing any ambiguity or of curing, correcting or supplementing any manifest or proven error or any other defective provision contained herein or therein or (ii) in any other manner which is, in the sole opinion of the Issuer, not materially prejudicial to the interests of the Noteholders.<sup>39</sup>

In this variation, the “Manifest Error” landmine, the sovereign issuer and the sovereign’s Principal Paying Agent may amend the notes, among other things, to correct “any manifest or proven error.” Unlike the typical manifest error clause, this variation gives authority to correct the manifest error to the sovereign. Moreover, the clause also allows other changes that “in the sole opinion of the Issuer” are “not materially prejudicial to the interests of the Noteholders.” What happens if the sovereign decides to make a change that impairs the Noteholders’ contract rights (such as reducing the interest rate) but states that in the sovereign’s sole opinion it is not “materially prejudicial”?

It is hard to imagine that investors would consciously have given the sovereign quite so much discretion to alter their contract rights as the literal wording of the Manifest Error clause above suggests. But nor does the language seem to be the product of an inadvertent drafting error; it is too specific and clear for that. Someone from the sovereign side purposefully amended the standard form without the underwriters paying attention to the implications of the changed language.

#### *B. A Cross-Default Clause that Covers “All” Debts*

The cross-default clause is one of several provisions in the typical sovereign bond contract that constrains the sovereign debtor from taking actions that might impair creditors’ claims. The clause typically entitles bondholders to declare an Event of Default if other debt of the sovereign is in default: If that default is not cured within a fixed period (e.g., 30 days), creditors are entitled to accelerate their obligations. In other words, the cross-default clause operates as an early warning signal that alerts the creditors to exit if an event occurs that suggests the debtor may be unable to continue making payments on the bond. Defaulting on other debt is one such sign.

Sovereigns, however, incur a vast array of debts ranging from international bonds to salaries owed to local government employees. International bond creditors will likely not be concerned about defaults on most domestic debts—it is the availability of foreign currency reserves to pay

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39. Republic of Zambia, 2012 bond (on file with authors).

them that they will care most about. Both the creditor collective and the issuer, therefore, have an interest in narrowly defining the scope of the debts that are covered by the cross-default clause. Having an unduly broad clause creates the risk of a violation that the creditors as a collective would not wish to pursue: coordination problems may preclude the collective action needed to prevent a subset of activist creditors from declaring default unwisely.

Assume, for example, that a cross-default covers all of the sovereign's unsecured debt rather than being limited to the exchange listed foreign currency bonds. In the case of a broad scope provision, the sovereign's failure to pay any of its debts on time—say, for example, a local firefighter's salary following a dispute over a disciplinary action—would trigger the cross default and might be hard to cure. Holders of the sovereign's billion-dollar bond issue will not regard a dispute over a single employee's actions as a reliable signal of impending default such that they would need to accelerate their debt. Indeed, most creditors would affirmatively want to deter others from declaring this local problem as an Event of Default.

Given the possibility of disruption caused by premature or inapt claims of default, most sovereign bonds narrowly define the scope of the cross-default clauses to the type of debt where a default would indeed send a clear signal of an impending crisis. For example, the application of the cross-default clause might be limited by a term such as "External Debt" that is defined as "Foreign currency debt of the Republic traded on an exchange with a maturity greater than a year."

There are, however, bond contracts where the connection of the cross-default clause to a narrow definition is missing. Instead, these bonds provide that the cross-default clause is triggered by a default on any of the sovereign's "unsecured or public debt."<sup>40</sup> This creates a risk that all of the sovereign's entire external debt could be accelerated because of a local action that led to a default on a state obligation. This is not an outcome that either party would intentionally agree to *ex ante* and therefore, most likely, arose from careless drafting.

Any strategic advantage from erroneous, overly broad scope language would likely accrue to activist creditors who might wish to impede forthcoming restructuring negotiations. Importantly, since activist creditors are not present at the contract drafting stage, a cross-default clause that has an overly broad scope is unlikely to be the product of purposeful bargaining. In theory, the prospect of empowered activists could reduce potential moral hazard on the part of the sovereign and thereby reduce upfront financing costs. However, little evidence exists that moral hazard in fact is an important cause of sovereign distress.<sup>41</sup> Moreover, underwriters,

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40. See *infra* Appendix B.3.

41. Under a moral hazard conception of the central problem in sovereign debt, sovereign debtors would be affirmatively seeking opportunities to default. Instead, the evidence shows that

motivated to conclude a deal quickly, are unlikely to care much about the prospects of restructuring and the long-term incentive effects on sovereign behavior.

We posit instead that the “broad scope cross-default” landmine is the product of inadvertence. Lawyers motivated to limit their time investment in drafting efforts or facing constraints due to market pressures will tend not to negotiate purposefully for new provisions. At the same time, these lawyers may make errors.

### C. *The Puzzling Function of the Negative Pledge Clause*

The standard negative pledge clause, which generally appears alongside the *pari passu* clause, states:

So long as the Bonds remain outstanding, the issuer shall not incur any lien without at the same time securing the Bonds equally and ratably.<sup>42</sup>

What does it mean in the context of a sovereign instrument to “secure the Bonds equally and ratably”? The concept of bonds ranking equally and ratably makes sense in the domestic corporate bankruptcy context, where a firm’s assets are liquidated and bondholders who are ranked equally are paid *pro rata*. But the concept is hard to apply in the context of a sovereign that cannot enter liquidation. To be sure, if the asset on which the security interest was granted was located outside the sovereign borrower’s borders, the creditors who were not receiving payments on the debt could attempt to attach the asset and liquidate its cash value. All those creditors secured equally and ratably by that asset would receive a proportional share.<sup>43</sup> But what if the collateral is within the borrower’s borders and thus cannot be seized and sold by foreign creditors? What does being secured “equally and ratably” mean then?<sup>44</sup>

The conventional view is that it does not matter that no one knows the full reach of the negative pledge clause because sovereigns in the modern era rarely collateralize their debts. But the clause can cause trouble in

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debtors strive hard—sometimes too hard—to avoid default (the “too little too late” problem). For discussion of why sovereign debtors seek to avoid default, see Ugo Panizza & Eduardo Borenstein, *The Costs of Sovereign Default*, 56 IMF STAFF PAPERS 683, 684 (2009) (empirically evaluating reputational costs and direct sanctions associated with sovereign defaults); Anna Gelpern & Ugo Panizza, *Enough Potential Repudiation: Economic and Legal Aspects of Sovereign Debt in the Pandemic Era*, 14 ANN. REV. ECON. 545 (2022) (discussing sovereign debt theories in developing and advanced economies).

42. This is a simplified version of Sri Lanka’s 2017 bond’s Limitations on Liens provision (on file with authors).

43. We are simplifying. Commentators suggest that the answer to this question is not clear even in the domestic context. See Morey McDaniel, *Are Negative Pledge Clauses in Public Debt Issues Obsolete*, 38 BUS. LAW. 867, 875 (1983).

44. For a discussion of the uncertainty over what remedy is available for a violation of a negative pledge, see LEE C. BUCHHEIT, *HOW TO NEGOTIATE EURO CURRENCY LOAN AGREEMENTS* 87 (2d ed. 2006). If carefully drafted, the negative pledge clause would exempt a set of “permitted liens” that would cover domestic projects such as pledged payments from a domestic toll road. But, in that case, if the clause covers only secured foreign currency loans listed on a foreign exchange, the question is why the clause is in the contract since this type of lending is almost never secured.

cases where the sovereign needs short term financing and tries to tap a source such as swap lines from a foreign central bank that, by its local laws, is required to take collateral to protect taxpayer funds.<sup>45</sup> Most creditors would not object in such a case since they are benefiting from the temporary bailout. But an activist creditor could threaten to raise claims of interference with its rights under the negative pledge clause by the foreign central bank.<sup>46</sup>

All of this begs the question of why the negative pledge exists in its current form in the sovereign bond contract. The negative pledge clause, just like the cross-collateral clause, is a common term in domestic loan contracts. As noted earlier, many practitioners assert that these clauses were imported from corporate instruments at or around the time that the source document for the contemporary bond contract was being prepared in the 1990s. While the origins of the negative pledge clause may not ever be definitively established, contemporaneous commentary has expressed the common view that the negative pledge clause in sovereign bonds was the product of unthinking plagiarism from prior documentation.<sup>47</sup>

#### *D. Unraveling the Landmine Puzzle*

The seventeen landmines that we have documented present a puzzle. Our data show that not all landmines are the same. As illustrated by our three exemplars, the landmines appear to be either (a) subversive accretions: a purposeful change in language that improves the sovereign debtor's post-default options, or (b) inadvertent and apparently random errors introduced into the standard form that serve to benefit activist creditors (who have no role in the drafting process) or (c) historical clauses inappropriately imported in the 1990s from syndicated loans or domestic corporate bonds (which assumes some degree of thoughtlessness at the time of importation).

The divergent incentives of issuers and underwriters to effect changes to standardized language during the drafting process implies that, if the drafters are experienced and mindful of their clients' interests, we would expect to find purposeful additions or omissions that function to enhance a sovereign's post-default position.<sup>48</sup> But we would rarely expect to find careless errors that would favor the interests of activist creditors. After all, the way the bond contract is typically drafted implies that the only

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45. Such financings typically require the grant of a security interest to the bank that typically is providing this financing at below market rates. Even though asserting a violation of the negative pledge clause in such a context would harm creditors as a group, activist creditors can use the threat of litigation to attempt to extract a favorable recovery.

46. One such claim would be that of tortious interference with contract rights. See Michael Bradfield & Nancy R. Jacklin, *The Problems Posed by Negative Pledge Covenants in International Loan Agreements*, 23 COLUM. J. TRANSNAT'L L. 131, 135-37 (1984).

47. See Lee C. Buchheit, *Negative Pledge Clauses: The Games People Play*, 9 INT'L FIN. L. REV. 10, 10 (1990).

48. We discuss this asymmetry in the drafting process in detail in Part V.



substantial changes will be those proposed by the sovereign's own lawyers. Yet half of the landmines that we have found in our dataset are inconsistent with these assumptions about standard drafting practices. Experienced lawyers can be expected to protect their clients' interests when they represent the sovereign but would not be expected to make careless mistakes that undermine those interests. Inexperienced lawyers might make these mistakes but would not be expected to attempt to draft new provisions that effectively expand the sovereign's post-default rights. And so, we have a puzzle: what explains the peculiar combination of landmines that we have discovered?

We begin to address this question in Part III: we report there the results of interviews with thirty-one of the world's leading sovereign debt lawyers to whom we posed the preceding puzzle and asked for insights into the surprising character and prevalence of linguistic irregularities found in multi-billion-dollar sovereign debt contracts.

### III. The Interviews

Why so many landmines and what drafting dynamics produced the peculiar combination of irregularities that we have found? To get traction on these questions, we contacted thirty-one leading experts—the gurus of the sovereign debt business—and sent them our list of contractual landmines. The sample of subjects to interview was constructed using the lists of senior lawyers involved in four major endeavors to reform the international architecture over the past two decades. One of those efforts involved the design of a sovereign bankruptcy scheme; two of them involved revising the standard collective action clauses and one involved fixing the *pari passu* clause.<sup>49</sup> We asked each respondent the following question: “Assuming you agree that we have identified a set of landmines in the contract, can you shed light on how these landmines arise and, sometimes, persist.”

Conversations with the interview respondents generally lasted between a half hour and an hour on Zoom, except for a handful of respondents with whom we communicated by email. We organize below the responses from the respondents in terms of five explanations that they offered for the contractual irregularities that we described as landmines. The sixth explanation is one that we posed to our respondents as a possibility.

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49. For discussions of the prior efforts to engineer changes in the sovereign-debt-contracting universe mentioned in the text, see Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. U. L. REV. 1627, 1633-38 (2006); Anna Gelpern & Mitu Gulati, *The Wonder-Clause*, 41 J. COMP. ECON. 367, 367 (2013); Mark Sobel, *Strengthening Collective Action Clauses: Catalyzing Change – The Back Story*, 11 CAP. MKTS. L.J. 3, 4 (2016); Anna Gelpern, Ben Heller, & Brad Setser, *Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds*, in *TOO LITTLE, TOO LATE: THE QUEST TO RESOLVE SOVEREIGN DEBT CRISES* (Martin Guzman, José Antonio Ocampo & Joseph E. Stiglitz eds., 2016).

### A. *Rational Changes to Standardized Terms*

A handful of respondents disagreed with our use of the term “contractual landmines” to the extent the label suggested these were drafting goofs or blunders. Yes, they might present risks in the future, but they were the product of considered choices in the negotiation process. One respondent explained:

For most of the landmines . . . I can tell you that there was a good reason why the provision was drafted in the way that it was. Take the authorization and execution language [i.e., language granting the sovereign jurisdiction over matters of authorization and execution] . . . for [the Republic of X]. During the negotiations for that document, the local Attorney General’s office was uncertain as to whether it was legally allowed to have the legality of certain matters relating to authorization of the lending be made under New York law. On the other hand, the underwriter’s counsel took the position that investors would want New York law to govern. So, we had a compromise—New York law would govern everything except authorization and execution. Yes, that’s vague. But it was a compromise to get to the point where the issuance could happen. I can tell a similar story for some of the uses of [“to the extent permitted by applicable law”] that you point to or the use of the embassy as the agent for service of process.

There is a risk when one does this sort of thing that there will be litigation later. But it is a small risk . . . Both sides are trying to get the deal done. These are context specific compromises that one would hope get removed when they are not needed. I worry, from reading your paper, that they sometimes migrate into deals where they are not needed.<sup>50</sup>

Respondents explained that any rule-like provision—such as a broad waiver of sovereign immunity—was seen by investors as a standard clause they were entitled to receive (it was “market”). With a change such as a provision limiting the waiver “to the extent permitted by applicable law,” the issuer was still able to state that it was granting the full waiver of immunity, and the question of what “applicable law” meant was, in effect, deferred for a later date when and if a dispute occurred. Thus, investors received a waiver of immunity—the market standard—and the sovereign was able to postpone difficult questions of application.<sup>51</sup>

### B. *Experts versus Novices*

A second set of respondents was less charitably inclined about the landmines we had identified. These were, in a number of cases, “embarrassing goofs,” “the product of 2:00 a.m. drafting after too much caffeine,” that “reflect[ed] “badly on [the legal] profession.”<sup>52</sup> One respondent explained:

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50. Interview No. 18 (Oct. 16, 2021).

51. *Id.*

52. Interview No. 20 (Jan. 10, 2021).

Most of these landmines are the product of some lawyer not understanding the sovereign context. The sovereign context is different. Just because it is a cross-border bond issue does not mean that you blindly use the same language that you used for the last three hundred corporate deals. . . . I am ashamed to say that this kind of language sometimes escapes the scrutiny of even the senior lawyers . . . .

These deals are done quickly, and there is not a lot of time given to scrutinizing the language. Errors are made. Worse, they sometimes get repeated . . . .<sup>53</sup>

The consistent refrain from respondents was that there were two categories of lawyers—experts and novices. The experts (the gurus) understand the sovereign context and the implications of the landmines because they work on restructurings as well as issuing new bonds. Indeed, a majority of our respondents described additional landmines they had found during their careers.<sup>54</sup> In some cases, they had tried to correct errors without success because the lawyer on the other side was not able or willing to accept that the clause in question was flawed and could potentially harm their client's interests. One veteran explained:

I've seen Events of Default where the clause fails to say what the implications of the Event of Default are, or where the provision fails to state that the event must be continuing as opposed to just having occurred once. These are big errors . . . . But they show up periodically. If one does not understand the big picture and how these things play out . . . then how does one know?

There was one case . . . where I tried to point out the error to the kid [i.e., young lawyer] on the other side. But he was too petrified to change anything on his standard form. He had no authority to do anything. I decided that I had fulfilled my ethical obligations by telling him about the risks to his client.<sup>55</sup>

There is a contradiction in the foregoing. The story is both one of errors being introduced by novices and of novices being unwilling to change anything in prior forms. If novices are too reluctant to change any of the standard language, how do they introduce these landmines in the first place?

One answer to this contradiction is that there are two types of novices, one type knows they don't know anything and, therefore, they cling to the standard form, refusing to change anything. This is the paradigm of the junior associate working at 2:00 AM. The other type does not know that they don't know anything—they may be relatively senior lawyers who are familiar with corporate debt instruments but are inexperienced with sovereign debt offerings—and they create errors by tinkering with language that goes unnoticed thereafter. The second type is more consistent with what we know about standard drafting practice: there are few incentives

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53. Interview No. 19 (Mar. 1, 2021).

54. If we add the additional landmines the gurus identified, we would have a total of more than forty. A file containing the full set of forty-plus landmines is available from the authors.

55. Interview No. 20 (Jan. 10, 2021).

for any junior lawyer to change standard language embedded in prior precedents. But that raises the question of how errors arise when the drafting is being handled by the dangerous novice—the senior lawyer who is inexperienced in sovereign bond transactions.

Several respondents explained that sometimes there is no choice but to modify the standard form. One example arises when the lead bankers change, and the new bankers use a different standard form that had been drafted for a different type of issuer. Language has to be changed because some provisions had been tailored to that difference.<sup>56</sup> Another example involves an industry-wide change to a standard form—such as when the market moved toward collective action clauses in 2003-04 or when the market coordinated around a revision to the standard *pari passu* clause in 2013-14.<sup>57</sup> In these instances, a new clause is being incorporated into the standard document, and other portions of the document that are inconsistent with the new clause must be updated. A lawyer who neither fully understands the new clause nor has the time to determine how it might not cohere with the rest of his standard form runs the risk of making a mistake. A respondent explained:

If you want to see a dog's breakfast of a document, just pick up the prospectus for [X] where a London firm was doing an issuance under New York law, trying to incorporate a combination of New York and English law-style provisions. It is a mess. And that mess kept getting repeated deal after deal, probably because no one understood the problems that had been created and because it was [perhaps] too embarrassing to fess up later.<sup>58</sup>

### C. Inexperience and Random Errors

As noted above, we are skeptical that the typical error story—which assumes an overcaffeinated associate revising a document at 2:00 AM—is an explanation for our landmines. It is not that we do not accept that errors are made in drafting; rather, we are skeptical that this story holds when the incentives for the junior associate are always to avoid changing anything.

