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THE ILLEGALITY OF THE GREEK SOVEREIGN DEBT CRISIS:
CONTRACT LAW'S RESPONSE TO THE GREEK GOVERNMENT

By Paris Gyparakis*

I. INTRODUCTION

Greece is imperiled with one of the most disquieting economic states in its modern history. The debt of roughly €300 billion,1 which encompasses approximately 180% of the GDP,2 has fostered not only a depressed economy, but social and political upheaval which has amounted to an equally concerning humanitarian crisis as well. The country once considered “the privileged topos [of] European imaginary”,3 is now besieged with scathing international criticism and scolding media attacks by their European counterparts.4 It appears as though all eyes are on Greece, with the question being “Will Greece ever recover?” and “What would that recovery look like?”5

The causes of the Greek debt crisis are deeply rooted in its history and subject to scholarly debate.6 However, the wake of the global financial crisis in 2008 highlighted the severity of the debt, which confronted Greece with an imminent solvency crisis,7 and the international community with an imminent currency crisis. Greece, on the brink of default,

*J.D. Candidate, Maurice A. Deane School of Law at Hofstra University, 2017. I would like to thank Professor Miriam R. Albert and my colleagues in the Journal of International Business & Law for their unconditional support and contributions to this note.
2 Id.
3 See GREGORY JUSDANIS, BELATED MODERNITY AND AESTHETIC CULTURE: INVENTING NATIONAL LITERATURE 13 (2012).
4 See, e.g., Tony Patterson, Greece Debt Crisis: German-Greek Relations Slump Further After Der Spiegel Magazine Cover Prompts Controversy, INDEPENDENT (July 15, 2015), http://www.independent.co.uk/news/world/europe/greece-debt-crisis-german-greek-relations-slump-further-after-der-spiegel-magazine-cover-prompts-10388792.html (citing German newspaper headlines such as “Sell off your islands you bankrupts!” and “We Germans can pay off our debts because we get up and go to work!”).
6 See generally MICHAEL MITSOPOULOS & THEODORE PELAGIDIS, UNDERSTANDING THE CRISIS IN GREECE: FROM BOOM TO BUST (2011) (referring to some of the contributory factors leading to the current economic crisis. Namely, a corrupt political system, an uncompetitive economy, and rampant tax evasion); PANAGIOTIS PETRAKIS, THE GREEK ECONOMY AND THE CRISIS: CHALLENGES AND RESPONSES (2012) (referring to both the fiscal and political causes, however attributing the crisis mostly to the progressive tax system of Greece).
sought assistance from its Eurozone members and financial institutions in the form of "bailout loans." To date, three major bailout loan packages have distributed over €300 billion to Greece since 2010, and were negotiated between Greece and the "Troika," a pseudonym for the tripartite coalition of financial institutions comprised of the European Commission ("Eurogroup"), the European Central Bank ("ECF"), and the International Monetary Fund ("IMF").

The first of these packages, "the 2010 Agreements" was signed on May 2, 2010, and consisted of three loans totaling over €110 billion in disbursements. Subsequently, "the 2012 Agreements" ensued for €130 billion, as well as "the 2015 Agreements" for an additional €86 billion. In exchange for these loans, Greece has signed various agreements, promising to implement a number of austerity measures imposed by the Trioka. These austerity measures however, have proven to be onerously harsh for the Greek people, and the focal point of much of the Greek crisis discussion, as they have not seemed to help Greece yet, which still faces rampant unemployment rates over 25%, including 46% of its youth.

Of course, the idea of a sovereign debt crisis is not a new phenomenon in international finance by any means. Argentina was imperiled with $93 billion of debt before

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9 In this context, the term "bailout loans" refers to countermeasures to the Greek government debt crisis, known formally as "Economic Adjustment Programmes," by European economists. See Explaining Greece’s Debt Crisis, N.Y. TIMES (June 17, 2016), http://www.nytimes.com/interactive/2016/business/international/greece-debt-crisis-euro.html?_r=0 (last visited Jan. 2, 2017).


11 Comprised of nineteen Eurozone member states.


14 Known collectively as the Memoranda of Understanding ("MoU"). See infra note 16.

15 See discussion infra Part IV.A.

16 See EUROPEAN COMM’N, supra note 1.

defaulting in 2002, while Ecuador part-defaulted in 2008 with over $13 billion of debt. However, the story in Greece is unique by virtue of its Eurozone membership, and the imbroglio created between Greece as a sovereign state, and its fellow Eurozone creditor counterparts. As several have noted, sovereign debt crises are radically different within a monetary union such as the Euro, as no individual nation has control over the currency. Simply put, European countries have more to lose than their investments, as their own currency may be at the caprice of sovereign defaults, not only by Greece, but also by other similarly situated countries like Italy, Spain and Portugal. Their interest in avoiding a Greek default, is their interest in ensuring the stability of the currency, and managing default contagion within the Eurozone. In addition, a Greek default, forcing Greece to leave the Eurozone against the people’s wishes, will pose social and humanitarian concerns that nobody can seem to fathom.

Contemporary proposals to address the Greek crisis have included: abandoning the Eurozone and European Union entirely, the so called “Grexit,” which still enjoys popularity in Greece amongst the left; declaring bankruptcy, a question whose potential outcomes have agonized international legal scholars for decades; and even a solution found in macro-economic computer game theory, espoused by former Greek Minister of Finance Yanis Varoufakis.

21 Id.
22 Id.; EUROPE’S CRISIS, EUROPE’S FUTURE 1-20 (Kemal Dervis & Jacques Mistral eds., 2014).
23 I must note, albeit parenthetically, that the cultural implications that would result in a Grexit, relate to a far-reaching plight in Neohellenistic Identity. The theory of continuity, which traces the glory of the ancient Greek civilization as is emerges through the Byzantine and into modern Greece, has been coupled with an immense amount of cultural pride with being considered “European” for modern Greeks, which has existed since the Neohellenic Enlightenment. See generally GREGORY JUSDANIS, BELATED MODERNITY AND AESTHETIC CULTURE: INVENTING NATIONAL LITERATURE 13-30 (2012), STATHIS GOURGOURIS, DREAM NATION: ENLIGHTENMENT, COLONIZATION AND THE INSTITUTION OF MODERN GREECE 141-174 (1996).
24 Mostly because there is no currently accepted international regime which allows a sovereign to declare bankruptcy. For a detailed analysis on the issue of a global bankruptcy mechanism and respective international law policies see Alice de Jonge, Returning to Fundamentals: Principles of International Law Applicable to the Resolution of Sovereign Debt Crises, 36 SUFFOLK TRANSNAT’L L.REV. 1, 35-41 (2013) (exploring the popular proposals for an independent oversight body; including the U.N Conference on Trade and Development (UNCTAD) proposal, and the IMF’s Sovereign Debt Restructuring Mechanism (SDRM) proposal among others); see also Adam Brennenman, Note, Gone Broke: Sovereign Debt, Personal Bankruptcy, and a Comprehensive Contractual Solution, 154 U.PA. L. REV. 649, 670-684 (2006).
25 See Adam Bouyamourn, Yanis Varoufakis Saw the Answer to Greece’s Euro Crisis in Computer Game Economy, THE NATIONAL (July 29, 2015) (reporting that the proposed theory comprises of a digital payments system and online settlement platform, which would replace paper money and can be controlled by the Greek government. This was inspired by Team Fortress (TF2) game company Valve; who’s digital form of currency is related to the number of goods available).
However the most controversial solution was made by the Greek government itself, after a parliamentary committee’s public debt audit officially declared the Greek debt as “illegal, illegitimate, and odious.” The report, which cites a series of findings and research, concluded that because of the illegitimacy, illegality, and odiousness of the debt, the Greek government is entitled to unilateral revocation of its bailout loan agreements. The big question has now changed to “Is the Greek debt illegal, illegitimate and odious?” and, more importantly, “If so, does this entitle Greece the remedy of unilateral revocation?”

