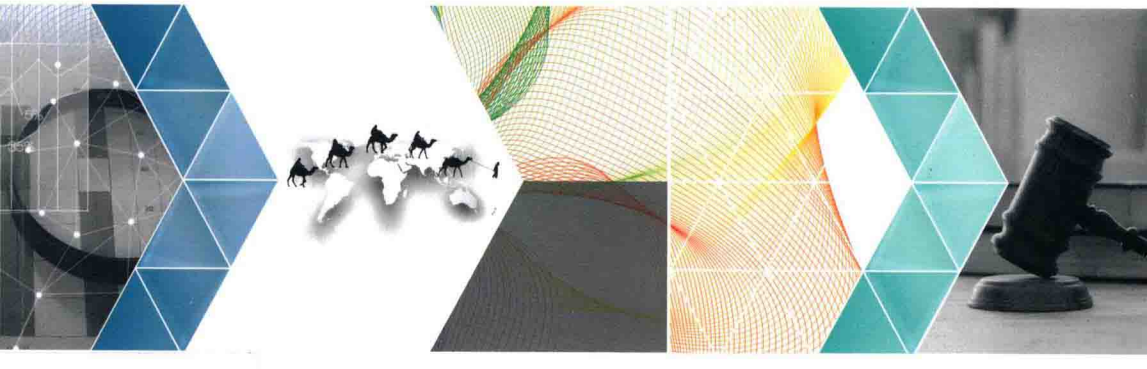
金融支持“一带一路”丛书

Research on the Legal System of Sovereign Bond Default Resolution

主权债券违约处置法律制度研究

李 皓 ◎ 著



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摘　要

世界各国政府普遍通过举借主权债务来筹集基础设施建设和社会公共服务等领域所需的大规模资金。主权债务包括主权债券和主权贷款两种类型，由于两者具有不同特点，因而它们在违约处置方面存在着较大差异。主权贷款的债权人数量有限且构成简单，其违约处置程序较为有序；而主权债券的债权人数量多、分布广、构成多元化且异质性强，这使主权债券违约处置的难度和复杂性更大。现阶段主权债券是主权债务的主要组成部分，主权债券违约后能否得到妥善处置不仅直接关系到主权债券市场的运行，而且也会影响到债券发行国及所在地区的金融稳定，但是现有研究较少涉及这一问题，有必要从法律层面对主权债券违约处置问题进行系统研究。

经过长期实践，主权债券市场已形成相对固定和明确的主权债券违约处置方式。主权债券重组、主权债券违约诉讼和主权债券违约的国际官方救助共同构成当前主权债券违约处置的主要方式，其中主权债券重组发挥着最重要的基础性作用，而主权债券违约诉讼和主权债券违约的国际官方救助则扮演辅助性角色。不过，由于主权债券违约处置领域的相关法律制

度仍不完备，当发行主权债券的债务国出现违约时，上述违约处置方式有时并不能完全有效解决主权债券违约问题。首先，主权债券重组的合同约束方法尽管已被广泛应用于规范主权债券重组并取得良好的实际效果，但是合同约束方法同样也暴露出不足，特别是在欧洲主权债务危机爆发后这一问题更为凸显，提倡运用法律规制方法来规范主权债券重组的呼声增多。其次，诉讼对主权债券违约处置的影响日益增大，有时甚至会干扰主权债券重组的顺利进行。一直以来，债权人以诉讼方式主张债权会受到主权豁免制度的限制，但是近年来资金实力雄厚且具有高超诉讼技巧的秃鹫基金频繁对违约债务国发起诉讼攻击，这使主权债券违约诉讼的可行性逐步增加，主权债券违约诉讼案件的数量呈明显上升趋势。最后，以国际货币基金组织为代表的国际组织以及一些国家向违约债务国提供的国际官方救助，虽然在一定程度上促使了主权债券违约问题得到有效解决，但是对国际官方救助制度也存在着强烈的批评和质疑，认为国际官方救助制度本身存在自由裁量空间过大，缺乏独立性和一致性，容易使债务国和债权人滋生道德风险等缺陷。总之，目前主权债券违约处置法律制度还处于形成和发展的过程中，其中涉及很多法律问题值得深入研究，国际社会应继续着力构建更加完善系统的主权债券违约处置法律制度。

