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**Cross Border Insolvency: International Jurisdiction, Extraterritorial
Effects, and the Tangled Web from a Bankruptcy Repealed.**

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Summary²

This presentation summarises some of the arguments made and judgements handed down in the course of a well-known international insolvency, involving voluntary bankruptcy proceedings instituted by the debtor in Greece, as forum of choice, in order to defeat ordinary (non-bankruptcy) proceedings in several other jurisdictions, and particularly in the UK, and pre-empt the effectiveness of creditor remedies obtained outside the Greek territory by subjecting a substantial part of the debtor's assets to the Greek bankruptcy estate and therefore to the control of the Greek receiver. Three categories of attendant problems may be identified: questions regarding the debtor's "bankruptcy competence" (eligibility to become subject to domestic bankruptcy); the international consequences of domestic bankruptcy; and the consequences from the retroactive revocation (on appeal) of the bankruptcy judgement.

Introduction

1. The debtor, a Liberian oil-trading company (as conduit for the debtor's internationally active group), operating refineries and storage facilities in the Gulf area, eventually became seriously over-indebted and unable to fulfil its obligations, both for the delivery of certain quantities of oil and oil products, and for the payment of its monetary obligations.

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² This draft discussion paper is based on the author's case notes and research. Reference to parties, locations and other facts is made in generic form, due to the fact that extensive related litigation is currently pending.

2. With a combined claim value of some 500 million US dollars, proceedings were opened in several jurisdictions, including the UK (intended by international creditors to be the main forum for the resolution of the dispute), France, Switzerland, the United Arab Emirates, and Greece. In a tactical effort to defeat such proceedings, the debtor actively sought its own subjection to voluntary insolvency proceedings in Athens, Greece, for the dual purpose of defeating foreign proceedings and pre-empting the effectiveness of any creditor remedies obtained abroad by subjecting its assets to the Greek bankruptcy estate, and therefore to the powers of the domestic receiver.
3. A complex of proceedings was eventually staged in Greece throughout the world around the fundamental interests and tactical choices of the parties involved: on one side, of international creditors (a number of the largest US oil trading companies and certain banks) electing for various reasons to pursue the debtor individually outside Greek territory, rather than partake as bankruptcy creditors in domestic proceedings; on the other side, of the debtor striving to fortify itself behind domestic bankruptcy and its *quasi*-universal consequences.
4. In the course of these proceedings most of the core issues of the law of international insolvency, as well as certain fundamental principles and doctrines of private international law, were brought before Greek courts of all instances, inviting the scrutiny of both well settled and substantially new points of law.
5. The bankruptcy was eventually repealed after operating for nearly two years, a first time ever occurrence in the history of Greek insolvency law and practice, allowing international creditors to substantially transfer the dispute to the UK. Considerable outgrowths of the Greek bankruptcy, concerning both the validity of the receiver's actions throughout its course and the fate of former bankruptcy assets, are currently pending. Importantly, in November 2002 the Supreme Court in Plenary Session will decide a point of law upon referral by its First Chambers (discussed below, §§13 -20), which will dramatically affect the fate of countless foreign commercial and industrial corporations active in Greece.
6. Viewed as a whole, the case may or may not rank among the ten most important bankruptcy cases of all time by international legal or economic standards. It does not inspire the awe, nor contain the systemic threat, of the collapse of a major international financial institution, nor excites popular emotion by the purportedly rich political back scene preceding the collapse of an energy giant. Yet it is probably noteworthy for the complexity of the questions of law, to which it has given rise, and definitely so from the microscopic viewpoint of Greek law and jurisdiction.

