

Courts and sovereigns in the *pari passu* goldmines

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Extract

1. Introduction

This article revisits a once-notorious case brought by a Swedish holder of defaulted German bonds, decided by the highest federal court in Switzerland in 1936.¹ Like another notorious case, prompted by Argentina's default and decided in New York between 2011 and 2014,² it considered a sovereign debtor's promise to rank its creditors *pari passu* ('on equal footing'). Swiss and US courts both read this contract term to require the sovereign to make proportional payments to its creditors. Nonetheless, Germany's creditors lost, whereas Argentina faced a worldwide financial boycott ordered by US courts in the name of equal treatment.³

Courts and advocates in the USA, the UK and Belgium, among others, have long operated on the assumption that no court had considered the meaning of *pari passu* in sovereign debt before 2000.⁴ The Swiss interpretation, tangled up in the financial and economic wreckage of World War I and the collapse of the gold standard, has gone unremarked in the huge scholarly literature on the *pari passu* clause⁵ — even though it resurfaced in 1980 as part of a high-profile dispute involving the same clause in the same bonds, which had been restructured after World War II.⁶ This article reviews the opinions from the 1930s and 1980, and explores their implications for today's contracts.

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