If junior associates inserting words into the standard form is a myth, there has to be a different story. Random errors that inexperienced lawyers never notice is one answer that we heard from a few respondents. Among the explanations we heard was:

Errors happen. . . . These documents are produced quickly. . . . [and there can be] idiosyncrasies of the particular sovereign's requirements. Sometimes, with a clause that doesn't really make sense in the first place, but has become "market," . . . like *pari passu*, you might add a few words just to

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56. For discussions of these moves, see generally Gelpern & Gulati, *Public Symbol in Private Contract*, *supra* note 49 (discussing changes to standard form sovereign bond contracts and the growth of Collective Action Clauses in sovereign debt); Sobel, *supra* note 49 (same).

57. Sergio J. Galvis, *Solving the Pari Passu Puzzle: The Market Still Knows Best*, 12 CAP. MKTS. L.J. 204, 211-14 (2017).

58. Interview No. 20 (Jan. 10, 2021).

have it make sense. But as we have seen with the Argentine case . . . that change might make it more of a landmine. . . .  
[K]eep in mind that this stuff is not literally boilerplate in the way in which you suggested. There are . . . variations in words across deals. The goal is to give your client what is “market”—that is different from boilerplate which suggests identical provisions . . . .<sup>59</sup>

#### *D. Time Constraints*

A quote from a conversation that we had with two respondents together exemplifies the relevance of the time constraints that were a part of almost every respondent’s story.

You need to understand that these markets work quite efficiently. There are flaws, to be sure, in the standard contracts. But the markets work well and have done so for decades. These deals need to be done . . . when there is a market window . . . . No one is willing to [delay to indulge the lawyers]. The reality is that these bonds rarely default and mostly, when there is a default, they are renegotiated in an amicable fashion. No one is negotiating these deals with an expectation of default. Not even when Argentina is the issuer. Argentina and the *pari passu* litigation was an anomaly. And those clauses got revised, along with collective action clauses, through an industry-wide effort. Unless there is such an effort—and we only do that on rare occasions, maybe once a decade—changes are hard to make. The issuers do not want to do them, and the underwriters really do not. There is no appetite.<sup>60</sup>

As we translate the foregoing, it is a story about how the fine details of contract drafting are too costly to worry about when a deal needs to quickly go to market. And because issuers and their bankers are trying to time market windows and issue within a favorable window that might soon disappear, the cleanest and quickest way to get agreement on the deal is to use the documents that worked in the prior deal.

A different version of the same argument was:

Yes, there are ambiguities and problems if you read these documents with a magnifying glass as you do. But that’s not the real world. In the real world, litigation is difficult and expensive against sovereigns. It is hard to effectively sue them and harder to attach assets—unless you are . . . Elliott and other activists who have infinite patience. In the real world, sovereigns primarily repay because of reputation not because of fear of litigation. Plus, don’t you think that smart judges in almost every case will figure out the right outcome—judges in [England and New York] are much more nuanced [than you give them credit for].<sup>61</sup>

A problem with the market timing argument, however, is that it doesn’t explain how language glitches get into the contracts in the first place. If it is rational to stick to precedent and avoid making any changes whatsoever, then how to do the anomalies—many of which are the product

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59. Interview No. 23 (Sept. 7, 2021).

60. Interviews Nos. 14-17 (group interview) (Nov. 21, 2021).

61. Interview No. 22 (Nov. 21, 2021).

of extra words having been added to or omitted from the contracts—get in? We were given several possibilities in the discussion of novices and inexperience that we reported above. But at least at first cut, and not having yet done a deep forensic investigation into the origins of each clause, there seem to be too many landmines to be explained either by a change in investment banks or market-wide revisions of core clauses.

### *E. Misaligned Incentives*

Prior research has extensively investigated the reasons why the *pari passu* clause was retained for over a decade and a half despite widespread recognition in the market that this was a landmine.<sup>62</sup> The “gravitational pull of the standard form” was the primary explanation reported in prior studies for the long period in which the *pari passu* clause was retained without revision.<sup>63</sup> Once a clause makes it into the standard form and then onto the “checklist” of provisions that every international bond is required to contain, it is virtually set in stone regardless of whether the clause makes sense or not.

This category of “checklist” provisions, as our respondents explained, had their origins in the source documents for the standard template that was created in the 1990s via the Brady bonds in the wake of the Latin American debt crisis.<sup>64</sup> One veteran of the Brady era explained:

There were hardly any sovereign bonds at the time, except for a few from AAA rated nations. The Brady bonds helped create a . . . new bond market for emerging market nations. And the template that was used for these bonds was the corporate template. So, clauses such as the negative pledge and the *pari passu* clause . . . got into the standard template even though they didn’t really work in the sovereign context where there was no bankruptcy and liquidation of assets. Once there . . . and part of the basic form . . . no one wants to change what is market for fear [of market penalty] . . . The worst of these, as you well know, was the unanimity requirement to change payment terms—a term borrowed from the corporate context where there was the backstop of bankruptcy.<sup>65</sup>

The foregoing describes a two-sided agency problem. Neither the government officials on the one side (whose short term interests are to raise funding and who care little about long term default costs that might occur after they have left office) nor the underwriters on the other side (who won’t be holding on to bonds for more than an instant and primarily care about their fees from doing the deal) care much about what will happen in

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62. See Varottil, *supra* note 33; GULATI & SCOTT, *supra* note 1; Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 15-24.

63. GULATI & SCOTT, *supra* note 1, at 6, 42.

64. For discussion of the Brady bonds, see *supra* note 17.

65. Interview No. 19 (Mar. 1, 2021).

a future debt restructuring that involves litigation, which is a low probability event in any case.<sup>66</sup>

At the start of this project, it was tempting for us to blame the lawyers for not making clear to their clients that they were incurring significant future risks that were trivially easy for expert lawyers to repair at the drafting stage. But the lawyers protested that they would be happy to bill their clients for the additional time that it would take to negotiate a change to the standard form. However, clients on neither side would permit it.

#### *F. Strategic Lawyering*

If one puts aside the historical clauses derived from the original source documents, more than half of the landmines we identify favor the sovereign side. And a number of them involve a word or a phrase being added that, while innocuous on its face, could provide the sovereign a significant advantage because the sovereign borrower controls the law that will govern a future dispute.

The question then is how do these purposeful changes originate and why do they advantage the sovereign rather than the investors as a group? One possible answer interrogates the standard practice of drafting these documents. As described in Part I, the lawyers negotiating the contract are the sovereign's lawyers and the underwriter's counsel. There are no investors per se represented in the process. Indeed, the underwriter's counsel are typically denoted as "designated underwriter's counsel" because they have been working for the underwriters deal after deal, even though the underwriters themselves may change.<sup>67</sup> And, often, these designated counsels are picked and paid for by the issuers. Further, even if the underwriters were actively engaged during the drafting process, their incentives are short term—to get the deal done rather than expend costs dickering over words in the contract. By contrast, the sovereign's lawyers are present in the process for the long term. If the sovereign defaults, they have to pick up the pieces.

We asked respondents whether sovereign-side lawyers might introduce a few innocuous words and phrases when no one was paying attention. Respondents resisted this framing. Strategic drafting was not the explanation—no sovereign wanted or rewarded lawyers for being opportunistic during this process. Once a reputation for strategic behavior developed, the underwriters would respond by scrutinizing the contract more carefully and the goal of getting the deals done quickly would be undermined. One respondent explained (in response to our question about strategic or opportunistic drafting):

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66. Interviews Nos. 14-17 (Nov. 21, 2021).

67. For discussion, see Michael Bradley, Irving de Lira Salvatierra & Mitu Gulati, *Lawyers: Gatekeepers of the Sovereign Debt Market*, 38 INT'L REV. L. & ECON. 150, 159-60 (2014).

The most I've seen is where the sovereign lawyer won't fight hard to correct language that benefits his client. I don't think anyone would actually try to insert language that would advantage the sovereign. . . . There is no reward for the transactional lawyer who does that—there is a completely different group of restructuring lawyers or litigators who deal with the default. They are not going to be asking the client to reward the clever deal lawyer who inserted a phrase or two at the front end that benefitted the sovereign's case.<sup>68</sup>

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The interviews we have summarized above yield four insights about the process of drafting sovereign debt contracts: (i) some lawyers writing these contracts are experts in sovereign bond contracting, and others are novices; (ii) time constraints can impose significant costs on attempts to change the standard form; (iii) on occasion, careful revisions to standard language are negotiated in order to resolve concerns sovereigns have about strict adherence to contractual duties; and (iv) the original source document that was derived from syndicated sovereign loans and corporate bonds has a canonical status that deters deleting language that may be inapt in the sovereign context. The challenge is to organize these observations in a coherent way. To aid in that process, we turn in Part IV to the theory of incomplete contracts as a frame for illuminating the insights that have come from the lived experience of the lawyers, an experience unfiltered by any conceptual framework.

#### IV. Incomplete Contract Theory and Contractual Landmines

##### A. *Theories of Incomplete Contracts*

Theory teaches that all debt contracts are incomplete: the contract will fail to specify a solution to a contracting problem in every state of the world that might materialize.<sup>69</sup> The theory of incomplete contracts began with economists who focused on the front-end costs of contract completion in their models.<sup>70</sup> They posited two causes of incompleteness: *ex ante*

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68. Interview No. 10 (Oct 7, 2021).

69. For discussion, see ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 81-84 (5th ed. 2013).

70. Most economic models of contract incompleteness focus on the costs of describing or specifying *ex ante* all of the contingencies for every possible state of nature. Owing to these costs, parties write incomplete contracts and then renegotiate when a particular state of nature is realized. See, e.g., Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 REV. ECON. STUD. 115, 115 (1999). The inability of exogenous transaction cost explanations to predict the contracts that we see in the world led to an effort to explain incompleteness in a world where transaction costs are zero. These models explain incompleteness as endogenous owing to asymmetric information. Under these circumstances, parties choose not to complete contracts so as to avoid moral hazard or adverse selection problems. See, e.g., Benjamin Hermalin & Michael Katz, *Moral Hazard and Verifiability: The Effects of Renegotiation in Agency*, 59 ECONOMETRICA 1735,



transaction costs and asymmetric information. First, contracting parties systematically will fail to write complete contracts because the transaction costs of writing complete contracts are simply too onerous.<sup>71</sup> One cost of writing complete contracts is the resource costs of negotiating and reducing to a written form the agreed upon allocations of risk. Those resource costs, in turn, include not only the time and effort to negotiate and draft the clauses in question, but also the possibility that in doing so the parties might make a mistake in their written contract. A clause that they regard as clear may, upon subsequent examination, appear ambiguous or vague. This “formulation error” may then lead to litigation over the appropriate meaning that should be given to the clause in question.<sup>72</sup> Another transaction cost is the burden of adequately identifying in advance all the possible contingencies that might occur and then specifying the appropriate outcome for each one. Given the limits of human cognition, parties may be unable to identify and foresee all the uncertain future conditions or may be incapable of characterizing adequately the complex adaptations required to accommodate all the possibilities that might materialize.<sup>73</sup>

Asymmetric information is a second reason why parties may choose to write incomplete contracts. Under these accounts, parties would not write complete contracts even if transaction costs were zero and they were able to costlessly describe all contingencies and their corresponding consequences. Suppose that the ideal contract would provide the promisor with optimal incentives by providing a bonus payment for extra care and attention to the contract performance. But now, assume that the promisee is unable to monitor and observe the amount of care the promisor provides. Under those conditions, it would be foolish to specify a compensation scheme that provided for a bonus because it is conditioned on acts by the promisor that are difficult or impossible either for the promisee to observe or subsequently to verify to a court. Asymmetric information thus leads parties to specify a contract that falls short of the theoretical ideal. To conclude an ideally specified contract, either (1) the parties would have to

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1735 (1991); B. Douglas Bernheim & Michael D. Whinston, *Incomplete Contracts and Strategic Ambiguity*, 88 AM. ECON. REV. 902, 910 n.11, 921 (1998). Some models have also made transactions costs endogenous by focusing on factors such as the limited attention of decision makers, see Sharon Gifford, *Limited Attention and the Optimal Incompleteness of Contracts*, 15 J.L. ECON. & ORG. 468 (1999), or on the complexity of the contracting environment, see Ilya Segal, *Complexity and Renegotiation: A Foundation for Incomplete Contracts*, 66 REV. ECON. STUD. 57 (1999).

71. See Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 575 (1977) (discussing the transaction costs associated with the penalty rule). For formal analyses that appeal to exogenous transactions costs to explain incomplete information, see Gur Huberman & Charles Kahn, *Limited Contract Enforcement and Strategic Renegotiation*, 78 AM. ECON. REV. 471 (1988); Katherine E. Spier, *Incomplete Contracts and Signaling*, 23 RAND J. ECON. 432 (1992).

72. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 265-67 (1985).

73. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

disclose information that they wish to keep private, or (2) enforcement would have to turn on facts that one or both parties could not observe or verify in court. Writing an incomplete contract is preferable to these unpalatable alternatives.<sup>74</sup>

The economists who developed the theory of incomplete contracts only considered the front-end costs of contract completion in their models. They thought of enforcement as a constant cost binary function—a judge either enforces the contract as written or dismisses the lawsuit. Legal scholars have extended the economists’ insights by recognizing that enforcement costs are variable and thus are a function of the total contracting cost that parties could affect.<sup>75</sup> Parties who understand that there are two dimensions to contracting costs will rationally shift costs between the front end—the negotiation stage—and the back end—the enforcement stage—in order to optimize total contracting costs. For example, parties could save negotiation costs by agreeing to a vague standard in lieu of specifying all the contingencies in advance. Despite the resulting increase in the cost of enforcing the vague standard, the tradeoff could nevertheless yield a net savings in total contracting cost. Alternatively, parties could expend more time in ex ante negotiations to specify precise terms that are less costly to enforce.

The choice between where to best spend your costs between the front and back end turns on the comparative advantages between the parties and the courts.<sup>76</sup> The parties know their purposes better than any later court, but the parties may have difficulty in coming to an agreement. Even when parties can reach an ex-ante agreement, uncertainties about the future may make it difficult to capture this agreement across all the possible contingencies.<sup>77</sup> Courts have the benefit of hindsight and may be in a better position ex post to capture the parties’ intention in an agreement. When parties are in agreement on the purposes but the future is unknown (as in the typical sovereign debt contract), total contracting cost will often be optimized by drafting a vague standard that delegates to a later court the discretion to determine an appropriate exception to a bright line obligation rather than expending the additional costs of specifying ex ante all the possible exceptions to the obligation. Thus, for example, in an effort to satisfy a sovereign’s concerns that a broad waiver of immunity might violate some domestic constitutional requirements, parties may forego a detailed list of qualifications to the waiver. Instead, the parties might negotiate for a vague standard such as “we waive sovereign immunity to the extent permitted by applicable laws,” a provision that postpones to a later litigation

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74. See, e.g., Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 733 (1992).

75. For discussion, see Scott & Triantis, *supra* note 19, at 856 (discussing how parties can vary the enforcement process and costs).

76. *Id.* at 835-39.

77. *Id.* at 841-42.

the determination of possible conflicting domestic constitutional requirements.<sup>78</sup>

The foregoing illustrates that the reasons for incompleteness are many and varied but at least three are relevant to the puzzle of landmines in debt contracts: (1) What we will call Optimal Contract Design Theory explains parties' motivation to optimize total contracting costs by shifting contracting costs from the front end to the back end by substituting a vague standard in lieu of even more costly efforts to specify *ex ante* every possible action that constitutes an act of default;<sup>79</sup> (2) Satisficing Theory explains incompleteness as a function of the opportunity cost of time, where expending additional negotiating costs to write better contracts causes parties to miss more profitable opportunities;<sup>80</sup> and (3) Agency Cost Theory predicts contracts will be incomplete when the misalignment of interests between drafting lawyers and their clients and between the nominal clients—underwriters and debt managers—and the “real” clients—bondholders and the citizens of the sovereign state—leads to hyperbolic discounting of future risks in order to capture present returns.<sup>81</sup>

To summarize: incompleteness that results from trading *ex ante* negotiating costs for *ex post* enforcement costs would be subsumed under an optimal contract design umbrella. Satisficing theory, on the other hand, assumes that contingencies can optimally be specified *ex ante* but spending the necessary time requires the sacrifice of an exogenous opportunity. This theory thus identifies the opportunity cost of negotiating and drafting as a unique reason for incompleteness. Agency cost theory also focuses on incompleteness resulting from opportunity costs, but in this frame the costs are a function of the agent's own opportunity set separate from the interests of the principal.

### *B. Can Incomplete Contract Theory Explain the Landmines?*

Each of the three theories of incompleteness outlined above can account for some of the landmines in our dataset. The problem is that none can account for all of them.

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78. See *infra* Appendix at A.4.

79. The terminology of an “optimal” combination of front-end and back-end costs derives from Scott & Triantis, *supra* note 19, at 816-17.

80. See generally Bolton & Faure-Grimaud, *supra* note 20 (extending the notion of satisficing behavior to contracting). Bolton and Faure-Grimaud model time constraints as a source of incomplete contracting. Parties in their model *satisfice* in equilibrium by assigning control rights to one of the agents as a means of deferring time-consuming deliberations. The model suggests that the fact that agents actually tend to resolve most conflicts up front implies that contracts are excessively complete. This theory, then, might support the argument that lawyers negotiate too much and that the imposition of time constraints is efficiency enhancing.

81. See GULATI & SCOTT, *supra* note 1, at 142-46; Stephen J. Choi, Mitu Gulati & Robert E. Scott, *Contractual Arbitrage*, in THE OXFORD HANDBOOK OF INSTITUTIONS OF INTERNATIONAL ECONOMIC GOVERNANCE AND MARKET REGULATION (Eric Brousseau, Jean-Michel Glachant & Jérôme Sgard eds., 2019).

