Chapter II

Early Proposals for a Legal Framework for Sovereign Debt Reorganisation

First proposals for a legal framework for sovereign debt reorganisation emerged at the end of the 19th century. The suggestions made ranged from using the debt contract as the sole source of interpretation and solution of conflict (1) to the application of a set of national legal rules in accordance with the provisions governing the conflict of laws (2).

1. **Contract Autonomy**

One doctrine that is also the subject of intense debate in relation to the shape and existence of a *lex mercatoria*, is the doctrine of contract autonomy (often referred to by German commentators as *rechtsordnungsloser Vertrag*). In effect, a contract can in itself be law. According to the doctrine of contract autonomy, the terms of the agreement are decisive for all issues and no reference to any other law is necessary. However, the question arises whether the agreement can also exist without an overarching legal order that exists prior to the contract. Further to the inability of the contracting parties to foresee all eventualities, and thus the inherent incompleteness of the contract, the parties also lack the power to give the contract binding power without reference to any existing legal system from which this binding character could be derived, since there is a gap of enforceability. Finally, the existence of choice of law provisions and venue selection clauses hints at the parties’

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1. Meili, Fr., *Der Staatsbankrott und die moderne Rechtswissenschaft*, Berlin 1895.
intention to be subject to a legal order outside the contract. A loan contract cannot, therefore, suffice as a legal underpinning for a system of sovereign debt reorganisation.

2. Choice of Law and Legal Venue Selection Clauses

Debt contracts of sovereigns, be it in the form of loans or bonds, usually contain choice of law and legal venue selection clauses. In general, the parties can agree on every national legal order, although in practice, most loan and bond agreements are governed by English or New York law. It is not necessary that the whole contract be governed by the same legal system. Instead, the parties can choose different systems to govern the various parts of the agreement. Difficulties caused by an explicit choice of law flow from the (lack of) balance of powers between the contracting parties. The stronger party will always attempt to declare the order that it sees as more favourable as the governing legal order. This is most often the ‘home’ legal order, since the party is more used to it, making this legal order seem to be more predictable and easier to handle. As illustrated above, this is particularly disadvantageous if the creditors agree to the law of the debtor state as governing law because here there is a risk that the state may change its law to the disadvantage of its creditors. Although, sometimes, parties try to avoid such changes by introducing stability clauses (Versteinerungsklauseln), the legislator can de facto circumvent such clauses by refusing to accept them.


5 This leads to the so called dépeçage, Kegel, Gerhard; Schurig, Klaus, Internationales Privatrecht, 9th ed., München 2004, p. 141.

6 This difficulty is one of the core reasons for the emergence of the idea of a lex mercatoria: Weise, Paul-Frank, Lex mercatoria: materielles Recht vor der internationalen Handelschiedsgerichtsbarkeit, Frankfurt 1990, p. 1.

7 See the example of the Norwegian Loans Case, ICJ, Case of Certain Norwegian Loans, [1957] ICJ Reports, p. 9 et seq.