I. Declaration and international effects of a domestic insolvency

7. The first, and in the long run perhaps the most critical, point of private international law raised in connection with the debtor's Greek bankruptcy is that of the law governing the incorporation, legal competence and eligibility for subjection to bankruptcy of a legal entity (and specifically a commercial or industrial corporation). The significance of the question is made all the more evident if one considers the importance of the attendant issue of the conditions, under which a foreign corporation may be declared insolvent in Greece (and generally in a foreign state, according to its rules of private international law).
8. It is indeed not unobjectionable that the debtor, an internationally active *Liberian* corporation with substantial fixed assets in *third countries*, in off-shore facilities or in international waters, concluding contracts *abroad* or *at a distance*, but largely run as a whole from a minor establishment in Greece, should be treated as a Greek company and governed as to its lawful incorporation and legal competence by the laws of this country.
9. On these facts, a central point in the case at hand is occupied by the latent conflict between two traditionally and diametrically opposed doctrines, well documented in international theory and practice, namely of the (Continental) doctrine of the **actual** seat or establishment (according to which the lawful incorporation and legal competence of a legal entity is governed by the laws of the state, in which it is *actually seated*) and the (Anglo-Saxon) doctrine of the **registered** or constitutional seat (according to which these issues are governed by the laws of the state of incorporation).
10. Current Greek law does not contain an express and direct choice between the two approaches. However, as the Greek Supreme Court has extensively explained in an uninterrupted and unwavering sequence of judgements over the past 50 years, Greek law implicitly adopts the doctrine of *actual seat*, subjecting a corporate entity to the laws of the state where the centre of its administration and interests is actually situated.
11. An exception to the dogma (which, according to some, also serves to confirm the rule) applies where specifically provided for by statute (as in the case of *maritime* companies, specifically excepted and recognised if duly incorporated according to the laws of their registered establishment) or, importantly, under bilateral conventions, such as the treaty between the United States and Greece of August 3, 1951³, or the treaty between the latter and Great Britain of February 27, 1936⁴, under which the lawful incorporation and legal competence of companies is governed by the laws of the state of incorporation (and therefore incorporation in accordance with

³ Treaty of friendship, commerce and navigation, signed in Athens Aug. 3, 1951, Entered into force Oct. 13, 1954; 5 UST 1829; TIAS 3057; 224 UNTS 279.

⁴ Convention between the United Kingdom and Greece regarding Legal Proceedings in Civil and Commercial Matters, London, 27 February 1936.

the laws of either signatory is effectively recognised in the territory of the other).

12. Accordingly, unless an exception is applicable, a foreign-incorporated entity shall be deemed to have its legal seat in Greece if it is actually seated in the country. An immediate consequence is that such an entity is under an obligation to fulfil domestic statutory requirements of form and substance as regards its incorporation, failing which it is considered *null and void* as a corporate entity, and by legal fiction treated as a (constructive) *unlimited liability de facto partnership* between its principals and purported board members (a variant of setting aside the corporate veil). Members of the constructive partnership are thus made jointly and severally liable for the partnership's obligations, and become bankrupt simultaneously with the partnership.
13. On the aforementioned facts the majority of the Supreme Court⁵ upheld the judgement of the Court of Appeal in the case at hand⁶, reaffirming its long held position that

"[...] a registered seat is not a true, but a fictional one, subject at pleasure to choice and change. However, the recognition of freedom in the choice of the governing law may be a reasonable approach with respect to contractual obligations, but is a clearly inappropriate one for the determination of such questions as the lawful incorporation, internal functioning (winding up and liquidation) and legal competence of a legal entity, which is a self-existent subject of rights and obligations; whose activity affects third parties and market dealings at large, and therefore could not be treated as the private affair of its equity holders. The opposite approach would run contrary to legal certainty and to the principle of numerus clausus of legal entities [under Greek law], and would permit private agreements to circumscribe mandatory rules of public order. It is for such reasons that the doctrine of the actual seat is invariably dominant in our jurisprudence and legal theory, but also in those Continental legal systems, which are structurally similar to our own".

14. The majority of the Court went one step further, observing that

"[...] the doctrine is today further founded on the rules of article 48 (formerly 58) of the Treaty of the European Union, which, although mandating the recognition (in relation to the freedom of establishment) of the registered seat, it does so only in respect of 'companies formed in accordance with the laws of a Member

⁵ Supreme Court Judgement 335/2001 (First Chambers), reported in most Greek commercial law journals, see *Business & Company Law* 7 (2001), 608 (Gr).

⁶ Athens CA, Judgement 2735/2000, reported in *Business & Company Law* 6 (2000), 871 (Gr).

