

JUDGMENT HOLDERS IN SOVEREIGN DEBT RESTRUCTURINGS

W. MARK C. WEIDEMAIER & F. ANDREW HESSICK*

Sovereign bond restructurings depend on collective voting mechanisms called Collective Action Clauses (CACs) in bond contracts. CACs let a bondholder supermajority modify the bond and bind dissenters to the outcome. But what if dissenters can avoid being bound by rushing to court and getting a judgment? Existing analyses suggest that the legal doctrine of merger and bar might cause the CAC to “merge” into a court’s judgment, effectively allowing judgment holders to escape the restructuring. Other bondholders would be unable to stop judgment holders from enforcing their judgments. Policymakers have long worried that this risk might undermine the contractual architecture for restructuring sovereign debt obligations. That concern also has prompted the U.S. and other governments to intervene in extraordinary ways in recent sovereign debt litigation.

We consider whether a judgment indeed has this effect. We begin by dispensing with the doctrine of merger and bar, which is largely irrelevant, and instead focus attention on two issues. First, we explain that a modification vote under the CAC does not purport to affect the previously-entered judgment of a federal court and generally should not be seen as a basis for judicial intervention granting relief from the judgment. To that extent, observers are right to worry that judgment creditors will escape the effect of a sovereign debt restructuring. However, we also explain that, while they cannot modify a court’s judgment, a bondholder majority or supermajority can still modify the bond to impair a judgment holder’s ability to enforce a judgment. Using Venezuelan sovereign debt as an example, we illustrate how this might work and highlight legal risks. We conclude that, if judgment holders pose a risk (and they often do not), the existing contractual architecture includes tools for dealing with that risk.

* Ralph M. Stockton, Jr. Distinguished Professor and Judge John J. Parker Distinguished Professor of Law, respectively, at the University of North Carolina School of Law. We thank discussants and workshop participants at the Princeton Sovereign Finance Lab and at Brooklyn Law School. We also have benefitted from comments by Robin Effron, Anna Gelpern, Mitu Gulati, David Hoffman, Ted Janger, and by numerous readers who practice law in the field or work on sovereign debt matters at multilateral financial institutions.

TABLE OF CONTENTS

I. Introduction	244
II. Using the Right Doctrine to Answer the Right Question.	248
A. The Misplaced Emphasis on “Merger and Bar”	249
B. Modifications Affect Contracts, Not Judgments	256
1. A Restructuring Vote Has No Effect on a Court’s Judgment	256
2. Courts May, but Generally Should Not, Enforce Agreements to Modify Judgments	262
III. Modifying the Bond to Impair Judgment Enforceability.	267
A. Removing the Waiver of Sovereign Immunity from Execution	268
B. Adding Sharing Clauses and Other New Provisions.	272
C. Legal Uncertainties.	273
IV. Conclusion	276

I.

INTRODUCTION

Sovereign nations cannot file for bankruptcy and cannot force creditors to grant debt relief.¹ Instead, a sovereign that cannot pay its debts must persuade creditors voluntarily to reduce their claims.² The typical sales pitch is that a voluntary debt restructuring will make everyone better off: By deferring or reducing claims, creditors allow the sovereign to invest in its people and domestic institutions, and these investments will fuel economic growth and ultimately let the sovereign resume debt service sooner and pay creditors more than it could absent the restructuring.

If the pitch persuades, the sovereign’s creditors should agree, at least in principle. The well-known difficulty is in coordinating their response. Even when a restructuring makes creditors better off collectively, individuals have the incentive to defect. A restructuring frees up resources, and the defector may hope to persuade or coerce

1. See Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 890 (2012) (“[T]here is no bankruptcy regime for nation-states”); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 3 (2004) (“Whereas private debt defaults lead to bankruptcy, sovereign debt defaults lead to informal, often lengthy standstills. . . . [F]or the most part, payment resumption requires that creditors come to the negotiating table to rewrite the defaulted debt contracts.”).

2. See Lee Buchheit et al., *The Restructuring Process*, in SOVEREIGN DEBT: A GUIDE FOR ECONOMISTS AND PRACTITIONERS 329, 329–30 (S. Ali Abbas, Alex Pienkowski & Kenneth Rogoff eds., 2020) (“A sovereign’s debt can never be legally discharged in bankruptcy; debt relief can only be obtained with the creditors’ consent.”).

the sovereign to divert some of these now-available resources to pay it in full at the expense of other creditors. Anticipating such defections, creditors otherwise inclined to participate in the restructuring may balk, fearing their sacrifices will only fund larger payments to other creditors. This dynamic may complicate and delay debt relief, potentially leaving everyone worse off.³

Sovereigns typically borrow by issuing bonds. Bond contracts are designed to mitigate the risks posed by holdout creditors.⁴ The primary contractual tool is the Collective Action Clause (CAC), which lets an investor majority or supermajority modify the sovereign's payment and other important obligations in a vote that binds dissenters.⁵ By allowing creditors to approve a restructuring proposal without risk of defection, CACs mitigate "the overarching challenge [of] ensuring that . . . restructurings are not disrupted and delayed through actions not in the interest of creditors as a whole."⁶

One way that an investor might seek to avoid this collective voting mechanism is by filing a lawsuit and getting a judgment. After winning a judgment, the investor may argue it is exempt from the bond contract's collective voting mechanism. It is free to enforce that judgment and recover 100% of the bond's principal, plus interest, even if a supermajority of its fellow investors votes to reduce the bond issuer's payment obligations. In effect, the argument goes,

3. See Barry Eichengreen, *Restructuring Sovereign Debt*, 17 J. ECON. PERSPS. 75, 77–78 (2003) (explaining how information and coordination problems cause individual creditors to hold out in restructuring, which imposes substantial costs on lenders and sovereign borrowers).

4. This coordination problem and a potential contract reform solution occupied thinking and practice in sovereign debt markets for many years. See generally W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 51 (2013) (examining a century of bond contract clauses designed to remedy bondholder coordination problems as a historical backdrop to early twenty-first century debates between proponents of Collective Action Clauses and sovereign bankruptcy schemes).

5. See *id.* at 53 ("Collective Action Clauses (CACs) . . . allow[] for collectively binding restructuring decisions. . . . [C]ollective *modification* clause[s] . . . allow[] a defined percentage of bondholders to accept a restructuring proposal in a way that will bind the entire group. . . . [C]ollective *acceleration* clause[s] . . . prevent[] individual bondholders from demanding full payment after a default and instead require[] a minimum bondholder vote to approve such a demand.") (emphasis in original) (footnotes omitted); see also Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. U. L. REV. 1627, 1639–42 (2006) (describing introduction of CACs and examining the shift from unanimous to majority modification provisions in bonds governed by New York law).

6. IMF, *THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS* 29–30 (2020) [hereinafter IMF, INTERNATIONAL ARCHITECTURE].

the judgment confers immunity from the risk of a subsequent debt restructuring.⁷

Although courts have not addressed whether a judgment protects against a debt restructuring,⁸ the possibility that investors might obtain such immunity has concerned public officials. The IMF warns that, if a judgment does confer immunity, “the contractual framework for addressing collective action problems could be seriously weakened.”⁹ In ongoing debt crises, such as those in Venezuela and Sri Lanka, creditors have in fact filed lawsuits to avoid the effect of anticipated restructurings.¹⁰ These lawsuits have concerned official sector actors enough to prompt extraordinary interventions by the governments of the United States and other countries, which have asked for litigation to be stayed to allow the conclusion of restructuring talks before any judgments are entered.¹¹ According to the U.S.

7. See *infra* notes 19–20 and accompanying text.

8. IMF, *International Architecture*, *supra* note 6, at 31–32 (explaining that the argument that bondholders who obtain judgment would no longer be affected by a CAC under the doctrine of merger has not been tested in courts).

9. *Id.* at 32. See also Anne O. Krueger & Sean Hagan, *Sovereign Workouts: An IMF Perspective*, 6 CHI. J. INT’L L. 203, 215 n.26 (2005) (suggesting that one benefit of a statutory bankruptcy regime for sovereigns is that such a regime, unlike CACs, “would bind judgment creditors: those creditors whose claims are no longer subject to the provisions of the underlying contract by virtue of the fact that they had received a judgment against the sovereign from a court of competent jurisdiction”); Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT’L L. 299, 323–24 (2005) (noting argument that the “reverse side” of the doctrine of merger in New York would render a judgment creditor “immune from any amendments that are affected with respect to any contractual claims”).

10. Claimants litigating against Venezuela have taken the position that a judgment offers protection from “compulsory restructuring of their debt[.]” Reply Memorandum of Law in Support of Plaintiffs’ Consolidated Motion for Summary Judgment and in Opposition to Venezuela’s Cross-Motion to Stay at 6, *Casa Express Corp. v. Bolivarian Republic of Venezuela*, 492 F. Supp. 3d 222 (S.D.N.Y. 2020) (No. 18 Civ. 11940). A commercial creditor litigating against Sri Lanka was understood to be seeking similar protection. *Cf. Hamilton Rsr. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683, at *2–4 (S.D.N.Y. Nov. 1, 2023) (noting that commercial creditor plaintiff “has not participated, and does not wish to participate, in Sri Lanka’s restructuring negotiations” and that denying a stay of proceedings “would encourage a ‘rush-to-the-courthouse’ by private creditors holding Sri Lanka’s sovereign debt in an attempt to secure priority”).

11. See Statement of Interest of the United States of America at 1–2, *Hamilton Rsr. Bank*, 2023 WL 7180683 (No. 22 Civ. 5199) (“The United States submits this Statement of Interest in support of Sri Lanka’s motion for a six-month stay. . . . U.S. policy interests favor an orderly and consensual sovereign debt restructuring process. . . .”); Brief for France and the United Kingdom as Members of the Paris Club as *Amicus Curiae* in Support of the Republic of Sri Lanka’s Petition for a Motion to Stay Proceedings at 1, *Hamilton Rsr. Bank*, 2023 WL 7180683 (No. 22 Civ. 5199) (“Both France and the UK support Sri Lanka’s request for a temporary stay of

government, letting a subset of investors “jump the queue” could undercut “efforts to seek economic and humanitarian improvements . . . and . . . the ability of future emerging market debt restructurings to achieve broad consensual participation.”¹²

In this Article, we consider whether a judgment indeed immunizes the judgment-holder against a debt restructuring approved by its fellow investors. We limit our discussion to the effect of a judgment issued by a federal court in the United States, but this is not much of a limitation, both because most litigation to enforce international sovereign bonds takes place in U.S. federal courts and because the effect of a judgment tends not to vary by jurisdiction.¹³

Existing analyses of this issue focus on the legal doctrine of merger and bar. As we will explain, that emphasis is misplaced. Instead, we focus attention on two questions, each of which has a relatively clear answer. The first question is whether a modification vote conducted pursuant to the CAC also modifies a previously entered judgment of a federal court. The answer is that it does not. The judgment is unaffected by the restructuring vote, and the judgment creditor may enforce the judgment even if this allows it to recover more than the issuer is obliged to pay restructuring participants. We suspect that existing analyses have focused on this first question and have therefore taken for granted the risks judgment creditors pose (at least in theory) to restructuring negotiations.