Of course, the question still remains whether the Greek government plans on acting upon this purported revocation right, or whether the report was only intended to put pressure on Greece’s creditors to accede to their demands, as it just happened to be published at a fraught time during Greece’s negotiations with creditors. At least one news source has proposed that the impetus of the report was most likely strictly political, and that the intended audience was always meant to be domestic, so that in the event of a Greek default and subsequent Grexit, the government could blame it on its creditors, with a well-wrought narrative as support. In fact, the assertions made in the report, although incorporate legal terms, are perhaps to be better understood as political statements, as opposed to sound legal arguments, as very few legal authorities are actually cited. The legal terms that do appear are merely used adjectivally, to describe various allegations, and not nounally, as they do not relate to corresponding illegality doctrine per se. Irrespective of their use, they elucidate issues related to the legal theory of discharging contractual obligations, and it is through this analogy that this Note will assess the allegation’s validity. As such, this Note focuses on the contract defense claim of illegality in the context of the specific loan agreements, not the odious debt doctrine, which has enjoyed relentless scholarly exposure, nor claims made based on international law, in an effort to avoid greater implications that accompany treaty interpretation in the context of sovereign debt.

Here, the loan agreements will be viewed as strict contractual instruments, when analyzing whether or not the Greek Government is entitled to unilateral revocation of their loan agreements, as they claim, under traditional Anglo-American contract law. As one might

27 Id. (“All the evidence we present in this report shows that Greece not only does not have the ability to pay this debt, but also should not pay this debt [...] because it is illegal, illegitimate, and odious.”).
29 See id.
30 See generally id.
31 See Evelyn Angelo, Greece & the Odious Debt Doctrine, 78 BROOK. L. REV. 1619 (2013); see also Lee C. Buchheit et al., The Dilemma of Odious Debts, 56 DUKE L.J 1201 (2007), Christiana Ochoa, From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine, 49 HARV. INT’L L.J 109 (1991) (outlining the history and development of the odious debt doctrine: The odious debt doctrine extends back to the 1920’s, and has been invoked in several similar cases of sovereign debt crisis in Zaire and Ecuador, however there has never been a ruling overriding the debt under the odious debt doctrine, and it appears as though the international legal community has yet to define its applicability precisely.)
32 For a discussion pertaining to the legality of the European Union’s authority to impose austerity measures under International Law. See generally Joanna Pagones, Note, The European Union’s Response to the Sovereign Debt Crisis: Its Effect on Labor Relations in Greece, 36 FORDHAM INT’L L.J. 1517 (2013) (concluding that fundamental EU treaties do not authorize the European Union within their scope of authority to infringe upon Greece’s sovereignty to save the Euro).
Imagine at the outset, the answer to the question is probably not. However, the claims themselves merit our attention, as they evoke critical questions pertaining to the politics of law, and more importantly, loan agreement interpretation and enforceability in an ever-changing international financial market.

II. THE TRUTH COMMITTEE ON PUBLIC DEBT

On April 4, 2015, the president of the Hellenic Republic, Ms. Zoe Konstantopoulou, established the Truth Committee on Public Debt ("Committee"), a parliamentary subcommittee aimed at investigating the nature and circumstances surrounding the public debt of Greece, and specifically, the validity of Greece's loan agreements.33 The Committee includes 35 international experts in the fields of law, economics, accounting and banking under the team's scientific coordinator Eric Toussaine,34 senior lecturer at the University of Liège.35 The Committee released its first publication, The Preliminary Report ("Report") on June 18, 2015, which served as a public debt audit, outlining the so-called "black box" of debt and its respective problems from inception to current implementation, before characterizing it as "illegal, illegitimate, and odious."36

When viewed collectively, the Report asserts, by name, a number of defenses recognized and well defined in contract law. These include coercion, fraud, misrepresentation, breach of the duty of good faith, undue influence, unconscionability, illegality, and illegal assignments.37 It claims that these doctrines, both independently and collectively, justify revocation of the loan contracts. Under Anglo-American contract law, these allegations are all appropriately analyzed under the doctrine of unconscionability, which holds that a contract or clause will be found unconscionable, and thus voidable, when it is so shockingly unfair or onerously one-sided under the circumstances existing at the time of the making of the contract.38 However, before analyzing these specific illegality claims, a decisive distinction regarding contract interpretation theory merits priority in this discussion; as the very nature of the contracts themselves, directly affect not only how they are viewed and analyzed, but even which defenses can be raised against them.

III. THE EVOLUTION OF CONTRACT LAW

Legal scholars have long recognized that differences between various types of contracts should not only be acknowledged by the courts, but also reflected in substantive law.39 Consequently, three theories of contract law have latently developed within the
academy, and distinguish contracts based on two critical characteristics: the duration of the agreements, and the degree of discreteness between the parties. The first theory, classical contract law, was developed in the nineteenth century based on the writings of Samuel Williston's *The Law of Contracts*, and is espoused by the Restatement of Contracts. This theory is known to govern short-term, discrete transactions best, as its strict and formal structure, limits interpretation of the agreement to the "four corners" of the document, practically ignores the identity of the parties, and draws clear and explicit rules of interpretation. It is the very nature of these discrete transactions that support the traditional classical contract remedy: unilateral revocation, the power to rescind or cancel a contract. The theory behind this is that most risks of change that occur within the confines of short and relatively simply transactions must be borne on a particular party to be effective. In light of the increasing role of ongoing contractual relations in the United States economy, neoclassical contract law developed in time, as a slight modification. This theory, adopted by the Restatement (Second) of Contracts and the Uniform Commercial Code ("UCC"), has been cited as recognizing the interests of parties engaged in more long-term contracts, and creates flexibility in agreements where the explicit terms may not adequately address future problems. By augmenting third-party rights and allowing gap-filling provisions to embody industry norms, the neoclassical theory defends the party's intent and freedom to contract from frivolous defenses. It recognizes value in the "course of conduct" between the parties, as an indicator when interpreting its terms, which may even serve to "amend" the written terms when parties have consistently deviated from them. It follows that remedies associated with neoclassical theory were crafted to address this less desirable need to terminate the relationship. One such remedy is exempting benign contractual deviations from constituting a breach, such as the harmless late tender of the delivery of goods for example, and a limited availability of specific performance as a potential remedy.

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41 See generally SAMUEL WILLISTON, THE LAW OF CONTRACTS (1920).

42 See Macneil, supra note 40, at 855 n.2.

43 See id. at 856-57 (characterizing discrete transactions as typically those with little personal involvement of the parties, where communication is largely linguistic and limited to the subject matter of the transaction, and where the exchange consists of a easily liquidated commodity and money and no significant past relations nor likely future relations, "For example, a cash purchase of gasoline at a station on the New Jersey Turnpike by someone rarely traveling the road is such a discrete transaction").

44 See id. at 863.

45 See id. at 883.


49 Palzer, supra note 46.

50 See Macneil, supra note 40, at 880-83.

51 See generally id.

52 See id. at 880.
An example from the UCC is that a seller aggrieved by a buyer's breach of unfinished goods, has the option to allow the complete manufacture of goods, or cease and resell for scrap or salvage, the value of what has been produced. This contrasts greatly from the analogous classical contract remedy of simply suing for breach of contract, as it gives the non-breaching party the power to avoid the travails of non-performance if it would better suit their interest.

Recognizing that traditional contract law theories still limit the parties generally to the explicit terms of the contract, the need for even greater flexibility in certain contexts endured. Thus, relational contract law was conceptualized to deal with the complexities of long-term, and multi-faceted relationships. Unlike classical structure theories, relational contract theory focuses on the ongoing relationship and past history of the parties, and not solely the agreement's terms. This differs from neoclassical theory, which although addresses the needs of parties in an ongoing exchange, is still subject to the contours of the document. Consequences of breach and litigation under relational contract law are replaced by social and political adjustment, separate from governmental intervention, usually in the form of arbitration or mediation. This enables the actual relationship of the parties, their history, customs, interpretations and expectations to provide the internal rules for dispute resolution, as opposed to state law. These private negotiation remedies, although differ greatly from traditional remedies and adjudication, are nevertheless grounded in contract law, as their theoretical contours are set by the same juridical instrumentals accepted as binding, to allow for realistic and practical results.