**Optimal Contract Design.** This is a story of incompleteness that emphasizes the goal of optimizing total contracting costs, including back-end enforcement costs. The addition of new language that creates the landmine rationally changes a contract term from a bright line rule to a vague standard: Despite the enhanced risk of litigation over the meaning of the new language, the change is justified if the addition of new language saves even more front-end costs. Drafters may thus find it cost effective to forgo disagreements in negotiating over specific exceptions to, say, an immunity waiver and instead substitute a vague standard that delegates that function to a later court. One interview respondent advanced this theory explicitly, claiming that “all clauses make some sense at some time.” He continued: “You take risks to please particular sovereigns and know that the risks are low in context because sovereigns can’t change the law for a single issue.” He was, therefore, “flabbergasted that the ‘manifest error’ clause [that gives discretion to the sovereign] was found in many bonds for multiple sovereigns” because he assumed that lawyers would have only granted discretion in one or two idiosyncratic cases and “it would always be carefully negotiated.”<sup>82</sup>

Optimal contract design is, however, inconsistent with the satisficing hypothesis since it posits that lawyers are not so constrained by timing problems that they are unable to negotiate sensible terms. Moreover, the theory may explain why the new language is introduced, but it cannot explain why it is retained in subsequent bonds, since careful lawyers, like the respondent, would always remove risky terms if they had no context specific reason to keep them. Moreover, this explanation for incompleteness cannot explain simple errors and glitches that are not inserted purposefully to reduce contracting costs. Rather, the landmines that derive from purposeful drafting efforts should not be widely spread across many bonds.

**Satisficing.** Opportunity costs are a further theoretical reason for incompleteness that can explain some of the landmines we have discovered. Here, the argument is that high front end negotiating costs motivate parties to satisfice in contract drafting. There is no time to engage in front end negotiations because the market moves so quickly that taking time to negotiate is not cost effective. Satisficing theory thus fits the factual assertion offered by some interview respondents that there is often only a “small window” for timing the placement of sovereign bond issues. Timing constraints may explain errors that arise from haste and also explain why errors are not eliminated once they have been introduced. Another way of expressing the satisficing motivation is that front-end costs are too high relative to the much lower back-end risks to justify getting the legal contract terms right. One respondent asserted that the legal contract is largely irrelevant, stating that “a sovereign loan is a gift that is repaid when the

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82. Interview No. 18 (Oct. 16, 2021).

sovereign needs more money.”<sup>83</sup> Another opined, “Who knows what a term such as the issuer’s right to correct a ‘manifest error’ means, but does it matter?”<sup>84</sup> In short, sovereigns are reputationally constrained and it is hard to make changes because of the timing problems.

The problem with the satisficing idea is that it does not explain why we would see new language being deliberately introduced to alter a clearly specified standard form term. A number of the landmines result from “subversive accretions”—additional language giving the sovereign the discretion to change payment terms on the grounds of “manifest error,” or “as required by mandatory law,” or as “permitted by applicable law,” changing a clear rule into a vague standard.<sup>85</sup> The satisficing theory predicts that no lawyer would make such deliberate changes in the standard form if they could avoid it, but we see what appear to be a number of these pro-sovereign changes. Satisficing theory cannot explain purposeful changes that create landmines where none existed previously.

**Agency Costs.** Agency costs are a third explanation of incompleteness. Sovereign debt contracting is peculiarly subject to agency costs. In the sovereign bond case, the individual interests of the key market participants are inconsistent with the interests of their respective principals—the investors in the market and the citizens of the sovereign. The private interests of the drafting lawyers are the mirror image of their *de facto* clients, the debt managers, the agents of the sovereigns, and the investment banks, the agents of the investors.<sup>86</sup> And both sets of agents are subject to hyperbolic discounting relative to the sovereigns and investors. The key agents are motivated to minimize the ex-ante costs of a bond issue (transaction costs plus negative price effects) even where expected ex post costs (restructuring cost, the cost of holdouts, etc.) are thereby increased by an even greater amount.<sup>87</sup> Agency costs imply that drafting lawyers will rarely change terms purposefully: lazy lawyers would prefer not to make any changes at all, and thus, agency costs cannot explain changes that were designed to optimize by turning a rule into a standard. Contracts infected by agency costs thus will have a higher risk of careless errors and thoughtless importation of terms from other documents as the drafters race to “fill in the blanks.”<sup>88</sup> In short, this theory in its pure form cannot explain how

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83. Interview No. 23 (Sept. 7, 2021).

84. Interview No. 22 (Nov. 12, 2021).

85. See *infra* Appendix at A.2, A.3, & A.4.

86. See Anna Gelpern, Mitu Gulati, & Jeromin Zettelmeyer, *If Boilerplate Could Talk: The Work of Standard Terms in Sovereign Bond Contracts*, 44 L. & SOC. INQUIRY 617 (2019) (reporting on interviews); GULATI & SCOTT, *supra* note 1, at 139-66 (reporting on interviews, and emphasizing the agency cost issue).

87. Excessive discounting by agents thus leads to bond issuances that are less efficient than they could be. An efficient sovereign bond contract optimizes total contracting costs by trading off the ex-ante or front-end costs of the contract and the ex post or back-end costs of default. See Scott & Triantis, *supra* note 19, at 816.

88. One lawyer described the process of drafting sovereign debt contracts in the following terms:

“subversive accretion” landmines exist but can explain both the creation and the retention of the historical holdover and human error landmines.

A number of the respondents offered a version of the agency cost story: the landmines resulted from various examples of careless drafting—the introduction of language from corporate bonds (by lawyers who don’t understand that sovereigns are sovereign)—or other random errors. One respondent explained: “[C]areless language is not removed because only a few skilled lawyers know to make changes.”<sup>89</sup> Another said: “No one who is not an expert—generally those who work on restructurings—cares, and the underwriters don’t care because litigation is a very low probability.”<sup>90</sup>

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In sum, the problem is not that we have no theory of incompleteness. It is that we have too many theories and none fit the universe of our landmines. Theories of incompleteness can account for some of these landmines, but none can account for all of them. Thus, optimal contract design explains the grafting of vague and problematic language onto clear contract terms in an effort to optimize total contracting costs. But this explanation for incompleteness cannot explain simple errors and glitches that are not designed to reduce contracting costs, nor can it explain the persistence of historical clauses where the original purpose of the clause is lost. Satisficing is a further theoretical reason for incompleteness: high front-end negotiating costs can foreclose other opportunities and motivate parties to hastily draft contracts.<sup>91</sup> This theory fits the “small window” for timing the placement of issues in sovereign bonds, and it explains why errors are not eliminated once they have been introduced. But it cannot explain purposeful or deliberate changes that give discretion to the sovereign in place of previously clear statements of the debtor’s obligations. Agency costs are a third theory of incompleteness that can explain why inadvertent errors may not get corrected once they are introduced. But only inexperience rather than laziness can explain the initial introduction of those random errors since lazy lawyers would prefer not to make any changes at all.

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You have to understand the system. No one pays that much attention to the minute details like this. One cannot afford to, if one wants to stay competitive. The firm has a computer program. You know . . . one that a junior associate can go to and plug the relevant parameters into—you know, type of issuance, type of issuer, which side we are representing, etc.—and the computer generates a standard contract. The firm spent [a large amount] on putting together this system. Associates can now produce a contract for one of these deals *in three and a half minutes*. This is the future of contracting in these markets.

GULATI & SCOTT, *supra* note 1, at 9 (quoting an interview with a senior law firm partner, June 18, 2007) (emphasis added).

89. Interview No. 20 (Jan. 10, 2021).

90. Interview No. 19 (Mar. 1, 2021).

91. See Bolton & Faure-Grimaud, *supra* note 20, at 964.

And, in any case, agency costs don't explain purposeful changes that were designed to optimize by turning a rule into a standard.<sup>92</sup>

The question, then, is whether a hypothesis can be advanced that both explains the different characteristics of the landmines in our dataset and harmonizes the three theories of incompleteness we have derived from the interviews with market experts. We turn to this question next in Part V.

## V. The Bifurcated Market Hypothesis

The place to begin making sense of what we have learned is with the claim (supported explicitly by roughly a third of our gurus and consistent with the observations of another third) that the market for sovereign lawyers is bifurcated. It consists of a small group of experts skilled in resolving debt crises (our gurus) and a larger group of inexperienced or only marginally competent novices. If we start by assuming that this claim is true, a story begins to fall into place. The expert group of lawyers, many of whom work on back-end restructurings as well as initial bond issues, are not subject to the same agency cost pressures, and they do negotiate terms for their clients. Because these lawyers are sovereign debt specialists, they care about their long-term reputation in the market, and this motivation to maintain their market reputation will better align their interests with that of the sovereign.

There is evidence of a further asymmetry in the process of drafting sovereign bond contracts.<sup>93</sup> The drafting begins when the underwriter's lawyers provide an unrevised standardized precedent to the issuer's lawyers for their review. The issuer's lawyers, particularly in the U.S., are primarily responsible for proposing redline changes to the standard form. Suggested revisions and changes to standard language are then reviewed by the underwriter's lawyers. The underwriter's strongest motivation is to resist any changes in the standard form that might raise concerns in the market and thereby reduce the price of the bond issue or otherwise cause the issue to miss a propitious market window. Presumably, the issuer's lawyers are also sensitive to price, but given their strategic advantage in proposing changes they may also wish to add language that advances the interests of their client. This well-entrenched drafting practice suggests that the most significant changes in the standard form will result from language drafted by the issuer's counsel. Otherwise, there is little incentive for either party to tinker with the standardized terms of the bond.

The divergent incentives created by the standard drafting practice for new bond issues suggest a different source of the linguistic irregularities we have discovered. In addition to inadvertence, landmines may result from

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92. See also Anna Gelpern, *The Importance of Being Standard*, in ESCB LEGAL CONFERENCE 2016, at 25 (2017) (observing the contradictions in conventional stories about the importance of standard forms and the prevalence of small variations in language).

93. *Id.*

purposeful actions to introduce or retain anomalies in the standard contract language. To be sure, a random error can favor either party to the contract, but the risk of an ambiguity favoring sovereign debtors is particularly acute in liquid markets that follow the standard drafting practice. Since the debtor's lawyers are primarily responsible for producing the contract language, they are in theory motivated to advance the interests of their clients by shifting some of the default risk from the debtor to the creditors who purchase the bonds. At the same time, the investment bankers, who nominally represent the interests of the largely anonymous creditors, are primarily interested in efficiently marketing the bonds and not as much in evaluating the risks of a default that may come in the distant future long after their task of placing the bonds is done.<sup>94</sup> Thus, a "subversive accretion"—new language that subtly favors the debtor—can get introduced without challenge and, as the process subsequently repeats, the language may become imbedded in the standard form.

The market of sovereign-bond lawyers, then, is composed of (a) a small group of lawyers (the "gurus") experienced in restructuring distressed debt who remove landmines when they encounter them if the terms are adverse to the sovereign's interest, and sometimes insert useful ones for their sovereign clients as well, and (b) the larger number of less experienced lawyers (the "novices") who typically prepare the contract quickly by filling in necessary blanks without giving much thought to the downstream effects of the individual terms in the contract.<sup>95</sup> The relatively small number of restructurings over the years relative to the number of sovereign offerings limits the proportion of gurus to novices in the market.

Based on this bifurcated market assumption, an origin story emerges that rationalizes each of the theories of incompleteness. We can now explain the differences among the landmines by separating them along three dimensions: (a) purposeful changes by gurus representing sovereigns that we call subversive accretions; (b) human errors by novices that subsequently function as litigation leverage for activist creditors; and (c) historic holdovers from source documents importing common terms from corporate transactions. This classification supports several predictions on the nature of the landmines that we should observe in the market.

#### *A. Subversive Accretions*

Subversive accretions—language changes that turn a bright line rule into a vague standard—are produced by gurus when they are representing sovereigns. These changes accommodate client concerns with assuming

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94. See Choi, Gulati & Scott, *The Black Hole Problem*, *supra* note 1, at 63.

95. See GULATI & SCOTT, *supra* note 1, at 10-12.



overly broad bright-line obligations.<sup>96</sup> Since gurus are experts in the meaning of the contract terms, they are less constrained by timing concerns than are novices who face high learning costs. Gurus are also less susceptible to agency problems; their longer-term interest in participating in restructuring arrangements motivates them to be more responsive to clients' concerns.

Because of the short-term focus of underwriters, gurus have a greater ability to introduce terms that favor the sovereign. Initially, we posit that gurus will generate vague language that results in pro-sovereign landmines. In Part II, we analyzed the Manifest Error landmine (giving a sovereign the right to modify a debt obligation in order to correct a "manifest error") as a type of subversive accretion.<sup>97</sup> Another example of a vague term that represents a subversive accretion, mentioned earlier, relates to the waiver of sovereign immunity.<sup>98</sup> The typical waiver of sovereign immunity reads like Zambia's 2017 bond:

To the extent that the Issuer may in any jurisdiction claim . . . [immunity] from suit, execution, [or] attachment . . . the Issuer agrees not to claim and irrevocably waives such immunity to the full extent permitted by the laws of such jurisdiction.<sup>99</sup>

The straightforward interpretation is that if a jurisdiction grants immunity to a sovereign debtor, the issuer waives it to the extent permitted by the laws of that jurisdiction. But in a subset of sovereign bonds, the waiver provides additional language:

To the extent that the Issuer may in any jurisdiction claim immunity from suit, execution or attachment, the Issuer agrees not to claim and irrevocably waives such immunity to the full extent permitted by applicable law.<sup>100</sup>

Here, the issuer is waiving immunity unless it is not permitted by an undefined "applicable law." Read literally, this provision appears to allow the waiver of immunity to be retracted by the sovereign since the laws of the sovereign debtor are, at least in theory, one of the "applicable laws." That interpretation essentially transforms the waiver into an option for the

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96. Changing a sovereign's contractual duty from a bright-line obligation to a vague standard saves negotiating costs and shifts those front-end costs to the presumably lower-cost back-end. In this way, parties forgo lengthy disagreements over specifying particular exceptions to, say, a broad immunity waiver and instead substitute a vague standard that delegates that function to a later court. *See supra* text accompanying notes 76-77.

97. *See supra* Section II.A.

98. A standard condition of sovereigns borrowing on the international bond markets is that they waive immunity from both suit and execution.

99. *See* Republic of Zambia, 2017 Offering Circular (on file with authors) (emphasis added).

100. *See* Republic of Barbados 2020 Restructuring Offer (on file with authors) (emphasis added).

sovereign debtor: it can waive immunity until it chooses not to do so.<sup>101</sup> We refer to this provision as the Sovereign Immunity By Law landmine.<sup>102</sup>

Although gurus are a small part of the market for bond lawyers, we expect that their efforts to add subversive accretions will have a substantial effect on the contract terms that dominate the market. Moreover, the frequency of subversive accretions should have increased from the start of the modern sovereign bond market in the early 1990s to the present as a cohort of gurus gained experience in handling distressed debt. We should also expect to see errors arise periodically. When the errors favor the sovereign, gurus in the market may choose not to correct the errors, leading to the persistence of the pro-sovereign errors. We group these pro-sovereign errors together with other purposeful changes in favor of the sovereign in the “subversive accretion” category. For some subversive accretion landmines, therefore, it is unclear if the problematic language is the product of a deliberate addition to the standard clause or, alternatively, a pro-sovereign error that gurus have little incentive to remove. In addition to the Manifest Error and Sovereign Immunity By Law landmines, we have identified at least six other subversive accretion landmines, including Fiscal Laws (omitting the place of payment),<sup>103</sup> Pari Passu Mandatory Law (local law limitations on pro-rata payments),<sup>104</sup> Sovereign Immunity Exclusions (exempting property necessary for public functioning),<sup>105</sup> Governing Law Authorization-Execution (local law controlling certain matters),<sup>106</sup> Prescription (local law controlling prescriptive period),<sup>107</sup> and Jurisdiction (providing an option for local jurisdiction).<sup>108</sup> We discuss each in more depth in the Appendix.

### B. Human Errors

Human error landmines are a product of hurried actions by novices: the bifurcated market for lawyers implies that these errors primarily result from a combination of ignorance and felt constraints to meet market timing demands. Novices satisfice: they are too constrained by the challenge of optimally issuing bonds in a liquid market to bargain for purposeful amendments to existing clauses. Since novices only represent clients at the issuance stage there are significantly higher risks of agency costs in their contracts. They rarely change terms purposefully, but their contracts will

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101. To be sure, a court may take judicial notice of the context of the sovereign bond market and hold that “applicable law” means the law of the forum state only. But the subversive accretion landmine is the litigation risk and its attendant costs regardless of the eventual outcome of that litigation.

102. See *infra* Appendix at A.4.

103. See *infra* Appendix at A.1.

104. See *infra* Appendix at A.3.

105. See *infra* Appendix at A.7.

106. See *infra* Appendix at A.6.

107. See *infra* Appendix at A.5.

108. See *infra* Appendix at A.8.

have a much higher risk of careless errors and thoughtless importation of terms from other documents as they race to “fill in the blanks in the contract.” The satisficing theory supports this prediction by introducing a time constraint that further explains the presence of sloppy errors.

### 1. Periodic Errors

When human errors disfavor the sovereign, we expect that the gurus in the market will work to clean up the errors. In equilibrium, there will be a balance between such errors arising periodically and gurus stamping them out.<sup>109</sup> We predict that this equilibrium results in more frequent periodic errors in the early stages of the modern sovereign bond market when attorneys were beginning to develop expertise and less frequent errors currently in a market with more established gurus. We term these anti-sovereign errors as “periodic error” landmines.

Importantly, these errors are not readily explained as the product of a negotiation between the drafting parties. Many of these errors have the effect of increasing the ex-post leverage of activist creditors who might subsequently attempt to undermine a proposed restructuring agreement. Since activist creditors only appear when the debtor nears default, they are not represented during the drafting process and thus it is difficult to characterize any of these irregularities as “purposeful.” As discussed above, underwriters who primarily care about getting a deal done quickly will undervalue any long-term incentive effect that empowering activists may have on sovereign behavior.<sup>110</sup>

In addition to the Cross-Default Scope landmine (extending the clause to “all the sovereign’s external or public debt”),<sup>111</sup> other examples of periodic error landmines that have an overly broad scope are found within the ubiquitous *pari passu* and negative pledge clauses. Given the possibility of disruption caused by premature or inapt claims of default, most sovereign bonds narrowly define the scope of the negative pledge and *pari passu* clauses.<sup>112</sup> There are, however, contracts that fail to define

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109. This prediction depends, of course, on the empirical question: what is the ratio of gurus to novices?

