Introduction

Sovereign debt crises have been afflicting countries, their citizens, foreign investors, the financial sector and the real economy for centuries, imposing enormous burdens on future generations.

Although sovereign defaults are a structural phenomenon typical of the global economy (since the 1960, 145 governments have defaulted on their obligations),[1] no international sovereign debt restructuring mechanism similar to domestic bankruptcy laws has ever been established and this is considered by many experts one of the most serious gaps in the international financial architecture.

The idea of adapting bankruptcy law principles and proceedings to sovereigns can be traced back to the 18th century when, in his 1776 *Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith wrote: "When it becomes necessary for a State to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open, and avowed bankruptcy is always the measure which is both least dishonourable to the debtor and least hurtful to the creditor".[2]

Since then, the debate on how to address this systemic deficiency has continued unabated and several important studies on sovereign debt restructuring have been published with a historical, legal, economic or interdisciplinary perspective.[3]

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[1] Beers D. and Mavalwalla J., 'The Bank of Canada-Bank of England Sovereign Default Database Revisited: What's New in 2018?', in *Bank of Canada Staff Working Paper*, n. 2018-30, July 2018, p. iii. See also Beers D. and Mavalwalla J., 'Database of Sovereign Defaults 2017', in *Bank of Canada*, Technical Report n. 101, June 2017. The authors rely on the Credit Rating Assessment Group (CRAG) database of sovereign defaults (1960-2018) which is compiled by the Bank of Canada in partnership with the Bank of England and is available at http://www.bankofcanada.ca/wp-content/uploads/2017/07/crag-database-update-13-07-18.xlsx (last visited 10 January 2020).

[2] Smith A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, London, 1904, 5th ed., Book V, Chapter 3, at 61.

[3] For an economic and historical perspective see among others: Roos J., *Why Not Default? The Political Economy of Sovereign Debt*, Princeton, 2019; Eichengreen B., El-Ganainy A., Esteves R. and Mitchener K., 'Public Debt Through the Ages', in *CEPR Discussion Paper*, No. 13471, 2019; Dyson K., *States, Debt and Power: 'Saints' and 'Sinners' in European History and Integration*, Oxford, 2014; Das U., Papaioannou M. and Trebesch C., 'Sovereign Debt Restructurings 1950-2010:

From a legal point of view, the most recent literature has provided a comprehensive and detailed analysis of the topic,[4] by comparing corporate, banking and sovereign debt restructurings,[5] by focussing on sovereign defaults before either domestic[6] or international courts and tribunals,[7] by analysing the relationship between sovereign indebtedness and human rights[8] as well as by studying a specific crisis scenario.[9]

The cornerstone of all these studies revolves around the issue of achieving long-lasting solutions that are at the same time orderly and prompt, fair and equitable, comprehensive and sustainable for all the parties concerned.

Nevertheless, finding a coherent global solution is made particularly difficult by the multitude of stakeholders, the many sets of applicable laws[10] and by the fact that each category of debt instrument (sovereign bonds, syndicated bank lending and official bilateral debt) has a dedicated restructuring mechanism.

Creditor coordination problems, 'too-little, too-late' solutions,[11] concerns over

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Literature Survey, Data, and Stylized Facts', in *IMF Working Paper* 12/203, August 2012; Reinhard C. and Rogoff K., *This Time is Different: Eight Centuries of Financial Folly*, Princeton, 2009; Sturzenegger F. and Zettelmeyer J., *Debt Defaults and Lessons from a Decade of Crises*, Cambridge, USA, 2007; Roubini N. and Setser B., *Bailouts or Bail-ins? Responding to Financial Crises in Emerging Economies*, Washington, DC, 2004. For an interdisciplinary approach see among others: Ali Abbas S., Pienkowski A. and Rogoff K. (eds.), *Sovereign Debt: A Guide for Economists and Practitioners*, Oxford, 2020; Guzman M., Ocampo J.A. and Stiglitz J.E. (eds.), *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises*, New York, 2016; Buchheit L.C., Gelpern A., Gulati M., Panizza U., Weder di Mauro B., and Zettelmeyer J., *Revisiting Sovereign Bankruptcy*, Committee on International Economic Policy and Reform, Washington D.C., October 2013; Kolb R.W. (ed.), *Sovereign Debt: From Safety to Default*, London, 2011; Herman, B., Ocampo J.A. and Spiegel S. (eds.), *Overcoming Developing Country Debt Crises*, Oxford, 2010.

[4] Rault C.J., *The Legal Framework of Sovereign Debt Management*, Baden Baden, 2017; Megliani M., *Sovereign Debt: Genesis, Restructuring, Litigation*, London-New York, 2015; Lastra R.M. and Buchheit L.C. (eds.), *Sovereign Debt Management*, Oxford, 2014; Mauro M.R. and Pernazza F., *Il debito sovrano: tra tutela del credito e salvaguardia della funzione dello Stato*, Napoli, 2014; Paulus C.G. (ed.), *A Debt Restructuring Mechanism for Sovereigns: Do We Need a Legal Procedure?*, Munich, 2014; Audit M. (ed.), *Insolvabilité des États et dettes souveraines*, Paris, 2011; Olivares-Caminal R., *Legal Aspects of Sovereign Debt Restructuring*, London, 2009; Schier H., *Towards a Reorganisation System for Sovereign Debt. An International Law Perspective*, Leiden-Boston, 2007.

[5] Olivares-Caminal R., Douglas J., Guynn R., Kornerberg A., Paterson S. and Singh D., *Debt Restructuring*, Oxford, 2nd ed., 2016.

[6] Kupelyants H., *Sovereign Defaults Before Domestic Courts*, Oxford, 2018.

