# Boilerplate Clauses as Pragmatic Knowledge Practices

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Prompted by the invitation to participate in this thematic week on #pragmatisms for Allegra, I would like to share some reflections from my ethnographic reading of a concrete and ongoing case of sovereign debt litigation. As in Amy Levine's (2016) study of *South Korean civil movement organisations*, my research of the field of sovereign debt in Argentina emphasized the instrumentality of legal tools and the pragmatic knowledge of legal artifacts (Barrera forthcoming).

After Argentina's debt default in 2001, and debt restructuring in 2005, *NML Capital,* a coalition of distressed debt funds and retail investors *(holdouts)* sued this country before the New York Southern District court. Since then, litigation has developed through different judicial instances in the US, including its Supreme Court of Justice, and other foreign jurisdictions. Rather than focusing on the effects of US court rulings on the parties in the case, interested third parties (namely payment and clearing institutions), or even on the alleged impacts upon the sovereign debt world (Gelpern 2013; 2014) and the policies and practices of international organizations (G 77 plus China, Summit 2014 Declaration; NU General Assembly Resolution, Sept. 9, 2014; G20 Leaders' Communiqué, Brisbane Summit 2014), my interest in this case has been looking at the place of legal knowledge, and law in general, in the making of sovereign debt agreements.

As Annelise Riles has shown (2011), the field of financial markets is a very interesting venue to explore the relationship between Law and Pragmatism ethnographically.

> *Commonplace representations of market transactions advance the idea of an a priori distinction between fact and value.*

This view was shared in general by the legal and financial experts that I met in the field of sovereign debt in Argentina, who saw the law's workings as subordinate to the process of making financial debt instruments. In this vein, law (the means) appeared as pre-determined by the ends (market's ends), which for my interlocutors were represented as rational, with no political implications. To quote an Argentine corporate lawyer and sovereign debt expert: "A bond issuer wants his operation to be successful, which means to pay a low interest rate for the notes, to collect as much money as possible through public offering, and yet, a broad secondary market is created for securities. The debtor wants all of this, without overlooking some legal aspects of the transaction that might cause him some troubles in the future". Within this ends-oriented framework, law (and legal work alongside) is just a tool among others, furthering a representation of legality as collateral (literally and figuratively) to the market (Riles 2011: 64).

Banco de la Nación Argentina, Casa Central y Sucursal Plaza de Mayo, Buenos Aires, Argentina. Self-published work by Barcex, CC BY-SA 2.5, Wikimedia Commons

However, judicial litigation involving Argentine defaulted bonds can be placed

within a larger political and economic context that encompasses the restructuring of Argentina's sovereign debt and its contingencies—expected or not—such as the creditors' reactions to that political and economic decision. Successive judicial decisions reached in the case have put some contractual terms under the spotlight not only in terms of their textuality and material aggregation to sovereign debt contracts, but, from an anthropological perspective, as indexical of strategies and forms of expertise. Concretely, the *pari passu* clause or equal treatment clause, a routinized legal formula used in sovereign debt agreements (Buchheit and Pam 2004; Weidemaier, Scott and Gulati, 2013; Gulati and Scott 2013), became a central issue in the judicial saga of the Argentine bonds. In 2012 a court decision held that with its 2005 debt restructuring (and other statutory provisions enacted afterwards) Argentina had breached its obligations to the holders of the original bonds under this clause, which prevented the debtor "from subordinating or otherwise treating unequally similarly positioned creditors, by continuing to pay the exchange bondholders without also paying the holdouts" (Neve 2013-14,:632, note 11). How, then, the *pari passu*, a "boilerplate" clause—that is, a term "conveyed from contract to contract with minimal alteration" (Johns 2008, 259)—became of central concern in the analysis of a phenomenon often deemed as purely economic, or a policy question?

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To address this question, my study focused on the constitution of financial instruments in the context of sovereign debt, looking at not only boilerplate terms like the *pari passu* but also other clauses, like the RUFO that seemed to be an innovation of Argentina's debt restructuring in 2005 [1] (Gelpern, 2005). To do so, I drew on archival research, documents and media analysis and on scholarly work about the genealogy of *pari passu,* as well as other academic literature on sovereign financing and debt restructuring. I also conducted semi-structured interviews with researchers of Argentinian sovereign debt, economists, former

civil servants, corporate lawyers and sovereign debt experts who were either directly or indirectly involved in the 2005 and 2010 Argentina's sovereign debt restructuring processes.

My study of this case, takes on the conflict of judicial interpretation of contractual terms such as *pari passu* or the equal treatment clause triggered by the court decisions case in particular, and the speculations about the concrete effects that other provisions (namely, the RUFO clause) might cause as manifestations of the central role of legal instruments. To put it differently,

> *legal instruments are not merely means-to-an-end relations, marginal to allegedly more substantial economic and political debates on sovereign debt. On the contrary, they are intriguing political possibilities themselves. Or, following Riles, they can operate as techniques of governance (2011:15).*

Remarkably, the actors that I encountered in my field imagined or represented the ends that their means (themselves, their legal work) were called to meet in terms of market rationality. In this sense, the findings of my research were not surprising. However, accessing the practice of sovereign debt experts ethnographically allowed me to unpack procedural practices, authoritative expert knowledges, institutional and social relations, and the politics inherent to those legal instruments. In this vein, knowledge was manifested in different forms: it could be perceived as a failure of agency; or an overreaction to a contingent political context; and even, it could be oriented toward multiple ends, as pointed out by one of my informant's framing of sovereign debt default through the binary collective-individual interests. In other words, by looking into the constitution of legal technicalities (Riles 2005, 2011; Valverde 2003, 2009) as mere vehicles of pragmatism, as encountered in the case of Argentine sovereign debt, it is possible to see how those instruments further an inscription of political possibility through a description of economic inevitability.

[1] The RUFO (Rights Upon Future Offers) clause of the 2005 restructuring debt agreements bound Argentina to the restructured bondholders. If, after the restricting process, Argentina gave holdouts more favorable terms than those of the debt restructuring, the restructured bondholders would get the same.

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