110. If the value to activist investors were priced in, there would be an incentive for the underwriters to retain these activist-favoring glitches (indeed, they would no longer be glitches). But there is little evidence of this kind of pricing effect. *See supra* note 32; GULATI & SCOTT, *supra* note 1, at 70-71 (investigating the pricing question in the *pari passu* context).

111. *See supra* Section II.A.

112. For example, Montenegro’s definition of “Public Indebtedness” in its 2020 bond has three separate conditions that have to be satisfied for a debt to be covered by the negative pledge clause:

“Public Indebtedness” means any indebtedness which (a) is in the form of or represented by any bond, note, debenture, debenture stock, loan stock, certificate or other instrument, (b) is, or was intended by the issuer thereof to be at the time such indebtedness was issued, listed, quoted or traded on any stock exchange or in any securities market (including, without limitation, any automated trading system or over-the-counter market) and (c) has a maturity date falling more than one year after its issue date.

*See* State of Montenegro, 2020 Offering Circular (on file with authors).

“external” or “public” debt narrowly. Instead, these contracts provide that the negative pledge and pari passu clauses are triggered by “all of the sovereign’s unsecured or public debt.”<sup>113</sup> (We refer to these as the Pari Passu Scope and Negative Pledge Scope landmines.)<sup>114</sup> These landmines create a risk that all of the sovereign’s external debt could be accelerated because of a local action that led to a default on a state obligation. Since this is not an outcome that either party would intentionally agree to ex ante, most likely it arose from error. Any strategic advantage from overly broad scope language in the negative pledge clause would likely accrue to activist creditors who might wish to impede forthcoming restructuring negotiations.

One might predict that errors such as this would typically be scrubbed by issuers’ drafters taking care to protect their clients’ interests. However, to the extent only novices negotiate the deal, a periodic error may arise that negatively affects the intended operation of the pari passu, negative pledge and cross-default clauses.

## 2. Innovation Errors

We posit that periodic errors arise randomly from the actions of novice attorneys drafting sovereign bond deal documents. In certain circumstances, however, the rate of errors may be higher. In particular, when a new clause or term is introduced into the market and there is no single market standard, market participants may experiment with different variations of language to describe the new clause or term. While lawyers generally eschew modifying boilerplate contracts, they are motivated to revise boilerplate in response to a shock, such as an unexpected court ruling. Once drafters determine to revise one aspect of the contract, the temptation is greater to further alter the contract language.<sup>115</sup> Thus, the rapid changes to language following the adoption of a new clause or term will predictably lead to a higher rate of errors. These “innovation errors” typically favor activist creditors not present at the contract drafting stage who might attempt to use the inapt drafting to undermine a proposed restructuring agreement.

One example of an innovation error relates to the shift in the sovereign bond market from clauses requiring unanimity in order to change payment related terms to collective action clauses that only require a stated percentage of noteholders to agree to any modification. Because the sovereign debt market had been targeted with numerous instances of holdout creditors blocking restructurings, a number of revisions were made to the

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113. See, e.g., Russian Republic 2018 Offering Circular (on file with authors).

114. See *infra* Appendix at B1 & B2. This is the same problem with the broad scope cross-collateral clause that is discussed in Section II.B.

115. For a discussion of this dynamic, see Stephen J. Choi, Robert E. Scott, & Mitu Gulati, *Investigating the Contract Production Process*, 16 CAP MKTS. L.J. 414, 419-25 (2021).

standard modification clause.<sup>116</sup> One of those revisions permitted a minority of creditors (25% in principal amount) to accelerate the payments owed to them upon default, but then authorized a majority of the creditors (50% in principal amount) to reverse the acceleration. This right to reverse an acceleration is important in situations where the majority of creditors are working out a settlement with the debtor but a minority threatens to hold out from the deal in order to extort an additional payment. Ex ante, all the creditors would prefer to prevent such holdout behavior.

The idea behind the reverse acceleration clause is simple. But initial drafting efforts often present challenges. Thus, there are some bonds that subject the reversal to a condition precedent. For example, the Uruguayan 2021 reverse acceleration clause reads:

Holders of debt securities representing . . . more than 50% of the principal amount of the [debt securities of that series] may waive any existing defaults, and their consequences, on behalf of the holders of all of the debt securities of that series, if [that event of default] has been . . . cured, remedied or waived.<sup>117</sup>

If the purpose of the Uruguayan clause is to permit a majority of creditors to reverse an acceleration because it is in the process of working out a deal with the debtor, it is puzzling to require the event of default to first be “cured” or “remedied.” After all, the likely reason the sovereign’s actions triggered the event of default is that it lacked the funds to make its coupon payments. And the likely reason the majority wants to reverse the acceleration is that it wants a restructuring deal to enable the sovereign to begin making payments again (albeit at a lower amount). Given that reasoning, requiring the sovereign to cure the event of default by paying the full amount of a debt that it was previously unable to pay defeats the very purpose of the clause.

Presumably, what the clause is meant to say is that a majority of creditors can “waive” the initial acceleration. But the “waiver” term is not defined, and this reading is not obvious. One could just as easily conclude that the waiver must come from the minority who exercised the right to accelerate in the first place. On this reading, either the event of default is cured, or the minority must decide to waive the acceleration. That interpretation gives a minority of activist creditors the textual basis for asserting a meaning that undermines the essential purpose of the reverse acceleration clause which is to prevent activist creditors from holding up the majority who are attempting to work out a restructuring.

We refer to this patent ambiguity as the Reverse Acceleration landmine.<sup>118</sup> We predict that landmines that result from these innovation errors should reduce in frequency over time, particularly if they negatively

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116. For a history of the collective action clause innovation circa 2004, see W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 51 (2013).

117. See República Oriental del Uruguay, 2018 Prospectus at 10 (on file with authors).

118. See *infra* Appendix at C.1.

affect the interests of the sovereign. In addition to the Reverse Acceleration landmine, we have identified at least two other innovation error landmines including Governing Law Always (conflict between modification and governing law clauses)<sup>119</sup> and CAC Strategy Disclosure (no limitation on debtors modifying disclosure requirement).<sup>120</sup> We discuss each in more depth in the Appendix.

### C. *Historical Holdovers*

One more separate category of human errors results from the importation in the early 1990s of terms from corporate documents and other instruments into the historical source documents that formed the current standard form. The best view is that this practice occurred when the lawyers participating in the transformation from syndicated loans to the sovereign bond template lacked the experience that subsequently revealed the problem with the importation practice.<sup>121</sup>

Drafting lawyers who write commercial contracts for multiple markets often borrow standard terms that are particularly useful in one market and import them into another, seemingly similar, market. This practice is particularly tempting for drafters who write debt contracts for corporate as well as sovereign clients.<sup>122</sup> Both corporate and sovereign bonds share many similarities; they are issued in large, liquid markets with standardized terms principally designed to reduce the risk of the debtor's default. It seems quite appropriate, therefore, to import a term that efficiently reduces the default risk in the corporate context into the contract of a sovereign debtor so as to accomplish the same purpose. But this importation of standard terms from corporate to sovereign bonds can have unintended effect if the accepted meaning of the term in the corporate context does not translate meaningfully to the sovereign context. The result is a landmine—a term without an apparent meaning in the new environment.<sup>123</sup>

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119. See *infra* Appendix at C.3.

120. See *infra* Appendix at C.2.

121. See *supra* discussion at text accompanying note 31.

122. See Tal Kastner, *Systemic Risk of Contract*, 45 B.Y.U. L. REV. 451, 479 (2021) (describing the phenomenon as “modular drift”). For an empirical analysis of this borrowing phenomenon, and the problems it can cause in the context of merger and acquisition contracts, see Robert Anderson & Jeffrey Manns, *The Inefficient Evolution of Merger Agreements*, 85 GEO. WASH. L. REV. 57, 71-76 (2017).

123. GULATI & SCOTT, *supra* note 1, at 115-18. A related explanation for the practice of importation is the conjecture that importation of language may occur when a particular practice area has a large volume of deals and corresponding greater involvement by the drafting attorney while other practice areas have less deal volume. Drafters that have extensive experience in the high-volume area are likely to be more comfortable importing language from the area with which they are more familiar. Shocks may accelerate the propensity of drafters to import language across different subject matter areas by using language from one area to address concerns arising from a shock in another area.

We call these one-time importation errors the “historical holdover” landmines. Because the historical holdover landmines are embedded in the original source documents for the modern sovereign bond template, we predict that once embedded, these landmines are unlikely to disappear even over long periods of time. As discussed in Part II, the negative pledge clause is an exemplar of a historical holdover.<sup>124</sup> Negative pledge clauses have been in sovereign bonds for a number of decades. These clauses might have made sense at a time when pledges were enforceable through force (foreign governments sending in gunboats to enforce the rights of their creditors<sup>125</sup>). But these clauses draw little attention in the modern era where sovereigns rarely pledge anything more than their full faith and credit and gunboat diplomacy is no longer permitted. More recently, however, sovereign pledges are becoming more common. Because of the embedded nature of the clause as part of the original source documents used to form the modern sovereign bond contract, we predict that the negative pledge clause will persist over time despite the presence of gurus who otherwise might attempt to clean up landmines. In addition to the Negative Pledge landmine,<sup>126</sup> we have identified at least two other historical holdovers, including the *Pari Passu*<sup>127</sup> and *Buy Back*<sup>128</sup> landmines.<sup>129</sup> We discuss each in more depth in the Appendix.

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The preceding analysis has generated three central predictions based on the bifurcated market assumption: (1) Subversive accretion landmines will be more prevalent over time and more persistent in contemporary bond contracts than human errors; (2) Periodic errors will tend to diminish over time and innovation errors should be prevalent initially and then diminish more rapidly than periodic errors; (3) Historical holdovers from source documents will be more prevalent and persistent over time than subversive accretions and human errors. In Part VI we test these predictions against a random sample of bond contracts.

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124. See *supra* Section II.C.

125. This is referred to as “gunboat diplomacy.” See MICHAEL TOMZ, REPUTATION AND INTERNATIONAL COOPERATION: SOVEREIGN DEBT ACROSS THREE CENTURIES 114-157 (2007).

126. See Marc Flandreau, Stefano Pietrosanti & Carlotta E. Schuster, *The Puzzle of Sovereign Debt Collateral: Big Data and the First Age of Financial Globalization* (CEPR Discussion Paper DP17286, 2022), <https://ssrn.com/abstract=4121470> [<https://perma.cc/8DGL-HV5T>] (noting that collateral is being used again in modern sovereign finance).

127. See *infra* Appendix at D.3.

128. See *infra* Appendix at D.1.

129. There is one other landmine we identified that is part of some of the original source documents: an event of default based on access to the “general resources” of the IMF. This landmine was only present in a minority of bonds in the early 1990s. In our random sample of bonds from 1990 to 1995, discussed in Part VI, we found this landmine in only 8% of the bonds. Because this landmine was not embedded in the standard form for all bonds, we did not include it in our analysis of historical holdovers.

## VI. Empirical Analysis

In Part VI, we undertake a preliminary assessment of the prevalence and persistence of the various landmines in modern sovereign bond contracts using a dataset of randomly selected sovereign bond issuances from 2020 to 2022 obtained from the Perfect Information database. We selected 40 bonds each from 2020 and 2021 and 20 bonds from 2022, collected up to June 1, 2022.<sup>130</sup> This gave us a total of 100 bonds. We included issuances directly by a sovereign (90% of the sample) as well as by entities related to the sovereign for which the sovereign provided a guarantee (10% of the sample). Most of the bonds were governed by English law (54%) and the next most by New York Law (41%). The remainder were governed by German (2%), Ontario/Canada (2%), and PRC Law (1%).

While our sample includes bonds governed by different law and bonds issued by non-sovereigns guaranteed by a sovereign, each is denominated in a currency other than the sovereign's own currency and, importantly, structured for sale to the international market. In theory, the need to sell to the international market will lead the sovereign to account for the preferences of the investors in this market. To the extent the investors are sophisticated commercial parties with interests represented by investment banks seeking to place the bonds, conventional wisdom holds that the bonds, even if boilerplate, should reflect those terms that maximize the expected joint surplus of the sovereign and the investors. Under the conventional view, therefore, we would not expect to find any landmines in the bonds we have collected. We find, however, that landmines are pervasive in our sample. In the sample of 100 bonds from 2020-22, 100% had at least one of the landmines we identify in this paper.

### *A. Prevalence Across Sections of the Sovereign Bond Contract*

Where are the landmines found in the typical sovereign bond contract? If the landmines were concentrated in one specific portion of the bond contract that receives little attention, their prevalence might be attributed to simple inattention by lawyers. Alternatively, if the landmines were pervasive across different sections of a sovereign bond contract, simple inattention is a less plausible explanation for their existence.

To assess the prevalence of landmines across different sections of a sovereign bond contract, we grouped our landmines by the "standard" sections of the typical sovereign bond contract. To determine the standard format of a sovereign bond contract, we selected a single bond each from

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130. We chose to collect a cross-section of bonds issued contemporaneous with the research and drafting of this Article. This allows us to address whether landmines are an issue in the modern sovereign bond market. In Tables 5, 7, and 8, we also provide a preliminary time series for a select sample of sovereign bonds. In future research, we plan to gather a more complete time series of sovereign bond contracts to assess the origin of landmines, how landmines spread, and when—if ever—they are corrected.



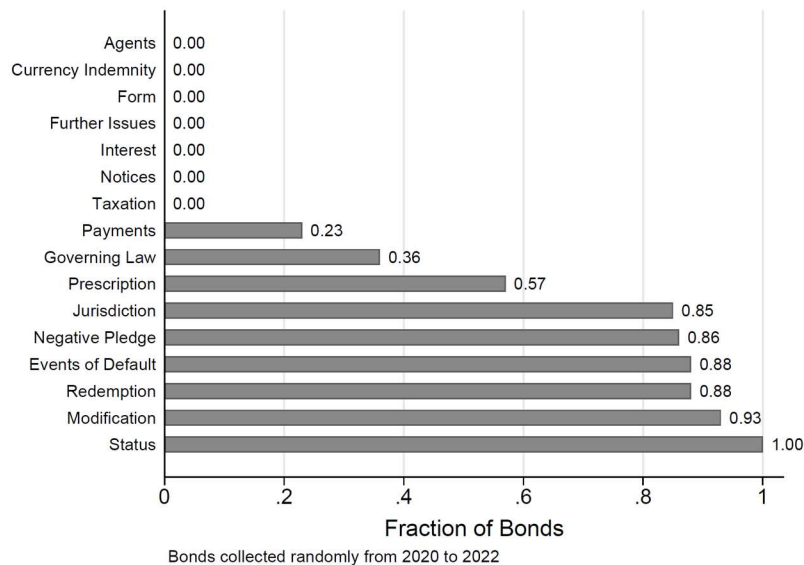
20 randomly selected sovereigns in our sample. These bonds used either numbered headings or bold-faced headings to delineate the different sections of the bond contract. Market forces will lead sovereign issuers to delineate separately (either by numbering or bold face) the major sections of a bond contract. Not all sections are identical. One sovereign, for example, may have separate sections for Governing Law, Jurisdiction, and Sovereign Immunity. Another sovereign may group Governing Law, Jurisdiction, and Sovereign Immunity together in a single section. For our purposes, we selected those sections used by a majority of the 20 sovereigns. We assume that the use of a section by most of the sovereigns we surveyed reflects market acceptance of the section as an important segment of the sovereign bond contract. Using this procedure, we identified sixteen sections in the sovereign bond contract. Table 1 reports the sections and the correspondence with the landmines we identify in this paper.

Table 1: Standard Sections of the Sovereign  
Bond Contract and Landmines

<b>Section</b>	<b>Landmines</b>
1. Form	
2. Status	Pari Passu Pari Passu Scope Pari Passu Mandatory Law
3. Negative Pledge	Negative Pledge Negative Pledge Scope
4. Interest	
5. Payments	Fiscal Laws
6. Redemption & Purchase	Buy Backs
7. Taxation	
8. Prescription	Prescription
9. Events of Default	Cross Default Scope Reverse Acceleration (Cure or Remedy Required)
10. Agents	
11. Notices	
12. Modification	Manifest Error CAC Strategy Disclosure
13. Further Issues	
14. Currency Indemnity	
15. Governing Law	Governing Law Authorization Execution Governing Law Always
16. Jurisdiction & Enforceability	Jurisdiction Sovereign Immunity By Law Sovereign Immunity Exclusions

Using the section categorization in Table 1, we tabulated the presence of landmines by section for each bond contract in our sample, treating the presence of any landmine in a section as equal to 1 and 0 otherwise. Figure 1 below depicts the incidence of the landmines for our sample bonds from 2020-22.

**Figure 1. Incidence of Landmines by Contract Section**



Note that our survey of landmines is not comprehensive. Our tabulation depicted in Figure 1 does not reflect the full extent of potential landmines in a sovereign bond contract but instead focuses on the presence of the seventeen landmines we track in this study. Our study establishes a floor for how many landmines are potentially present in these contracts based on the seventeen landmines we have identified. In addition, some of the sections, such as the Form section which describes the form in which the bonds will be issued (such as “fully registered form . . . and without interest coupons”) and the denominations of the bonds are more descriptive and thus less likely to contain a landmine. Indeed, for purposes of this Article, we did not identify any landmine in the Form section, leading the incidence of landmines for the Form section to equal 0 in Figure 1.

With these caveats, note from Figure 1 that in seven of the sixteen sections, over half of the bonds in the 2020-22 period had a landmine in our sample. In six sections, Status, Modification, Redemption, Events of Default, Negative Pledge, and Jurisdiction, we found at least one landmine in over 80% of the bonds in our sample. Landmines not only exist in

sovereign bond contracts, but they are present in many separate sections of the standard sovereign bond contract.