But the first question is less important than one might suppose. The second, more important, question is this: Can restructuring participants modify the bond in ways that will impair a judgment creditor’s ability to enforce the judgment? Despite some legal uncertainties, we think the answer to this question is “yes.” A judgment

proceedings . . .”). An additional concern is that, when bond investors opt out of a debt restructuring, the effect is to shift costs onto taxpayers in wealthy countries. *Id.* at 6 (“From the official bilateral creditors’ point of view, a holdout implies that their taxpayers bear the costs while enabling other creditors to receive full or comparatively superior reimbursement.”).

12. Statement of Interest of the United States of America, *supra* note 11, at 19–20. See also Lee Buchheit & Mitu Gulati, *Why the US *Should* Care About Sovereign Creditor Lawsuits*, FIN. TIMES (Nov. 1, 2023), <https://www.ft.com/content/57a2fa5b-bc68-4049-992c-e5920fce4a34> [<https://perma.cc/U5SF-6AUK>] (referencing the Statement of Interest and its principle of treating creditors the same).

13. See, e.g., 49 C.J.S. *Judgments* § 1 (2026) (gathering citations across jurisdictions adhering to a common understanding of “judgment”); see also HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 261 (2d ed. 1902) (“No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction.”).

creditor's right to enforce a judgment depends, in key respects, on the terms of the underlying contract. And in many cases, restructuring participants will be able to modify these terms while leaving the judgment itself intact. Assuming the sovereign's restructuring proposal enjoys broad creditor support, the mechanics of implementing these solutions are relatively straightforward. Although the risk is not zero, the existing contractual architecture gives restructuring participants tools to mitigate the risk of holdout judgment creditors, at least in some cases.¹⁴

This Article proceeds as follows. Part II shifts attention away from the doctrine of merger and bar, which does not provide a useful framework for analyzing the effect of a restructuring vote on a judgment. As Part II explains, the CAC in a sovereign bond survives the entry of judgment and continues to bind any investor, including any judgment holder, that still holds the bond. Nevertheless, a modification approved under the CAC neither alters a federal court judgment nor ordinarily provides a basis for judicial relief from that judgment. Part III then addresses the more consequential issue: whether, even if the judgment itself remains intact, restructuring participants can modify the underlying bond in ways that impair a judgment holder's ability to enforce it. Part III also explores the contractual tools available to creditor majorities as well as the legal uncertainties surrounding their use.

II. USING THE RIGHT DOCTRINE TO ANSWER THE RIGHT QUESTION

Restructuring negotiations often follow an extended period of debt distress, and it takes time to organize a vote under the CAC.¹⁵ There may be time for creditors to rush to the courthouse to obtain

14. The exceptions will involve cases where the sovereign remains in default for a very long time before restructuring. In such cases, it is possible that a large proportion of bond creditors will obtain judgments, making it effectively impossible for the remaining creditors to achieve the voting threshold required by the CAC. Venezuela is the prime candidate. But even in the Venezuelan context, relatively few creditors have sought to obtain judgments. See Patrick Bolton, Mitu Gulati & Ugo Panizza, *Sovereign Debt Puzzles*, 15 ANN. REV. FIN. ECON. 239, 255 (2023) (“[T]hroughout multiple recent crises—Argentina, Venezuela, Lebanon—dispersed creditors appeared to refrain from pulling the trigger and filing suit. If anything, creditors seem reluctant to take the step of filing suit.”).

15. See *id.* at 253–54 (2023) (“[C]ountries often appear to unduly delay debt restructuring Delayed defaults are then a form of second-best solution in an international financial architecture that lacks an efficient statutory mechanism for dealing with sovereign defaults.”).

judgments, yet such a rush rarely materializes. Few creditors have the appetite for the difficult and time-consuming process of enforcing a judgment against a foreign state. Creditors who do obtain a judgment risk seeing the judgment's real value shrink relative to the underlying bond claim if the judgment carries a lower interest rate.¹⁶ This leaves two plausible scenarios in which a sovereign's debt distress might prompt bondholders to convert bond claims into court judgments. In the first, a lone investor (or small group) believes that claims excluded from the restructuring will be paid more than creditors who participate in the restructuring.¹⁷ In the second, the sovereign's debt restructuring is so delayed that an expiring statute of limitations on the defaults prompts investors to sue.¹⁸ In these scenarios, it is possible that a subset of bond creditors might sue and obtain judgments. If this happens, do these creditors insulate themselves from a subsequent restructuring?

A. *The Misplaced Emphasis on "Merger and Bar"*

Early discussions of the risk posed by judgment creditors linked that risk to the legal doctrine of "merger and bar." As explained in a 2004 IMF paper:

At least under U.S. and English laws, the parties' legal obligations under an accelerated bond contract are extinguished by a court

16. This is because a bondholder who converts a bond claim into a judgment thereafter earns interest at the federal post-judgment rate, set by 28 U.S.C. § 1961, at a rate equal to the short-term borrowing costs of the U.S. government, rather than at the rate specified in the bond. As the metaphorical "risk free" borrower, the U.S. government's borrowing costs typically will be lower than those of the sovereign issuer of the bond. If the bond continues to accrue interest after default and the federal funds rate is lower than the interest due under the bond, a court judgment shrinks rapidly in value relative to the corresponding claim under the bond. *See, e.g.,* Gregory Makoff & W. Mark C. Weidemaier, *Mass Sovereign Debt Litigation: A Computer-Assisted Analysis of the Argentina Bond Litigation in the U.S. Federal Courts 2002–2016*, 56 U.C. DAVIS L. REV. 1233, 1256 tbl. 1 (2023) (demonstrating that the judgment's value in relation to the claim is smaller the earlier the judgment is entered).

17. Although the motives for the lawsuit are unclear, this may explain the litigation in *Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683 (S.D.N.Y. Nov. 1, 2023).

18. Venezuela is the example here, where a wave of litigation has so far been prevented only by a tolling agreement reached by the government and a large group of creditors. *See, e.g.,* Nicolle Yapur, *Venezuela Creditors Back Legal Extension for Defaulted Bonds*, BLOOMBERG (Aug. 17, 2023), <https://news.bloomberglaw.com/capital-markets/venezuela-creditors-back-legal-extension-for-defaulted-bonds> [<https://perma.cc/9FRS-QH8D>] (reporting on approval from creditors holding more than \$11 billion of Venezuelan debt).

judgment on liability. Consequently, the debtor's obligation to pay . . . becomes "merged" in the judgment. In turn, a judgment creditor obtains the right to enforce its judgment through the judicial enforcement mechanisms, as opposed to reliance on the extant contractual terms. This doctrine implies that a creditor who obtains a judgment on an accelerated claim is removed from the contractual limitations on its claim. Thus, in principle, such judgment creditors would be insulated from the reach of contractual clauses and, particularly, they could not be subjected to majority restructuring provisions and exit consents. However, the application of the doctrine of merger in this context has not been tested.¹⁹

The argument, in other words, is that, because of the doctrine of merger and bar, a judgment on an accelerated bond contract abrogates legal obligations under that contract, including the provisions relating to restructuring, and leaves the parties subject only to the terms of the judgment. Similar assertions reappear in more recent IMF reports discussing the risks posed by judgment creditors.²⁰

The argument laid out in this passage tends to obscure more than illuminate.²¹ It is undoubtedly correct insofar as a judgment creditor indeed may enforce its judgment notwithstanding a vote to restructure the bond's payment terms.²² But the reason is not "merger and bar." The ancient doctrine of "merger and bar," long ago absorbed in the federal system by the doctrine of claim preclusion, says that a final judgment on a claim precludes the plaintiff from bringing a second action asserting the same claim.²³

19. IMF LEGAL DEPARTMENT, RECENT DEVELOPMENTS IN SOVEREIGN DEBT LITIGATION AND IMPLICATIONS FOR DEBT RESTRUCTURING AND DEBT RELIEF PROCESSES, ¶ 43, SM/04/98 (Mar. 24, 2004) [hereinafter IMF, 2004 REPORT] (footnotes omitted).

20. See IMF, INTERNATIONAL ARCHITECTURE, *supra* note 6, at 31 n.48 ("This means that the parties' legal obligations under an accelerated bond are extinguished by a court judgment on liability—the debtor's obligation to repay principal and interest becomes merged in the judgment, and the creditor obtains the right to enforce its judgment through the judicial enforcement mechanisms, as opposed to relying on the contractual terms.").

21. To be clear, the authors of the passage mean to describe but not endorse the argument.

22. See discussion *infra* Section II.B.1.

23. Merger precludes the subsequent action when the plaintiff prevailed in the first action while bar applies when the defendant was victorious in the earlier action. *United States v. Ryan*, 810 F.2d 650, 654 (7th Cir. 1987) (defining merger and bar). Today the doctrine's relevance in federal court is confined to how it informs claim preclusion. See, e.g., *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("Claim preclusion . . . encompasses the law of merger and bar."); *NML Cap.*,

Under merger and bar, a judgment does not extinguish all legal obligations under a contract.²⁴ The doctrine holds only that the judgment bars the plaintiff from filing another lawsuit asserting the same “claim,” a term now defined to include all rights and remedies with respect to the transaction that prompted the original cause of action.²⁵ The obvious example is the creditor who wins a judgment for non-payment of an accelerated bond; the creditor cannot file a second lawsuit against the same defendant for non-payment of the bond but instead must seek to enforce the original judgment.²⁶ But the judgment does not extinguish *all* legal obligations under the contract. For example, the creditor may file a new lawsuit asserting claims that were not available at the time of the first lawsuit, as well as suits against entities who were not parties in the original action.²⁷

Moreover, the IMF passage invites confusion by implying that a judgment renders contract provisions irrelevant. For instance, the passage says that the judgment creditor “obtains the right to enforce its judgment through the judicial enforcement mechanisms, as opposed to reliance on the extant contractual terms”; is “removed from contractual limitations on its claim”; and is “insulated from the reach of contractual clauses”²⁸ None of these assertions is correct. It is true that a defendant who loses cannot resist enforcement of the judgment on the basis of “defenses he might have interposed, or did interpose, in the first action.”²⁹ But a judgment on a contract claim does not automatically extinguish the entire contract between the parties. Many provisions in bond contracts are intended to continue

Ltd. v. Banco Cent. de la Republica Argentina, 652 F.3d 172, 185 (2d Cir. 2011) (referring to merger and bar as “terminology of the common law that federal courts have supposedly retired”).

24. *See* 50 C.J.S. *Judgments* § 918 (2026) (“On the entry of a judgment in favor of the plaintiff, the plaintiff cannot maintain a subsequent action on the original cause or claim, but may maintain a different cause of action even based on the same transaction or contract.”); *In re Davis*, 809 F. App’x 415, 416 (9th Cir. 2020) (“[O]nly ‘the particular cause or causes of action on the contract are merged into the judgment, not the contract itself,’ so merger ‘does not bar a different cause of action . . . on the same contract.’”) (quoting *Gietzen v. Covenant RE Mgmt.*, 253 Cal. Rptr. 3d 97, 100 (Cal. Ct. App. 2019)).

25. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 24 (AM. L. INST. 1982). In the past, the same claim was often defined to be the precise same cause of action. *Id.* § 24 cmt. a.

26. *Id.* § 18. Again, this is better understood as an example of the doctrine of claim preclusion, rather than merger and bar.

