
CHAPTER 7

Legislation

We have seen that nothing short of legislation will stop these investors from their outrageous practices.

Nick Dearden, Director of the Jubilee Debt Campaign⁶⁶

Whatever the hopes and whatever moral pressure is applied, there has been increasing recognition that without legislation to regulate vulture funds it will be difficult to stop their exploitative practices.

Jurisdictions such as those of the UK, USA and France have been very involved, since commercial creditors opt for the favourable law of contract of these countries in nearly all loan agreements. Whilst commercial creditors can easily afford to defend cases in these countries, sovereign debtors cannot. The negative outcome of a lawsuit has even more devastating consequences for a country than its immediate socio-economic effects, especially if the lawsuit is not dealt with properly from a legal perspective. It is a mistake to consider this as a purely socio-economic issue which can be dealt with on a voluntary basis or by passing moral judgements.

According to the law of contract, both parties are bound by their intentions and their intentions are reflected in the loan agreement. In such cases it is impossible to ask the court to interpret the obligations of the sovereign debtor in a manner contrary to the stipulations made in the agreement. The only exception that can be validly used to cancel the obligation of either party is if the nature of the contract is against public order. Even if it is clear that aggressive litigation by a vulture fund is disrupting the greater global good, the court still has to interpret according to the terms of the loan agreement. In the recent vulture fund case of Hamsah Investments and Wall Capital Ltd brought against Liberia in the UK courts, the judge, Mr Justice Burton, said:⁶⁷

The only issue raised is plainly a sad one, that Liberia is a poor country, and cannot afford it.

This chapter outlines legislative action taken in a number of countries to regulate unfair practices in an attempt to help indebted countries. It looks at the jurisdictions of Belgium, the UK, the USA and France.

7.1 Belgian law (2008)

Belgium was the first country to make a strong legal commitment to help countries achieve sustainable debt. The Belgian Government has contracted many loans to Congo-Brazzaville and DR Congo. In 2007, ten lawsuits were lodged against DR Congo in Belgian courts. Some of these asked the courts to validate the judgments which vulture funds had obtained in their favour in other foreign courts. Enforcement of judgments is a crucial factor in vulture funds' success in lawsuits.

In January 2008, Belgium set a precedent by passing a legal resolution to 'safeguard Belgian funds disbursed towards development co-operation and debt relief from the actions taken by vulture funds'. The legislation came into operation in April 2008 after being voted on and published in accordance with Belgium's constitutional requirements. The law is very concise and provides that no monies granted by the Belgian authorities can be seized by or transferred to vulture funds or any other creditor. This legislation has automatically barred any vulture fund from pursuing any Belgian money or companies investing in the sovereign debtor country to obtain repayment. The members of Belgium's Federal Parliament approved the law quickly and unanimously. The Bill had a swift passage from the last day of January 2008, when it was introduced in the House of Representatives, and became law on 6 March 2008.⁶⁸ The Belgian Government is determined to deter vulture fund creditors, which could not challenge this unanimous decision. (See Annex 2 for the text of the Belgian law.)

The Legal Debt Clinic commends Belgium's action and the other steps it has taken to eradicate immoral lawsuits. It believes Belgium's stand should encourage other countries such as the UK and the USA to fight vulture fund lawsuits.

7.2 UK law (2010)

UK courts are a favourite place for vulture funds to bring lawsuits or seek recognition of foreign judgments made in their favour. There are many reasons for choosing UK courts. UK law is favourable to creditors and is often used in loan agreements as the applicable law.

The UK's commitment to debt relief has been stronger since it chaired the 2005 G8 meeting (see Chapter 8, International Initiatives, for more detail). The actions of

vulture funds creditors in siphoning off the resources of UK taxpayers by making huge profits from litigation caused the UK Government to act to resolve the situation. Ian Pearson MP, Economic Secretary to the Treasury, stated:

*These claims, including those brought in UK Courts, mean that poor countries are forced to pay back some of their outstanding debt in full and with the addition of interest. The nature of these cases means that a small minority of creditors can divert some of the benefits of debt relief provided by the majority. The government is determined that these actions do not prevent poor countries from using the resources freed up by debt relief for development and poverty reduction. And we firmly believe it is right to act to prevent this from happening at the expense of debt relief funded by the UK taxpayer.*⁶⁹

After much campaigning for reform of the legislation, Labour MP Sally Keeble introduced a Bill in May 2009 under the ten-minute rule. This rule allows a Member of Parliament to bring an important issue to the attention of the government, although the Bill may not make it into law. The government decided to launch a consultation paper on vulture funds in July 2009.⁷⁰

The Bill introduced by Sally Keeble was entitled 'Developing Country Debt (Restriction of Recovery) Bill'. It aimed to clip the wings of the vulture funds. After its first reading it received cross-party support and was backed by around 160 MPs.⁷¹ Its main provisions were:

- To outlaw profiteering by putting a cap on the amount that vulture funds can ask in repayment;
- To require more accountability for the secret activities of vulture funds through disclosure to be made to the UK courts before bringing a lawsuit;
- To create transparency, as vulture funds would have to disclose their investors and beneficiaries;
- To ban corrupt payments.

