THE CASE FOR MORE ARBITRATION WHEN SOVEREIGN DEBT IS TO BE RESTRUCTURED: GREECE AS AN EXAMPLE

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This article seeks to pay tribute to Hans Smit, a distinguished and highly recognized international lawyer and personal friend of the author.[1] Hans Smit often mentioned that he was of Dutch origin and joked that he had never left the Netherlands since he still lived on Amsterdam Avenue. This witty remark is also a poignant one. Dutch lawyers have for centuries rendered most significant contributions to the development of international law all over the globe.[2] Hans Smit, though living in New York City for most of his professional life, belongs to this line of Dutch-born, most eminent international lawyers.

I. INTRODUCTION

International arbitration – partly in the form of so-called Mixed Claims Commissions – was greatly *en vogue* in past centuries when the international debts of sovereigns had to be restructured.[3] That has changed.[4] Modern international restructuring regimes normally disregard international arbitration,

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[1] The late Hans Smit and the author of this article cooperated in various endeavors over the last thirty years. Our cooperation started in the mid-1980s, when Hans, as head of the Parker School of Foreign and Comparative Law, organized six-week courses for post-graduates who were already working as attorneys and were seeking additional training in international business law. Hans invited the author to lecture on various topics within the framework of those courses. When Hans started *The American Review of International Arbitration,* our cooperation extended to that field, which was just in the process of growing at unexpected rates in almost all countries.

[2] The contributions of these lawyers were mentioned in summary by Otto Sandrock, *Pieter Sanders 100 Jahre*, 111 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 259-72 (2012). They started with the unsurpassed Hugo Grotius (1583-1645), continued with Paul Voet (1619-1667), Ulrich Huber (1636-1694), Johannes Voet (1647-1714), Cornelis Bynkershoek (1673-1743), J. H. W. Verzijl (1888-1987), the Peace Nobel Prize winner T. M. C. Asser (1838-1913) and Pieter Sanders, who celebrated his 100th birthday on September 21, 2012 but, sadly enough, passed away six days later. *See also* the English translation of Otto Sandrock's aforementioned article on the website of the ICCA (International Council for Commercial Arbitration) *at* http://www.arbitration-icca.org/index.htlm;jessionid=A9A805BFFAFC2398ADB3597758E36B5.

[3] *See* MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 157 (2011) with further references.

[4] *See id*. at 167 with further references.

and modern sovereign debt instruments almost invariably submit to the jurisdiction of national courts in important financial centers. Today's sovereign bonds therefore rarely contain arbitration clauses.[5] This bleak state of affairs has now been criticized on the ground that the persistent absence of arbitration clauses from debt instruments does not result from any inherent unsuitability of arbitration as a mechanism for resolving sovereign debt disputes but "is likely attributable to the lock-in effects of standardized contract terms."[6] Indeed, it is probably this deeply entrenched perception that explains why, in the present worldwide financial crisis, international arbitration is hardly used as a means of dispute resolution when sovereign international debts are to be restructured.

Greece presents a striking example of the point. That country has been forced over the last two years or so to weather a grave debt crisis. Here again, the deep-rooted mistrust of arbitration, including mistrust within the international banking community, has permeated all processes involved in restructuring. At least as of today (September 2012), international arbitration has not been considered as a mode of dispute resolution in restructuring Greece's sovereign debt. This is unfortunate indeed. International arbitration offers remarkable advantages and should thus be the preferred method for resolving these disputes. This holds true notwithstanding that its appropriateness has once again come into question, although never persuasively.[7]

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[5] *Id*. at 157. *See id.*, *Opening Pandora's Box: Sovereign Bonds in International Arbitration,* 101 AM. J. INT'L LAW 711 (2007). That phenomenon has been explored from an historical perspective by W. Mark C. Weidemaier, *Contracting for State Intervention: The Origins of Sovereign Debt Arbitration,* 73(4) LAW & CONTEMP. PROBLEMS 335 (2010). *See also id.*, *Disputing Boilerplate,* 82 TEMPLE L. REV. 1 (2009) where the author presents valuable statistical material on the use of forum selection clauses on the one hand, and arbitration clauses on the other, in state bond contracts.