本书共由八章组成，按照提出问题—分析问题—解决问题的基本思路，将主权债券违约处置法律制度划分为若干具体分项问题逐一进行研究。

第1章是导论。导论部分建立了全书的框架，对本书选题背景和研究意义进行分析，阐述国内外学者对相关问题的研究成果，介绍本书的研究思路和研究方法，并对创新之处进行说明。

第2章是主权债券违约处置理论概述。本章梳理主权债券违约处置基础理论问题，对相关概念进行辨析，分析当前主权债券违约处置的主要方式，研究历史上曾采用，但现在由于各种原因不再使用或较少使用的主权债券违约非常规处置方式。本章为后续章节提供了理论依据，也为深入研究主权债券违约处置法律制度找好切入点，使下一步的研究工作具备有力的基础支撑。

第3章是主权债券重组的合同约束方法。目前主权债券发生违约后最重要的解决方式是由债务国与债权人协商进行主权债券重组，主权债券重组的合同约束方法现阶段已在实践中被广泛应用于规范主权债券重组。本章首先从总体上对主权债券重组的合同约束方法进行研究，随后对集体行动条款这一最重要的合同约束方法展开深入分析，接下来对2012年希腊主权债务重组以及2000年厄瓜多尔主权债券重组的实践进行研究，最后从法律角度提出完善主权债券重组合同约束方法的建议。

第4章是主权债券重组的法律规制方法。除了目前在实践中已经得到应用的合同约束方法，法律规制方法在理论上是调整规范主权债券重组的另外一种选择。尽管法律规制方法还未付诸实践，但是对法律规制方法的理论研究一直不断深入。特别是在欧洲主权债务危机爆发后，合同约束方法暴露出的问题再次引发关于合同约束方法和法律规制方法的讨论，国际社会开始检讨合同约束方法的不足，并重新审视运用法律规制方法规范主权债券重组的可能。本章对主权债券重组的法律规制方法进行研究，着重分析了在法律规制方法中占有重要地位的主权债务重组机制（SDRM），并对法律规制方法的最新发展趋势进行展望，最后从法律角度对如何运用法律规制方法处置主权债券重组提出建议。

第5章是主权债券违约诉讼制度。主权债券发生违约后，对于债权人而言通常有两种选择：一是与债务国协商进行主权债券重组，这意味着债务需要进行减免；二是向有管辖权的法院提起主权债券违约诉讼，要求债务国全额清偿债券本息。理论上债权人可以不接受重组而是依据主权债券合同的争议解决条款向债务国提起诉讼追索债权。但是由于主权国家无法像公司一样破产，并且对国家进行诉讼的难度大、专业性强，所以一直以来重组是多数债务人的优先选择，诉讼只是替代性的解决方式。自20世纪80年代起，主权债券违约诉讼案件的数量出现明显上升，对主权债券重组产生的影响日益增大。本章以主权债券违约诉讼为研究主题，研究了主权债券违约诉讼的可行性、法院判决的可执行性以及主权债券违约诉讼的发展趋势，随后对阿根廷主权债券重组过程中发生的著名诉讼案例进行分析，进而对主权债券违约诉讼进行全面评价，最后在总结前文的基础上

对如何使主权债券违约诉讼发挥效力提出建议。

第6章是主权债券违约的国际官方救助制度。主权债券违约的有效解决有时还会需要得到新的资金协助债务国从根本上改善财政状况、调整经济结构并恢复债务的可持续性。然而债务国发生违约后很难再通过资本市场筹集资金，即便有可能得到新资金也必须支付极高的融资成本，此时可行的外部资金来源是由相关国际组织或国家向债务国提供的国际官方救助。国际货币基金组织（IMF）在国际官方救助领域一直处于主导地位，本章主要结合国际官方救助领域最具代表性的IMF救助机制来研究国际官方救助制度。本章首先对IMF救助机制进行研究，随后对国际官方救助制度存在的主要法律问题进行分析，最后从法律角度提出对主权债券违约的国际官方救助制度的建议。