When considering the Greek loan agreements, it follows that proper classification of the contracts in question is of great importance, as it dictates the applicable theory of substantive law and the available remedies that follow. However, it is the purpose of this Note to address the claims made by the Greek government as would a competent court; namely, as pleaded in the complaint (Report). To this end, each claim will be addressed under the same substantive legal doctrine used by the Greek government in making their claims, beginning with the substantive claims of illegality, those found within the contracts themselves, followed by the procedural claims, those which arise from the bargaining and enactment process.

53 See id. at 880 (citing U.C.C. §2-704).
54 Used in this context the term "traditional contract law" refers to both classical and neoclassical theories see Macneil, supra note 40, at 854, n.2.
55 See Macneil, supra note 40, at 886-901.
56 See id. at 886-901.
57 See id. at 886-901; Palzer, supra note 49, at 730-31.
59 See Gottlieb, supra note 58, at 572-73 ("In sustained and inextricable relations, a principal use of contracts is to provide a basis for renegotiations once a defective performance occurs.").
IV. SUBSTANTIVE ILLEGALITY CLAIMS MADE BY THE GREEK GOVERNMENT

A. Austerity Measures

The main claim of substantive illegality made by the Greek government, relates to the austerity measures imposed by the Troika. 60 Namely, the Committee claims that the austerity measures are illegal as they contravene human rights laws as well as the Constitution of Greece and international treaties to which Greece is a party. 61 These various austerity measures, known in international finance loans as conditionalities, are common to “official lending” type-agreements, 62 and describe the requirements Greece must follow in order to be able to use the resources. Each loan agreement includes a provision that subjects subsequent disbursement of funds on compliance of the budgetary and administrative discipline, set out by various memorandums. 63 Only upon satisfactory compliance of measures and receipt of an official certificate by the European Financial Stability Facility (“EFSM”), is Greece entitled to disbursement. 64 In the 2010 agreements for example, Greece agreed to adopt measures including budget and pension cuts, subsidy withdraws, tax code changes, changes in the justice system and public administration of health and social security, and an increase in its main sales tax from twenty-one to twenty-three percent. 65 The underlying policy behind imposing austerity measures is, of course, relatively straightforward: creditor control over capital investments to ensure economic growth. However, the austerity measures have only proven to have adversely affected the economy; as by 2014, the economy shrunk by 25%, the minimum pension had fallen below the poverty threshold, wages and salaries had dropped 40%, and minimum wage had fallen to its level of the 1970’s. 66 As the French economist Thomas Piketty has noted, “the financial demands made by Europe have crushed the Greek economy, led to mass unemployment and a collapse of the banking system, and made the

60 See supra p. 2 and accompanying text.
63 See, e.g., Loan Facility Agreement, under Euro Area Loan Facility Act 2010, May 20, 2010, https://www.oireachtas.ie/documents/bills28/acts/2010/a710.pdf (“The release of Loans subsequent to the first one shall be conditional upon the Euro Area Member States (except Greece) deciding favourably after consultation with the European Central Bank on the basis of the findings of verification by the Commission that the implementation of the economic policy of the Borrower accords with the adjustment programme or any other conditions laid down in the Council decision on the basis of Articles 126(9) and 136 TFEU and the MoU.”).
64 One such agreement holds: “it shall be an additional condition to any Disbursement under the DBB Installment that: EFSF has received a certificate of compliance satisfactory to it given by the Legal Advisor to the State at the Ministry of Finance of the Beneficiary Member State in the form set out in Annex 2 (Certificate of Compliance) to the Amendment Agreement and such certificate of compliance remains correct and accurate as at the Disbursement Date”; see Master Financial Assistance Facility Agreement, supra note 13 at 57.
66 See Ozlem, supra note 34.
external debt crisis far worse [...] The economy now lies broken, with tax receipts nose-diving, output and employment depressed, and businesses starved of capital.67

Consequently, antipathy towards the Troika and the austerity measures is evinced by citizens who riot the streets of Athens and lament the, "draconian domestic policy," otherwise known as neoliberal reform.68 Despite uniform disapproval, are the austerity measures illegal?

When making their claim, the Greek government acknowledges not only that they agreed to implement these measures, but even that they are partially to blame for their implications. They explicitly recognize that a state is primarily responsible for protecting and promoting the human rights of its citizenry.70 Notwithstanding these potentially defeatist statements, they nevertheless conclude that the conditionalities, "supposedly intended to rescue Greece," are nevertheless illegal and aimed at rescuing private creditors and forcing neo-liberal reforms.71

The first specific allegation made by the Greek government is that the austerity measures have enabled various violations of human rights, by directly impacting living and working conditions.72 The government cites a series of findings highlighting the impact that the reforms have made on the population, attributing them to the mandated spending and public sector cuts and tax increases, ostensibly aimed at reducing the country’s fiscal deficit.73 The allegation is that these measures have generally undermined basic human rights, and particularly economic rights, by increasing unemployment, homelessness, and poverty as well as reducing access to public services such as health care, social security and education.74 The impact of the adjustment measures was said to be more severe for the poor, pensioners, people with disabilities and immigrants.75 Further, the Committee claims that these changes, mistakenly called “reforms,” violate key principals of human rights law reflected in international treaties such as the International Covenant on Economic, Social and Cultural


68 See Marilena Simiti, *Rage and Protest: The Case of the Greek Indignant Movement*, Hellenic Observatory: European Institute (Hellenic Observatory Papers on Greece and Southeast Europe), The London School of Economics and Political Science (February 2014), http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/CMS%20pdf/Publications/GreeSE/GreeSENo82.pdf. (In this paper, Professor Simiti describes a mass movement of social resistance to financial assistance from the Troika (known as Aganaktismeni or the Indignant), and the draconian austerity measures imposed by the government, despite its promises that the country would quickly recover from the crisis.

69 In this context, neoliberalism refers to displacement of Keynesian welfare, through liberalization and privatization of expanded markets. See generally Thomas I. Palley, *Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, in NEOLIBERALISM: A CRITICAL READER (Alfredo Saad-Filho & Deborah Johnson eds., 2005); see DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

70 See Hellenic Parliament Truth Committee on Public Debt, supra note 26, at 45 ("[T]he measures adopted and implemented by the Greek government under the “bailout” programme have led to a range of human rights violations. Since Greece bears primary responsibility for the protection and promotion of human rights for all subject to its jurisdiction, it can be argued that it bears primary responsibility for such violations.").

71 See id. at 34.

72 See id. at 37-43.

73 See id. at 6.

74 See id. at 37-43.

75 See id. at 37-43.
Rights ("ICESCR") and the International Covenant on Civil and Political Rights ("ICCPR").76

Secondly, the Committee claims that these measures directly violate the Greek Constitution by infringing various constitutionally protected rights, including the right to work, health, education, social security, housing and justice.77 The right to work for example, was claimed to have been severely undermined in both the private and public sector by reforms which compressed labor costs, reduced minimum wages, repealed allowances and benefits, weakened collective bargaining and shrunk the public sector size.78 These labor market reforms were deemed unconstitutional and the cause of an institutional breakdown, resulting in massive lay-offs, increased job insecurity and unrestrained unemployment.79 Similar arguments were made regarding the right to health being undermined, which was attributed to deep reductions to public health expenditure, state hospital operating costs, and outpatient pharmaceuticals,80 as well as the right to education, which was ascribed to a mandated reduction of teachers' pay and the merging and closing of schools.81

In contract law, these conditionalities are simply conditions to the contract: terms that limit or otherwise qualify promises, and exist because the parties have agreed to them.82 Conditions are said to create a duty,83 in this case, that Greece must adhere to the austerity measures in order to continue to receive funds. The language of the loan agreements clearly and unambiguously articulate that the financial support granted to Greece is dependent on satisfaction of the measures, making these express conditions.84 Moreover, these can be further qualified as express conditions precedent, which must be satisfied prior to performance of the other party,85 as the agreements call for multiple disbursement dates, each subject to the satisfaction of program measures.86 Contract law on fulfilling express conditions is generally straightforward, usually requiring strict adherence.87 However, illegal conditions, or ones violating public policy, will not be automatically upheld.