[6] Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 377 (2006). To that effect, a debate has been conducted on the European continent, particularly in Germany, for about two decades. *See* Otto Sandrock, *Is International Arbitration Inept to Solve Disputes Arising out of International Loan Disputes?*, *in* ARBITRATION IN BANKING AND FINANCIAL MATTERS, ASA SPECIAL SERIES NO. 20 at 163 (ASA Swiss Arbitration Association, Gabrielle Kaufmann-Kohler & Viviane Frossard eds., 2003); *id.*, *Is International Arbitration Inept to Solve Disputes Arising out of International Loan Disputes?,* 11(3) J. INT'L ARB. 33 (1994); *id.*, *Internationale Kredite und die Internationale Schiedsgerichtsbarkeit, Part I*, 48 WERTPAPIERMITTEILUNGEN PART IV, ZEITSCHRIFT FUER WIRTSCHAFTS-UND BANKRECHT 405 (1994); *Part II*: WERTPAPIERMITTEILUNGEN PART IV, ZEITSCHRIFT FUER WIRTSCHAFTS-UND BANKRECHT 445. In October 2008, the German Institution for Arbitration devoted a one-day conference to a study of that issue; *see* the (unpublished) DIS-Materialien XIV (2008) on Schiedsgerichtabsrkeit in Finanz-und Kapitalmarkt-transaktionen; *see,* in particular, Klaus Peter Berger, Schiedsgerichtsbarkeit im modernen Finanzmarktgeschäft – ein Überblick, at p. 1 *et seq.*

[7] *See* Weidemaier, *Disputing Boilerplate*, *supra* note 5. Weidemaier first refers to the fear that arbitral tribunals would be less rigorous in enforcing loan obligations, thus reducing the deterrent effect of enforcement proceedings. This argument has been raised

Few of Greece's creditors (including bondholders) will have access to arbitral fora. While certain creditors might potentially be able to sue the Greek state in arbitration,[8] for many others the doors to arbitration are closed. As a rule, then, the holders of Greek state bonds must bring their claims before state courts.[9] This often prevents them from enjoying the substantial advantages international arbitration offers. These advantages manifest themselves as a matter of both procedural and substantive law.

A. *Procedural Advantages Offered by International Arbitration*

First, on the procedural side, international creditors suing Greece in the national courts of Greece or those of another country have little hope of securing judgments in their favor. As explained below, national courts necessarily feel themselves bound to apply national procedural rules, which will hardly take account of the interests of Greece's international creditors.[10] Moreover, even if an international creditor were to secure a favorable judgment, it would have significant difficulty enforcing that judgment either in Greece or elsewhere. There is no general worldwide international convention for the recognition or enforcement of the judgments of foreign national courts. Only a few bilateral or regional conventions are of potential help when a judgment creditor seeks to execute a foreign judgment in a domestic forum.[11] Although EU Council Regulation No. 44/2001 may permit a creditor to enforce a judgment from an EU court within the EU,[12] the Regulation normally has no effect outside the EU.[13]

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often and refuted just as often (*see* the authors *supra* note 6). Weidemaier also argues it would be unlikely that the incremental international pressure associated with unpaid arbitration awards would prompt voluntary payment. That argument is not persuasive since, in modern sovereign debt crises, states normally do not care about incremental international pressure. They are insolvent anyway, and their insolvency is known everywhere. Incremental international pressure therefore has little meaning. Finally, Weidemaier alleges bond contracts that provide for arbitration by including broad waivers of sovereign immunity would capture some of arbitrations' potential benefits without incurring any of the associated costs and uncertainty. This argument overlooks the fact that, in general, broad waivers of sovereign immunity need not be included in arbitration clauses since these clauses already imply waivers of immunity – a waiver that ordinarily suffices to enforce awards outside their states of origin.

[8] *See infra* Sec. IV.C and D.

[9] *See infra* Sec. III.

[10] *See infra* Sec. III. E.

[11] There is, *e.g.*, a bilateral convention of that kind between Germany and Switzerland ("Abkommen zwischen der Schweizerischen Eidgenossenschaft und dem Deutschen Reich über die gegenseitige Anerkennung und Vollstreckung von gerichtlichen Entscheidungen und Schiedssprüchen" of Nov. 2, 1929).

[12] Commission Regulation No. 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) 1. That Regulation greatly facilitates the mutual recognition and enforcement of judgments as between member states of the EU.