State and having their registered office, central administration or principal place of business within the Community'. This provision operates within the federal perspective of the Community, which includes the United Kingdom, where the Anglo-Saxon doctrine in favour of the registered seat is generally accepted. Express reference is, therefore, made to the concept of actual establishment, which would otherwise not be evident".

15. The concepts of “*establishment*” and “*centre of main interests*” under the new Council Regulation on Insolvency Proceedings⁷, which came into force eleven days ago, would lend additional support to the above position traditionally adopted in Greek Jurisprudence. In the first place, the definition of “*establishment*” as a place where a debtor carries out a non-transitory activity (Article 2), now provides the statutory foundation for the requirement of a physical presence and activity, ensuring a sufficiently close link between the debtor’s business and the laws applicable to its incorporation and legal competence. In the second place, the Regulation institutes a *presumption of coincidence* of the registered establishment with the actual one (Article 3: “*in the absence of proof to the contrary*”), acknowledging the functionality of the Anglo-Saxon approach (and perhaps introducing an element of procedural freedom in the choice of the *forum concursus* under the Regulation, absent objection or contrary proof by the parties involved), but directly rejecting the equivalence of the two approaches and the mechanical recognition of the registered seat.
16. In an attempt to elaborate on tractable criteria, which could support a finding of an “*actual seat*” or centre of main interests different from the registered one, the court observed that

“[the company] never maintained an establishment at the place of its registered seat. By contrast, from the very beginning of its business activity it maintained offices in [Athens], where, unlike the place of its registered seat, it also had numerous employees in permanent employment. Its board of directors has always consisted of Greek nationals permanently resident in Greece, where it convened to make all fundamental decisions for the company’s operations, decide policy, concentrate the economic results from the company’s business activity, and conclude agreements. Market participants addressed the company in its above premises, unquestionably convinced that the company’s centre of affairs was located in Greece. [...] additionally, [UK counsel] for the company’s creditors petitioned the English court for permission to serve a writ in Greece, further evidencing that this is where the company was to be found by anyone so disposed. Neither is the position affected by the fact that certain of the company’s contracts were either negotiated or concluded abroad, since this was in execution of decisions made in the company’s centre of management in Greece”.

⁷ EC/1346/2000, OJ L.160, p. 1, 30.6.2000.

17. From these premises results an array of fundamental consequences for insolvency law, the full exposition of which is beyond the scope of this paper. Critical for the case at hand was that incorporation in a foreign (and particularly offshore) jurisdiction does not protect from domestic bankruptcy entities with a principal place of business in Greece⁸. It further exposes their principals and board members to the risks of joint and several liability and personal bankruptcy.
18. Foreign corporations active in Greece may, furthermore, find the law of their incorporation (e.g. of an offshore jurisdiction for a group's holding company) set aside in favour of the laws of the place of their main establishment or centre of business interest.
19. On the other side, the doctrine has long been recognised to raise formidable questions in respect of the recognition of foreign bankruptcies (opened in the forum of the registered or actual establishment) or the concurrence of a domestic with a foreign bankruptcy or of multiple foreign bankruptcies. It, furthermore, leaves open the question whether foreign companies with a principal place of business in Greece may be validly re-incorporated in accordance with local laws.
20. However, the latent tension between the doctrines of actual and of registered seat manifested itself in the narrow majority by which the Supreme Court decided (1 vote), by reason of which the issue will be judged again by the same court in Plenary Session (consisting of between 17 to 42 Judges) in November 2002.