27. *See* *Exp.-Imp. Bank of the Republic of China v. Grenada*, No. 13-cv-1450, 2013 WL 4414875, at *2–3 (S.D.N.Y. Aug. 19, 2013) (holding that *res judicata* does not bar a second action based on facts not present in the first action).

28. IMF, 2004 REPORT, *supra* note 19, at ¶ 43.

29. RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (AM. L. INST. 1982).

operating post-judgment. To take an obvious example, consider the waiver of the sovereign's immunity from execution—a standard feature of international sovereign bonds today.³⁰ This clause necessarily must operate post-judgment; a writ of execution is the primary means of enforcing a money judgment.³¹ The judgment-holder will rely on the waiver of execution immunity in seeking to attach and force an execution sale of sovereign assets.³² Likewise, bond provisions that assure the equal ranking of bondholders have been interpreted to survive the entry of judgment.³³

Some legal authorities do include broad statements to the effect that the parties' entire contract merges with a court's judgment.³⁴ But it is important to read these statements in context. What "merges" into the judgment is the underlying *claim*, not the entire contract.³⁵

30. See W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 88 fig. 1 (2014) (illustrating the rise in the use of this boilerplate contract term); W. Mark C. Weidemaier & Mitu Gulati, *Market Practice and the Evolution of Foreign Sovereign Immunity*, 43 LAW & SOC. INQUIRY 496, 509 fig. 4 (2018) (illustrating how common execution immunity waivers have become over the past few decades).

31. See FED. R. CIV. P. 69(a)(1) ("A money judgment is enforced by a writ of execution, unless the court directs otherwise.").

32. A judgment creditor may need to characterize itself as a holder of the bond in order to benefit from the waiver of execution immunity. See, e.g., REPUBLIC OF EGYPT, PROSPECTUS 36 (Oct. 2, 2020) (on file with N.Y.U. Ann. Surv. Am. L.) (waiving immunity "for the benefit of holders of Notes"); cf. *Ex Parte* Application of Plaintiff at 9, 20, NML Cap., Ltd. v. Spaceport Sys. Int'l, L.P., No. 11-cv-03507, 2011 WL 13262661 (C.D. Cal. Apr. 25, 2011) (seeking execution on property subject to prior judgment and claiming waiver of execution immunity as a "holder of beneficial interests in bonds issued by the Republic of Argentina").

33. See *Exp.-Imp. Bank of the Republic of China v. Grenada*, No. 13-cv-1450, 2013 WL 4414875, at *3–4 (S.D.N.Y. Aug. 19, 2013) (reasoning why a claim on a bond's *pari passu* provision should survive the entry of judgment).

34. See, e.g., 30 WILLISTON ON CONTRACTS § 76:50 (4th ed. 2025) ("The general rule is, that by a judgment at law or decree in chancery, the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment." (quoting *Doerr v. Schmitt*, 31 N.E.2d 971, 972 (Ill. 1941))); *In re Olick*, 221 B.R. 146, 152 (Bankr. E.D. Pa. 1998) ("In a contract action, the contract itself is held to merge with the judgment, thereby depriving a plaintiff from ever again being able to assert claims based on the terms and provisions of the contractual instrument.").

35. E.g., *Gietzen v. Covenant RE Mgmt.*, 253 Cal. Rptr. 3d 97, 100 (Ct. App. 2019) ("[T]he rule would be better stated that the particular cause or causes of action on the contract are merged into the judgment, not the contract itself."); see *Kenny v. Kenny Indus.*, 976 N.E.2d 1040, 1045 (Ill. App. Ct. 2012) (noting that the merger doctrine "applies only 'to causes of action to bar relitigation of the same cause'" and not where "the defendant's complaint does not seek to attack the judgment itself, but rather attempts to enforce its separate rights under the contract" (quoting *Stein v. Spainhour*, 553 N.E.2d 73, 76 (Ill. App. Ct. 1990))); see also *Orix Credit Alliance, Inc. v. Horten*, 965 F. Supp. 481, 485 (S.D.N.Y. 1997) ("[[P]laintiff's] original claim is extinguished and rights upon judgment are substituted for it." (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. a (AM. L. INST. 1982)));

There also are cases in which courts (in our view, unhelpfully) use the doctrine of merger effectively as a default rule of construction—that is, as establishing a presumption that a particular contract provision does not survive the entry of judgment. For instance, there are cases invoking merger to hold that a judgment accrues interest at the rate specified by law rather than at the contractual rate and that a mortgagor's obligation to pay taxes and insurance premiums does not survive a foreclosure judgment.³⁶ Like other default rules of construction, the merger doctrine, when used in this way, does not apply when the contract says otherwise.³⁷

To our knowledge, these are the only “merger and bar” cases that even arguably support the argument that a judgment creditor “is removed from the contractual limitations on its claim.”³⁸ In theory, a judgment creditor might invoke them to argue that, unless the bond's text says otherwise, courts should presume the CAC does not survive the entry of judgment and, therefore, that any modification pursuant to the CAC does not affect bonds held by the judgment creditor. Both in concept and in its particulars, however, this argument makes little sense.

Conceptually, it is unhelpful to invoke the doctrine of “merger and bar” to identify a rule of construction in this context. Rules of construction apply only if the contract has nothing to say on the subject. The analysis must start with the contract's text. Only in the absence of relevant text will the court have to select an appropriate rule of construction.³⁹ To do so, it will need to ask a series of

30 WILLISTON ON CONTRACTS, *supra* note 34, § 76:52 (“[A]ll the essential consequences of the merger of the plaintiff's right in a judgment are also necessary consequences of an application of the principles of res judicata.”).

36. See *FCS Advisors, Inc. v. Fair Finance Co.*, 605 F.3d 144, 148 (2d Cir. 2010) (holding that choice of law clause designating New York law did not require application of New York's post-judgment interest rate instead of federal post-judgment interest rate applicable by default); *Jack Henry & Assocs. v. BSC, Inc.*, 753 F. Supp. 2d 665, 670–71 (E.D. Ky. 2010) (holding that interest rate provision in contract was not specific enough to require application of contract interest rate post-judgment); *In re Presque Isle Apartments*, 112 B.R. 744, 747 (Bankr. W.D. Pa. 1990) (“[T]he legal rate of interest applies unless the documents evidence a clear intent to continue the contractual rate of interest post-judgment.”); *In re Stendardo*, 991 F.2d 1089, 1095–97 (3d Cir. 1993) (holding that mortgagor's obligation to pay taxes and insurance premiums did not persist after foreclosure judgment).

37. See, e.g., *In re Stendardo*, 991 F.2d at 1095 (“Parties to a mortgage may rely upon a particular provision post-judgment if the mortgage clearly evidences their intent to preserve the effectiveness of that provision post-judgment.”).

38. IMF, 2004 REPORT, *supra* note 19, ¶ 43.

39. See *R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002) (“Unless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play . . .” (citations omitted)).

very pragmatic questions. Would a proposed rule of construction advance or undermine reasonable commercial expectations in this market?⁴⁰ Would it be consistent with broader considerations of the public interest?⁴¹ The court's fundamental objective will be to identify a rule that is reasonable under the circumstances, and this cannot be done by incanting metaphors like "a contract merges into a judgment."⁴²

More important, there is no general rule of construction providing that contract provisions do not operate post-judgment. A judgment resolves only whether a contract has been breached and prescribes a remedy. That determination settles the obligations of the parties to the contract, but it does not cancel other provisions in the contract.⁴³ To the contrary, courts routinely presume that provisions related to dispute resolution and choice of law survive termination of the contract.⁴⁴ These cases typically do not involve

40. See generally Gregory Klass, *Boilerplate and Party Intent*, 82 L. & CONTEMP. PROBS. 105, 121–25 (2019) (discussing usage of boilerplate language and standard rules of construction within insurance and derivatives, two markets that "significantly benefit from uniformity of terms").

41. See generally *id.* at 125–30 (comparing effects of plain meaning rule and *contra proferentem* doctrine in insurance contracts as pertains to both drafters and insured).

42. See RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. L. INST. 1981) ("[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy . . .").

43. See *Gietzen v. Covenant RE Mgmt.*, 253 Cal. Rptr. 3d 97, 100 (Cal. Ct. App. 2019) ("[T]he rule would be better stated that the particular cause or causes of action on the contract are merged into the judgment, not the contract itself."):

44. See, e.g., *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 252–54 (1977) (presuming that an arbitration agreement survives termination of a contract); *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1062 (9th Cir. 2020) (holding that the omission of an arbitration clause from "the survival clause is insufficient to expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties intended for their arbitration obligations to terminate with the Agreements"); *Huffman v. Hilltop Cos.*, 747 F.3d 391, 394–95 (6th Cir. 2014) (holding that an arbitration clause survived contract termination despite being omitted from a contract's survival clause, which identified clauses that "shall survive the expiration or earlier termination of this Agreement"); *U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd.*, 612 F. App'x 671, 672–73 (4th Cir. 2015) ("Generally, dispute-resolution provisions, such as forum-selection clauses, are enforceable beyond the expiration of the contract if they are otherwise applicable to the disputed issue and the parties have not agreed otherwise." (citations omitted)); *Warren Bros. Co. v. Cardi Corp.*, 471 F.2d 1304, 1309 (1st Cir. 1973) (rejecting argument that an arbitration clause did not apply to disputes arising after completion of work under a construction contract); 13 CORBIN ON CONTRACTS § 67.2 (rev. ed. 2003) ("Although termination and cancellation of an agreement extinguish future obligations of both parties to the

disputes over whether the provision operates post-judgment, but their reasoning extends to that context. They reason that the objectives the parties hoped to achieve by designating the law or forum in the contract remain relevant after the affirmative obligations in the contract terminate. For example, parties who include an arbitration clause in their contract presumptively do so because they have “confidence in the arbitration process” and wish to benefit from the arbitrator’s “presumed special competence.”⁴⁵ The desire to realize these benefits “does not terminate with the contract,” and it therefore makes sense to presume the arbitration clause (or the choice of forum clause, or the choice of law clause) remains in effect.⁴⁶

Thus, there is no generally applicable presumption, whether labeled a consequence of “merger and bar” or a default rule of construction, that a contract’s provisions cease to operate after the contract terminates. Courts sometimes presume contract terms survive termination, sometimes presume the opposite, and in all cases defer to the contract’s text. To the extent the opposing presumptions can be linked to an underlying principle, it is that contract provisions that are “structural (e.g., relating to remedies and the resolution of disputes)” presumptively survive termination, while provisions creating substantive obligations presumptively do not.⁴⁷ Because disputes often arise after termination of the contract, it makes sense to presume that parties expect clauses that govern the resolution of such disputes to survive contract termination as well.⁴⁸ As we explain below, the CAC in a sovereign bond is most reasonably viewed as a “structural” provision that survives termination of the

agreement, neither termination nor cancellation affect those terms that relate to the settlement of disputes or choice of law or forum selection clauses.”).

45. *Nolde Bros.*, 430 U.S. at 254.

46. *Id.*

47. *Silverpop Sys., Inc. v. Leading Mkt. Techs., Inc.*, 641 F. App’x 849, 857 (11th Cir. 2016). *See also* *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 (1991) (“[S]tructural provisions relating to remedies and dispute resolution—for example, an arbitration provision—may in some cases survive in order to enforce duties arising under the contract. . . . [This] is similar to the rule of contract interpretation which might apply to arbitration provisions of other commercial contracts. We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.” (footnote omitted)).