The consultation on the legislation closed in October 2009 and the government gave its response in February 2010.⁷² It decided to introduce the Debt Relief (Developing Countries) Bill. Its response to the consultation was presented by Ian Pearson MP, who stated:

We need to change the law to prevent creditors from taking this path. Commercial finance can help – not hinder – development in low-income countries. The Private Member's Bill seeks to prevent creditors from recovering an amount in excess of the debt relief expected. The Government, which consulted on legislation last year, will be supporting the Bill when it is debated on 26 February. Parliament has

*a chance to make sure that millions of the world's poorest people gain maximum benefit from the debt relief that we provide. Parliamentarians from across the political spectrum can bring this about by helping the Bill to become law.*⁷³

In February 2010, the Bill had its second reading in Parliament. It was passed into law at the last parliamentary session before the general election of May 2010. Known as the Debt Relief (Developing Countries) Act 2010,⁷⁴ the legislation will have many positive results. (See Annex 3 for the text of the Act.) According to its sponsoring MP, under its provisions Donegal International Ltd would have obtained only US\$3.3m in its case against Zambia, instead of the US\$15.5 million it received.⁷⁵ The first application of this favourable law will be in the Liberian case, where US\$20m was awarded to Hamsah Investments and Wall Capital Ltd in November 2009, which will have to be revised in the light of the new Act.

The UK legislation is of great benefit to the HIPC countries which are at present unable to use monies disbursed to them through debt relief for the purposes of economic development. Once the vulture fund creditors are stopped from profiteering, the countries will be able to use the freed-up resources in the sectors where they are most needed, such as health, education and infrastructure.

Though the passing of legislation in the UK has not been as smooth as in Belgium, it is nevertheless very welcome. It highlights the challenges involved in passing such legislation in developed countries. The effect of the UK law will probably compel the vulture funds to lodge their cases in other jurisdictions such as the USA or France. This is so that they can continue to make huge profits from such lawsuits. However, surprisingly, the UK law has an expiry date and is valid only for one year beginning in April 2010. The UK Treasury will then have the power to give the law permanent effect.

Poor countries and campaigners will now have to concentrate their efforts on the USA to ensure that a similar law is passed there; they must also wait and see what the UK Parliament will decide in a year's time.

7.3 US law (2008 and 2009)

In August 2008, a Bill was introduced into the US Congress under H.R. 6796. It was known as the 'Stop Very Unscrupulous Loan Transfers from Underprivileged Countries to Rich, Exploitative Funds Act'.⁷⁶ This Bill never made it into law, but was referred to two committees.

In June 2009, Representative Maxine Waters (Democrat, California) reintroduced the US Stop Vulture Funds Bill (H.R. 2932)⁷⁷ to outlaw profiteering by vulture funds. This draft law is similar to the UK Debt Relief (Developing Countries) Act.

The Stop Vulture Funds Bill aims to cap the amount of profit which a secondary creditor can reap through litigation based on defaulted sovereign debts. Before any such litigation can be pursued in the US courts, the Bill requires public disclosure of the names of any persons with an interest in the sovereign debt claim, how and where the claim was acquired and the purchase price. The Bill also requires vulture funds to certify that they have not given any bribe while acquiring or pursuing collection of the defaulted debt claim.

The Stop Vulture Funds Bill⁷⁸ prohibits:

1. Any US person from engaging in sovereign debt profiteering, or any person from engaging in such profiteering in the USA; and
2. Any US court from issuing a summons, subpoena, writ, judgment, attachment or execution in aid of a claim which would further sovereign debt profiteering. The legislation sets forth required court disclosures in actions involving the collection of sovereign debt.

The proposed legislation is gaining momentum and has been co-sponsored by many other representatives. The legislation now needs the support of the full House and to be moved for Senate review.

7.4 French law (2007)

In August 2007, Marc Le Fur presented a law before the French Assembly to fight the actions of vulture funds.

The proposed law, which has not yet been passed, is based on a principle similar to the champerty rules (explained in Chapter 2, Loan Agreements). The law has two purposes. First, it aims to stop vulture fund creditors using the French courts to validate judgments obtained before foreign courts. Second, it aims to allow vulture fund creditors to claim only the amount they spent on buying the debt, instead of the debt plus interest. The French Assembly has not yet legislated on this.

Conclusion

The legislative initiatives outlined in this chapter show that legislation is seen as essential to regulate the unfair practices of vulture funds, although it is not the only solution. If nothing is done by legislatures and if the matter is left to voluntary action by the vulture funds or to the courts, the efforts of all those countries which have been willing to work together to eradicate poverty and help countries attain the MDGs will be defeated. But there are many challenges in passing legislation. The

most recent case against Liberia lodged in London in November 2009, where the UK courts ordered Liberia to pay US\$20m to its vulture fund creditors, shows that free riding by vulture funds on debt relief has not as yet been stopped. Instead, debt relief mechanisms are making enforcement of the judgments more feasible, with the vulture funds calculating that the indebted country will eventually have to pay. It will be interesting to note the reaction of the vulture funds when the court revises the amount to be paid in accordance with the UK Debt Relief (Developing Countries) Act 2010.

The key messages of this chapter are:

- The challenges faced in passing legislation show that the applicable law clause in agreements (explained in Chapter 2, Loan Agreements) will be increasingly important in taking advantage of favourable jurisdictions.
- Once again, it is clear that the preferred solution available to sovereign debtors is negotiation of a safer loan agreement or settlement agreement when a new creditor takes over the rights of the original creditor.
- Without further solutions (outlined in Chapter 9, Ways Forward) and legislation to stop profiteering, vulture funds will continue to take action until all unsettled debts sold to them are paid in one way or another.

Further reading

UK Parliament, <http://www.parliament.uk/>

US House of Representatives, <http://www.house.gov/>

Debt Relief (Developing Countries) Act 2010, http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100022_en.pdf

Annex 3 of this Handbook, UK Debt Relief (Developing Countries) Act 2010