II. The universal effects of bankruptcy – International jurisdiction of the bankruptcy court and of the receiver.

21. The debtor's assets prior to the opening of the Greek bankruptcy proceedings spanned several jurisdictions (a substantial part located in international waters) both at the time of opening and at a later stage, when the bankruptcy court authorised and the receiver effected their disposal by summary proceedings without the involvement of the authorities of the state, in which the disposal was effected.
22. By rare coincidence in the history of Greek insolvency law, the facts of the case made it necessary to address both of the two fundamental questions (more accurately, "problem areas") raised by an international bankruptcy, namely whether specific assets outside the territory belong to the bankruptcy estate; and whether, under domestic law, the bankruptcy court

⁸ In this context, a strong nuance of policy considerations has traditionally attended relevant judgements as an *obiter dictum*, namely that the doctrine effectively protects the country from becoming a safe haven (and an entry point for the European market) for the precarious or obscure dealings of shelf and sham corporations, which might not qualify for incorporation or withstand supervision under the laws of any civilised state.

and/or receiver have jurisdiction to act outside the forum (without the aid of authorities and/or proceedings of the place, where the consequences of their actions are intended to materialise).

23. The position adopted by Greek law is largely affirmative on the first question, but negative on the second, not without considerable controversy and qualification on either of the two questions.
24. It appears to be beyond current debate that Greek law adopts the approach of *universality* (as opposed to the principle of *territoriality* adopted in other legal systems) of the consequences of bankruptcy, aspiring to subject the entirety of the debtor's global assets to the bankruptcy estate, so that the equal treatment of all creditors and claims (regardless of nationality, location or origin), may be satisfied proportionately from the proceeds of the entirety of the debtor's assets.
25. It is worth noting here that the principle of universality of a Greek bankruptcy is invested with EU-wide effects if the latter constitutes "*primary proceedings*" within the meaning of the new Insolvency Regulation, which refers to the *lex fori concursus* the substantive issue of the assets belonging to the bankruptcy estate⁹.
26. The manner in which universality will effectively materialise, however, has in this case been the object of extensive and original controversy in respect of considerable bankruptcy assets. In two separate judgements¹⁰ the Court of Appeal has held that a receiver in a Greek bankruptcy is largely entitled to the mandatory disposal (that is: to a mandatory act of enforcement) to a third purchaser of assets located in foreign (and sovereign) territory. The receiver's power, according to the court's reasoning, is founded in

"[...] the fact that no rule of Greek law prohibits a receiver from so doing, while, conversely, a receiver is by law responsible for the administration and preservation of the bankruptcy assets [...] irrespective of their geographic location"

27. By upholding on these grounds the disposal in the forum by the receiver of assets located in foreign territory the court may have in fact misinterpreted the law. It was fortunate that, in this case, the assets were delivered voluntarily to their purchasers, or the court might have been pressed to develop the logical consequences of its ruling to the point of accepting the receiver's power to perform physical acts of enforcement (e.g. removal of the assets from the debtor's possession) in foreign territory – which would make personal injury or incarceration an occupational hazard for conscientious receivers. In any event, the recognition of powers of

⁹ See Article 4§2(b) and Annex B of the Regulation – *cf.* 12th Recital. By contrast, developing the consequences of *territoriality* (applicable to secondary proceedings under Article 27 in *f.*; *cf.* 12th Recital) will perhaps require considerable effort.

¹⁰ Athens CA Judgements 8403/2001 and 8404/2001 (not reported).

enforcement (literal or effective) outside the forum is clearly an affront to the concept of international comity, an idea, which even the courts of states with a traditionally “imperial” conception of international jurisdiction are nowadays growing accustomed to.