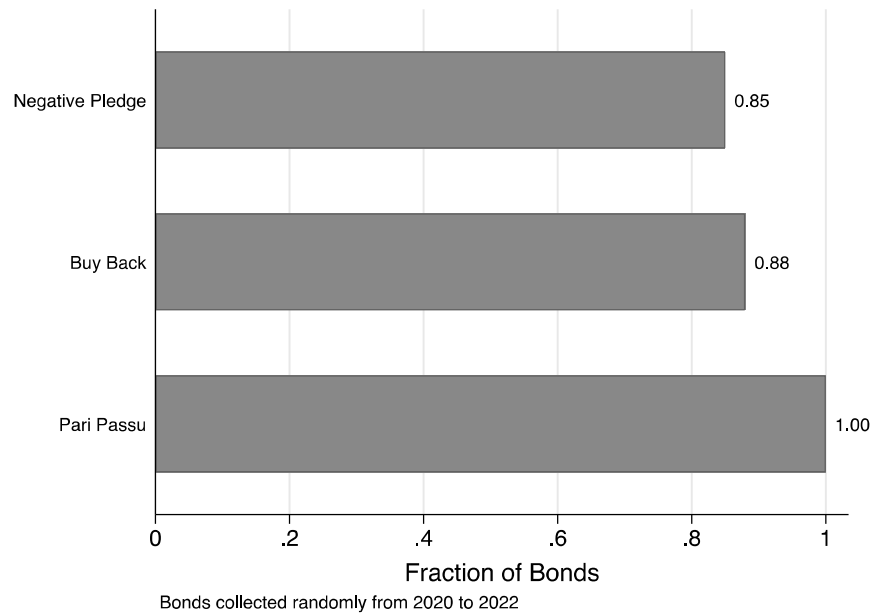
### *B. Landmines Grouped by Origin Theory*

To assess our theories for how sophisticated contracting parties end up with landmines in their sovereign bond contracts, we group our landmines into four categories.

#### 1. Historical Holdovers

Our first category, Historical Holdovers, captures those landmines that have existed from at least the start of modern sovereign bond issuances in the early 1990s. Such landmines may persist because they are deeply embedded as part of the standard boilerplate. We group three landmines in the historical holdover category: *Pari Passu*, *Negative Pledge*, and *Buy Back*. The Historical Holdovers, to the extent they are a long-standing part of the standard boilerplate, will be relatively difficult to remove from the sovereign bond contract. We accordingly predict a relatively high prevalence of historical holdover landmines in 2020-22. Figure 2 depicts the incidence of the historical holdover landmines for 2020-22.

**Figure 2. Incidence of Historical Holdovers 2020-22**



Note from Figure 2 that our three historical holdovers are present in over 80% of our bonds in the 2020-22 period. One of them, the *Pari Passu* landmine, is present in 100% of the bonds.

Each of our theories for the origin of landmines predicts a different progression over time for the incidence of the landmines. For historical holdovers, we predict that because these landmines are longstanding parts of the boilerplate, they should persist over time.

To test the historical progression for each group of landmines, we construct an additional sample of sovereign bond contracts from 1990 to 1995, the period when the modern sovereign bond issuances began. Due to a relative lack of bond issuances in this period, we randomly selected only 75 sovereign bond issuances using bonds obtained from Perfect Information.

Table 2 compares the incidence of the historical holdover landmines for the 1990-95 and 2020-22 periods.

Table 2. Historical Holdover Comparison

Clause	Incidence in the 1990-95 Period	Incidence in the 2020-22 Period	p-value
<b>Negative Pledge</b>	0.760	0.850	0.132
<b>Buy Back</b>	0.720	0.880	0.007
<b>Pari Passu</b>	0.987	1.000	0.247

p-value is from a chi-squared test of the difference between the 1990-95 and 2020-22 periods for each clause.

Table 2 notes that for the historical holdover landmines—Buy Back, Negative Pledge, and *Pari Passu*—the incidence of the landmine was not only high in 2020-22 but also at the start of the modern sovereign bond issuances in the early 1990s. The historical holdover landmines had a high prevalence in both of our randomly selected samples in the 1990-95 and 2020-22 periods.

Table 2 is based on pooled cross-sectional data from the 1990-95 and 2020-22 periods. To assess the persistence of the historical holdover for a specific sovereign, we looked at the sovereigns that included the historical holdover landmines in 1990-95 and assessed whether these same sovereigns still had the same landmines in their contracts in 2020-22. We find high levels of persistence for the historical holdovers for specific sovereigns, albeit with some differences. For those sovereigns that had one of the historical holdovers in their contracts in 1990-95, the same sovereigns used historical holdovers as follows in 2020-22: Buy Back (63.6% of the 11 sovereigns using the clause in the 1990-95), Negative Pledge (77.8% of the 7 sovereigns using the clause in the 1990-95), and *Pari Passu* (100.0% of the 14 sovereigns using the clause in 1990-95). At the high end, every single sovereign that used a *Pari Passu* clause in 1990-95 continued to use a *Pari Passu* clause in 2020-22. The Buy Back and Negative Pledge historical

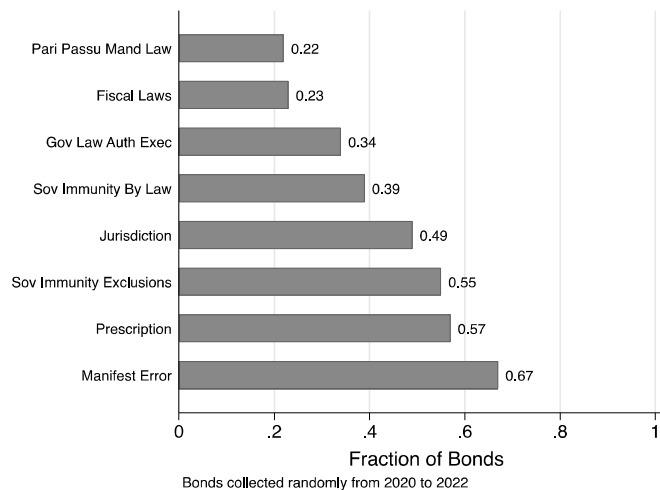
holdovers show lower although still substantial persistence at over 50% of the sovereigns. The difference in persistence for the three historical hold-over is significant at the 10% confidence level.

We leave for future research the analysis of what explains differences in persistence for the historical holdovers. It is possible, for example, that the market is focused more on some historical holdovers (*Pari Passu*) as part of the standard form at the beginning of the modern sovereign bond market in the early 1990s than others (Buy Back clauses), leading the market to penalize the absence of one more than the other.

## 2. Subversive Accretions

Our second category, subversive accretions, captures those landmines that arose because the gurus, the attorney-agents representing the sovereign issuer, systematically have more expertise as well as incentive to insert terms that favor the sovereign issuer. We group eight landmines into this category: Fiscal Laws, Manifest Error, *Pari Passu* Mandatory Law, Sovereign Immunity By Law, Sovereign Immunity Exclusions, Prescription, Governing Law Authorization and Execution, and Jurisdiction.<sup>131</sup> We predict widespread prevalence of subversive accretions, particularly as a function of time from the early 1990s to today. Figure 3 depicts the incidence of the subversive accretion landmines for 2020-22.

**Figure 3. Incidence of Subversive Accretions 2020-22**



Note from Figure 3 that the subversive accretion landmines are not as prevalent in 2020-22 as the historical holdover landmines. Nonetheless, subversive accretion landmines are found frequently in the sovereign bond

131. For discussion, see *infra* Appendix A.

contracts from 2020-22, ranging from 22% of the bonds (Pari Passu Mandatory Law) to 67% of the bonds (Manifest Error). The expertise and asymmetric incentives of sovereigns and their attorneys compared with the underwriters who represent the investors leads to frequent subversive accretion landmines. Nonetheless, the frequency is less than that for three of the historical holdovers, consistent with the presence of market pressures to limit subversive accretions.

We predict that subversive accretions should not be as prevalent at the start of the modern sovereign bond issuances in the early 1990s. Instead, we conjecture subversive accretions arose over time as lawyers, particularly those for the sovereign, developed expertise in handling distressed debts after the start of the modern sovereign bond market in the early 1990s and used this expertise to favor the sovereign over time.

Table 3 compares the incidence of subversive accretion landmines for the 1990-95 and 2020-22 periods.

Table 3. Subversive Accretion Comparison

<b>Clause</b>	<b>1990-95 Period</b>	<b>2020-22 Period</b>	<b>p-value</b>
<b>Fiscal Laws</b>	0.293	0.230	0.343
<b>Jurisdiction</b>	0.467	0.490	0.760
<b>Immunity By Law</b>	0.307	0.390	0.254
<b>Pari Passu Mand Law</b>	0.120	0.220	0.086
<b>Prescription</b>	0.320	0.570	0.001
<b>Gov Law AuthExec</b>	0.080	0.340	0.000
<b>Immunity Exclusion</b>	0.280	0.550	0.000
<b>Manifest Error</b>	0.200	0.670	0.000

p-value is from a chi-squared test of the difference between the 1990-95 and 2020-22 periods for each clause.

Note from Table 3 that, in general, subversive accretion landmines have grown in prevalence over time. Seven of the eight subversive accretions increased in prevalence from the 1990-95 period to the 2020-22 period. The increase for five of the eight subversive accretions is significantly different from zero. Only Fiscal Laws decreased somewhat in prevalence from 29.3% in 1990-95 to 23.0% in 2020-22 (difference not statistically significant).

The determination of the causal factors that lead to the adoption of subversive accretions requires a time series of bond data for individual sovereigns. Such a time series would allow us to pinpoint when a subversive

accretion is adopted (and may thereafter get repeated due to the boilerplate nature of bond covenants). We could also assess the factors that are correlated with the initial adoption, including the economic circumstances of the sovereign and the associated underwriters and attorneys in the specific bond offering.

For purposes of this Article, we instead make a conjecture that leads to a testable hypothesis. We conjecture that richer sovereigns are likely to have a lower expectation of default and thus value subversive accretions less. Conversely, poorer sovereigns will value subversive accretions more. Based on this conjecture, we predict that poorer sovereigns will accumulate more subversive accretions over time compared with richer sovereigns. Bonds in the 2020-22 period will represent three decades of accumulation of subversive accretions from the start of the modern sovereign bond market in the early 1990s. Our testable hypothesis is that poor sovereigns will have more subversive accretions in 2020-22 compared with rich sovereigns.

To identify Low Wealth sovereigns, we use data from the World Bank on gross national income (GNI) per capita.<sup>132</sup> We define High Wealth sovereigns as the top 30 countries in terms of GNI per capita in 2019.<sup>133</sup> Low Wealth sovereigns are those sovereigns in our dataset that are not High Wealth sovereigns. Based on this categorization, High Wealth sovereigns had an average of 1.6 subversive accretions in each bond issuance compared with Low Wealth sovereigns that had an average of 3.0 subversive accretions in each bond issuance (difference significant at the 1% confidence level). Consistent with our hypothesis, almost double the number of subversive accretions accumulate in the bond contracts for Low Wealth compared with High Wealth sovereigns. As a multivariate test, we estimate the following Ordinary Least Squares (OLS) regression model with the number of subversive accretions as the dependent variable on bond offering level data for 2020-22 as reported in Table 4:<sup>134</sup>

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132. See *GNI per Capita, Atlas Method*, WORLD BANK (2022), <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD> [<https://perma.cc/WP6R-4FBR>].

133. See *id.* The sovereigns in our dataset that are in the top 30 countries in terms of GNI per capita in 2019 are (in alphabetical order): Australia, Austria, Belgium, Bermuda, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Israel, Japan, New Zealand, Norway, San Marino, Sweden, the United Arab Emirates, and the United Kingdom.

134. We treat the overall number of subversive accretions in a particular bond offering as the result of the sovereign's decision to retain this number of subversive accretions in the contract for the offering. We use the overall number of subversive accretions as a measure of the sovereign (and the sovereign's agents) desire to implement potential leverage in any future restructuring. A sovereign that decides to retain four subversive accretions, for example, is opting for a more-sovereign friendly contract than a sovereign that decides to retain three subversive accretions. We thus use an OLS regression model with the overall number of subversive accretions as the dependent variable in Table 4. Another view is possible. Subversive accretions appear initially at some point in time. The overall number of subversive accretions may simply represent the number of these prior events that have occurred for a particular sovereign. To address this alternate view, we treat the overall number of subversive accretions as a count and estimate a negative binomial model with the same independent variables as in our OLS regression model. Unreported, we obtain the same qualitative results as in Table 4.

$$\text{Number of Subversive Accretions}_i = \alpha + \beta_1 \text{Low Wealth}_i + \beta_2 \text{English Law}_i + \beta_3 \text{Other Law}_i + \beta_4 \text{Top Issuer Counsel}_i + \beta_5 \text{Top Underwriter Counsel}_i + \varepsilon_i$$

For independent variables, we include an indicator variable for a Low Wealth sovereign (Low Wealth) to test whether Low Wealth sovereigns correspond to the accumulation of more subversive accretions. We also include other independent variables that may affect the adoption of subversive accretions. We include whether the bond is governed under English Law or Other Law compared with the base category of New York Law. We include an indicator variable for whether the issuer's counsel is one of the most frequent in our dataset (Top Issuer Counsel), defined as those attorney firms for the sovereigns that appear in at least 10% of the bond offerings in the 2020-22 period. Sovereigns with a Top Issuer Counsel may be better able to implement subversive accretions. We lastly include an indicator variable for whether the underwriter's counsel is one of the most frequent in our dataset (Top Underwriter Counsel), defined as those attorney firms for the underwriters that appear in at least 10% of the bond offerings in the 2020-22 period. Sovereigns with a Top Underwriter Counsel may eschew adopting subversive accretions.

Table 4. Subversive Accretions

	Model	Number of Subversive Accretions
Low Wealth	0.993*	(2.09)
English Law	1.143 <sup>+</sup>	(1.84)
Other Law	1.483*	(2.63)
Top Issuer Counsel	-0.466	(-1.30)
Top Underwriter Counsel	0.194	(0.53)
Constant	1.500**	(4.08)
N	90	
adj. R <sup>2</sup>	0.130	

t statistics in parentheses; <sup>+</sup> p < 0.10, \* p < 0.05, \*\* p < 0.01

Note from the Model of Table 4 that the coefficient on Low Wealth is positive and significant at the 5% level. A Low Wealth sovereign, compared with a High Wealth sovereign, corresponds with 0.99 more subversive accretions in a bond contract in 2020-22. This is consistent with more subversive accretions accumulating over time in the bond contracts of Low Wealth sovereigns.

The coefficient on English Law is positive and significant at the 10% level. English Law governed bonds correspond to 1.14 more subversive accretions compared with the base category of NY Law governed bonds. The coefficient on Other Law is positive and significant at the 5% level. Other Law governed bonds correspond to 1.48 more subversive accretions



compared with the base category of New York Law governed bonds. The differences among bonds with different governing law may be due to variation in how contracts are produced. Law firms that specialize in English Law or Other Law governed contracts may organize their contract production differently from law firms that specialize in New York law.<sup>135</sup> Firms that specialize in English law contracts, for example, tend to have more centralized development of contract terms, making it easier for such firms to develop and adopt subversive accretions compared with firms that specialize in New York law contracts. Sovereigns, in turn, tend to have separate boilerplates for English versus New York law governed offerings. Once a subversive accretion is adopted as part of the boilerplate for a sovereign's English law governed offerings, the subversive accretion will tend to persist and thus accumulate for subsequent English law governing offerings by the sovereign. Our results are consistent with more subversive accretions accumulating for English law governed contracts compared with New York law governed contracts.<sup>136</sup>

Note that the coefficients on both Top Issuer Counsel and Top Underwriter Counsel are not significantly different from zero. While the issuer and attorneys associated with any particular offering may change the bond covenants for that offering, in practice bond covenants likely display considerable stickiness over time after adoption. Because we look only at 2020-22 in Table 4, we do not observe when many of the subversive accretions are first adopted (likely before 2020-22) and instead only observe the accumulation of prior adoptions of subversive accretions in the standard bond contract boilerplate for a particular sovereign in our pooled data for 2020-22. Factors that are specific to a particular offering, including the law firms in the offering, therefore may not correlate with this accumulated total.<sup>137</sup> The use of a Top Issuer Counsel in an offering in 2020, for example, may not correspond to the number of subversive accretions in the offering

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135. See Choi, Scott, & Gulati, *supra* note 115, at 91-93.

136. As a robustness test, we re-estimated the Model of Table 4 with an indicator variable for those sovereigns not in the top 20 sovereigns in terms of the World Bank 2019 GNI per capita ranking. Unreported, we obtained the same qualitative results as in the Model of Table 4. We also re-estimated the Model of Table 4 with an indicator variable for those sovereigns not in the top 30 sovereigns in terms of the World Bank 2000 GNI per capita ranking. Earlier World Bank rankings did not include data on many of our sovereigns including Canada. Unreported, we obtained the same qualitative results as in the Model of Table 4 with one exception: the coefficient on English Law, while positive, is significant at only the 11.5% level, beyond conventional levels of statistical significance.

137. For this reason, we do not include other deal-specific factors in the regression including the offer amount or maturity date of the offering in the Model in Table 4. As a robustness, we re-estimate the Model in Table 4 with the addition of the log of the offering amount in billions of U.S. dollars and the maturity length of the bond in years as independent variables. We converted offering amounts in other currencies into U.S. dollars based on the exchange rate on the date of the prospectus or prospectus supplement for the offering. Where there was more than one offering on the same date under the same prospectus or prospectus supplement, we used the offering amount and maturity date for the first listed offering. Unreported, neither variable was significantly different from zero. We obtained the same qualitative results as in the Model in Table 4 with one exception: the coefficient on English Law, while positive, is significant at only the 12.8% level, beyond conventional levels of statistical significance.

if the events giving rise to the adoption of subversive accretions in the sovereign's standard boilerplate occurred prior to 2020. While sovereigns and underwriters often use the same law firms over multiple deals across time, we do not find that there is correlation between a Top Issuer Counsel or Top Underwriter Counsel in an offering and the observed number of subversive accretions in the offering for our 2020-22 data.

As with our analysis of historical holdovers, the identification of the causal factors leading to the adoption of subversive accretions requires more detailed time series data for each sovereign to pinpoint the circumstances around the initial adoption of a subversive accretion. While we leave this analysis for future research, we focus here on the adoption of a particular subversive accretion involving the Manifest Error clause for Ukraine. For Ukraine, we collected bond covenants at roughly five-year intervals to assess changes in Ukraine's Manifest Error clause over time. Table 5 reports on this time series.