76 See Hellenic Parliament Truth Committee on Public Debt, supra note 26, at 41.
78 See id. at 37-43.
79 See id. at 37-43.
80 See id. at 37-43.
81 See id. at 37-43.
82 See Arthur L. Corbin, CORBIN ON CONTRACTS § 31.1 (Joseph M. Perillo et al. eds., Rev. ed. 2015).
83 Id.
84 One such provision reads: "the support granted to Greece is made dependent on compliance by Greece with measures consistent with such decision and laid down in a Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding." See Intercréditor and Loan Facility Agreement, supra note 12.
85 See Corbin, supra note 82.
87 See 5 Samuel Williston & Walter H.E Jaeger, A TREATISE ON THE LAW OF CONTRACTS §675 (3d ed. 1957) ("conditions must be fulfilled exactly or no liability can arise on the promise which such conditions qualify").
The doctrine of illegality and public policy recognizes unenforceability of contractual provisions if legislation provides that it is unenforceable, or if the enforcement interest is clearly outweighed by a strong public policy interest.\textsuperscript{88} Most often, the doctrine applies to cases where either the formation or performance of the contract is founded on an illegal consideration, such as a tort or a crime.\textsuperscript{89} The approach to determining illegality, espoused by the Second Restatement of Contracts, calls for a "balancing," where courts consider a number of factors in weighing their decision, such as: the parties' justified expectations and the likely result if enforcement is denied, as well as the strength of the public policy, seriousness of the misconduct and the extent of which it was deliberate.\textsuperscript{90} Further, because freedom of contract is a public policy of itself,\textsuperscript{91} in the absence of legislation or a strong public policy, courts are less likely to declare the provision illegal, as this severely undermines freedom of contract.\textsuperscript{92}

When a finding of illegality does occur, the contract or provision is considered void, and the court usually leaves the parties exactly where they found them.\textsuperscript{93} However, there are exceptions to the no restitution remedy,\textsuperscript{94} and courts rarely apply this rule in its absolute fashion.\textsuperscript{95} The legal effect of contracts against public policy is said to vary with the character of the factors that cause them to be against public policy.\textsuperscript{96}

88 See Restatement (Second) of Contracts §178 (1981); but see CISG Art.4 (1980) (where UNIDROIT Principles and Principles of European Commercial Contracts are silent about issues of illegality).
89 See C.I.T Corp. v. Breckenridge, 63 Cal.App.2d 198, 200 (1944) (holding that a contract founded upon an unlicensed person to act as a contractor is void, as founded on an illegal consideration); Restatement (Second) of Contracts §178, 190, 192 (1981) (outlining various unenforceable contracts: whose formation or performance is a tort or a crime, against public policy, promises detrimental to marital relationships, and whose promise involves a commission of a tort); see also e.g., Sayres v. Decker Auto. Co., 145 N.E. 744 (N.Y. 1924) (holding that an agreement to defraud third party is illegal).
90 See Restatement (Second) of Contracts §178(2-3) (1981) (enumerating some factors that the court should look at in making this determination; some of which include: the parties' justified expectations, forfeiture that would result if enforcement were denied, the strength of that policy as manifested by legislation or judicial decisions, the likelihood that a refusal to enforce the term will further that policy, the seriousness of any misconduct involved and the extent to which it was deliberate, and the directness of the connection between that misconduct and the term).
This contemporary approach has been contrasted from the rather firm position of Section 512 of the First Restatement which held that if formation or performance of a contract is illegal or otherwise opposed to public policy, it is automatically considered an illegal contract, with restitution automatically denied. See Ian Ayres \& Gregory Klass, Studies in Contract Law 556; see generally Walter Gelhorn, Contracts and Public Policy, 35 Colum. L.Rev. 679 (1935).
91 See Computrol, Inc., Newtrend, L.P., F.3d 1064, 1070 (8th Cir. 2000) (holding the basis for enforcement of limitation of liability clause is a strong public policy favoring freedom of contract).
94 See Restatement (Second) of Contracts §197 (1981) ("unless denial of restitution would cause disproportionate forfeiture"), Restatement (Second) of Contracts §§198-199 (1981) (recognizing two more exceptions: where a party was excusably ignorant or not equally in the wrong, and when a party did not engage in serious misconduct and withdrew from the transactions before the improper purpose had been achieved).
95 See Corbin, supra note 83, § 79.
96 Id.; Compare Family Financial Servs., Inc. v. Spencer, 677 A.2d 479 (Conn. App. Ct. 1996) (holding a contract unenforceable as a violation of a public policy where the mortgage transaction was found
Considering the purported illegal conditions in Greece's loan agreements, a court of law would have to consider numerous factors and policies when applying the balancing test. A court will certainly acknowledge the inviolable public policy against unconstitutional government actions and violations of human rights laws. However, the inquiry will most likely begin with the contract itself, by questioning the intention of the parties and their expected result, namely, to provide financial assistance to Greece by requiring measures intended on restructuring the economy. A court would unquestionably acknowledge the adverse effects which have resulted by the austerity measures, but would most likely conclude that the austerity measures do not represent flagrant and intentional illegal conduct per se, but only by virtue of their implementation have these adverse results ensued. This contrasts greatly with the preponderance of case law on this subject that mostly deals with clear illegal conduct specifically prescribed by the contract itself. Moreover, a court would acknowledge the general criticism from the international community of the effectiveness of similar adjustment programs, as far as they interfere with the debtor countries' sovereignty and autonomy, but also the fact that this criticism is known to be of a polemic nature, often "motivated by the internal political situations in the debtor countries."

Another important distinction is the fact that, although the Greek government is claiming that some of the austerity measures violate international treaties, the majority of the examples given in the report actually relate to the purported violations of their own constitution and labor laws. Moreover, the generally accepted position under the law of treaties is that a party to an international agreement cannot invoke its own domestic law to escape its international obligations.

Other factors taken into consideration include what purpose will be served in denying enforcement, and what the likely result would be. This question is significant in light of the traditional "no restitution remedy," as a void contract will leave Greece with whatever funds they have collected so far with no obligation to repay, a far cry from the party's reasonably expected outcome.

Instead, a court of law is more likely to recognize a way to avoid injustice and respect the party's freedom to contract and intentions; by allowing for alterations or omissions to the provisions found illegal. Allowing for alterations to the terms is consistent with the


97 See e.g., Meyer v. Hawkinson, 626 N.W.2d 262 (N.D. 2001) (holding a contract void for illegality when the alleged contract was to share the proceeds of a winning Canadian lottery ticket in a jurisdiction where gambling agreements are forbidden by statute), Homani v. Iranzadi, 211 Cal.App.3d 1104 (Cal.Ct.App. 1989) (holding that an oral agreement for the payment of loan interest in violation of the tax code is unenforceable); see also HILLMAN, supra note 92, at 77-100.


99 See infra notes 76-81 and accompanying text.


101 In fact, given the severity of the Greek debt which involves the second-largest currency in the world, an automatic write-down of the loans may very well collapse the entire global financial system.
reasonable test, which holds that if provisions can be reasonably altered to render them enforceable, then a court can determine what is reasonable considering all available evidence and the intention of the parties at the time of contracting.\textsuperscript{102} This approach is taken by the Restatement (Second) of Contracts as well as the U.C.C.,\textsuperscript{103} and aligns with judicial preferences of deference towards freedom of contract and preserving the essence of the parties bargain. A similar contract theory, divisibility of contracts, recognizes that agreements with multiple sets of promises and performances can essentially be divided into parts.\textsuperscript{104} Under this theory, courts may enforce any divisible portion of the contract, and hold other portions as unenforceable, and avoid the devastating effect of voiding entire agreements.\textsuperscript{105}

It may be true that the conditionalities of the loan agreements since 2010 have only destabilized the economy even more. In fact, compelling independent research has shown that absent austerity measures, the economy in Greece would have only stagnated rather than lose 25% of its GDP.\textsuperscript{106} However, in light of the strong policies favoring enforcement as well as the theories of contract interpretation and divisibility, a court would unlikely render the entire loan agreement void as the Committee has implied. At best, a court will render only some specific provisions unenforceable.