48. *Nolde Bros.*, 430 U.S. at 254 (explaining that the parties’ presumed “confidence in the arbitration process . . . does not terminate with the contract” and that a contrary presumption, which would lead to “the alternative remedy of a lawsuit[,] is the very remedy the arbitration clause was designed to avoid.”).

contract.⁴⁹ As we will also explain, there are sound textual arguments that a sovereign bond's CAC continues to operate post-judgment.⁵⁰

Two key implications follow. First, when a holder of a sovereign bond sues and obtains a judgment, the holder remains bound by any contract provisions that survive entry of judgment. The surviving provisions include those that the parties intended to survive (as that intent is expressed in the contract's text) as well as those "structural" provisions that survive by presumption. Second, any of these surviving provisions may be modified in a vote conducted pursuant to the CAC.

B. Modifications Affect Contracts, Not Judgments

Before elaborating on those arguments, some further clarification is in order. The core concern expressed in the IMF report quoted above, and raised by other official actors, is that a judgment holder will escape the effect of a restructuring vote.⁵¹ In considering that risk, it is tempting to conflate several questions that are best kept separate. One is whether a vote to modify a sovereign bond also modifies or alters a federal court judgment previously entered in a bondholder's favor. It does not. A second question is whether a modification vote under the CAC—roughly akin to a post-judgment settlement—could justify the court (never the parties!) in modifying or vacating its judgment. Perhaps, but rarely, and the restructuring vote would not be a very good reason to provide such relief. Finally, one might ask whether restructuring participants can modify a sovereign bond in ways that leave the judgment intact but impair the judgment-holder's ability or incentive to enforce the judgment. Subject to some constraints, they can.

1. A Restructuring Vote Has No Effect on a Court's Judgment

For two reasons, a modification vote conducted pursuant to a sovereign bond's CAC will have no effect on a previously entered judgment. First, by their own terms, CACs do not even purport to have such an effect. Second, and more fundamentally, even if they tried to exercise it, contracting parties do not have the power to modify judgments.

49. *Infra* Section III.A.

50. *Id.*

51. *See supra* notes 19–20.

a. CACs Do Not Purport to Reach Judgments

Assume that a supermajority of bondholders votes to reduce the outstanding principal amount due under the bonds by 50 percent. What could it mean to posit that this vote would also affect a court's judgment? First and foremost, one would have to argue that the text of the CAC manifests the intent to produce such an outcome. But existing CACs do nothing of the sort.

The text of a typical CAC makes clear that a duly approved modification binds all holders, including those who have already reduced their claims under the bond to judgments. It typically provides that a modification is "conclusive and binding on all holders," or something to that effect, whether or not a given holder participated in the vote, supported the modification, or anything else.⁵² Thus, if a vote satisfies the requisite voting threshold, a judgment creditor who continues to hold the bond will be affected by the modification.

But the modification is *to the bond*, not to the judgment or to the creditor's right to enforce it. A typical CAC says something like this, with our emphasis:

Upon the affirmative vote of holders of not less than X% in aggregate principal amount of the Bonds, the issuer may *modify, amend, or supplement the terms of the Bonds*; provided, however, that no such action may, without the consent of holders of X+Y% in aggregate principal amount of the Bonds, reduce the principal amount of any Bond.⁵³

52. See, e.g., Republic of Argentina, Prospectus, at 218 (Filed Pursuant to Rule 424(b)(3)) (Mar. 14, 2017), <https://www.sec.gov/Archives/edgar/data/914021/000119312517081458/d314222d424b3.htm> [<https://perma.cc/Q87Z-AER3>] (modifications "will be conclusive and binding on all holders of the relevant series of debt securities . . . whether or not they have given such consent or approval, and on all future holders of those debt securities"); GOVERNMENT OF BARBADOS, LISTING PARTICULARS 95 (Dec. 18, 2019) (on file with the N.Y.U. Annual Survey of American Law) (modifications "will be conclusive and binding on all Holders of the Bonds whether or not they have given such consent, and on all future Holders of the Bonds"); REPUBLIC OF LITHUANIA, OFFERING CIRCULAR 43 (Feb. 5, 2024), <https://finmin.lrv.lt/media/viesa/saugykla/2024/2/kFCvkA2IPC4.pdf> [<https://perma.cc/S39J-UW6C>] (modification "will be binding on all such Holders, whether or not the Holder was present or represented at the meeting, voted for or against the resolution or signed the written resolution").

53. See, e.g., BOLIVARIAN REPUBLIC OF VENEZUELA, LISTING MEMORANDUM 20 (Oct. 23, 2009), https://data.cbonds.info/emissions/11672/Prospectus_Venezuela_2019_2024.pdf [<https://perma.cc/9PQJ-5GAM>] ("[W]ith the written consent of the owners of not less than 66%% in aggregate principal amount of such Series of the Bonds then Outstanding . . . the Republic and the Fiscal Agent . . . may modify, amend or supplement the terms of such Series of the Bonds . . . and the holders of such Series of the Bonds may make, take or give any request, demand,

Many CACs also make clear that holders can vote to take actions “with respect to the [b]onds[,]” such as giving notice, waiving rights, or directing the fiscal agent or trustee to act.⁵⁴

No plausible reading of such language extends restructuring votes to judgments. A judgment is not a bond or a contract, nor is it a term of a bond or a contract.⁵⁵ It is an entirely separate thing, a decision representing a “court[’s] . . . final determination of the rights and obligations of the parties in a case.”⁵⁶ A judgment is a judicial decree entered by the government entitling the judgment-holder to invoke the coercive legal machinery of the state. And while the standard CAC template lets a creditor majority modify the contract over the objection of dissenters, it does not purport to have any effect on such a decree. It follows that, in any attempt to modify a judgment, the judgment creditor can rightfully deny ever having consented to such a modification.⁵⁷

authorization, direction, notice, consent, waiver or other action provided hereby or by the Fiscal Agency Agreement to be made, given or taken by the holders of such Series of the Bonds; provided, however, that no such action may, without the consent or affirmative vote, in person or by proxy thereunto duly authorized in writing, of the holders of not less than 75% in aggregate principal amount of such Series of the Bonds then Outstanding, [modify any payment or other key provision.]”).

54. *Id.* at 22. *See also* Republic of Chile, Prospectus Supplement, at 7 (Filed Pursuant to Rule 424(b)(3)) (June 27, 2023), https://www.sec.gov/Archives/edgar/data/19957/000110465923075660/tm2319570d8_424b2.htm [<https://perma.cc/4V6L-37VR>] (“The holders may generally approve any proposal by Chile to modify or take action with respect to the indenture or the terms of the debt securities . . .”).

55. *See* discussion *infra* Section II.B.1.b (noting that “[c]ourts equated judgments with contracts as a legal fiction to explain why parties could bring actions to enforce judgments,” and even then, courts “did not actually treat judgments as contracts”).

56. *Judgment*, BLACK’S LAW DICTIONARY (12th ed. 2024); *see also* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1826 (2008) (“[J]udgments . . . authoritatively settle disputes between the parties.”). The judgment holder thereafter gains the right to enforce the judgment, including by filing a separate action on the judgment. *See, e.g.*, N.Y. C.P.L.R. 5303(b) (McKinney 2021) (providing for recognition of foreign country judgment by filing an action on the judgment among other methods).

57. It is often said that arbitration awards become part of the parties’ contract. That formulation is common in the context of labor arbitration. *See, e.g.*, *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184–86 (7th Cir. 1985) (noting that “the refusal to comply with an arbitrator’s award becomes a breach of contract” and “[t]he arbitrator may not modify the contract unless authorized to do so”); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1160–61 (1977) (finding that an arbitrator’s award becomes part of the collective bargaining agreement). But it is equally true in other arbitration contexts. *See, e.g.*, *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (likening arbitral awards to settlements); *Zelle v. Chicago & N.W.R. Co.*, 65 N.W.2d 583, 590 (Minn. 1954) (“An arbitration award . . .

b. Parties Cannot Vacate or Modify Court Judgments Directly

Even if CACs purported to allow parties to vacate or modify court judgments, that grant of power would be ineffective. A judgment represents the exercise of the judicial power of the United States.⁵⁸ That power is reserved to the Supreme Court and to any lower courts created by Congress.⁵⁹ It cannot be exercised by others.

The judicial power is the authority to decide cases dispositively.⁶⁰ The judgment is the legally operative tool that courts use to exercise that power.⁶¹ A judgment has the force of law for the parties.⁶² For example, Henry Campbell Black stated in his treatise on judgments that a judgment “establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement.”⁶³ Other historical treatises offer a similar definition.⁶⁴

would for all purposes under the arbitration provisions thereof be read into the original agreement”); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 535 (2009) (noting that an arbitration award “is thus not the equivalent of a judgment” but is “instead, the equivalent of a contract term that must be enforced unless some legal rule renders it unenforceable”). It is an interesting question, then, whether a vote under the CAC could directly affect an arbitration award entered in favor of a bondholder. But regardless of the answer, the modification would not reach any judgment obtained by the creditor in proceedings to confirm or enforce the arbitration award.

58. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989))); F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 720–21 (2018) (explaining the history of the judicial power to render dispositive judgments).

59. U.S. CONST. art. III, § 1.

60. *Plaut*, 514 U.S. at 219 (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Easterbrook, *supra* note 58, at 926)); see also Hessick, *supra* note 58, at 720 (tracing this understanding of the judicial power to the founding era).

61. See *Plaut*, 514 U.S. at 219 (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Easterbrook, *Presidential Review*, *supra* note 58, at 926)); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) (“The operative legal act performed by a court is the entry of a judgment . . .”).

62. HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 1 (2d ed. 1902) (“[A] judgment, as the culmination of the action, declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other.”).

63. *Id.* § 4.

64. See, e.g., ABRAHAM CLARK FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1, at 2 (Edward W. Tuttle ed., 5th ed. 1925) (“[A judgment] finally terminates the disputes and adjusts the adverse interests of mankind.”).

Judgments differ from opinions, which provide a rationale for the judgment.⁶⁵ But the judgment's authority depends on its source, not its rationale.⁶⁶ Opinions apply to everyone, and anyone—including parties to the judgment that produced the opinion—can argue that the theory espoused in an opinion should be limited or reconsidered.⁶⁷ Not so with judgments.⁶⁸ Judgments conclusively establish rights and obligations, and they impose the relief that the lawsuit seeks.⁶⁹ A prevailing plaintiff armed with a judgment may seize chattels, obtain a lien, or attach property, and, in the case of an injunction, file a motion for contempt.

The core characteristic of a judgment—what makes a judgment authoritative—is that it cannot be modified except by another exercise of judicial power. The Supreme Court has recognized this principle since its earliest days. In 1792 in *Hayburn's Case*, Chief Justice Jay and Justices Iredell, Cushing, Wilson, and Blair stated that executive officials could not review judicial judgments.⁷⁰ Almost two centuries later, in *Plaut v. Spendthrift Farm*, the Supreme Court invoked the same principle to hold that Congress cannot direct courts to reopen final judgments.⁷¹ These cases rest on the basic proposition that only the judiciary can revise judgments issued by a court.