Table 5: Ukraine Manifest Error Time Series

Date of Prospectus / Prospectus Supplement	Joint Book-running Managers	Issuer Counsel	Underwriter Counsel	Manifest Error Clause
11/27/2002	Credit Suisse First Boston; Dresdner Kleinwort Wasserstein	White & Case	Allen & Overy	The <u>Trustee and the Issuer</u> may, without the consent of the Noteholders, agree (i) to any modification of these Conditions or the Dollar Trust Deed (other than in respect of a Reserved Matter) which is, in the <u>opinion of the Trustee</u> , proper to make if, in the <u>opinion of the Trustee</u> , such modification will not be materially prejudicial to the interests of Noteholders and (ii) to any modification of the Dollar Notes or the Dollar Trust Deed which is of a formal, minor or technical nature or is to correct a manifest error.
10/12/2005	Citigroup; Deutsche Bank; UBS Investment Bank	Link-laters	Clifford Chance	[Substantially the same as in 2002]
9/22/2010	J.P. Morgan; Morgan Stanley; VTB Capital	Link-laters	Clifford Chance	[Substantially the same as in 2002]
2/17/2014	VTB Capital	White & Case	Clifford Chance	[Substantially the same as in 2002]
10/13/2018	BNP Paribas; Citigroup; Goldman Sachs International; J.P. Morgan	White & Case	Latham & Watkins (London)	The Agency Agreement may be amended without the consent of the holder of any Note for the purposes of, as determined by the Issuer, curing any ambiguity or of curing, correcting or supplementing any defective or inconsistent provisions contained therein or herein, to take into account further issues of notes pursuant to Condition 15 (Further Issues) or in any manner that the Issuer may deem necessary or desirable and that will not adversely affect, <u>in the opinion of the Issuer</u> , in any material respect, the interests of the Noteholders.
12/16/2020	BNP Paribas; Goldman Sachs International	White & Case	Latham & Watkins (London)	[Substantially the same as in 2018]
7/23/2021	BNP Paribas; Goldman Sachs	White & Case	Latham & Watkins (London)	[Substantially the same as in 2018]

Note that for the Ukrainian bonds from 2002 to 2014, Ukraine used largely the same manifest error clause. Importantly, the manifest error clause is largely identical across the four issuances in this period. Each

clause leaves it to the “Trustee and the issuer” to make modifications which are of a “formal, minor or technical nature or is to correct a manifest error.” The Trustee ostensibly acts on behalf of the bondholders. The clause also provides that modifications may be made if in the “opinion of the Trustee” such modifications are “not . . . materially prejudicial to the interests of Noteholders.” The last offering in this series was in 2014 and Ukraine used VTB Capital, a Russian investment bank, as the underwriter.

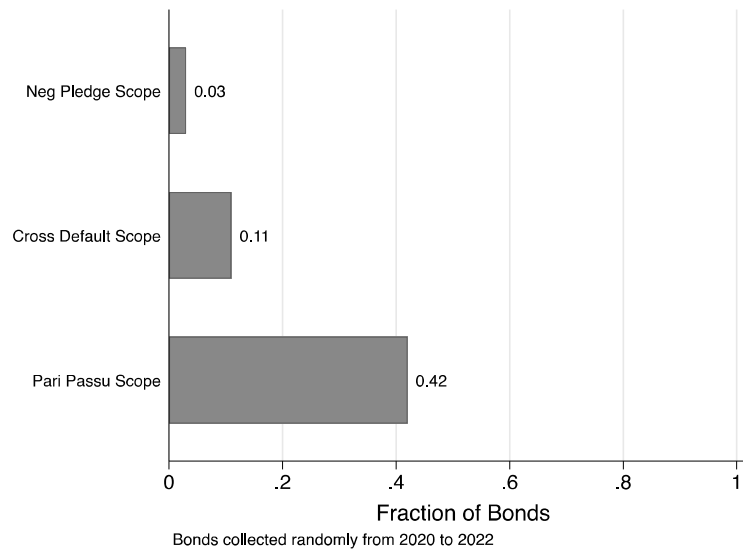
Russia then invaded Ukraine in 2014, which we take as a shock to Ukraine and to Ukraine’s future economic prospects. By 2018 (the next data point we have), Ukraine had dropped VTB Capital as the underwriter. The underwriter counsel also changed from Clifford Chance in 2014 to Latham & Watkins (London) in 2018 and onward. Coinciding with these changes, Ukraine’s 2018 Manifest Error Clause no longer refers to the Trustee. Instead, the issuer alone may determine to make modifications to cure ambiguities, defective provisions, or inconsistent provisions. Moreover, modifications may be made if the modifications “will not adversely affect, in the opinion of the Issuer, in any material respect, the interests of the Noteholders.”

Ukraine’s shift, and importantly the timing of the shift coinciding with a military and economic shock to the country, might relate to it putting in place subversive accretions when concerns about potential default increase. Of course, other changes coincide with Russia’s invasion of Ukraine including the shift away from VTB Capital as an underwriter and change in underwriter’s counsel. It is unclear, however, why a new underwriter or underwriter’s counsel, in and of itself, would affirmatively push for the adoption of a subversive accretion that affirmatively favors the issuer at the expense of investors. If anything, an underwriter and underwriter’s counsel should be in favor of investor interests (or at least not against such interests).

### 3. Periodic Errors

Our third category, periodic errors, captures those landmines that arose due to mistakes. We identify three landmines as periodic errors: *Pari Passu* Scope, Negative Pledge Scope, and Cross Default Scope. In each landmine, the clause fails to define the scope of the provision, potentially leaving the sovereign vulnerable to a claim that the clause applies even to types of obligations of the sovereign (such as the obligation to pay the salary of a state employee) that are unrelated to the sovereign’s activities in raising capital from the international market. Such mistakes, at least to the extent they pose a potential risk to the sovereign, should get weeded out by the sovereign’s attorneys. Thus, we predict a diminishing incidence of mistakes over time and a relatively low incidence of mistakes as a result in 2020-22. Figure 4 depicts the incidence of the Periodic Error landmines for 2020-22.

Figure 4. Incidence of Periodic Errors 2020-22



Note from Figure 4 that the periodic errors landmines, while they exist, are not as prevalent as either the historical holdovers or the subversive accretions. The Negative Pledge Scope and Cross Default Scope errors, in particular, are not as prevalent. The relatively low incidence of periodic errors is consistent with an equilibrium where such errors arise randomly and the gurus (in particular, the sovereign's attorneys) eventually weed out such landmines over time. Even if errors are part of the boilerplate contract, the low incidence of periodic errors is consistent with the market's ability (at least for the sovereign's side) to correct such mistakes eventually.

We predict that these attorneys worked to weed out the periodic error landmines that tend to disfavor the sovereign, leading to a lower incidence of the persistent errors over time from the early 1990s. Figure 8 compares the incidence for the periodic errors landmines for the 1990-95 and 2020-22 periods.

Table 6. Periodic Error Comparison

Clause	1990-95 Period	2020-22 Period	p-value
<b>Cross Default Scope</b>	0.260	0.110	0.010
<b>Neg Pledge Scope</b>	0.307	0.030	0.000
<b>Pari Passu Scope</b>	0.480	0.420	0.429

p-value is from a chi-squared test of the difference between the 1990-95 and 2020-22 periods for each clause.

Unlike subversive accretions, the incidence of periodic errors diminished over time. For all three periodic error landmines, the incidence dropped from 1990-95 to 2020-22. For two of the periodic error landmines, Cross Default Scope and Negative Pledge Scope, the drops were both large in magnitude (drops of 15.0 and 27.7 percentage points respectively) and statistically significant. The decrease in the incidence of the periodic errors landmines is consistent with gurus, working on behalf of the sovereigns, weeding out such errors (at least the ones that negatively affect the sovereign).

One puzzle in this weeding out process is why the *Pari Passu* Scope error did not appreciably decrease from 1990-95 to 2020-22. As we discuss in the next section, we posit that a key factor for the origination of new errors in boilerplate is the need to modify a term (what we call an Innovation Error). Our definition of Innovation Error focuses on errors directly related to the innovation itself. But it is possible that when attorneys scrutinize a contract in order to change a particular clause for one purpose, other unrelated errors may arise in the clause. Put another way, once attorneys “open the hood” of a clause, the chance for unrelated periodic errors increases.

To assess the “open the hood” hypothesis for the origination of periodic errors, we look at a time series of bond issuances by Mexico at roughly five-year intervals from 1995 to 2020. While not comprehensive, this time series provides insight into how Mexico modified a particular clause—the *pari passu* clause—over time.

Table 7. Mexico *Pari Passu* Time Series

Date of Prospectus / Prospectus Supplement	Joint Bookrunning Managers	Issuer Counsel	Underwriter Counsel	<i>Pari Passu</i> Clause
11/28/1995	Citigroup Securities, Inc.	Cleary, Gottlieb, Steen & Hamilton	Sullivan & Cromwell	Yes
1/10/2000	Bear Stearns & Co. Inc; J.P. Morgan & Co.	Cleary Gottlieb Steen & Hamilton	Sullivan & Cromwell	Yes
1/4/2005	Citigroup; JPMorgan	Cleary Gottlieb Steen & Hamilton	Sullivan & Cromwell	Yes
9/2/2010	BofA Merrill Lynch; Citi	Cleary, Gottlieb, Steen & Hamilton	Sullivan & Cromwell	Yes
2/16/2015	Barclays; Deutsche Bank; Santander	Cleary, Gottlieb, Steen & Hamilton	Sullivan & Cromwell	Yes
1/31/2020	Barclays; BNP Paribas; BofA Securities; Deutsche Bank	Cleary Gottlieb Steen & Hamilton	Sullivan & Cromwell	Yes

## Contractual Landmines

Date of Prospectus / Prospectus Supplement	Pari Passu Clause Text
11/28/1995	The Debt Securities will rank pari passu, without any preference among themselves, with all other unsecured and unsubordinated obligations of Mexico, present and future, relating to external indebtedness. For purposes of this paragraph, “external indebtedness” means any indebtedness for money borrowed which is payable by its terms or at the option of its holder in any currency other than the currency of Mexico (other than any such indebtedness that is originally issued or incurred within Mexico) and “indebtedness” means all unsecured and unsubordinated obligations of Mexico in respect of moneys borrowed by Mexico and guaranties of Mexico in respect of moneys borrowed by others. Mexico has pledged its full faith and credit for the due and punctual payment of principal of, interest on, and premium, if any, on the Debt Securities.
1/10/2000	The debt securities will be the direct, general and unconditional external indebtedness of Mexico. They will rank equal in right of payment among themselves and with all Mexico’s existing and future unsecured and unsubordinated public external indebtedness, as defined under “Negative Pledge” below.
1/4/2005	[Substantially the same as in 2000]
9/2/2010	[Substantially the same as in 2000]
2/16/2015	The debt securities rank and will rank without any preference among themselves and equally with all other unsubordinated public external indebtedness of Mexico. It is understood that this provision shall not be construed so as to require Mexico to make payments under the debt securities ratably with payments being made under any other public external indebtedness.
1/31/2020	[Substantially the same as in 2015]

From Table 7, note that Mexico had a Pari Passu clause in each of the offerings we examined from 1995 to 2020. While Mexico used different investment banks as its underwriter in the offerings, Mexico used the same issuer’s counsel and underwriter’s counsel in all the offerings. Despite the continuity of law firms, Mexico varied its Pari Passu clause over the years. From 1995 to 2010 Mexico provided a definition for the scope of the Pari Passu clause. In 1995, the scope definition was specified directly in the Pari Passu clause. From 2000 to 2010, Mexico’s Pari Passu clause referenced the scope definition for “public external indebtedness” contained in the negative pledge clause for the same contract.

Mexico then used a modified Pari Passu clause in 2015 in response to the longstanding litigation involving the Pari Passu clause. In the 2015 offering, Mexico deliberately specified that the Pari Passu clause did not require ratable payments, adding the following language: “It is understood that this provision shall not be construed so as to require Mexico to make payments under the debt securities ratably with payments being made under any other public external indebtedness.” Along with this deliberate change, Mexico omitted the language from prior offerings that referenced the scope definition from the negative pledge clause. The omission of the

scope definition is unnecessary to the Mexico's deliberate change in language in the *Pari Passu* clause disavowing ratable payments.

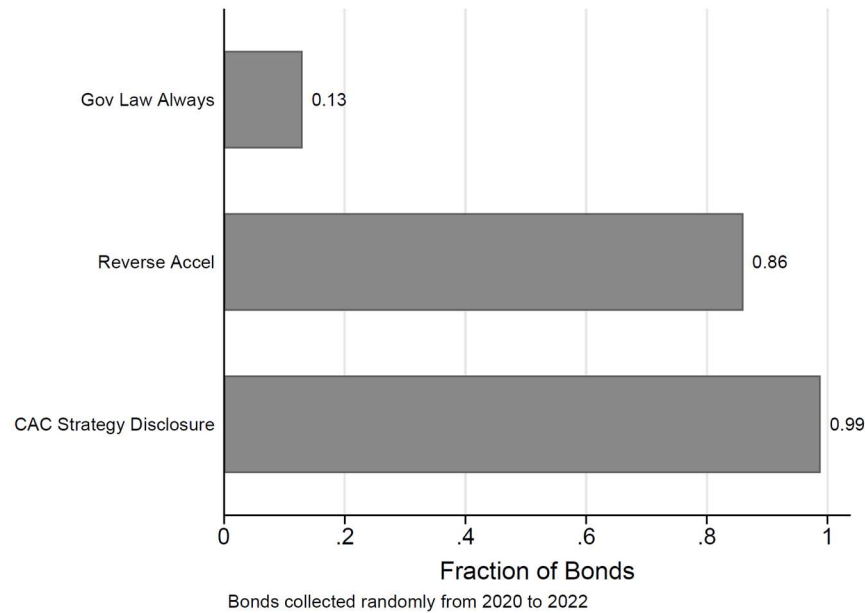
The decision to modify the *Pari Passu* clause for one purpose (addressing ratable payments) also resulted in unrelated, periodic errors. The relatively recent decision on the part of Mexico (and likely other sovereigns) to modify their *Pari Passu* clause in the early to mid-2010s likely resulted in the unrelated *Pari Passu* scope error, consistent with the elevated levels of such errors in the 2020-22 Period.

#### 4. Innovation Errors

Our fourth category, innovation errors, captures those landmines that arise when a new type of clause is introduced into the standard sovereign bond contract. We conjecture that a new clause generates a flurry of activity by sovereigns and their attorneys. This results in experimentation and, occasionally, formulations of a new clause that may have unintended, landmine-like effects. As time passes and a new clause becomes more standardized, we expect such landmines to reduce in prevalence if not disappear entirely. We identify three landmines in the innovation errors category, Governing Laws Always, Reverse Acceleration, and CAC Strategy Disclosure. All three are related to the rise of CAC clauses in the early 2000s. Two of them, Reverse Acceleration and CAC Strategy Disclosure, are landmines in the new clause itself. The third, Governing Law Always, is a landmine that arises because a different provision of the contract (the Governing Law provision) was not modified so as to be consistent with the new clause, thereby producing a conflict among provisions purporting to address the same matter. Figure 5 depicts the incidence of the innovation error landmines for 2020-22.



Figure 5. Incidence of Innovation Errors 2020-22



Note from Figure 5 that the two innovation error landmines associated with the introduction of CAC clauses are very high incidence—86% for Reverse Acceleration and 99% for CAC Strategy Disclosure. This high incidence is consistent with experimentation with a new clause resulting in new landmines.

As a qualitative example of the path of an innovation error over time for a particular sovereign, we examine the Reverse Acceleration clause for Italy at approximately five-year intervals from 2000 to 2020.

Table 8 reports on the type of modification clause in each of the Italian offerings we examined. Note that Italy moved from a unanimity action clause (UAC) in 2000 to a CAC by 2005. Italy used a CAC from 2005 to 2019. In 2020, Italy adopted a modified CAC with specific provisions that allow for the aggregation of votes across different bonds issuances by Italy. Across these offerings, Italy used the same issuer's counsel (a government attorney) and the same underwriter's counsel (Skadden Arps).

Table 8. Italy Collective Action Clause Innovation Error Time Series

Date of Prospectus / Prospectus Supplement	Joint Bookrunning Managers	Issuer Counsel	Underwriter Counsel	Modification
9/6/2000	Salomon Smith Barney	Italy Gov. Atty (Dept. of Treasury)	Skadden, Arps, Slate, Meagher & Flom (UK)	UAC
1/13/2005	Merrill Lynch & Co.; Morgan Stanley; Nomura Securities	Italy Gov. Atty (Dept. of Treasury)	Skadden, Arps, Slate, Meagher & Flom (UK)	CAC
1/19/2010	Barclays Capital; Citi; Credit Suisse	Italy Gov. Atty (Dept. of Treasury)	Skadden, Arps, Slate, Meagher & Flom (UK)	CAC
10/10/2019	Barclays; HSBC; J.P. Morgan	Italy Gov. Atty (Dept. of Treasury)	Skadden, Arps, Slate, Meagher & Flom (UK)	CAC
11/18/2020	Barclays; BofA Securities; Goldman Sachs Bank Europe	Italy Gov. Atty (Dept. of Treasury)	Skadden, Arps, Slate, Meagher & Flom (UK)	CAC Aggreg.
4/28/2021	Citigroup; Deutsche Bank; Morgan Stanley	Italy Gov. Atty (Dept. of Treasury)	Skadden, Arps, Slate, Meagher & Flom (UK)	CAC Aggreg.

Table 9 reports on the Reverse Acceleration clause that corresponds to the modification clause in each Italian offering that we examined.

Table 9. Italy Reverse Acceleration Clause Innovation Error Time Series

Date of Prospectus / Prospectus Supplement	Reverse Acceleration
9/6/2000	Principal may be declared due and payable if a holder gives a written demand to us and the fiscal agent, unless we have cured all defaults prior to receipt of the demand.
1/13/2005	The holders of at least 66.67% of the aggregate principal amount outstanding of the debt securities may rescind a declaration of acceleration if the event or events of default giving rise to the declaration have been cured or waived.
1/19/2010	[Substantially the same as in 2015].
10/10/2019	The holders of more than 50 per cent of the aggregate principal amount outstanding of the Notes may rescind or annul a notice of acceleration.
11/18/2020	[Substantially the same as in 2019].
4/28/2021	[Substantially the same as in 2019].