第7章是中国应对主权债券违约的策略。本章在分析中国主权债券市场概况以及中国对主权债券违约问题基本立场定位的基础上，从我国的国家利益角度出发针对如何应对解决主权债券违约问题提出建议。

第8章是结论。结论部分在总结前述章节研究成果基础上提出了本书的主要研究结论。

关键词：主权债券　违约处置　重组　集体行动条款　秃鹫基金诉讼

Abstract

Governments around the world commonly raise large amounts of funds for infrastructure constructions, public services and other sectors by borrowing sovereign debts. Sovereign debts consist of sovereign bonds and sovereign loans. Sovereign bonds and sovereign loans have different features which make them have major differences with respect to default resolution. Sovereign loan creditors have a limited number and relatively simple structure, sovereign loan default resolution is relatively in order. However sovereign bond creditors have a very large number, widespread dispersion, diversified make-up and great heterogeneity, so that sovereign bond default resolution is more difficult and sophisticated. Nowadays sovereign debts are mainly in the form of sovereign bonds. Sovereign bond default resolution is not only related to the orderly operation of sovereign bond market but also related the financial stability of sovereign bond issuing country, its neighboring countries and region. Since few current researches involve this subject, it's necessary to conduct systematic research on sovereign bond default resolution from legal aspect.

Over a long period of practice, sovereign bond market has developed relatively fix and definite sovereign bond default resolution mechanisms. Sovereign bond restructuring, sovereign bond default litigation and international official bailout for sovereign bond default all together constitute the major sovereign bond default resolution mechanisms among which sovereign bond restructuring plays the most important basic role whereas sovereign bond default litigation and international official bailout for sovereign bond default play supplementary roles. Because the legal system in sovereign bond area is not so well-developed, the abovementioned sovereign bond default resolution mechanisms sometimes could not completely resolved the sovereign bond default problems in the event of default by sovereign bond issuing country. Firstly, the contractual approach has been widely adopted to regulate sovereign bond restructuring and has achieved good effects, but it also has problems. Especially highlighted by the European sovereign debt crisis, demands for applying statutory approach to regulate sovereign bond restructuring have begun to increase. Secondly, litigation has increasing impacts on sovereign bond default resolution, sometimes even disrupts the sovereign bond restructuring process. Creditors' right to litigate has long been limited by sovereign immunity. However vulture funds with abundant capital and great litigation skills have initiated litigation attacks to defaulted debtor countries in recent year which have gradually increased the feasibility of sovereign bond default litigation and the number of sovereign bond default litigation case. Lastly, international organizations represented by IMF and some sovereign countries have effectively assist debtor countries in resolving sovereign bond default. But international community also has criticized international official bailout system for having too much discretion, lacking of independence and consistency and breeding moral hazard of debtor country and creditors. Overall the legal system of sovereign bond default resolution is in the process of formation and development in which many legal issues are involved and worth intensive research. International community shall

engage in establishing a more improved and systemic legal system of sovereign bond default resolution.

This book is made up of eight chapters. Followed the way of identifying issues, analyzing issues and solving issues, this book conducts research on the legal system of sovereign bond default resolution by dividing the thesis into several specific issues:

Chapter One-Introduction. The introduction part sets up the framework of the whole book, elaborates the research background and significance of the book, reviews relevant domestic and international research achievements, presents research way of thinking and methods and explains the innovations of the dissertation.

Chapter Two-Theoretical summary of sovereign bond default resolution. This chapter reviews the basic theoretical issues of sovereign bond default resolution, differentiates relevant concepts, analyzes the current major mechanisms of sovereign bond default resolution and discusses the unconventional mechanisms of sovereign bond default resolution which had been applied in the past but now have been rarely used or even abandoned for various reasons. This chapter provides subsequent chapters with theoretical basis, finds breakthrough point for researching the specific issues of the sovereign bond default resolution legal system and lays a solid foundation for next step research.