65. Hartnett, *supra* note 61, at 126 (“The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment.”). An opinion is not part of the judgment and is not necessary to the exercise of judicial power. See FREEMAN, *supra* note 64, § 2, at 5 (“The reasons announced by the court to sustain its decision . . . constitute no part of the judgment.”); see also *id.* § 98 (“Ordinarily it is no proper part of a judgment at law to make provision for its enforcement . . .”).

66. As Chief Justice Marshall observed, even if a “judgment” is “erroneous . . . , it is a judgment, and, until reversed, cannot be disregarded.” *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 186 (1809). Cf. *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 302 (1866) (“Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits.”).

67. Cf. *Hubbard v. United States*, 514 U.S. 695, 711–15 (1995) (discussing role of *stare decisis* and grounds for departing from precedent).

68. See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (noting the “general consensus” that judgments in personam ordinarily bind only the parties to the litigation).

69. The Constitution does not define the “judicial Power,” but it is clear that, at its core, the judicial power refers to the power to provide remedies for legal wrongs, to determine the facts of, and apply the law to, particular cases, and to render dispositive judgments in those cases. See Hessick, *supra* note 58, at 719–22 (detailing historical aspects of Article III judicial power).

70. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792).

71. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (“The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them By retroactively commanding

Although the Court's decisions have focused on the inability of other branches of government to modify judgments, the underlying principle—that no one outside the judiciary can modify a judgment issued through the judicial power—applies equally to individuals. That principle precludes the parties to a judgment from modifying it. John Jay observed this point in Federalist 64, stating “judgments” issued by courts “are as valid and as binding on all persons whom they concern, as the laws passed by our legislature”⁷² Thus, even if all the parties to a judgment agree that it should be modified, they have no ability to do so. The judgment's authority does not depend on their acquiescence.⁷³ In the main, parties may *prevent* a court from rendering a judgment by settling a dispute and mooted the case.⁷⁴

the federal courts to reopen final judgments, Congress has violated this fundamental principle.”). Before ratification, some state legislatures had the power to vacate judicial judgments. See *Bank Markazi v. Peterson*, 578 U.S. 212, 240 (2016) (Roberts, C.J., dissenting) (referencing the independent State of Vermont legislature which “stay[ed] and vacat[ed] judgments, suspend[ed] lawsuits, [and] resolv[ed] property disputes”). Preventing this practice in the federal system was a major reason for the independent judiciary established in Article III of the Constitution. See EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 42 (1914) (describing how when the Philadelphia Convention vested the judicial authority and supremacy to a federal judiciary, it was with the “expressed . . . intention of excluding Congress from the business of law-interpreting altogether” and to give “the Constitution the character of supreme law within the individual States enforceable by the several State judiciaries”); John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1663 (2001) (“Article III, in large measure, reflects a reaction against the practice [of legislative interference with] state courts.”). The fear was that combining the legislative and judicial power in a single body could lead to tyranny. See CORWIN, *supra*, at 36–37 (“[A]s both Madison and Jefferson put the matter later, legislative power was the *vortex* into which all other powers tended to be drawn.”). But even when those states did allow legislative override, the parties themselves could not overturn or modify the judgment. They had to ask the legislature to do so.

72. THE FEDERALIST No. 64 (John Jay); see also *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 17 (2023) (Jackson, J., concurring in the judgment) (“We do not consider a court’s judgment to be any less binding on the parties simply because there is not an appeal; appeal or not, lower court rulings are still law.”); *Gamble v. United States*, 587 U.S. 678, 719 n.5 (2019) (Thomas, J., concurring) (“Of course, consistent with the nature of the ‘judicial Power,’ the federal courts’ judgments bind all parties to the case, including Government officials and agencies.”); *East Carolina Lumber Co. v. West*, 102 S.E.2d 248, 249 (N.C. 1958) (holding under state law that “[a]n erroneous or irregular judgment binds the parties thereto until corrected in a proper manner”).

73. Baude, *supra* note 56, at 1814 (describing the judgment power as “the power to bind those who disagree with [the court]”).

74. See *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369, 372 (11th Cir. 2012) (“As a general principle, settlement between the parties in litigation renders the case moot.”); see also *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 77

But once a court renders a judgment, it becomes law, and the parties cannot overturn or modify it.⁷⁵ The inability of the parties to modify a judgment distinguishes it from other methods of resolving disputes, including contractual settlements.

It is true that some old authorities described judgments as contracts. A typical example is the statement by a New York court in the 1920s that “[a] judgment . . . is but a contract.”⁷⁶ The theory was that a judgment establishes a legal obligation, and a promise to pay was implied where such an obligation existed.⁷⁷ On this view, one might think that the parties can modify a judgment just as they can any other contract.

But judgments are not contracts.⁷⁸ Courts equated judgments with contracts as a legal fiction to explain why parties could bring actions to enforce judgments, reasoning that the action to recover on a judgment was effectively a contract action.⁷⁹ Even these courts, however, did not actually treat judgments as contracts. Among other things, they did not leave judgments up for renegotiation. As one New York court stated after describing a judgment as a contract, a “judgment stands as a conclusive declaration” of rights, and “forever settles the plaintiff’s claim.”⁸⁰

2. Courts May, but Generally Should Not, Enforce Agreements to Modify Judgments

Thus, parties cannot directly modify or vacate a judgment and cannot compel a court to do so either. In rare cases, however, post-judgment events can justify a court in granting relief from a judgment. Litigants who reach a settlement after the entry of judgment sometimes point to the settlement as a basis for such relief, asking the court to vacate the judgment or revise it to reflect the

(2013) (stating that a claim for damages “remains live until it is settled” or otherwise resolved).

75. Although parties cannot modify a judgment by settlement, a court has the power to do so. *See infra* Section II.B.2.

76. *Markle v. Osborne*, 201 N.Y.S. 7, 8 (App. Div. 1923).

77. *See Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 288 (1883) (explaining this contractual theory).

78. *See, e.g., McCoun v. N.Y. Cent. & Hudson River R.R.*, 50 N.Y. 176, 180 (1872) (“Even a judgment founded upon contract is no contract for *judicium redditur in invitum*.”).

79. *See, e.g., Folsom*, 109 U.S. at 288.

80. *Crane v. Crane*, 19 N.Y.S. 691, 693 (N.Y. City Ct. 1892).

terms of their new agreement.⁸¹ This is perhaps the closest analogy to what might happen after a modification vote takes place under the CAC. The bond issuer might point to this post-judgment development as a basis for vacating or modifying a judgment entered in favor of a non-participating bondholder.⁸² But we think courts generally should deny such requests.

As an initial matter, the fact that parties to a lawsuit have reached a post-judgment settlement is not a very good basis for granting relief from the judgment. This is especially true when the settlement is proffered as a basis for vacatur. Judicial actions are expensive. The public bears that cost, both through taxes to support the judiciary and by serving as jurors in particular cases. The classic justification for state-subsidized dispute resolution is that it produces public goods such as precedent.⁸³ If a post-judgment settlement results in vacatur, it allows the parties to capture the benefits of state-subsidized adjudication while eliminating the public goods that justify the subsidy in the first place. Vacatur also increases litigation costs by compromising the judgment's preclusive effect and raising the prospect of additional litigation.⁸⁴ Accordingly, revisiting judgments is limited to exceptional circumstances, such as to prevent a miscarriage of justice. The federal rules capture these principles, permitting courts to vacate or modify judgments only for limited reasons, as when the

81. See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) (rejecting petitioner's argument that functional settlement in Chapter 11 case justified appellate court's vacatur of lower court judgments). See also *Clarke v. Castro*, No. 10-cv-6330, 2013 WL 686680, at *3 (S.D.N.Y. Feb. 26, 2013) (rejecting parties' motion to vacate despite settlement agreement premised on vacatur).

82. We have never seen a CAC whose text, in our view, can be reasonably interpreted to require this result. That is, no CAC we have ever seen purports to modify an investor's rights as judgment holder, as opposed to its rights as bondholder. The analogy is therefore imperfect, since the modification vote under the CAC does not produce a "settlement" that reduces the amount the litigating bondholder is owed on the judgment.

83. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 242, 248 (1979) (discussing how the "precedent-creating function of adjudication . . . may invite public intervention in the judicial-services market" and the "public-good character of precedent").

84. The entry of judgment precludes a losing party from relitigating in another case an issue resolved by the judgment. Issue preclusion conserves judicial resources, a benefit that is lost when a judgment is vacated because of a settlement. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[Preclusion doctrines] relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

judgment is the product of fraud or there are other “extraordinary” circumstances.⁸⁵

Relying on reasons of this sort, the Supreme Court held in *Bonner Mall* that “mootness by reason of settlement does not justify vacatur of a judgment under review.”⁸⁶ Although the Court left open the possibility that “exceptional circumstances” might justify vacatur, it made clear that “those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur.”⁸⁷ Following this guidance, lower courts generally have refused to reopen or vacate judgments based on a settlement.⁸⁸ A few courts have held that vacatur is appropriate where, for instance, vacatur is a necessary condition for the parties to reach a settlement, or where vacatur was necessary to prevent a windfall recovery.⁸⁹

We are skeptical of these lower court decisions. Vacatur of a judgment wastes public resources and eliminates public goods.⁹⁰ That litigants believe it necessary to impose such costs on the public

85. See FED. R. CIV. P. 60(b) (listing these circumstances); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (“[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show ‘extraordinary circumstances’ justifying the reopening of a final judgment.”).

86. *Bonner Mall*, 513 U.S. at 29.

87. *Id.*

88. See, e.g., *Doe v. Gonzales*, 449 F.3d 415, 420–21 (2d Cir. 2006) (denying vacatur of district court ruling because “[j]udicial precedents are presumptively correct and valuable to the legal community as a whole” (alteration in original) (quoting *U.S. Bancorp.*, 513 U.S. at 26)); *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 113 (2d Cir. 2008) (same, where “despite the possibility that the parties’ settlement efforts may fail as a result,” denial of vacatur promotes the public interest “in preserving judicial precedent”); *Austin v. Ford*, 181 F.R.D. 283, 286 (S.D.N.Y. 1998) (denying vacatur despite parties’ argument that vacatur “will not have any impact on the development of decisional law” because the “public interest in finality of judgment in this case controls”).

89. See *Major League Baseball Props., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 152 (2d Cir. 1998) (finding exceptional circumstances were present, in part because “vacatur of the district court’s order and opinion was a necessary condition of settlement”); *Doe v. Hreib*, 384 F. Supp. 3d 137, 139 (D. Mass. 2019) (granting vacatur where court had encouraged settlement after signaling that it would grant remittitur of jury verdict and where denial of vacatur would “grant [plaintiff] a windfall” and “incentivize plaintiffs . . . to settle strategically post-judgment to avoid remittitur of an unduly large jury verdict”).

90. See *Bonner Mall*, 513 U.S. at 26 (“Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.” (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))).

as a condition of their settlement strikes us as an argument against rather than for vacatur.⁹¹

In any event, these cases provide no support for the argument that a successful modification vote under the CAC should result in the vacatur of judgments entered in favor of that subset of investors who opted to sue rather than negotiate. The successful modification vote would show, if any proof were needed, that the sovereign could effectuate a debt restructuring even without vacatur of any outstanding judgments against it.