From Table 9 note that in 2000 when Italy used a UAC, the Reverse Acceleration clause allows the sovereign to reverse any acceleration if the sovereign has “cured all defaults.” Because each bondholder in a UAC regime may individually seek to accelerate payment upon a default in

payment, the requirement of “cure” simply provides that the default provision applies unless there no longer is a default (i.e., it has been cured). Because a UAC already gives each creditor the power to act as a holdout, the requirement of a “cure” to each creditor does not change this allocation of power to potential holdouts.

When Italy shifted to a CAC, as displayed in Italy’s 2005 offering, the CAC dramatically reduced the influence of potential holdouts. The Reverse Acceleration clause accordingly took on greater importance. As we discuss above, Reverse Acceleration in the context of a CAC allows a majority of creditors to pause the default in order to facilitate negotiations with the sovereign over a restructuring deal and to enable the sovereign to begin making payments again (albeit at a lower amount). Given that reasoning, requiring the sovereign to cure the event of default by paying the full amount of the debt to all the creditors that it was previously unable to pay defeats the purpose of the clause. A single holdout could require the default be “cured” and thereby resist any attempts by the majority to reverse the acceleration.

Importantly, Italy eventually recognized this error in the Reverse Acceleration clause. In 2019 and thereafter, Italy’s Reverse Acceleration clause no longer requires that the issuer “cures” the default or otherwise that there is “waiver” of the default. The circumstances of the correction of Italy’s innovation error are not clear. There was no change in Italy’s issuer or underwriter’s counsel. Instead, the change seems to have occurred after several years under the innovation error either due to Italy (or its attorneys) directly realizing the presence of the innovation error or, possibly, learning from other sovereign deals.

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The data from this preliminary study supports the predictions generated by an assumption that the market for sovereign bond lawyers is bifurcated between experts and novices. Together with the asymmetry between sovereign’s counsel and underwriter’s counsel in the process of producing sovereign bond contracts, these several market forces appear to negatively affect the efficiency of contract design. While the study is preliminary, it suggests reason to doubt the standard view that the terms in standard form large market commercial contracts are finely tuned representations of the parties’ ex ante intentions. Assumptions about the efficiency of market contracts and the extent to which they reflect the shared intentions of the contracting parties must necessarily account for the substantial distortion that lawyer-side agency costs have on the contract production process.

## V. Conclusion

There are many reasons to accept the conventional view that standardized boilerplate terms in thick markets such as those for sovereign or corporate bonds “represent a contractual solution which is efficient from the standpoint of the [parties].”<sup>138</sup> After all, one might plausibly think that a standard contract form that is used repeatedly, over multiple decades and in thousands of high value deals, will be as finely crafted and error free as imaginable. It will be one where, as Smith and Warner explained, “harmful heuristics, like harmful mutations in nature, will die out.”<sup>139</sup> But an examination of a sample of current sovereign bond contracts reveals, to the contrary, numerous instances of harmful landmines—vague and apparently purposeful changes to standard language that increase a creditor’s nonpayment risk, coupled with blatant errors in expression and drafting and a continuing use of inapt terms that were historically imported from corporate transactions. And these blunders, gaps, and booby traps in the documents do not diminish over time with repeated use; if anything, the general pattern is that the contracts develop more landmines over time.

Our conjecture is that the conventional view errs because it fails to consider seriously the reality of the particular contract production process at hand. The assumption of perfect contract design fails to recognize the unique (and distorting) role that lawyers, both gurus and novices, play in the drafting of standard form contracts. Experienced lawyers, our gurus, play an outsized role in the drafting of debt contracts used in large liquid markets such as sovereign debt. In negotiating with the underwriters who place these instruments on the market, gurus are able to insert vague language that softens the strict payment obligations found in the standardized terms. These changes to the standard form are “subversive” in the sense that they offer strategic advantage to the sovereign in subsequent restructuring negotiations. Novice lawyers, on the other hand, are reluctant to negotiate important changes in the standard form but their haste in executing the contract can lead to harmful errors. We find that these subversive accretions are common in contemporary sovereign debt contracts and are more prevalent over time than the equally common errors that occur when inexperienced lawyers, our novices, attempt to make change in the standard terms.

While our project is largely descriptive, there is a normative implication: much of what we do not know about contract design results from the failure to disaggregate the interests of the parties and those of the many different kinds of lawyers who collectively draft the contracts. In this

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138. By contrast, many commentators hold a rather different view of boilerplate or standard-form contracts in the consumer world—where standard-form contracts are often described as contracts of adhesion. For a discussion of the differing views of boilerplate contracts, see NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* 133-59 (2017).

139. Smith & Warner, *supra* note 2, at 123.

Article, we learn that standardized contract terms will evolve as a function of the actions of the drafting lawyers charged with updating prior precedents. Here, agency costs between lawyers and their clients, asymmetries between the negotiating lawyers, and differences in lawyers experience and culture will affect the nature and prevalence of harmful changes to the standard contract.

## Appendix

### I. The Landmines

#### A. Subversive Accretions

##### 1. Payments Subject to Fiscal Laws

Almost every international sovereign bond is listed on an exchange in a foreign jurisdiction and typically that is also where payments to investors are made through a financial institution. Luxembourg and London are two prominent such locations. Given that payments are being made in these locations, there is the possibility that there will be some local taxes imposed on these payments. And the bonds will often contain a provision that makes it clear that investors bear the risk of such taxes. This provision is different from a clause where the issuer promises investors that they will not be subject to any taxes that the issuer itself imposes on payments being made on its bonds. The latter provision is called the “tax gross up clause.”

The typical “fiscal laws” clause, therefore, makes clear that the issuer will protect bond investors from any issuer-imposed taxes, but not any taxes imposed by the location of payment. And it will state something like the following:

All payments are subject in all cases to any applicable fiscal or other laws, regulations and directives in the place of payment, but without prejudice to the provisions of the tax gross-up clause.<sup>140</sup>

In some bonds, however, the drafter omits the words “in the place of payment,” causing the clause to read:

All payments are subject in all cases to any applicable fiscal or other laws, regulations and directives, but without prejudice to the provisions of the tax gross-up clause.<sup>141</sup>

This latter version of the clause leaves open the interpretation that the “applicable fiscal or other laws, regulations and directives” might be those of the sovereign issuer itself. The omitted language creates a risk that this seeming innocuous change in a clause that is meant to cover only taxes imposed at the location of payment can be weaponized against creditors. A sovereign debtor needing to restructure the obligation might be tempted to argue that, per the fiscal laws clause, it is entitled to pass a wide variety of “laws, regulations, and directives” imposing costs on bondholders.<sup>142</sup> The investor will have to argue that such a reading contradicts the tax

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140. “Fiscal laws” clauses in Eurozone debt restructurings are discussed in Lee C. Buchheit, Mitu Gulati & Ignacio Tirado, *The Problem of Holdout Creditors in Eurozone Sovereign Debt Restructurings*, BUTTERWORTHS J. INT’L BANKING & FIN. L., 191-94 (2013).

141. *Id.* (discussing the Cypriot Fiscal Laws clause); see also Gulati, *supra* note 16 (reporting the issue in Russian bonds).

142. Mark Weidemaier & Mitu Gulati, *Russia’s Perplexing Sovereign Bonds*, JUSTMONEY (Apr. 22, 2022), <https://justmoney.org/mark-weidemaier-and-mitu-gulati-russias-perplexing-sovereign-bonds> [<https://perma.cc/N3UA-7KPX>].

gross-up clause. But the debtor can respond that these additional “regulations or directives” are not covered by the terms of the tax gross-up clause.

## 2. Correcting a Manifest Error—Who Decides?

Buried at the end of the standard “modification” clause is typically a subsidiary clause, the “manifest error” provision. The clause is generally understood to deal with trivial errors.

Typically, the manifest error provision provides something like:

The Republic and the trustee may, without the vote or consent of any holder of debt securities[,] . . . amend the [debt securities] for the purpose of . . . correcting a manifest error of a formal, minor or technical nature.<sup>143</sup>

Some bonds, however, say:

The Administrative Agent may agree, without the consent of the Noteholders, to any modification of any of these Conditions . . . either (i) for the purpose of curing any ambiguity or of curing, correcting or supplementing any manifest or proven error or any other defective provision contained herein or therein or (ii) in any other manner which is, in the sole opinion of the Issuer, not materially prejudicial to the interests of the Noteholders. Any modification shall be binding on the Noteholders . . .<sup>144</sup>

Read literally, this language could cover the situation where the debtor and a majority of creditors view a deal as maximizing their joint welfare. Imagine also that the IMF has blessed the deal and the barrier to agreement is a set of holdout creditors. The clause, read on its own, appears to permit the debtor to override the holdouts by claiming that, given the approval of the majority of creditors and the IMF, the modification is not “materially prejudicial to the interests of the Noteholders.” The language doesn’t even contemplate a challenge by the creditors since at the determination is delegated to the “sole discretion” of the issuer and that determination is to be binding on all the creditors.<sup>145</sup>

## 3. Pari Passu—But for Provisions of Mandatory Law

The basic sovereign pari passu clause provides something along the following lines:

The Notes rank pari passu with all other present and future unsecured and unsubordinated External Indebtedness of the Republic.

Commentators suggest that a possible purpose of this clause in the sovereign context was to protect against the possibility that some sovereigns might have domestic laws that could inadvertently subordinate

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143. See Argentina 2020 Restructuring Offer (on file with authors).

144. See, e.g., Republic of Zambia 2012 Offering Circular (on file with authors).

145. See Lee Buchheit, *Recent Sovereign Debt Drama*, CLAUSES & CONTROVERSIES, at 3:42, 32:22 (Apr. 14, 2021), <https://podcasts.apple.com/us/podcast/ep-34-ft-lee-buchheit/id1528208049?i=1000517139058> [<https://perma.cc/29Z8-64N3>].

creditors who didn't know to take certain actions required by domestic law.<sup>146</sup> The *pari passu* clause thus contracts around the possibility that the sovereign might have such a domestic law. The landmine is found in the version of the clause that has the following additional language (in italics):

The Notes rank *pari passu* with all other present and future unsecured and unsubordinated External Indebtedness of the Republic, save only for such obligations as may be preferred by mandatory provisions of applicable law.

Recall that the suggested purpose of the *pari passu* clause is to contract around the possibility that a sovereign either already has, or later passes, a domestic law that involuntarily subordinates investors in the bond in question. Adding a provision that now states “save for such obligations that may be preferred by mandatory provisions of applicable law,” where “mandatory provisions of applicable law” could arguably mean the sovereign issuer's domestic law, directly contradicts the apparent purpose of the provision.<sup>147</sup>

To add insult to injury for creditors, for whom a supposedly protective clause has been reduced to a nullity, the *pari passu* clause can now potentially be used as a weapon by the debtor. The debtor arguably has the authority to pass a local law that subordinates the creditors holding a bond with this additional language. This threat has not yet been used, but the possibility has been raised.<sup>148</sup>

#### 4. Waiver of Sovereign Immunity—But for Applicable Law

A standard condition in international sovereign bonds is that the issuer waives immunity from suit, execution and attachment. This condition is not purely a matter of contract, however, since the country in which the lawsuit is being brought may have its own rules about whether it wants creditors suing foreign sovereigns in its courts. Further, the sovereign in whose jurisdiction the suit is being brought may have preferences regarding the kind of assets the creditor is permitted to attach. For example, in the Foreign Sovereign Immunities Act, the United States constrains enforcement actions against embassy properties and military assets. In other words, a foreign sovereign that is being sued in the United States may not be able to waive this constraint contractually.<sup>149</sup>

Given the foregoing, the typical waiver of sovereign immunity provides that the sovereign waives all immunities that it might have from suit, execution and attachment, subject to the constraints on that waiver

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146. See Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 903 (2004).

147. There are versions of this clause that are even worse in that they explicitly provide that the “applicable law” is the debtor's law. See, e.g., Republic of Lebanon Offering Circular 2019 (on file with authors); Republic of North Macedonia 2021 Offering Circular (on file with authors).

148. See Mark A. Walker & Richard J. Cooper, *Venezuela's Restructuring: A Path Forward*, 9 EMERGING MKTS. RESTRUCTURING J. 6, 16 (2019).

149. See Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 77-81.



imposed by the law of the enforcing jurisdiction. Along these lines, Zambia's 2017 eurobonds contain the following:

To the extent that the Issuer may in any jurisdiction claim . . . [immunity] from suit, execution, [or] attachment . . . the Issuer agrees not to claim and irrevocably waives such immunity to the full extent permitted by the laws of such jurisdiction.<sup>150</sup>

Thus, if a jurisdiction grants immunity to a sovereign debtor, the issuer waives it to the extent permitted by the laws of that jurisdiction.

In some bonds, however, the waiver reads a bit differently:

To the extent that the Issuer may in any jurisdiction claim immunity from suit, execution or attachment, the Issuer agrees not to claim and irrevocably waives such immunity to the full extent permitted by applicable law.<sup>151</sup>

What is the applicable law? What if the parliament of the sovereign debtor enacts a law stating that, because of a financial crisis, the country is retracting any waivers of immunity it may have previously made? Read literally, this provision appears to allow the retraction since the law of the sovereign debtor is, in theory, one of the applicable laws. But that interpretation transforms the waiver into an option for the sovereign debtor: it can waive immunity until it does not want to.

#### 5. Prescription—As Provided by Local Law

The typical prescription clause, standard in international bonds, is aimed at setting a fixed period of time after funds have been deposited by a sovereign debtor with the paying agent after which the paying agent is no longer responsible for making payments. Thereafter, the creditor has to seek payment directly from the sovereign. The clause generally reads something like:

Claims in respect of principal and interest will become void unless presentation for payment is made within a period of ten years in the case of principal and three years in the case of interest from the Relevant Date.

That is a fairly harmless provision, given that “Relevant Date” is usually defined as the date when the sovereign places funds with the paying agent. But treacherous versions of this clause can appear such as where the term “Relevant Date” is omitted from the clause making this more like a contractual version of a statute of limitations. For an example of a treacherous version of a prescription clause, consider the following from a recent Argentine issuance:

Claims against the Republic for the payment of principal, interest, if any, or other amounts due on the Bonds will be prescribed unless made within five years, with respect to principal, and two years, with respect to interest, premium, if any, or other amounts due on the Bonds, in each case from the date

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150. See Republic of Zambia 2017 Offering Circular (on file with authors) (emphasis added).

151. Republic of Barbados, 2020 Restructuring Offer (English Law) (on file with authors) (emphasis added).

on which such payment first became due, or a shorter period if provided by Argentine law.<sup>152</sup>

In the Argentine formulation, prescription functions precisely like a contractual reduction of the statute of limitations. Claims are extinguished two years after they are due. Worse, from the investors' perspective, the clause grants Argentina the option to enact a law that makes the prescription period even shorter.

#### 6. Governing Law—Authorization and Execution Under Local Law

Every international sovereign bond has a governing law clause that specifies what system of laws applies. The basic clause generally says something like:

The Notes are governed and construed by the law of the State of New York.<sup>153</sup>

On occasion, however, there is a second sentence that carves out matters of authorization and execution of the bonds to be governed by the issuing sovereign's local law. For example:

The Notes are governed and construed by the law of the State of New York, provided, however, that the laws of Ruritania will govern all matters concerning authorization and execution the Notes.<sup>154</sup>

It looks as if challenges that are brought to the validity of the bond issuance in the first place (e.g., whether the legislature properly authorized the debt) are to be governed by Ruritania's local laws. But how does an English judge determine the outcome based on Ruritanian laws? Is there to be a battle of experts in Ruritanian law in the English courtroom? Or worse (for the creditors), could this mean that the English court has to defer to the Supreme Court of Ruritania on this matter?

#### 7. Sovereign Immunity Exclusions—Unless Necessary to the Sovereign's Proper Functioning

Most sovereign immunity waiver provisions in bonds are broad, initially waiving all of the sovereign's immunities from suit and execution. The broad waiver will then be followed by exceptions where the sovereign excludes a few of its assets, such as military assets of foreign embassies, from its immunity waiver.

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152. Republic of Argentina 2017 issuance (on file with authors) (emphasis added).

153. See, e.g., Republic of Chile, 2021 Prospectus at 14 (on file with authors) ("The indenture and the securities are governed by and construed in accordance with the law of the State of New York . . .").

154. See, e.g., Republic of Panama, 2005 Prospectus at 17 (on file with authors) ("The fiscal agency agreement, any warrant agreement, the debt securities and any warrants will be governed by and interpreted in accordance with the laws of the State of New York . . . ; *provided, however*, that the laws of Panama will govern all matters concerning authorization and execution of all agreements and securities by Panama.").

On occasion, however, the exceptions swallow the waiver. For example, consider an exemption from execution “‘of all property related to essential public functioning’ and ‘not for commercial’ purposes.” Exceptions such as these give the sovereign debtor freedom to argue that the property the creditor is trying to attach is both “essential” for the public functioning of the state and is not used for commercial purposes.

Cypriot bonds, for example, contain the following exception:

The . . . waiver [of sovereign immunity from attachment or execution against the Republic’s property] . . . shall not constitute a waiver of immunity from attachment or execution [against] assets and property of the Republic of Cyprus . . . necessary for the proper functioning of the Republic of Cyprus as a sovereign state . . .<sup>155</sup>

It is hard to imagine that an issuer benefiting from such a carveout would not argue in litigation that all of its property held abroad was necessary for the proper functioning of the sovereign state and therefore immune from seizure by a creditor seeking to enforce the terms of the contract following a default.

There are other exclusions in this family of landmines that may be even more potent than “necessary for proper functioning.” These include exclusions for “public property,” property that provides an “essential public service” and “noncommercial” property.<sup>156</sup>

## 8. The Local Jurisdiction Option

Sovereign bonds are typically drafted to contain a “non-exclusive” jurisdictional clause, where the sovereign submits to jurisdiction in both the jurisdiction whose law governs (e.g., New York) and the sovereign’s own courts. The clause does not generally say anything about the jurisdiction the creditors are agreeing to use. The assumption is that the only important matter to be specified is in what courts the sovereign consents to jurisdiction. But what if there are creditors whose interests are aligned with the sovereign? Can they take advantage of the sovereign’s local courts to disadvantage other creditors?