**B. Other Contract Provisos**

In chapter seven of the Report, the Committee cites various clauses in the agreements themselves that are thought to be abusive or otherwise illegal, the first being a waiver of immunity clause. This would deprive the Greek state of the right to assert sovereign immunity in the event that arbitration or litigation disputes pursuant to the loan agreements ensue.\textsuperscript{107} This claim is grounded in the doctrine of sovereign immunity, which shields foreign sovereigns from the jurisdictional reach of private parties.\textsuperscript{108} However, strict doctrinal adherence, known as absolute immunity, has been largely abandoned in the twentieth century.\textsuperscript{109} Most states have now adopted the so-called restrictive theory of immunity, under which foreign sovereigns are no longer automatically immune from suit, and creditors can

\textsuperscript{102} See Raimonde v. Van Vlerah, 325 N.E.2d 544 (Ohio 1975).
\textsuperscript{104} See 6 Willison on Contracts § 860 (3d ed. 1962); RESTATEMENT (SECOND) OF CONTRACTS § 240 (1981).
\textsuperscript{105} RESTATEMENT (SECOND) OF CONTRACTS § 240 cmt. e (1981) ("The court's decision will usually depend on considerations of fairness."); see e.g., Management Serv. Corp. v. Development Assic., 617 P.2d 406 (Ut 1940).
\textsuperscript{106} See Ozlem, supra note 34.
\textsuperscript{107} The exact wording of this provision is as follows: "The Beneficiary Member State, HFSF and the Bank of Greece hereby irrevocably and unconditionally waive all immunity to which each of them is or may become entitled, in respect of itself or its assets, from legal proceedings in relation to this Agreement and each of its Annexes and Schedules (including the Annexes to such Schedules) and each Pre-Funding Agreement, including, without limitation, immunity from suit, judgment or other order, from attachment, arrest or injunction prior to judgment, and from execution and enforcement against its assets to the extent not prohibited by mandatory law." See Intercreditor and Loan Facility Agreement, supra note 12.
overcome sovereign immunity under various exceptions. In the U.S for example, the Foreign Sovereign Immunities Act of 1976 (FSIA) provides the commercial activity exception, which exposes a foreign sovereign to suit when it engages in commercial activities, as opposed to public activities, recognizing the momentous right of private party litigants to sue foreign sovereigns to enforce judgments. Further, this exception has also been recognized by both the International Court of Justice and by the United States Supreme Court in the context of international loan and bondholder agreements in a number of cases. Even so, international loan creditors often insist that sovereign borrowers waive their immunity just for good measure, as consistent with efforts to safeguard potential claims against the sovereign. As it happens, such provisions are considered common to international loan agreements. The concern amongst legal scholars is never the existence of these clauses, but rather their practical application and the jurisdictional questions that they pose; however, this is not at issue here. As such, the claim that the waiver of immunity clause by its own is illegal is extremely weak.

The second clause the Committee cites as illegal is a severability clause, which states that in the event that a provision is judicially noted as illegal, void, or unenforceable, the remaining provisions of the agreement are to remain in force. This rather innocuous clause is frequently employed in contemporary contracting, as some consider it a boilerplate provision, and most courts do not hesitate to enforce them. In fact, the absence of such clause tends to indicate that the underlying contract is not severable. The underlying theory is that although a particular provision may be deemed illegal, it shall not undermine the entire contract. This is consistent with the judicial tendency that generally recognizes the

111 See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 349 (2003).
114 Id.
115 See Ku, supra note 110, at 443-445 (where Professor Julian G. Ku asserts that, although a waiver of immunity subjects the sovereign to monetary judgments, United States law still binds the creditors ability to execute these judgments against a sovereign’s assets, and by simply moving attachable assets out of the jurisdiction before execution, the sovereign is essentially litigation-proof).
116 The exact wording of the provision is as follows: “If any one or more of the provisions contained in this agreement should be or become fully or in part invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not be affected or impaired thereby. Provisions which are fully or in part invalid, illegal or unenforceable shall be interpreted and thus implemented according to the spirit and purpose of this Agreement.” See Intercreditor and Loan Facility Agreement, supra note 12.
intentions of the parties and their respective “meeting of the mind.” Courts that decide on the issue of severability do so irrespective of the existence or exact wording of the severability clause, but rather in light of the nature of the illegal provision sought to be severed, and its relation the contract as a whole. Overall, courts have predominantly favored severability in their determination, as long as it is consistent with the intent of the parties. The claim made here is that the severability clause is itself illegal, however, this independent illegality claim may be unprecedented and runs afoul of the nature of severability clause jurisprudence. The severability clause independently is likely to be viewed as rather innocuous, and neither burdensome nor unfair.

The third clause cited by the Committee as illegal is a waiver of defense clause. It states that, “provisions of [this] agreement have to be implemented even if they were found illegal, and that Greece hereby irrevocably and unconditionally waives all defenses.” A court would not want to even consider the first part of this provision as illegal contracts are automatically void by operation of law. However, a court could very well consider this waiver of defense clause as unfair, as such clauses are usually only employed within the context of assignments and delegations of financial agreements. In those cases, a party would agree “not to assert against the assignee any defenses it might have against the assignor.” Such agreements are given substantial deference by courts and are usually upheld, recognizing not only the parties “broad latitude within which to fashion their own remedies,” but also the commercial necessity that a prospective third-party assignee is guaranteed meaningful security. Further, the UCC protects the use of waiver of defense clauses for financing leases for the sale of goods as well as for future services, but only by an assignee of a funding source of the payee. Otherwise, courts have held that a waiver of defense clause in a two-party transaction is unwarranted and out of place as the contracting parties are said to be protected by their own covenants, representations and warranties, and the obligation to pay from the debtor should not continue where there is an egregious breach by the creditor. Consequently, the provision cited by the report, as written, is not referring to the assignee of the contracting party creditors but to themselves, and is arguably an illegal proviso, either as onerously one-sided (unconscionable) or as transgressing the duty of good faith and fair dealing in contracting.

However, as previously asserted, courts favor the severability presumption, and have held that when the illegal portion can be severed from the rest of the contract, the

121 Id.
122 See JANIS, supra note 111.
124 See supra accompanying notes 85-93.
127 See generally UCC §§ 2-407, 2-508, 9-403.
128 2 Com. Asset-Based Fin. § 14:46.
129 See infra notes 189-192 and accompanying text.
remaining contract is still enforceable.\textsuperscript{120} As such, a court will, at best, simply strike this provision.

V. PROCEDURAL ILLEGALITY CLAIMS

The second cluster of illegality claims considers various aspects that stem from the bargaining process of the parties, which are said to be illegal or violate public policy. The Committee cites three types of procedural illegality: the choice of law governing future disputes; various debt-mechanism procedures embedded within the contracts, which allow creditors to sell their right to collect on the loans; and the failure of the creditors to comply with certain enactment procedures prior to contracting.