If a bond issuer restructures its payment obligations to bondholders under the CAC, its best argument might be that the restructuring constitutes an “extraordinary circumstance” that justifies modifying, not vacating, the judgment under Federal Rule of Civil Procedure 60(b)(6).⁹² For instance, it might ask the court to reduce the amount of the judgment to match, in net present value terms, the issuer’s financial obligations to restructuring participants. Such a modification, it might argue, would not raise the same concerns as a request for vacatur, because the precedential and preclusive effect

91. This is not to suggest that modification of a judgment based on a contract is *never* warranted. In some circumstances, a contract may change circumstances in a way that makes it unjust or inequitable to maintain the original judgment. One situation is if a party claims the ability to enforce a judgment after a contract satisfies that judgment. Failure to recognize satisfaction is a ground for modifying a judgment. A judgment entitles the prevailing party to only one recovery. If the prevailing party fails to acknowledge that the other party has paid off a judgment, a court may modify the judgment to reduce the defendant’s liability by the amount of payment. See FED. R. CIV. P. 60(b)(5) (describing this ground for relief from a judgment). The modification prevents the plaintiff from going to another jurisdiction to seek a second recovery. The same principles apply to satisfaction by contract. For example, a contract providing for the reduction to \$100 of a \$200 judgment in favor of the plaintiff constitutes partial satisfaction of the judgment. If the plaintiff continues to insist that the defendant owes the full \$200 despite the contract, the court should reduce the judgment by \$100.

92. See *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 210 (2025) (“Relief under Rule 60(b)(6) requires extraordinary circumstances.”). Notably, FED. R. CIV. P. 60(b)(5) would not be applicable because it permits the court to grant relief from a judgment when “applying it prospectively is no longer equitable[,]” and money judgments do not operate prospectively. See, e.g., *Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998) (“Rule 60(b)(5)’s equitable leg cannot be used to relieve a party from a money judgment”); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2d Cir. 1994) (“[J]udgments involving injunctions have prospective application, while money judgments do not.”) (citation and internal quotations omitted); *Marshall v. Bd. of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978) (“[Rule 60(b)(5)] empowers a court to modify a judgment only if it is prospective, or executory.”) (citation and internal quotations omitted); *Fed. Trade Comm’n v. Hewitt*, 68 F.4th 461, 467 (9th Cir. 2023) (“[Such] a money judgment does not have prospective application’ for purposes of Rule 60(b)(5)” (quoting *Stokors*, 147 F.3d at 762)).

of the judgment would remain intact.⁹³ Indeed, the issuer might argue, modification in this context would leave intact the public goods created by litigation while generating additional public goods to improve the functioning of sovereign debt markets.

The logic of this argument will be familiar to anyone exposed to debates about the role of collective voting mechanisms in sovereign debt restructurings.⁹⁴ There is a strong public interest in orderly restructuring, predicated on a system in which creditors are treated equally. CACs play a crucial role in this system by preventing defectors from undermining or derailing a restructuring that benefits the sovereign and its creditors as a group. By modifying the judgment to conform to the terms of the restructuring, the court would be limiting incentives to defect, filling a gap in this system.

We think a court should reject this argument out of hand. There is nothing unforeseeable or extraordinary about a scenario in which some creditors race to the courthouse ahead of a restructuring.⁹⁵ It is precisely what one would expect to happen in the absence of a formal bankruptcy regime. A creditor's race to the courthouse, in other words, is a predictable feature of the existing legal landscape. To grant vacatur or modification on such a basis would undermine the finality of judgments and dilute the strict "extraordinary circumstances" standard. Motions for relief under Federal Rule of Civil Procedure 60(b)(6), unlike motions under some other parts of the Rule, can be filed at any time.⁹⁶ Creditors could never be confident in their rights. Moreover, it proves too much to suggest that courts should vacate judgments to maintain parity among creditors. The argument implies that courts should use their inherent powers to

93. The judgment's preclusive effect arguably may be impaired even if a court simply modifies rather than vacates it, at least to the extent the modification implies that the judgment rests on the contract instead of on the issues necessarily resolved in the original action.

94. See Weidemaier & Gulati, *supra* note 4, at 57 ("Once CACs were incorporated into sovereign bonds, private lenders would be more likely to participate in a sovereign debt restructuring. This trend would reduce the need for official intervention and give private lenders an incentive to lend more prudently."); see also Gelpern & Gulati, *supra* note 5, at 1709–15 (summarizing contract theory of desirability of CACs for sovereigns and creditors).

95. See, e.g., *Hamilton Rsr. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683, at *4 (S.D.N.Y. Nov. 1, 2023) (granting a stay of proceedings out of concern that to do otherwise "would encourage a 'rush-to-the-courthouse' by private creditors holding Sri Lanka's sovereign debt in an attempt to secure priority").

96. Compare FED. R. CIV. P. 60(b)(6) (containing no time requirement), with FED. R. CIV. P. 60(c)(1) (motions under Rule 60(b) must be made "in a reasonable time" and within one year if under 60(b)(1)–(3)).

conjure a system of bankruptcy from thin air. This would be an extraordinary assertion of judicial power. Finally, the argument for modification relies on a bootstrapping logic that effectively treats a successful modification vote as sufficient to prove that it would be inequitable to allow a litigating creditor to enforce its judgment. But the inequity is not so obvious. In at least some cases, the creditor's lawsuit and resulting judgment, and the threat of others like it, may provide additional incentive to get a restructuring deal done.

III. MODIFYING THE BOND TO IMPAIR JUDGMENT ENFORCEABILITY

Although a modification to a sovereign bond has no effect on a court judgment and generally is not a basis for granting a request to vacate or modify the judgment, the toolkit is not empty. It is common for creditors who participate in a restructuring to worry that other creditors will get better treatment. On occasion, they insist on contractual protections against this risk, such as "most favored creditor" clauses in which the sovereign promises to extend to them the terms of any better deal it offers to non-participating creditors.⁹⁷ Such clauses prevent the sovereign from voluntarily paying the full amount of an outstanding judgment. Of course, a judgment creditor does not need the sovereign to pay voluntarily; it can try to collect on the judgment by attaching sovereign assets. Typically, its odds of success will be low.⁹⁸ But if attachment does pose a serious threat, and this bothers restructuring participants, they can use the CAC to impair the judgment holder's rights. This power is not absolute, and there are legal uncertainties, but we think that restructuring participants have significant power to defang judgment creditors.

An example will help illustrate how restructuring participants might try to limit the power of judgment creditors, as well as the areas of legal uncertainty implicated by any such attempt. We will use Venezuela, a country desperately in need of a debt restructuring.

97. See DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, INVITATION AND CONSENT SOLICITATION MEMORANDUM 121 (Nov. 25, 2024) (providing that, so long as restructured debt remains outstanding, Sri Lanka "shall not enter into any agreement or arrangement to pay . . . or otherwise restructure . . . [on more favorable terms] unless the Republic offers such more favourable terms" to restructuring participants).

98. See Makoff & Weidemaier, *supra* note 16, at 1251–52 & 1256 tbl. 1 (discussing difficulties in attaching sovereign assets and detailing higher financial returns to creditors who delay as long as possible before reducing claims against a foreign sovereign to judgment).

Suppose an investor holding a position too small to block a restructuring vote obtains a court judgment on its claim.⁹⁹ This appears to describe litigation by a number of holders of Venezuelan debt. For instance, several investment funds organized under the law of the Cayman Islands, apparently, hold around \$209.5 million in face value of a Venezuelan bond issued in 2009 with a total face value of roughly \$2.5 billion.¹⁰⁰ These entities sued and received judgment for certain missed payments.¹⁰¹ The bonds' CAC allows holders of two-thirds in aggregate principal amount of the bonds to modify most bond provisions. More important terms, including those related to payment, require holders of at least three-quarters in aggregate principal amount to vote in favor.¹⁰² Assume that, in an eventual Venezuelan debt restructuring, the country reasonably fears that it cannot restructure this bond unless it assures other bondholders that it will not give a better deal to entities that raced to the courthouse and obtained judgments. What options might it pursue?¹⁰³

A. *Removing the Waiver of Sovereign Immunity from Execution*

An outstanding judgment is of little value unless it can be enforced, and the ability to enforce the judgment depends, in important ways, on the provisions of the bond contract. Most notably,

99. Of course, a judgment creditor with a sufficient stake may be able to veto any modification limiting its ability to collect on the judgment. That veto power stems from the CAC itself, not from the judgment obtained by the creditor.

100. Complaint at 4, *Pharo Gaia Fund, Ltd. v. Bolivarian Republic of Venezuela*, 2021 WL 2168916 (S.D.N.Y. May 27, 2021) (No. 19 Civ. 3123), Dkt. No. 1-1 (alleging plaintiff funds own a beneficial interest in \$114 million and \$95.5 million of Venezuela's 7.75% 2019 Bonds, respectively); *BOLIVARIAN REPUBLIC OF VENEZUELA*, *supra* note 53, at 12 ("The Bonds will[] be issued in an aggregate principal amount of U.S.\$2,495,963,000 in respect of the Bonds due 2019. . . .").

101. *See Pharo Gaia Fund, Ltd. v. Bolivarian Republic of Venezuela*, No. 19-cv-3123, 2025 WL 1284787, at *1 (S.D.N.Y. May 1, 2025) (describing this case history).

102. *See BOLIVARIAN REPUBLIC OF VENEZUELA*, *supra* note 53, at 20 ("[N]o such action may, without the consent or affirmative vote, in person or by proxy thereunto duly authorized in writing, of the holders of not less than 75% in aggregate principal amount of such Series of the Bonds then Outstanding [modify any payment or other key provision] . . .").

103. We are using the litigation brought by these funds as an example only. In these specific cases, after unsuccessfully seeking to enforce the judgments, the plaintiffs successfully moved to vacate the judgments and voluntarily dismissed their claims. *See Pharo Gaia Fund, Ltd. v. Petróleos de Venezuela, S.A.*, No. 23-cv-10071, 2025 WL 1380685, at *3-4 (S.D.N.Y. May 12, 2025) (vacating judgments and voluntarily dismissing claims without prejudice); *Pharo Gaia Fund, Ltd. v. Bolivarian Republic of Venezuela*, No. 20-cv-8497, 2025 WL 1268864, at *3 (S.D.N.Y. May 1, 2025) (same); *Pharo Gaia*, 2025 WL 1284787, at *3 (same).

without the provision in the bond contract waiving the sovereign's immunity from execution, a judgment creditor will find it nearly impossible to find non-immune assets against which it can satisfy its claim.¹⁰⁴ For this reason, judgment creditors often continue to hold the bond post-judgment.¹⁰⁵

If judgment creditors are viewed as a potential threat to a restructuring, restructuring participants could tender their old (non-performing) bonds for new ones, in the process voting to modify the old bonds by removing the sovereign's waiver of immunity from execution.¹⁰⁶ The modification would significantly limit the judgment creditor's ability to enforce the judgment, at least in the United States.¹⁰⁷ This is because U.S. law limits a judgment creditor's enforcement rights against a sovereign borrower.¹⁰⁸ Without a waiver of execution immunity, the judgment creditor may attach an asset used for a commercial activity in the United States only when the asset "is or was used for the commercial activity upon which the claim is based."¹⁰⁹ Because an attached asset will rarely if ever have been "used for" the commercial activity of bond issuance, this latter requirement will prove nearly impossible to satisfy.¹¹⁰ By contrast,

104. See Weidemaier, *supra* note 30, at 87 (explaining that absent a waiver of immunity from execution, bondholders could seize only commercial assets used for the bond issuance, which "may have been a null set.").