Sri Lanka’s 2019 dollar bond issue, for example, says:

The Issuer will submit to the non-exclusive jurisdiction of any State or Federal Court in the Borough of Manhattan, the City of New York and the courts of Sri Lanka . . .<sup>157</sup>

Creditors under this clause can bring actions in at least two jurisdictions, New York and Sri Lanka (and likely others at well). The two jurisdictions, however, are likely to have different rules of procedure and types of courts. And these differences can matter. Rules of procedure, for

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155. Republic of Cyprus, 2019 Offering Circular at 27 (on file with authors) (emphasis added).

156. See, e.g., Republic of Barbados, 2020 Restructuring Offer (on file with authors).

157. The Democratic Socialist Republic of Sri Lanka, 2019 Offering Circular (on file with authors) (emphasis added).

example, can include statutes of limitations and rules governing when class actions can be brought.

Imagine now a situation where Sri Lanka has made an offer that a majority of creditors wish to accept, but there are not enough creditors in favor of the deal to satisfy the threshold required by the Collective Action Clause. Assume that Sri Lanka has procedural rules that allow for similarly situated claimants in a class action to be bound without 100% consent, so long as a judge approves of the settlement. A creditor sympathetic to the sovereign, who wants to get the restructuring deal done, could file a case in the local Sri Lankan court and try to invoke the local class action rules. Other creditors will likely disagree and file in New York, asking the New York court to quash the Sri Lankan judgments. Perhaps the New York court will agree on the grounds that only the sovereign agreed to jurisdiction in Sri Lanka, the creditors never did. But the New York court may instead conclude that the creditors agreed in the contract for the sovereign to submit to jurisdiction in both New York and Sri Lanka and thus recognize the Sri Lankan determination.<sup>158</sup> And regardless, there will be delay, which will not help the creditors seeking to obtain a quick recovery.

The foregoing is exacerbated in bonds containing clauses that say something like “Mexico and the Trustee . . . submit[] to the jurisdiction of these courts,” where “these courts” include both the courts of New York and Mexico.<sup>159</sup> In such a case, the creditors, through their representative, have arguably submitted to jurisdiction in Mexico. The sovereign, therefore, can bring an action there, in what is surely a sympathetic court.

### B. Periodic Errors

1. Pari Passu—All Other Unsecured Indebtedness<sup>160</sup>
2. Negative Pledge—All Other Unsecured Indebtedness
3. Cross-Default—All Other Unsecured Indebtedness

Sovereign bonds typically have provisions that constrain the debtor from taking actions with respect to other outstanding debt that would impact the bond in question. The typical Negative Pledge clause, for example, states that if a security interest is given to a new lender, the old lender must

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158. For a discussion of such issues in clauses that have multiple jurisdictions or laws specified, see Vitek Danilowicz, *Floating Choice of Law Clauses and Their Enforceability*, 20 INT’L LAW. 1005, 1005 (1986).

159. See, e.g., United Mexican States, 2020 Prospectus at 6-7 (on file with authors).

160. The danger of failing to use a narrow definition of indebtedness is essentially the same for the Pari Passu, Negative Pledge and Cross Default clauses, in that the sovereign becomes far more vulnerable to creditors bringing suits against it than it likely intended. So as not to bore the reader, we explain the issue only with respect to one of the types of clauses, the Cross Default clause. We do, however, discuss the pari passu and Negative Pledge scope landmines earlier in the Article. See *supra* Section V.B.

be equally secured. A Cross-Default clause, in turn, says that it is an Event of Default on the current debt if a default occurs on some other debt of the sovereign. A question in drafting such a clause is how broad should it be; that is, what debt does the clause cover? Sovereigns have many and varied debt obligations and neither the sovereign nor the majority of creditors presumably wants litigation triggered each time there is a delayed payment to some local government employee.

The solution, therefore, in most international sovereign bonds, is to narrowly define the term “External Indebtedness” or “Public External Indebtedness” so as to cover only those debts that are similar to the debt in question (e.g., debt in a foreign currency, debt that has a maturity greater than a year, and listed on an international exchange).<sup>161</sup>

Periodically, however, there are instruments where one of the three clauses will fail to narrowly define External or Public Debt. Instead, these bonds provide that one or more of the Negative Pledge, Cross-Default, and *pari passu* clauses are triggered by “all of the sovereign’s unsecured or public debt.”<sup>162</sup> Thus, in the case of the Cross-Default clause, this creates a risk that all of the sovereign’s entire external debt stock could be accelerated because of a local action that led to a default on a state obligation. This is not an outcome that either the debtor or majority of creditors would intentionally agree to *ex ante* and, most likely therefore, arose from inadvertent error. The erroneous, broad scope language could however grant an advantage to activist creditors seeking a means to threaten the disruption of upcoming restructuring negotiations.

### C. Innovation Errors

#### 1. Reverse Acceleration—What Constitutes Cure?

In a typical sovereign bond, the occurrence of an Event of Default generally gives a certain fraction of the holders of the bond (typically 25% in principal amount) the right to accelerate the payment due to them if the default event is not cured within a specified amount of time. On occasion, though, there may be circumstances where a minority asks for acceleration, but a majority does not want the debt to be accelerated. For example, take a situation where the majority of creditors are in the process of working out a deal with the debtor. Here, both the majority of creditors and the

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161. See, e.g., State of Montenegro, 2010 Prospectus at 14 (on file with authors) (defining “Public External Indebtedness” to mean “any Indebtedness which is (A) evidenced by any bond, debenture, note or other instruments which is or is capable of being quoted, listed or ordinarily purchased and sold on any stock exchange, automated trading system or over-the-counter or other securities market and (B) denominated or payable, or at the option of the creditor or holder thereof payable, in a currency other than the lawful currency of the Kingdom.”).

162. See, e.g., Russian Republic, 2018 Offering Circular at 35 (on file with authors) (providing, as an event of default, that “[t]he Bonds do not rank *pari passu* without any preference among themselves or *pari passu* with any other unsecured and unsubordinated obligations of the Russian Federation . . .” (emphasis added)).

debtor would lose if a minority was allowed to undermine the deal by litigating.

To protect against such a circumstance, bonds typically contain a Reverse Acceleration provision where a majority of the creditors can reverse the acceleration of the debt that a minority of creditors have asked for.

Along these lines, Italy's 2021 provision reads:

The holders of more than 50 percent of the aggregate principal amount outstanding of the debt securities may rescind or annul a notice of acceleration.<sup>163</sup>

There are some bonds, however, where the reversal clauses are not as clear as Italy's. Rather, these latter bonds appear to subject the reversal to a condition precedent. Along these lines, the Uruguayan 2021 Reverse Acceleration clause reads:

Holders of debt securities representing . . . more than 50% of the principal amount of the [debt securities of that series] may waive any existing defaults, and their consequences, on behalf of the holders of all of the debt securities of that series, if [that event of default] has been . . . cured, remedied or waived.<sup>164</sup>

If the purpose of the Uruguayan clause is to permit a majority of creditors to reverse an acceleration because it is in the process of working out a deal with the debtor, it is puzzling to require the Event of Default to be first "cured" or "remedied." After all, the likely reason the sovereign's actions triggered the Event of Default is that it lacked the funds to make its coupon payments. And the likely reason the majority wants to reverse the acceleration is because it wants a restructuring deal to enable the sovereign to begin making payments again. Given that reasoning, requiring the sovereign to cure the Event of Default by paying the full amount of a debt that it was previously unable to pay, defeats the purpose of the clause.

This is where the "waived" element of "cured, remedied or waived" becomes relevant. Presumably, what the clause means to say is that a majority of creditors can "waive" the initial acceleration. But the "waiver" term is not defined. Without a background understanding of what the reverse acceleration clause was meant to do, one could conclude that the waiver has to come from the minority who exercised the right to accelerate in the first place. After all, it was the minority of creditors who triggered the acceleration in the first place. On this reading, either the Event of Default is cured, or the minority must decide to waive the acceleration. That interpretation gives a minority of creditors the textual basis for asserting a meaning that undermines the purpose of the reverse acceleration clause which is to prevent a minority from holding up the majority that is attempting to work out a restructuring.

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163. Republic of Italy, 2021 Prospectus at 7 (on file with authors).

164. Republic of Uruguay, 2021 Prospectus at 10 (on file with authors) (emphasis added).

Let us assume now that the intended meaning is that the Event of Default has to be cured before a reversal can occur. Along these lines, there are clauses that provide the following:

If the [Republic] receives notice in writing from holders of at least 50 per cent in aggregate principal amount of the [Bonds] to the effect that the Event of Default . . . [is] cured . . . [the Republic] shall give notice thereof to the Bondholders . . . whereupon the relevant declaration shall be withdrawn . . .<sup>165</sup>

At first cut, the clause seems to require the Event of Default to be cured and notice of that cure be given to the majority, before the majority can send the relevant notice of reversal to the trustee. However, upon closer reading, the clause does not actually require the Event of Default to be cured. It only requires that the majority give notice of a cure. Receipt of the notice by the sovereign then allows the sovereign to give notice to the bondholders and acceleration gets reversed. This then would undermine the minority right to accelerate, a right that is specified elsewhere in the contract.

## 2. Enhanced CACs—Debtor’s Easily Modified Disclosure Obligation

As of this writing, the most recent standard clause in sovereign bonds, introduced around 2014, is the “enhanced” collective action clause (CAC). This clause is referred to as “enhanced” CAC because the prior generations of CACs did not allow for restructurings to occur unless a certain vote threshold (e.g., 75% of the bonds, in principal amount) was satisfied in each individual series of bonds. The rationale for these enhanced CAC provisions was to enable the votes of multiple series of bonds to be aggregated so as to ameliorate the risks posed by holdouts.

Specifically, the aggregation feature allowed the debtor to specify which of its bond series it was going to aggregate for voting purposes. The point here was to structure the aggregation so that, if holdout creditors had clustered into a particular series of bonds, holdouts would not be able to undermine the whole restructuring process. The restructuring vote would be done without including the bond series where the holdouts were clustered. That holdout bond series would then be left out in the cold.

The concern of the creditors with the foregoing plan, however, was that once substantial relief was obtained from the cooperative creditors, the debtor would be tempted to pay the holdouts in full to get rid of them. And that would punish the creditors who had cooperated and taken haircuts to help the debtor recover—since they would in effect have subsidized the holdout strategy. To constrain such behavior, a condition of the enhanced CACs is that the debtor, if it chooses to do an aggregated vote with only a subset of its various series of debt, has to disclose to the creditors—

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165. Russian Federation, 2021 Offering Circular at 36 (on file with authors) (emphasis added).

before they vote—what its plans are with respect to those series being left out of the deal.<sup>166</sup>

Given the foregoing logic it would seem that the disclosure requirement is an indelible part of the apparatus that cannot be altered by the debtor colluding with a subset of creditors to disadvantage the others. However, nowhere does the contract say that this disclosure cannot be altered or cannot be altered except with the highest vote contemplated in the contract (for “reserved” matters, such as changing the payment terms themselves). And this means that this provision, that was thought to be crucial to protecting creditors from debtor opportunism, can be changed with the same vote required to change ordinary matters in the contract (often no more than a simple majority vote). In other words, what minority creditors might have seen as a crucial protection against coercion by a majority colluding with the debtor can be eliminated by a sneaky sovereign, so long as it colludes with a simple majority of creditors.

### 3. Conflict Between the Modification Clause and Governing Law Clause

Important provisions such as the governing law of the contract are usually specified to be “reserved matters.” The modification provision of the bond will explain that altering such reserved matters requires a supermajority vote. In some bonds, however, there is additional language in the governing law provision after the phrase stating that the notes are governed by the law of the State of New York. This additional language provides that:

“[n]otwithstanding . . . any reserved matter modification, all matters related to the consent of holders and to modifications of the indenture or the notes will always be governed by . . . the law of the State of New York.”<sup>167</sup>

This is confusing. The modification provision that explicitly governs how and when the changes to the terms of the contracts may be made specifies that the governing law provisions and all other specified key terms (the reserved matters) may be changed with a specific supermajority vote. But in the provision specifying the governing law, matters related to the consent of the holders and modifications of the indenture will “always” be governed by the law of New York. So, the governing law applying to changes to the vote requirements cannot be ever changed even though the contract also says that it can be changed with a certain pre specified vote requirement. If, in the context of a restructuring, the issuer needs to alter the governing law clause, the contradictory provisions provide dissenting creditors with an opportunity to object that they were likely not intended to have.

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166. This feature is disclosed in Gelpern, Heller & Setser, *supra* note 49, at 109.

167. United Mexican States, 2021 Prospectus Supplement at 9 (on file with authors).



#### D. *Historical Holdovers*

##### 1. Buybacks—What Does it Mean?

International sovereign bonds commonly contain a buyback provision. The typical clause states that the sovereign is allowed to repurchase their bonds on the open market or otherwise whenever it wishes. Panama's 2020 repurchase provision reads:

Panama may at any time purchase debt securities in any manner and for any price.<sup>168</sup>

There is no legal constraint on sovereigns purchasing their bonds on the open market. Sovereigns have long done this with no hint of displeasure from any of the relevant regulatory bodies. There may have been a reason for its inclusion at some point in the past. But today, the clause is pointless.

To see the danger posed by this clause, we have to accept the background assumption that a court is likely to make: clauses are in contracts because they have a purpose. That assumption then allows for an opportunistic debtor or creditor to assert a meaning for the clause whose purpose is unclear.

On the sovereign side, take one of the few sovereigns that does not have this buyback clause (e.g., the Philippines in 2015<sup>169</sup>) that decides to do an open market repurchase of a subset of its bonds. If this is a clause that almost every other sovereign uses, might a creditor argue that the absence of the clause suggests that the creditors in these cases have not granted permission to the debtor to repurchase its debt on the open market?

On the flip side, the clause might be the basis for an opportunistic sovereign to assert a meaning favorable to it. The sovereign debtor might argue that the broad provision allowing repurchases indicates that the debtor has carte blanche to do any repurchases, including, for example, sending negative information about the bonds to the market and then repurchasing bonds after the market price drops—an act that would run afoul of good faith duties that are implied in all New York law governed bonds.

##### 2. Negative Pledge—What Does the Promise to Secure Equally and Ratably Mean?

Negative Pledge clauses have been in sovereign bonds for multiple decades. Little attention has been paid to these clauses because sovereigns in the modern era have rarely pledged anything more than a vague statement extending their full faith and credit. Recently, however, this tendency

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168. Republic of Panama, 2020 Prospectus at 10 (on file with authors).

169. See Republic of the Philippines 2015 Prospectus Supplement at 10 (on file with authors).

is changing.<sup>170</sup> The standard Negative Pledge clause says something along the lines of:

So long as the Bonds remain outstanding, the issuer shall not incur any lien without at the same time securing the Bonds equally and ratably.<sup>171</sup>

The notion of bonds ranking equally and ratably is hard to understand in the context of a sovereign that cannot enter a liquidation process. If the asset upon which the security interest was granted was located outside the sovereign borrower's borders, then the creditors who were not receiving payments could try to attach and sell the asset. And all those secured equally and ratably by that asset would get a proportional share. But sovereigns almost never have assets outside their borders that they use to secure loans. And assets within their borders cannot be seized and liquidated by external creditors. That raises the question of what the negative pledge clause means within the context of domestic assets over which the debtor has granted a security interest.

Let us assume a scenario where a distressed sovereign borrower, seeking emergency financing to stave off a crisis, grants a security interest to a new creditor (call it China) to obtain the financing.<sup>172</sup> Say that the debtor goes into default on its external creditors, but continues to pay China because it received the Chinese lending on favorable terms and will likely need additional funding. One question the negative pledge clause poses is whether the violation of the promise to secure equally and ratably the external debt that has been defaulted gives these creditors any ability to interfere with the payments being made to China. Could they, for example, obtain an injunction from a foreign court barring the sovereign from paying China on its secured debt?

### 3. Pari Passu—Revised, Still Mysterious

The pari passu clause has been in sovereign bonds for over a century. It may have had a purpose at one time, but it is not clear what that purpose is today. Yet, holdout creditors in Brussels (2001) and New York (2011-2012), persuaded courts that the pari passu clause, in combination with the debtor's bad behavior, entitled them to be paid pro rata with other creditors. Crucially, this included creditors who had already agreed to take significant write downs on their debt. The holdouts successfully argued the failure to make these pro rata payments entitled them to injunctive relief—essentially barring payments to the other creditors. In the end the holdouts won.

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170. See Flandreau, Pietrosanti & Schuster, *supra* note 126.

171. Buchheit, *supra* note 47 (emphasis added).

172. On the use of collateral pledge provisions in Chinese lending, see Anna Gelpern, Sebastian Horn, Scott Morris, Brad Parks & Christoph Trebesch, *How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments* (Peterson Institute for International Economics, Working Paper No. 21-7, 2021), <https://www.piie.com/publications/working-papers/how-china-lends-rare-look-100-debt-contracts-foreign-governments> [<https://perma.cc/UN3Y-RPBH>].

The foregoing caused consternation in the markets and, in 2014, key parties in the market coordinated to revise the standard *pari passu* clause. The basic clause was retained, but a sentence was added providing that the clause did not entitle nonconsenting creditors to ask for pro rata payments. The current version provides:

The Notes rank and will rank *pari passu* with all other unsubordinated External Indebtedness of the Republic. It is understood that this provision shall not be construed so as to require the Republic to make payments under the debt securities ratably with payments being made under any other External Indebtedness.<sup>173</sup>

The revised clause reduces the likelihood of a court providing a holdout creditor with a right to pro rata payments as a function of a breach of the *pari passu* clause. But what if the holdout creditor does not complain about the failure to pay it on a pro rata basis? Instead, let us say that it complains that it is not being paid at all (which is usually what happens) and that that is a violation of the *pari passu* clause. As per the literal terms of the clause, the creditor can request injunctive relief in this scenario. Refusal to delete or clarify the ambiguous *pari passu* terminology continues, therefore, to provide activist creditors opportunities to advance strategic claims in the future.

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173. See *New ICMA Collective Action and Pari Passu Clauses*, CLIFFORD CHANCE (Oct. 2014), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2014/10/new-icma-sovereign-collective-action-and-pari-passu-clauses.pdf> [<https://perma.cc/T2F5-68S4>].