Chapter Three-The contractual approach of sovereign bond restructuring. At present, the most important way of sovereign bond default resolution is sovereign bond restructuring between sovereign debtor country and its creditors. And the contractual approach of sovereign bond restructuring has been adopted broadly to regulate sovereign bond restructuring at the present stage. This chapter first researches the contractual approach of sovereign bond restructuring generally, next thoroughly analyzes the most important contractual approach – collective action clauses, then studies Greece sovereign debt restructuring in 2012 and Ecudor sovereign bond restructuring in 2000, finally puts forward advices on the

contractual approach of sovereign bond restructuring from a legal perspective.

Chapter Four-The statutory approach of sovereign bond restructuring. Besides the contractual approach which has been applied in practice, the statutory approach of sovereign bond restructuring, in theory, is also an alternative way of adjust and regulate sovereign bond restructuring. Although the statutory approach has not been put into practice now, relevant theoretical studies on the statutory approach have been steadily intensified. Especially after the occurrence of European sovereign debt crisis, the problems in connection with the contractual approach have led to the discussions of the contractual approach and the statutory approach again. The international community began to review the disadvantages of the contractual approach and review the possibility of using the statutory approach to regulate sovereign bond restructuring. This chapter conducts research on the statutory approach of sovereign bond restructuring with an emphasis analysis on Sovereign Debt Restructuring Mechanism (SDRM), forecasts the latest development prospects of the statutory approach of sovereign bond restructuring and finally makes suggestions on the statutory approach of sovereign bond restructuring from a legal perspective.

Chapter Five-Sovereign bond default litigation system. Typically, creditors have two options after the occurrence of sovereign bond default: one option is to negotiate with sovereign debt country about sovereign bond restructuring which means that the debt amount need to be reduced, the other option is to initiate sovereign bond default litigation with competent court of law against the debtor country to repay the full amount of principal and interests. In theory, creditors may refuse to restructuring and file law suit to recover amounts owed by sovereign debtors pursuant to dispute resolution clause in the sovereign bond contract. However, unlike corporate entities, sovereign states are not subject to bankruptcy. And it is much more difficult and professional to bring legal actions against sovereign states. So over a long time, restructuring is the optimized choice for most of the creditors, and litigation is just an alternative way of

resolution. Form the 1980s, the sovereign bond default litigation cases have increased obviously which gradually has great impacts on sovereign bond restructuring. Taking sovereign bond default litigation as thesis, this chapter elaborates the feasibility of sovereign bond default litigation, enforceablity of court's judgement and development trend of sovereign bond default litigation, analyzes the well-known litigatioin case happened during the Argentina sovereign bond restructurings, then makes comprehensive comments on sovereign bond default litigation, finally, based on the preceding research, presents advices on how to make sovereign bond default litigation produce effect.

Chapter Six-International official bailout system of sovereign bond default. Sometimes the effective resolution of sovereign bond default needs the injection of new funds to assist the sovereign debtor country to fundamentally change its financial status, adjust economic structure and recover debt sustainability. However it's hard for the sovereign debtor country to raise funds in capital market after the occurrence of default. Even it's possible to obtain new funds, the sovereign debtor country has to bear extremely high financing costs. The feasible external financing resources at this moment are international official bailout from relevant international organization and other sovereign states. International Monetary Fund (IMF) is always taking the leading role in international official bailout area. So this chapter's research of international official bailout system is combined with the most representative international official bailout-IMF bailout regime. This chapter first conducts research on IMF bailout regime, then analyzes the primary legal issues with international official bailout, and finally proposes advices on the international official bailout of sovereign bond default from a legal perspective.

Chapter Seven-China's policies towards sovereign bond default. Based on the analysis of China's sovereign bond market and fundamental position towards sovereign bond default, this chapter puts forward proposals for resolving sovereign bond default from the perspective of China's national interests.

Chapter Eight-Conclusion. Based on the summary of the preceding chapters, the conclusion part puts forward the main conclusions of the research.

Keywords: Sovereign Bond, Default Resolution, Restructuring, Collective Action Clauses, Vulture Fund Litigations

目　录

1 导　论