105. See, e.g., *NML Cap., Ltd. v. Republic of Argentina*, 680 F.3d 254, 255–56, 260 (2d Cir. 2012) (affirming post-judgment restraining orders against account owned by state instrumentality for plaintiffs who continued to hold non-performing bonds).

106. Under the 2024 Venezuelan bonds, this modification would require the approval "of the holders of not less than 75% in aggregate principal amount" of the bond series. *BOLIVARIAN REPUBLIC OF VENEZUELA*, *supra* note 53, at 20. Of course, restructuring participants would want the new bonds to include robust enforcement provisions. We presume that any judgment creditor who remained a holder would be eligible to participate in this exchange and that participants would have to tender old bonds and also agree not to attempt to enforce any outstanding judgment.

107. Other jurisdictions do not have this requirement of a nexus between the attached asset and the underlying commercial activity that produced the claim. Removing the waiver of execution immunity will do less to impair the judgment creditor's enforcement rights outside the United States.

108. Under U.S. law, these limits are set by the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611). The FSIA provides that a foreign state's property in the United States is generally immune from attachment or execution unless an enumerated exception applies. 28 U.S.C. §§ 1609, 1610(a). The most relevant exceptions in this context are an explicit contractual waiver of execution immunity or the presence of an asset that "is or was used for the commercial activity upon which the claim is based[.]" 28 U.S.C. § 1610(a)(1)–(2).

109. 28 U.S.C. § 1610(a)(2).

110. See Weidemaier, *supra* note 30, at 87 (describing this "null set").

when the bond includes a waiver of execution immunity, the creditor need not show any link between the asset and the issuance of bonds; all it must show is that the asset itself is “used for a commercial activity in the United States.”¹¹¹ Because many assets are at least plausibly used for commercial activities, the waiver gives the creditor substantial freedom to disrupt the sovereign’s access to goods and services in the United States.

Thus, removing this waiver would significantly defang judgment creditors. Perhaps more important, the threat that restructuring participants might approve such a modification might deter minority holders from filing lawsuits in the first place. Can restructuring participants exercise this power? There are legal uncertainties, but on balance we think the better answer is that they can.

The answer begins with the bond contract. As noted, there is little question that the provision waiving the sovereign’s immunity from execution survives the entry of judgment.¹¹² The CAC in the holder’s bond also should remain operative. This result follows both from the text of the bond and, in cases where the text is silent, from selecting an appropriate rule of construction. It follows that a vote pursuant to the CAC may modify or amend the waiver of sovereign immunity.

The text of most sovereign bonds—every bond that we have seen, in fact—reveals the apparent intent to have the CAC operate post-judgment. For instance, the CAC in the 2024 Venezuela bond permits a two-thirds supermajority of bondholders to modify most bond provisions, and a three-quarters supermajority to modify payment and other key provisions, specifying that the modification will affect the “Series of the Bonds.”¹¹³ These defined terms refer to any bond issued pursuant to the relevant fiscal agency agreement and having the same maturity date (and presumably the same International Securities Identification Number).¹¹⁴ Bonds held by holders that have reduced their claim to judgment are within this definition.

Indeed, such holders would appear to have the right to vote on any restructuring proposal. Voting rights under the CAC typically extend to holders of “outstanding” bonds. When that term is defined, the definition typically includes holders who have obtained

111. 28 U.S.C. § 1610(a)(1).

112. See *supra* notes 30–32 and accompanying text.

113. BOLIVARIAN REPUBLIC OF VENEZUELA, *supra* note 53, at 20.

114. *Id.* at title page.

judgments.¹¹⁵ Again, the 2024 Venezuela bond is an example (and is typical of many other bonds). It extends voting rights to holders of Outstanding bonds, defined in the underlying Fiscal Agency Agreement to include:

[A]ny Note authenticated and delivered pursuant to this Agreement . . . *except* [as relevant here] . . . Notes that . . . “have become due and payable at maturity or otherwise and with respect to which monies sufficient to pay the principal thereof (and premium, if any) and any interest thereon shall have been made available to the Fiscal Agent”¹¹⁶

Even in cases where a judgment creditor has accelerated the bond—i.e., made it due and payable for reasons other than maturity—the issuer will not have provided the Fiscal Agent or other relevant financial intermediary with the funds to pay the creditor in full. Thus, the creditor’s bond will remain outstanding and the creditor will be entitled to vote.¹¹⁷ The unavoidable implication is that the CAC remains operative in the judgment creditor’s bonds.

Second, even if the text of the bond contract were silent, the appropriate rule of construction is to presume the CAC remains operative. We do not know of legal authorities addressing this precise question, but the result follows from the principle that courts are to presume that “structural” provisions survive termination while substantive obligations do not.¹¹⁸ The CAC is not structural in the same sense as provisions designating a forum or specifying a

115. Not all bonds define the term “outstanding,” but there is no reason to view silence on the definition as evidence that the parties intended a different outcome.

116. BOLIVARIAN REPUBLIC OF VENEZUELA, FISCAL AGENCY AGREEMENT 26 (July 25, 2001), <https://www.sec.gov/Archives/edgar/data/103198/000095013304000157/w93437exv99w8.htm> [<https://perma.cc/6TGW-DF9D>].

117. *See also* DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, OFFERING CIRCULAR 133 (July 17, 2012) (on file with the N.Y.U. Annual Survey of American Law) (“‘Outstanding’ means any Bond authenticated and delivered pursuant to the Indenture . . . except . . . (2) Bonds which have . . . become due and payable at maturity or otherwise and with respect to which monies sufficient to pay the principal thereof (and, premium, if any) and any interest thereon shall have been made available to the Trustee . . .”).

118. *See* *Liton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 n.3 (1991) (collecting cases in support of proposition that structural provisions relating to remedies and dispute resolution “may in some cases survive in order to enforce duties arising under [a terminated collective bargaining agreement] . . . similar to the rule of contract interpretation which might apply to arbitration provisions of other commercial contracts”); *Silverpop Sys., Inc. v. Leading Mkt. Techs., Inc.*, 641 F. App’x 849, 857 (11th Cir. 2016) (“While contractual obligations may expire upon the termination of a contract, provisions that are structural . . . may survive that termination.”).

governing law—it does not relate to “remedies [or] the resolution of disputes”¹¹⁹—but it does establish procedures, unrelated to the bond’s substantive obligations, for collectively modifying the contract. As with other structural provisions, the parties’ reasons for including the CAC remain relevant after the contract terminates. CACs use collective voting to mitigate the risk that a dissenting minority will block or delay a debt restructuring by seeking a “better deal for itself.”¹²⁰ That objective does not disappear—in fact, it is heightened—when potential dissenters race to the courthouse ahead of their fellow creditors. Thus, both the contract’s text and the background rule of construction support the argument that restructuring participants may modify or remove the sovereign immunity waiver in a judgment creditor’s bonds.

B. *Adding Sharing Clauses and Other New Provisions*

In theory, even more aggressive modifications are possible. For instance, restructuring participants might modify bonds to add a clause requiring judgment creditors to share the proceeds of any recovery pro rata or perhaps even prohibiting recovery on a judgment.¹²¹ Such a clause would remove much of the incentive to enforce the judgment.¹²² At present, we raise this only as an option. It is an aggressive use of the modification power that many sovereigns and investors would hesitate (rightly, we think) to use. But the important point is that changes of these sorts are possible. Again, the CAC remains operative in bonds held by judgment creditors. And the CAC in many sovereign bonds expressly authorizes votes not only to “modify” or “amend” but to “supplement” the terms of the bond.¹²³

119. *Id.*

120. Weidemaier & Gulati, *supra* note 4, at 53.

121. See Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, 5 HARV. BUS. L. REV. 47, 67 (2015) (footnote omitted) (“The inclusion of sharing clauses . . . makes bond instruments significantly less attractive for creditors that would have otherwise chosen to litigate against a sovereign debtor. This is because sharing clauses distribute any potential gains from litigation across all creditors, while the costs of such litigation are borne exclusively by the litigating creditors.”).

122. See Bratton & Gulati, *supra* note 1, at 46 (“As a practical matter, the sharing clause removes the incentive for individual bondholders to sue unilaterally in the hope of receiving an earlier and larger payment than that received by other members of the group.”).

123. See, e.g., DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, *supra* note 117, at 132 (“The Issuer and the Trustee may modify, amend, supplement or waive the terms of the Bonds or, insofar as respects the Bonds, the Indenture in any way, other than a modification, amendment, supplement or waiver constituting a Reserved

Even in contexts where courts are skeptical of or outright hostile to provisions allowing for the modification of a contract—such as cases involving unilateral amendment provisions in consumer finance contracts—such language is interpreted to allow the addition of new terms to the contract.¹²⁴

C. *Legal Uncertainties*

At least in principle, both New York and English law—the two key laws governing international sovereign bonds—impose some limits on the ability of bond issuers and bondholder majorities to coercively limit minority rights in the restructuring context.¹²⁵ A judgment creditor might argue that the issuer or its fellow bondholders violated the implied duty of good faith and fair dealing in

Matter”); BOLIVARIAN REPUBLIC OF VENEZUELA, LISTING MEMORANDUM 22 (Nov. 29, 2007) (describing how “a meeting of holders of Bonds may be called . . . [to] give or take any request . . . provided by the Fiscal Agency Agreement or the Bonds to be made, given or taken by holders of Bonds or to modify, amend, or supplement the terms of the Bonds or the Fiscal Agency Agreement as provided in the Bonds”); GOVERNMENT OF JAMAICA, PROSPECTUS SUPPLEMENT 9–10 (Mar. 2, 2007) (noting how “Jamaica and the fiscal agent may, without the vote or consent of any holder of any series of the debt securities, amend the Fiscal Agency Agreement or the debt securities to . . . cure any ambiguity or correct or supplement any defective provision”); REPUBLIC OF CHILE, PROSPECTUS SUPPLEMENT 9 (Jan. 21, 2020) (“[H]olders may approve, by vote or consent through one of three modification methods, any modification, amendment, supplement or waiver proposed by Chile that would do any of the following”).

124. See *Rudolph v. Wright Patt Credit Union*, 175 N.E.3d 636, 646 (Ohio Ct. App. 2021) (upholding lower court’s decision ordering the case to arbitration after it determined that “while the 2015 agreement lacked an arbitration clause, Rudolph did agree that ‘[e]xcept as prohibited by applicable law,’ [the credit union] could ‘change the terms of this Agreement and the other Account Documents at any time’”) (first alteration in original). But see *Pruett v. WESTconsin Credit Union*, 998 N.W.2d 529, 538–46 (Wis. Ct. App. 2023) (holding that “according to the plain meaning of the change-of-terms provision in the Agreement, the parties agreed that [the credit union] was authorized to ‘make different,’ ‘replace,’ or modify the terms that existed already in ‘this Agreement’” but not “‘add new terms’”).