[7] Waibel M., *Sovereign Defaults Before International Courts and Tribunals*, Cambridge, 2011.

[8] Bantekas I. and Lumina C. (eds.), *Sovereign Debt and Human Rights*, Oxford, 2018; Bohoslavsky J.P. and Cernic J.L. (eds.), *Making Sovereign Financing and Human Rights Work*, Oxford and Portland, 2016.

[9] For lessons learned from sovereign debt crises since the 1980s see, among others, Bohoslavski P. and Raffer K., *Sovereign Debt Crises: What Have We Learned?*, Cambridge, 2017.

[10] Martha R.S.J., *The Financial Obligation in International Law*, Oxford, 2015, p. 19 ff.

[11] Restructurings are often delayed for 'too long' and they address 'too little' and – as a consequence – debtor countries emerge from such processes bearing a debt level that is still unsustain-

the legitimacy and impartiality of debt restructuring processes [12] and their economic costs and social implications add layers of complexity to this highly fragmented scenario.

To overcome the inefficiency, unpredictability and inconsistency of the current legal framework, two major strategies have been identified: one based upon public international law (the so-called 'statutory approach') and one based on private domestic law (the so-called 'contractual approach').

The first entails the establishment of a permanent international debt workout mechanism to resolve sovereign debt disputes in an independent and impartial manner, coordinating all creditors of a country in distress. [13]

The second promotes the adoption of strengthened contractual clauses to facilitate the restructuring of bonded debt and it was mainly conceived to avert the threat of official intervention and prevent the establishment of a sovereign debt restructuring mechanism. [14]

Initially conceived as alternatives, these strategies are actually complementary and sequential. Although the contractual approach is insufficient to tackle the inherent complexity of debt problems (as in the case of pre-defaults), it unquestionably represents a major step forward.

While acknowledging that in the current scenario the market-based contractual approach is prevailing, this book aims at establishing what is the role played – and what are the limits encountered – by public international law in sovereign debt restructuring. The research will focus on State and non-State actors involved, describing the evolution of the relevant rules and institutions.

Chapter one defines key concepts and provides a brief overview of the main restructuring vehicles that have been developed over time to restructure the many categories of sovereign debt.

Chapter two focusses on the most important rules of public international law applicable to sovereign indebtedness, tracing a distinction between those that are relevant for debtor States (namely, State succession in respect of debts, the odious

able, making further restructurings necessary with additional costs being imposed on all the parties involved. See in particular Guzman M., Ocampo J.A. and Stiglitz J.E., *op. cit.*, 2016, p. xiii and IMF, 'Sovereign Debt Restructuring: Recent Developments and Implications for the Fund's Legal and Policy Framework', 26 April 2013.

[12] See Lienau O., 'The Challenge of Legitimacy in Sovereign Debt Restructuring', in *Harvard International Law Journal*, 2016, pp. 151-214.

[13] Many contend that the statutory approach entails interference with national sovereignty that most countries find unacceptable: debtors' sovereignty stands in the way of any attempt to design an international bankruptcy regime, which would be ineffective due to the absence – *inter alia* – of enforceable sanctioning measures.

[14] The advantage of the contractual approach is that all stakeholders coalesce around model contract terms and conditions without being mandatorily bound to adopt them. In addition, standard contractual language can be adapted to individual circumstances and changing market conditions.

debt doctrine, sovereign immunity and economic necessity) and for creditor States (diplomatic protection and the conclusion of treaties specifically aimed at providing debt relief to a country).

Chapter three describes the composition and functioning of the main debt restructuring vehicles (i.e. the Paris and London Clubs), also presenting the pros and cons of convening bondholders' committees.

Chapter four analyses in detail the law and practice of the two international organisations that are mostly involved in sovereign debt issues: the International Monetary Fund and the United Nations.

Chapter five examines the increasing role played by non-State actors – in particular, financial industry associations – in the field of sovereign debt restructuring. In fact, by relying on their standard-setting and self-regulatory powers, these creditor associations are filling in some of the gaps deriving from the absence of a comprehensive framework for sovereign debt restructurings.

Lastly, some caveats are necessary. Although the debt crises of Argentina (2001-2016) and Greece (2010-2018) will be often used to explain some theoretical aspects and inner workings of sovereign debt restructurings, a detailed description of the crises that struck the two countries or a full analysis of their causes do not fall within the scope of this research. Similarly, this study does not concern the European legal framework or the reform of the European economic governance which followed the Euro area debt crisis. [15]

[15] See, among the most recent contributions, Abel J., *The Resolution of Sovereign Debt Crises: Instruments, Inefficiencies and Options for the Way Forward*, Baden Baden, 2019, pp. 94-349 and 402-488; Hofmann H., Pantazatou K. and Zaccaroni G. (eds.), *The Metamorphosis of the European Economic Constitution*, Cheltenham, 2019; Santa Maria A., *European Economic Law*, Alphen aan den Rijn, 2019; Cremona M. and Kilpatrick C. (eds.), *EU Legal Acts: Challenges and Transformation*, Oxford, 2018; Estella A., *Legal Foundations of EU Economic Governance*, Cambridge, 2018; Beukers T., De Witte B. and Kilpatrick C. (eds.), *Constitutional Change Through Euro-Crisis*, Cambridge, 2017; Lo Schiavo G., *The Role of Financial Stability in EU Law and Policy*, Alphen aan den Rijn, 2017; Petch T., *Legal Implications of the Euro Zone Crisis: Debt Restructuring, Sovereign Default and Euro Zone Exit*, Alphen aan den Rijn, 2014; Adinolfi G. and Vellano M. (eds.), *La crisi del debito sovrano degli Stati dell'area euro: profili giuridici*, Torino, 2013.