A. Choice of Law Provision

The first of the Committee's procedural illegality claims, calls into question the illegality of the choice of law provision. That is, they claim that English law as the governing law for future litigation or arbitration, illegally facilitates the circumvention of the Greek Constitution and international human rights.\textsuperscript{131} In making this claim, the Committee neither refers to any specific provision of the Greek Constitution nor cites any examples in which English law would violate the Constitution or infringe on human rights.\textsuperscript{132} In fact, the only reason mentioned as to why their creditors would chose English law, is that it would favor a strict interpretation of the laws of contract, which is more favorable to them.\textsuperscript{133}

Of course, the very nature of international contracts heightens the risk of a conflict between different laws and court systems within this area, as it is possible that the laws of several jurisdictions could be involved with multiple-courts exercising jurisdiction over the very same dispute. The Restatement (Second) on Conflict of Laws, holds that the essential validity of a choice of law agreement is left entirely to the choice of the parties, as it is after all a part of the quid-pro-quo, considering it is governed by a legal system which the agreement is closely connected.\textsuperscript{134} Limitations arise only when the agreement has no substantial relationship with the state of choice, or is not otherwise deemed reasonable.\textsuperscript{135} Even within the context of multi-state contracts, the restatement recognizes that parties may chose a law that is unconnected with the agreement per se, as it may be necessary to have a stable legal system understood by all the parties.\textsuperscript{136}

\textsuperscript{120} See supra notes 88-96 and accompanying text.
\textsuperscript{131} See Hellenic Parliament Truth Committee on Public Debt, supra note 26, at 45.
\textsuperscript{132} See id. ("By choosing English law as the governing law for those agreements, the implicit objective of the creditors in their choice of law clause was to bypass the Greek Constitution and Greece's international human rights obligations. And thus, to the extent that English law does not incorporate or conflicts with, Greece's human rights treaty and customary obligations, it is invalid and merits no obligation to be honoured.").
\textsuperscript{133} See id.
\textsuperscript{134} See RESTATEMENT (SECOND), CONFLICT OF LAWS § 332 (Tent. Draft No. 6, 1960) (permitting the parties to choose the governing law within certain limitations, among which is that that the agreement has a substantial relationship with the law of choice or not otherwise unreasonable).
\textsuperscript{135} Id.
\textsuperscript{136} Id., comment f, pp.21-22.
Regarding English contract law generally, it has been noted that the International financial community has a history of the English law preference. 137 This is perhaps due to both the more pragmatic and commercial expressionist approach of English law, as well as for its well-defined case law support. 138 Further, English contract law is also preferred because of the country’s conceptual sophistication within its law, which is capable of accommodating disputes and transactions within its framework. 139 In light of the English law preference and considering the nature of the provision being in the original agreed-upon transaction, it is very unlikely to be held as illegal.

B. Debt-Mechanism Procedures

The second procedural illegality claim involve the so-called “debt mechanisms” provisions that allow creditors to transfer borrowed funds to private financial institutions. This would essentially allow transferring official debts, those owed to international financial institutions such as the Troika, 140 to commercial debts, those owed to commercial banks or other private entities. 141 This practice, known in finance as loan asset sales, enables a financial institution to transfer an asset inter-bank, analogous to the secondary market trading of bonds or stocks. 142 The contract law parallel is known as an assignment of rights, which involves a contracting party assigning their right of performance to a third party; that is, one not in privity with the initial contractors. 143

The claim by the Committee is that these encompass illegal assignment of rights that transform public debt into private debt and allow for the eventual transformation of Greece’s public state assets to private bonds. 144 To this, the Committee enumerates the exact debt mechanisms found within the loan agreements. The first of these, under the 2010 agreements, 145 provides for the transformation of debt securities into bilateral loans. 146 This essentially converts the debt owed to the IMF and ECB to private entities or states. The Committee claims that this mechanism, “hidden in an Annex,” allows a transfer of contractual

137 See Keith A. Palzer, Relational Contract Theory and Sovereign Debt, 8 NW. J. INT’L L. & BUS. 727, n.68 (1988) (“Almost all sovereign loan agreements have stipulated adjudication in New York or Longon, with New York or English law controlling. This is due to the growing sophistication and specialization of those financial centers as well as the unacceptable of a developing country forum to creditor banks lending to developing country sovereigns.”); see generally RAVI C. TENNEKOON, THE LAW & REGULATION OF INTERNATIONAL FINANCE (1991).
139 Id.
140 See generally Sylvester, supra note 62 at 283.
141 Id.
142 See TENNEKOON, supra note 138, at 103.
145 Known as the “Loan Facility Agreement” and “Intercreditor Agreement.”
rights from bondholders to any new party through simply completing a form. The second debt mechanism mentioned, found within the 2012 agreements, allows for re-capitalization of Greek banks, a process where the bank’s bonds and other securities are adjusted or restructured, and for recycling of debt through private sector involvement, “PSI” and “the debt buy-back operation”, allowing creditors to buy back even existing debt instruments. The last debt mechanism cited, known in finance as “securitization”, involves the pooling and repackaging of loans into securities, which are then sold to investors. The Committee asserts that securitization, as well as PSI, allow for the acceleration of the privatization process of public debt, which includes state assets such as state owned companies, land, buildings and natural gas storage rights, which in turn, would transform valuable public assets into means for debt repayments, a devastating result for Greece. They also claim, that these are done with malice intentions — a scam on the part of private creditors to exploit raising capital. In reality, these mechanisms simply allow for an assignment of contractual rights, and are considered common practice within the international finance community, even for secured transactions.

Contrary to the common law rule against assignments, the development of contract law in the nineteenth century has recognized the importance of alienability of intangibles such as securities, stocks, funds and other assets, as essential to commerce and trade. The assignment of the right to receive an amount in the future, known as an account receivable, is one of these recognized types. Ordinarily, an assignment of this nature would be subject to Article 9 of the UCC, because of its frequent use as a financial device. However, an exclusion from Article 9 exists when the assignment is for the sole purpose of collection, and American jurisdictions usually refer to common law rules as well as respective statutory enactments. Under general contract doctrine, an assignment of contractual rights is presumptively valid unless the assignment would materially change the duty of the other party, or materially increases the burden or risk imposed. Accounts receivables usually

147 See Hellenic Parliament Truth Committee on Public Debt, supra note 26, at 29 (citing Loan Facility Agreement, Annex 6 – Assignment Agreement and Schedule to the Assignment Agreement, and Article 13).
148 Known as the Master Financial Assistance Facility Agreement, “MFAFA”.
154 See JOSEPH M. PERILLO, CONTRACTS 640 (7th ed. 2014).
155 Id.
156 Id. at 643.
157 Id.
158 See U.C.C. § 2-210(2) (1977), RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(a) (1981), Crane Ice Cream Co. v. Terminal Freezing & Heating Co., 128 A. 280 (Md. Super. Ct. 1925) (holding that an assignment of a contract right materially changed the obligor’s duty when the quantity contracted for was based on past performance of the parties: “[I]t is clear that the rights and duties of the contract under consideration were of so personal a character that the rights that [one party’s rights] cannot be assigned […] without defeating the intention of the parties to the original contract”).
pose slight assignment problems, as one can imagine that simply changing the intended beneficiary neither changes the duty nor the risk of the indebted party.\textsuperscript{159} Even in the case of secured transactions, a creditor-party’s grant in its accounts receivable to an assignee the sole purpose of collection, only provides security for repayment that the original creditor had pursuant to the parties’ agreement.\textsuperscript{160} These assignments are intended as an outright transfer of an account receivable and have been distinguished within the law of secured transactions from those made as collateral security for a debt, which create the security interest.\textsuperscript{161} Even more problematic assignments exist when the party has not yet earned payment by performance under the contract and tries to convert this into present cash, however these are treated on an ad hoc basis and are not considered here.\textsuperscript{162} Only illegal assignments, those outlawed by statute or a strong public policy are considered automatically prohibited.\textsuperscript{163} However, these are usually limited to assignment of structured settlements, the right to payment under a public contract, or assignment of rights in life insurance policies.\textsuperscript{164}

The existence of an assignment clause in the contract is often given substantial deference by courts, simply reluctant to interfere with the parties’ freedom of contract.\textsuperscript{165} Even more deference is given to \textit{free assignment clauses}, which place no limitation on assignment. These have even been honored in cases where the rights would not otherwise be capable of assignment, as courts have acknowledged that as part of the bargained for exchange, the parties have contracted for all possible assignments, and thus submitted to any that may ensue.\textsuperscript{166}

In the case of Greece’s financial loan agreements, the lenders have already performed, and since the assigned right in questions is of an account receivable for collection purposes only, UCC Article 9 does not apply.\textsuperscript{167} We must simply ask under contract law, whether the assignment materially changes the duty or burden of Greece to the potential assignees. The Committee has not offered a strong reason that changing the intended beneficiary of the loan payments would alter the duty or imperil Greece in any way to make payment. They indirectly claim that the transfer of public to private debt constitutes a material burden, as State assets are potentially in the hands of private parties. However, this argument lacks merit, as those public security interests were pre-existing parts of the original agreements, and were not created by the assignment provision. As such, state assets were already within the potential reach of creditors and cannot be considered a material burden, or

\textsuperscript{159} See \textsc{Ian Ayres & Gregory Klass}, \textit{Studies in Contract Law} 1079 (8th ed. 2012).