125. See *Assénagon Asset Mgmt. S.A. v. Irish Bank Resol. Corp.* [2012] EWHC (Ch) 2090, [86] (Eng.) (holding an exit consent unlawful under English law because “oppression of a minority is of the essence of exit consents of this kind, and it is precisely that at which the principles restraining the abusive exercise of powers to bind minorities are aimed”); *Hackettstown Nat’l Bank v. D.G. Yuengling Brewing Co.*, 74 F. 110, 114 (2d Cir. 1896) (applying New York law and reversing a directed verdict for the defendant where there was a question of whether the majority compelled the minority bondholders to sell their bonds in good faith). See also *Katz v. Oak Indus.*, 508 A.2d 873, 880 (Del. Ch. 1986) (holding that a coercive exchange is “wrongful,” or legally problematic, where it violates the implied duty of good faith and fair dealing).

conducting the restructuring. Or it might accuse other bondholders of tortiously interfering with its bond contract with the issuer. These arguments cannot be assessed in the abstract; we would need more context about the specific restructuring techniques used by the sovereign. However, we can offer some preliminary thoughts on how seriously courts are likely to take such arguments.

A bondholder who participates in a restructuring might violate the implied covenant of good faith and fair dealing with regard to other bondholders by taking action that “has the effect of destroying or injuring the right of the other party to receive the fruits of the contract, or to violate the party’s presumed intentions or reasonable expectations.”¹²⁶ But the implied covenant cannot be used to impose obligations that are inconsistent with the contract’s express terms.¹²⁷ We would not go so far as to say that there is no legal risk in retroactively amending or eliminating contract rights related to enforcement.¹²⁸ In general, however, courts have been willing to tolerate a relatively high degree of coercion in the context of debt exchanges, recognizing that some level of coercion is inherent in

126. *Tirreme Energy Holdings, Inc. v. Innogy Renewables US LLC*, 706 F. Supp. 3d 409, 431 (S.D.N.Y. 2023), *aff’d*, No. 24-159-cv, 2025 WL 1374732 (2d Cir. May 13, 2025) (quoting *Spinelli v. Nat’l Football League*, 903 F.3d 185, 205 (2d Cir. 2018) (explaining the parameters of a covenant of good faith and fair dealing under New York law)).

127. *See, e.g.*, *Geren v. Quantum Chem. Corp.*, 832 F. Supp. 728, 733 (S.D.N.Y. 1993) (finding that incurrence of substantial debt to fund a dividend did not breach the implied covenant of good faith when the indenture did not explicitly restrict the amount of debt the issuer could incur nor contain any express prohibition on similar transactions); *In re Solutia, Inc.*, No. 03-17949, 2007 WL 1302609, at *9, *13 (Bankr. S.D.N.Y. May 1, 2007) (holding that the debtor “did not breach any contractual duty to the Noteholders by entering into a new loan agreement that deliberately de-securitized the Notes” when the indenture “[did] not contain an explicit provision prohibiting” the transaction); *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1517 (S.D.N.Y. 1989) (declining to find violation of implied covenant in leveraged buyout where no express covenant in the indenture restricted incurrence of new debt). *See also* *Hartford Fire Ins. Co. v. Federated Dep’t Stores, Inc.*, 723 F. Supp. 976, 991–92 (S.D.N.Y. 1989) (rejecting argument that indenture permitted some mergers but not the leveraged buyout that in fact occurred, where express terms of indenture suggested no such distinction).

128. *Cf. Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, No. 565123/2020, 2021 WL 3671541, at *7 (N.Y. Sup. Ct. Aug. 16, 2021) (“The parties have not cited, and the Court has not found, any case in which a no-action provision was strategically deployed in the manner alleged here—by a subset of lenders, without notice or consent, as part of a larger scheme to breach and then exit the agreement. The amended no-action provisions were, according to Plaintiffs, purpose-built to prevent *these Plaintiffs* from suing *these Defendants* in connection with *this transaction*—a preemptive self-pardon, of sorts. Subtle this was not.” (emphasis in original)).

such transactions.¹²⁹ The question is whether the exchange is “wrongfully coercive.”¹³⁰ Courts have emphasized that wrongful coercion arises when the methods employed violate the reasonable expectations of the parties or contravene the terms of the debt instrument. For instance, if a court determines that the contract would have expressly prohibited the sovereign’s restructuring methods had the parties contemplated the issue *ex ante*, the coercion may be deemed wrongful.¹³¹

Judged by that standard, it is not obviously wrongful to conduct a debt exchange in which participants vote to remove the sovereign immunity waiver in bonds held by non-participating creditors (whether or not these creditors have obtained judgments). Sovereign bonds generally do not impose *any* substantive limits on modification votes. An investor’s protection is procedural—the right to vote—and if it does not have a position large enough to block a modification under the relevant voting standard, it knows that its contractual rights may change in unspecified ways. Because judgment creditors may choose to retain their bonds and will retain the right to vote if they do, there is no reason to view them any differently. Moreover, while the right to vote cannot, by itself, justify literally *any* degree of coercion, courts should have greater tolerance for coercive techniques in the context of sovereign debt restructurings, because

129. See William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1620–21 (2018) (showing that courts have recognized the coercive nature of debt exchange transactions but, assuming that the parties have sufficient freedom to bargain, declined to find it legally problematic where no express contractual term is violated); Keegan S. Drake, *The Fall and Rise of the Exit Consent*, 63 DUKE L.J. 1589, 1603 (2014) (citing the leading court opinion on exit consents that “coercion must be characterized in some negative way” and “legal analysis should begin with the adverb modifying ‘coercive’”); HAYK KUPELYANTS, *SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS* 209 (2018) (ebook) (“The restructuring process may on occasions be characterised by the use of coercive and expropriatory measures.”).

130. See *Katz*, 508 A.2d at 879–80 (“[S]ome ‘coercion’ . . . is legally unproblematic. . . . For the word to have much meaning for purposes of legal analysis, it is necessary in each case that a normative judgment be attached to the concept (‘inappropriately coercive’ or ‘wrongfully coercive’, [sic] etc.).”); see also *RJR Nabisco*, 716 F. Supp. at 1517 (declining to read into a bond indenture an implied covenant against leveraged buyout).

131. Cf. *Katz*, 508 A.2d at 880 (“[T]he appropriate legal test [for wrongful coercion] is not difficult to deduce. It is this: is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter.”).

sovereigns do not have the fallback option of bankruptcy.¹³² Courts must still ensure that the restructuring process adheres to principles of fairness and good faith, but judgment creditors are not entitled to special treatment unless they can demonstrate that the restructuring process was fundamentally unfair or violated their substantive rights.

We do not know of cases in which courts have confronted bond modifications that removed a judgment creditor's rights to enforce its judgment. But we see no good reason why a creditor should get more protection post-judgment than it would get pre-judgment. Such a rule would only reward creditors who raced to the courthouse. On the other hand, we acknowledge that courts typically do not like to see their judgments go unenforced. Thus, we suspect the larger challenge a sovereign issuer will face is to persuade a reviewing court that its use of the CAC was necessary to accomplish a restructuring that benefitted bondholders as a group.¹³³ That task will be easier if the restructuring enjoys the support of a large majority of creditors and if the sovereign's restructuring techniques do not appear unduly coercive in other respects. If the sovereign can credibly argue that it has the good faith backing of a large majority of bondholders and that the judgment creditor is simply attempting to exploit concessions by other creditors to get a better deal for itself, it should be on relatively firm footing. The same is true for restructuring participants who vote in favor of a proposal that takes enforcement rights away from non-participants.

IV. CONCLUSION

Ultimately, concerns about the ability of judgment creditors to escape the effect of a restructuring may be overstated. As of now, there are relatively few examples of creditors using this tactic. If a handful of judgment creditors position themselves to receive a disproportionate payment, the simplest course of action may be to pay them in full. Even if litigation continues to increase in frequency, relatively few lawsuits should reach judgment before a restructuring concludes. In the Southern District of New York, the median time from filing to disposition of civil cases that proceed to the pretrial

132. See Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59, 66-67 (2000) (explaining that sovereigns do not have the option of bankruptcy as a means of achieving restructuring of their debts).

133. Cf. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 515 (1942) (upholding municipal debt-restructuring plan that bound dissenting creditors as "worked out with . . . due regard to the interests of all the creditors" and as improving creditor recoveries in the aggregate).

stage (as by summary judgment, the method by which sovereign debt disputes often are resolved) and are terminated by court action is roughly 13.7 months.¹³⁴ Despite their relative simplicity, sovereign debt cases can take longer, and often judges bend over backward to accommodate foreign states.¹³⁵ And recent developments, such as the stay entered in an investor's lawsuit against Sri Lanka, suggest that federal judges may be willing to delay entry of judgment when it appears that restructuring negotiations are on track.¹³⁶ In short, there often will be ample time for the sovereign to put together enough support to trigger the CAC. If one or two holdouts get judgments, the world will not end if they are paid in full.

In rare cases, however, litigation by holdouts may pose more serious problems.¹³⁷ Where these holdouts have large positions, they are immune to traditional restructuring methods whether or not they have court judgments. Most favored creditor clauses can offer restructuring participants some assurance that holdouts will not extract a better deal, but the clauses cannot offer complete protection.¹³⁸ The question is what to do about holdouts who, unable

134. UNITED STATES COURTS, TABLE C-5 – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition (2026), <https://www.uscourts.gov/data-news/data-tables/2025/12/31/statistical-tables-federal-judiciary/c-5> [<https://perma.cc/9HG9-U4ZA>] (last visited July 22, 2026) (stating the median time interval in the Southern District of New York for termination of a civil case during or after pretrial was 13.7 months during the twelve-month period ending December 31, 2025).

135. For instance, the complaint in *Casa Express Corp. v. Venezuela* was filed December 18, 2018, and final judgment was entered September 30, 2020, in circumstances where no restructuring was on the horizon. See 492 F. Supp. 3d 222 (S.D.N.Y. 2020). The *Hamilton Reserve Bank* case against Sri Lanka had been pending nearly 17 months when the judge entered the stay to allow restructuring talks to continue. See *Hamilton Rsr. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683, at *3 (S.D.N.Y. Nov. 1, 2023) (“Hamilton initiated this action on June 21, 2022.”).

136. See *Hamilton Rsr. Bank*, 2023 WL 7180683, at *6 (“Sri Lanka has made significant progress in negotiating a debt restructuring and seeks a defined stay that generally aligns with the expected timetable for resolution of negotiations.”).

137. Venezuela is the obvious example here (although the country has largely managed to avoid a wave of litigation by bond creditors). Even in the Venezuelan context, however, any problem obtaining broad bondholder participation in a restructuring would largely result from weak contractual modification provisions that do not provide for aggregated voting. In other words, the problem would result from the fact that many investors have veto positions, not from the fact that many investors have judgments.

138. See Makoff & Weidemaier, *supra* note 16, at 1297 tbl. 8 (estimating recoveries by various creditors that did not participate in Argentina's 2005 and 2010 restructurings, all of which recovered more than restructuring participants after the most favored creditor provisions in Argentina's restructuring expired).

to block a restructuring vote, seek to escape restructuring by racing to judgment. Creditors who take this route can rest assured that their judgments will remain intact despite the restructuring vote. Whether they will be able to enforce those judgments is another matter entirely.