28. More doctrinally coherent (and no less practicable) would have been a judgement in line with the more conventional jurisprudence, that the *lex rei sitae* should govern the substantive and procedural means, by which a receiver in a Greek bankruptcy will acquire control of bankruptcy assets located on foreign soil; that effective universality, therefore, is contingent on the recognition of domestic proceedings in a specific foreign jurisdiction, in which enforcement will follow the local (at least procedural) rules and be conducted by the competent authorities. This more conservative approach need not prejudice the interests of the bankruptcy creditors: if domestic proceedings are not recognised, the position of creditors who have partaken in enforcement over the debtor’s assets abroad is affected accordingly: they may forfeit their entitlement to partake in domestic bankruptcy proceedings, or be deemed indebted to the union of the bankruptcy creditors for amounts they have collected in excess of the bankruptcy dividend that they would be entitled to in domestic proceedings.
29. Under certain circumstances, nonetheless, a receiver may manage to obtain possession or dispose of assets abroad without recourse to local authorities or proceedings (for instance by obtaining the consent of a carrier to deliver according to the receivers instructions). The question then arises as to the validity of such disposals, which on their face are clearly illegal and therefore invalid from the view point of Greek law (which, if applicable to the passing of title according to the conflict of laws rules applicable for a purchaser from the receiver of assets under a Greek bankruptcy, would leave such purchaser without good title to the assets acquired).
30. To complicate things further, the disposal of the debtor’s assets subject to the Greek bankruptcy estate had been previously forbidden by an English Injunction, whose recognition was sought by international creditors in the course of the Greek bankruptcy. Specifically, it was argued that the (partial) force of *res judicata* created by the English Injunction within Greek territory pursuant to Articles 25 and 26 of the Brussels (Judgements) Convention¹¹ prevented the bankruptcy court from permitting and the receiver from effecting the disposal of assets subject to the Injunction. The Court of Appeal rejected the argument by a somewhat precarious reasoning, leading up to the conclusion that

“the exercise, discovery, verification and settlement of the [claims to which the Injunction referred] are subject after [declaration of the Greek bankruptcy] to the bankruptcy proceedings opened in Greece. Accordingly, the recognition in

¹¹ OJ L299/30.12.1972, p. 32.

the forum of the consequences of the Order pursuant to Articles 25 and 26 of the Convention is not possible”

To reach the above conclusion the court made reference to Article 1§2 (2) of the Convention, exempting from recognition thereunder

“bankruptcy, proceedings relating to the winding-up of solvent companies and other legal persons, judicial arrangements, compositions and analogous proceedings”

including not only ordinary judgements, but also injunctive measures ordered in relation to such proceedings, because

“1st) the application of the Convention to injunctive measures does not depend on their nature as such, but on the nature of the substantive law rights, which they are intended to secure, and 2nd) because it is not permissible to apply Article 24 of the Convention in order to bring within its ambit injunctive measures judgements related to a subject matter, which has directly been exempted from the scope of the Convention”

The Court of Appeal documented its ruling well – but by a logical leap reached what on its face appears as a *non sequitur*: it is a *bankruptcy* in another Member State, and therefore related injunctive measures, that are not recognised under the Convention in the forum¹²; but a bankruptcy in the forum does not prevent the recognition of a judgement originating in another Member State and otherwise falling within the scope of the Convention. This (and other) of the controversial points of these judgements have yet to be contested by the parties involved before the Supreme Court.

III. Revocation of the bankruptcy judgement

31. This bankruptcy was also the first in the history of Greek insolvency law to be repealed after operating for a period of over two years, during which the receiver (where necessary by leave of the bankruptcy court) managed the bankruptcy estate concluding and terminating contracts for the bankrupt entity and effecting payments from the bankruptcy estate.
32. The particularity here lies in the fact that under the law the revocation of a bankruptcy judgement operates *retroactively (ex tunc)* and the reinstatement of the status quo ante by unwinding the legal consequences of the bankruptcy is effectively mandated. This evidently raises the

¹² This is conventional wisdom in both Greek and European Court jurisprudence. See for instance *Gourdain v. Nadler*, Case 133/78 – ECR 1979, 733.

question of the validity and binding force of acts performed and contracts concluded in the meantime. Even if some form of validity is somehow accepted, a question of equal practical significance, namely who should be bound by such acts and contracts, calls for separate treatment.