\textsuperscript{161} See \textsc{Perillo, supra} note 154 (citing \textsc{International Harvester v. Peoples Bank & Trust}, 402 So.2d 856 (Miss. 1981) and \textsc{Aquaplex v. Rancho La Valencia}, 297 S.W.3d 768 (Tex. 2009)).

\textsuperscript{162} Id.

\textsuperscript{163} See \textsc{Perillo, supra} note 154, at 651.

\textsuperscript{164} See id. at 651.

\textsuperscript{165} See generally \textsc{John Copeland Nagle, Severability}, 72 N.C. L. REV. 203 (1993); \textsc{Joseph M. Perillo}, \textit{Contracts} 652 (7th ed. 2014); \textsc{Richard A. Lord}, \textit{Williston on Contracts} § 74, at 40 (4th ed. 1990) (citing \textsc{D.I. Stern Agency v. Mutual Benefit Health & Accident Ass’n}, 43 F. Supp. 167 (upholding a provision in a contract expressly permitting an assignment)).

\textsuperscript{166} See \textsc{Ducan Services v. ExxonMobil}, 722 F.Supp.2d 640, 648 (D.Md. 2010) (“[The court believes that the clear agreement of the parties to make the contract freely assignable controls, and no inquiry into the potential increase in burdens prompted by the assignment is necessary.”); \textit{see also} \textsc{Barnes v. Gulf Oil Corp.}, 795 F.2d 358 (4th Cir. 1986).

any burden for that matter. Had the secured transaction been solely a part of the assignment provision, would there be a better argument.

The argument that the privatization process is a scam for member-state lenders to raise capital through sales is also flawed. In fact, the main reasons why banks sell a loan’s assets has been found to be regulatory; to reduce of high-risk weighting assets, in order to maintain capital dependency in the market, as well as to improve profitability ratios. In addition, the existence of an assignment clause as agreed-upon in the original contracts, severely undermines Greece’s argument even more. Further, similar debt mechanisms are frequently used in international loans in order to finance debt of countries on the brink of insolvency. Some examples include private sector involvement used to finance Thailand’s debt in 1997, market-based security swaps employed for Brazil, Turkey, and Argentina, and securitization mechanisms for Mexico. Not only are these mechanisms common practice in the field, but they have been noted by scholars to be components of successful crisis finance strategies.

Securitization, for example, has actually been known to be more beneficial for the indebted country then the creditors. It allows the debtor nation to benefit from the transfer of loans to investors who have the resources to allow them to reschedule their repayment structure and work through their short-term problems, as opposed to the original lenders, which lack the ability to do so. In addition to preventing a hiatus in interest payments, securitization allows the debtor nation to purchase their own securitized debt, saving the market discount that would otherwise escape to the private sector. This serves as a huge advantage for debtors who are otherwise prohibited from directly repurchasing under the loan agreements. In fact, Ecuador took advantage of this in 2008, when it part-defaulted on 70% of its debt that it declared “illegitimate”, then bought back bonds at a third of their value eliminating billions of dollars off its debt.

Whether or not the securitization proposal truly addresses the needs and problems of debtor countries is questionable, as there is very good argument that this is nothing more than a “Cat in the Hat” solution of simply spreading the problem around to make it less

168 See PERILLO, supra note 154, at 103.
170 Id.
171 Id.
174 See id. at 139 (“In turn, countries owing the debt included in these securities should benefit from the transfer of some loans from, among others, a financially troubled group of lenders, to investors potentially better able to allow debtors to work through short-term problems.”).
175 Id.
177 See Arghyrou & Tsoukalas, supra note 19.
178 See Leebron, supra note 176, at 188 (“[S]ecuritization is emphatically not a solution to the countries’ problems, and thus not really an answer to the problem at all”).
noticeable. However, when viewed as a matter of contract assignment these mechanisms do not contravene the law, and if Greece were to assert this claim, a court would unlikely find them as illegal.

C. Enactment Procedure Compliance

In addition, the Committee claims that certain procedures, required before the enactment of such loan agreements, were not fulfilled due to the bad faith of the creditors, which also render the contract void. The procedures cited are known collectively as human rights impact assessments ("HIRA"), and are intended to examine the potential impact of the adjustment program’s legislative measures on persons likely to be affected, prior to their implementation. The claim that HIRA’s are required by international law is well-supported by a variety of sources, including: decisions by the Court of Justice of the European Union, treaties which require them, international guidelines, as well as various other international instruments which generally protect human rights. Greece claims that since no attempts were made to assess the impacts of the macroeconomic adjustment measures in neither 2010 nor 2012, the creditors acted in bad faith and with malice intent. Moreover, the Committee states that subsequent findings by both the Committee on Economic and Monetary Affairs, and by private individuals, have deemed these actions as, “lacking in transparency and democratic oversight,” due to the marginalization of the European Parliament, at least until 2013.

The “duty of good faith” has doctrinally developed in contract law based on equitable principals of fair dealing, and is recognized and codified in the Restatement of Contracts, the UCC, and in UNIDROIT. This duty, although seemingly difficult to define precisely, has been held to mean more than simply honesty in fact, and excludes behavior that violates community standards of decency, fairness and reasonableness. Consequently, the issue regarding the parties’ duty of good-faith under the contract is

179 See id. at 188.
182 See id. at 45-49.
183 See Hellenic Parliament Truth Committee on Public Debt, supra note 26, at 48 (citing Pliakos A., Memoranda of Understanding and the Requirements of the EU Values [sic]).
186 PICC Art. 1.7(1) (2004).
In fact, only in English Contract law do they refuse to recognize a general duty of good faith W.H. Knight, Jr., Loan Participation Agreements: Catching up with Contract Law, 1987 COLUM. BUS. L. REV. 587 (1987).
187 See JAY WINSTON & ARTHUR WINSTON, COMPLETE GUIDE TO CREDITOR AND COLLECTION LAW §3.07[E] (2012-2013 ed. 2013), HILLMAN, supra note 92 at 205-08.
188 See RESTATMENT (SECOND) OF CONTRACTS §205, cmt. a. (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as "bad faith" because they violate community standards of decency, fairness or reasonableness.").
generally one of fact, and which varies with the context. In analyzing this fact, courts are primarily concerned with parties that will be deprived of the benefit of its bargain, which usually does not extend beyond the terms of their agreements. In fact, the majority of courts have held that the duty of good faith and fair dealing does not create any additional rights or obligations, but only confers obligations based on the promises of the original contract. The New York Court of Appeals has held for example, that no obligation of good faith can be implied "which will be inconsistent with the other terms of the contractual relationship." In this holding, the court indeed acknowledged the implied duty of good faith in every contract, but highlighted that the terms of the contract are what govern the rights and obligations of the parties. Similar holdings have also suggested that in order to bring a claim for breach of the duty of good faith, the plaintiff must establish breach of an express provision of the contract, recognizing that the duty of good faith cannot stand as an independent cause of action.

In the case of Greece, they are claiming that failure to assess the potential impacts of its austerity measures, an obligation recognized in international law, constitutes a breach of the duty of good faith on the contract, and renders it void. However, this claim lacks substantial merit, as it mistakenly considers an international preference, as automatically binding on the parties as a matter of contract law.

Numerous cases have held that the duty of good faith may not be imposed to override express terms in the contract. One notable example in the context of a demand note is a Missouri Court of Appeals case in which the court refused to hold that the duty of good faith limits the rights of a holder of a demand note to call the obligation when the lender failed to disclose that the bank was concerned about the loan, and believed it was the largest risk exposure in the bank. The court noted its reluctance in altering the terms of the loan agreement, even with the existence of evidence supporting a potentially nefarious motive:

"The additional term would be that the note is not payable at any time demand is made but only when demand is made if such demand is made in good faith. Thus [the duty of good faith] has no application because it does

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189 See JAY WINSTON & ARTHUR WINSTON, COMPLETE GUIDE TO CREDITOR AND COLLECTION LAW §3.07 [E] (2012-2013 ed. 2013) ("The courts generally examine the fact situation to determine whether the party being accused acted in such an abominable manner lacking any of the virtues of good faith and fair dealing.").
190 Id. ("The court will not entertain the birth of a new obligation or new duty.").
191 Murphy v. Am. Home Prod. Corp., 58 N.Y.2d 293 (N.Y 1989) (considering the duty of good faith when questioning the legality of a discharge pursuant to an at-will employment contract).
192 Id. at 304 ("In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties.").
193 See, e.g., Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d (N.Y 1998) (holding that the duty of good faith does not require a bank to provide advance notice to its customer of its intent to segregate and seize collateral pursuant to a security agreement), Eaglehead Corp. v. Cambridge Capital Group, Inc., 170 F.Supp. 2d 522 (D. Md. 2001).
194 See, e.g., Flagship Nat'l Bank v. Gray Distribution Systems, Inc., 485 So. 2d 1336 (Fla. Dist. Ct. App. 1986) (holding that a bank does not violate its duty of good faith when failing to extend additional credit even after having done so in the past, when that was exactly what the contract called for).
not relate to the performance or enforcement of any right under the
demand note but in fact would add an additional term which the parties did
not agree to.196

Similarly, the allegation of bad faith made in the Report, would impose an
additional obligation on Greece’s creditors, not bargained for by the parties. It follows that a
court of law would acknowledge that a material part of the agreed-upon exchange, Greece
repaying the loan, will not be undermined in light of an un-bargained for international
preference, albeit potentially sinister.

This allegation of bad faith, is perhaps part of a broader underlying theme of the
report; that the creditors interests are not really to implement macro-economic growth, but to
serve the interests of the financial world. This, although alters the duty of good faith
argument, questions intentions that are outside the reach of usual contract law; as not existing
at the time of contracting. Courts have also held that absent a real defense, when one party
simply makes a bad deal and is seeking revocation, such detriment will not be considered,
“[T]he general rule of freedom of contract includes the freedom to make a bad bargain.”197

VI. A DIFFERENT TAKE ON ILLEGALITY

When considering the allegations made by the report and the rhetoric of the writers,
one can easily be just as utterly confused as vehemently persuaded. In fact, this may be the
sole purpose of the publication. However, amid the florid legalese and implicit political
attacks, the report asserts a number of substantive and procedural illegality claims relating to
the loan agreements — none of which are likely to pass muster in court to render the Greek
government with a revocation right. The power to rescind is a potent power, which has
fostered heightened judicial discretion, as courts recognize that the principal of freedom to
contract is severely undermined when the government impinges on private agreements.
However, there is still a way to give voice to Greece under contract law, even when failing to
meet the revocation burden. This, I argue, is to be found within the doctrinal development of
the law of contracts and relevant remedies.

As noted, the unilateral revocation right that is sought by Greece has been a remedy
traditionally associated with classical contract theories, suitable for discrete, one-time
contracts with shorter durations and expectations. However, the context of long-term
international loans more appropriately calls for relational contract theory and its applicable
remedies to govern. In fact, relational contract theory has actually been said to specifically
apply to long-term sovereign loan agreements, as it recognizes the complexities considering
the number of parties usually involved, and each party’s respective obligations and conflicting
political, social and economic rights.198 That is, the sheer volume and long maturity of such
loans highlights the importance and applicability of relational contract theory in this context.
In fact, conventional litigation over sovereign loan agreements has even been deemed

196 Id. at 48.
197 See Sanger v. Yellow Cab Co., Inc., 486 S.W.2d 477, 482 (Mo. 1972), Higgins v. American Car Co., 324
Mo. 189, 193 (Mo. 1929); see generally RESTATEMENT (SECOND) OF CONTRACTS §163, illus.3 (1981).
198 See Palzer, supra note 46, at 735 (defining sovereign loans as “one of the grandest relational exchanges in
the contract universe”).
problematic, as courts are simply unable to rid the "distortion of conventional thinking." As a result, "delegitimization" of the formal contract and its interpretation is usually warranted in order to avoid arcane legal rules and ineffective remedies.

Thus, relational contract theory would recognize the obvious objective of long-term sovereign loan agreements: money for present-use for repayment over time. As such, it would allow for "efficient breach" and for parties to avail themselves of more effective remedies, such as the use of debt restructuring or rescheduling that allows for parties to renegotiate the terms of the original agreement, either by spreading out the principal payment dates to a longer period, reducing interest rates, or simply altering or removing conditions.

Simply stated, the biggest problem with the allegations made by the Greek government lies not within the merits of the claims per se, but rather, the requested relief. Even Greece's strongest arguments, the ineffectiveness of the austerity measures and the waiver of defense clause, are not strong enough to render the entire agreements void. It is my contention, however, that these arguments can and should be used in a more effective way; a convincing argument that seeks serious debt restructuring and renegotiation of the terms. This approach, although far from being properly considered a contemporary solution, is however the norm in sovereign debt crisis.

In fact, scholars have noted that the nature of sovereign debt places inherent limitations on the legal enforcement and applicability of the underlying contracts, as restructuring and other non-legal mechanisms such as reputational concerns and political pressures seem to "govern" instead.

As such, I propose that the Truth Committee on public debt undertakes a re-drafting of the report in order to elucidate the meritorious claims, place them within the prism of the relational contract, and omit weak claims and any doctrinal references that gives rise to classical theory scrutiny. This would not only restore morale, but political sovereignty as well, and put the country in the best possible leveraging position to sit with creditors and renegotiate the terms in a way more favorable to the Greek people.

199 See Palzer, supra note 46, at 731 (citing ALCOA v. Essex Group Inc., 499 F.Supp. 53 (W.D. Pa. 1980) (where a court reformed a 20-year aluminum conversion contract based on mutual mistake of the parties in basing the price of services and aluminum on an index which did not include fuel prices, which skyrocketed in 1973) and Victor P. Goldberg, *Price Adjustment In Long-Term Contracts*, 1985 Wis. L. REV. 527, 534-40 (criticizing the ALCOA decision because of its failure to consider opportunity costs in determinations and the court's seeming ignorance of the purpose of long-term contracts).

200 See Palzer, supra note 46, at 731.

201 See Palzer, supra note 46, at 740.


VII. CONCLUSION

As we have seen, the idea of unenforceability in contract law has proven controversial for a number of reasons grounded in sound public policy. Similarly, the maxim *pacta sunt servanda* ("agreements are to be observed"), has long prevailed in the context of contractual agreements, and has been historically noted for its significance. However, the idiosyncratic nature of long-term loan agreements enables us, even through the otherwise shallow lenses of contract law, to take a deeper look for alternative solutions. By following the letter of the report, the Greek government has sought an unrealistic remedy that has little contractual merit. However pleading in terms of the relational contract theory, might in fact provide the Greek government’s contract claims the voice that it deserves to efficiently and robustly reach its creditors. This relief, although not as convenient and advantageous as revocation of the loan agreements, is a realistic remedy that is provided for within the purview of contract law, and if employed with the same zeal as was used in the drafting of the report, may make a convincing claim for Greece, to have even the upper hand in the negotiations. This is crucial given the propagating effect of the Greek debt crisis at this time. However, this significance will have implications that reach far beyond the Mediterranean, but for all sovereign debtors, as it would allow for classical contract law to provide an argument for a relational contract remedy, perhaps adding a Greco twist on the old Latin adage, *caveat emptor*, to endure in the future of contract law.
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