33. On adjudication of bankruptcy, for instance, a receiver will often terminate employment contracts, make severance payments, terminate operations and close down the debtor's establishment(s). What may appear as sensible at that time, however, may be the source of both intractable complication and financial loss to the debtor or its estate if following annulment of the bankruptcy a couple of years later, former employees or lessors are allowed to enter claims for wages purportedly due retrospectively (since, by virtue of the retroactive annulment of the bankruptcy, termination by the receiver of their employment is deemed retroactively (*ex tunc*) without consequence).
34. This precise question was considered by a court of first instance in this case, and was answered in favour of the employees, whose termination by the receiver was judged without consequences, and who were awarded wages and interest for the entire span of time. Equitable considerations may have tilted the balance in favour of the employees, and the issue was not adjudicated in a higher instance due to its subsequent indifference for the relationship between the litigants; the judgement has nonetheless made both counsel and market participants nervous for evident reasons.
35. Firstly, purchasers of assets from the bankruptcy estate are apparently left without good title to those assets, which the debtor may in principle reclaim with an action *in rem* (for physical (re)delivery of possession); on the opposite side, the purchaser's action *ad personam* for the price paid is clearly less certain may well result in an award for only part of the value originally paid (as in the case of depreciation of the asset reclaimed).
36. Secondly, post-commencement lenders may face the debtor's effort to avoid obligations under loan agreements concluded by the receiver, and the resourcefulness of debtors in constructing defences (such as frustration) to lenders' actions has not yet been tested before the higher courts. It is not inconceivable that courts might, for instance, void loans, which *ex post* appear too expensive (even if their risk weighted value could have been justified while the bankruptcy subsisted). The position is no different (although the practical problems are less pronounced) regarding any other category of post-commencement creditors.
37. The ensuing and unacceptable uncertainty (together with the structural attributes of domestic insolvency law, which actually discourage *early access* to insolvency proceedings) is the cause of the scarcity of post-petition funding, in itself an impediment to the efficient (and cost-efficient) conduct of insolvency proceedings.
38. Therefore, the legal framework regulating the consequences from the revocation of a bankruptcy judgement is, in the author's opinion, shown to

be incomplete, while its literal application must necessarily create results contrary to both equity and reason. The infrequency of the factual situations, which may give rise to these problems, however, cannot prevent the quest for a satisfactory answer in the law.

39. Such an answer has the first instance court (hearing an ancillary matter in this case) endeavoured to find in a statutory provision, which, although not specific to bankruptcy, operates to preserve the effective results, although not directly the validity, of contracts concluded and payments made in good faith in reliance on a judgement subsequently revoked. Although the application of these provisions to the above facts would raise as many questions as it would solve, in the author's opinion, it would at least do so in the direction of equity and reason.
40. It is noteworthy that the new Insolvency Regulation contains no direct rules regarding the fate of acts performed in the course of insolvency proceedings in the event that the latter are reversed (for instance, by a superior court for reasons of either law or fact). As the rules of the *lex fori concursus* are rendered applicable to a wide variety of issues¹³, foreign creditors may find their rights governed by different (although not necessarily less favourable) laws than initially contemplated¹⁴. In conjunction with the automatic EU-wide recognition (mainly) of primary proceedings, this contains the seeds of situations potentially complicated beyond imagination, on which courts and counsel would be wise to reflect.

Concluding Remarks

In all, a significant and highly complex case, which has challenged the resilience of fundamental doctrines and principles of insolvency and private international (and procedural¹⁵) law to the latent tension between the conflicting interests of parties to such procedures, but also between critical policy concerns spanning the domains of contract, corporate and employment law. By

¹³ See the conflict of laws rules of Art. 4§2.

¹⁴ It should be noted that, in the author's opinion, the conflict of laws rules of Article 4§2 do not sufficiently address the distinction between the legal position or exercise of rights *within specific proceedings* and the position or existence of such rights outside them. For instance, the rule of Article 4§2(k), stipulating that the *lex fori concursus* shall govern "*creditors' rights after the closure of insolvency proceedings*", may conceivably (for instance accepting that the rule does not preclude *renvoi*, whence EC law may be applicable as the law of the state of opening of proceedings) conflict not only with Member State rules of law (where the superior force of Community law may provide a way out), but also with rules of equal or superior stature (such as the "law of choice" rule established under the Rome Convention on the Law Applicable to Contractual Obligations). The effective consequences of such conflicts have yet to be worked out in theory and jurisprudence.

¹⁵ Reference to procedural law issues of domestic law is omitted, since it might be of interest only for practitioners of domestic law.

all foresight, it will continue to do so at least until November 2002, when the Supreme Court in Plenary Session will be called to strike one of the final notes, no less important for the case at hand than for its wider consequences regarding corporate accountability before the Greek courts.

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