An arbitral award, in stark contrast to a court judgment, has a much better chance of being recognized and enforced abroad. For example, and as anyone involved in international business law knows, an arbitral award rendered by a tribunal under the auspices of the ICSID can be enforced with considerable certitude and at a relatively low cost by virtue of Article 53 *et seq.* of the ICSID Convention, which entered into force on October 14, 1966. The same is true for awards handed down by other arbitral tribunals, most of which can be enforced pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958.[14] The Convention, ratified by more than 140 nations,[15] ensures that a party prevailing in arbitral proceedings can reasonably expect to reap the fruits of its victory in the event it must seek to enforce its award abroad.

B. *Advantages With Respect to Substantive Rules of Law as Applied by International Arbitral Tribunals*

Second, regarding substantive law, preventing private holders of Greek state bonds from pressing their claims in arbitration serves to deprive them of the protection of significant rules of substantive international law. The interests of Greece's private bondholders have been grossly harmed in the process of restructuring Greece's public debt. The sovereign acts that have caused these losses constitute or, at least come close to constituting, expropriations. BITs and other international conventions grant effective protection against such expropriations, irrespective of whether they would be direct, indirect or creeping.[16] These sanctions should be given their full effect.

National courts, by contrast, would most probably apply their domestic laws, which normally do not afford appropriate protection for creditors who have suffered significant losses through the actions of sovereign debtors.[17] National

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[13] *See*, *e.g.*, the so-called Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of September 16, 1988, EEC No. 592/1988, 1998 O.J. (L 319) 9, which facilitates the mutual enforcement of judgments rendered by EU courts and by the courts of the presently four European Free Trade Agreement (EFTA) states (Iceland, Liechtenstein, Norway and Switzerland).

[14] 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997.

[15] As of July 23, 2012, a total of 147 states had ratified the Convention. *See* the Status of the Convention as displayed by UNCITRAL, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[16] There also exists a standard of fair and equitable treatment in almost all international conventions of that sort. This standard is not discussed in this article.

[17] This has been substantiated in great detail by Otto Sandrock, *Ersatzansprueche geschaedigter deutscher Inhaber von griechischen Staatsanleihen*, 58 RECHT DER INTERNATIONALEN WIRTSCHAFT 429, 440-43 (2012). The problem has also been dealt with in a very comprehensive and detailed fashion by Alexander Szodruch, *State Insolvency – Consequences and Obligations Under Investment Treaties, in* THE INTERNATIONAL CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES 141, 147

restructuring laws normally serve their sovereign debtors who – in financial plight – are intent on maximizing their position vis-à-vis their international creditors.[18] The courts of other, non-debtor states are likewise often inclined to have sympathies for other states in financial distress, perhaps on the basis of a feeling of international comity. This runs counter to the interests of international creditors. Their interests must not be undervalued in international restructuring processes.

C. *Dire Setbacks for Private Holders of Greek State Bonds*

Both the procedural advantages of international arbitration and the advantages occasioned by applying substantive rules of international law are evident in the financial crisis Greece has endured since 2010. Soon after the crisis began, the euro states, represented by the EU,[19] the International Monetary Fund ("IMF") and the European Central Bank ("ECB"), prepared two rescue packages for Greece.[20] Greece responded with its Invitation Memorandum of February 24, 2012.[21] None of these documents provides for the jurisdiction of international arbitral tribunals or for the application of international rules of substantive law. These deficiencies would remain should Greece leave the eurozone ("Grexit"), irrespective of whether such "Grexit" were occasioned by an express declaration by Greece to terminate its "Invitation Offer" of February 24, 2012; by its *de facto* insolvency; or, finally, by "Grexit" regulated by statutory rules of the EC.[22] Again, there is no international arbitration regime charged with resolving disputes arising from such "Grexit," and no substantive rules of international law have expressly been called upon to apply to the problems then to be solved.

These deficiencies represent a serious setback for private holders of Greek state bonds. This article seeks to substantiate this statement in more detail.

(Rainer Hofmann & Christian Tams eds., 2007). Finally, see Christoph Thole, *Klagen geschädigter Privatanleger gegen Griechenland vor deutschen Gerichten?,* 66 WERTPAPIER-MITTEILUNGEN, ZEITSCHRIFT FUER WIRTSCHAFTS-UND BANKRECHT 1793 (2012).

[18] For more detail, *see infra* Sec. III. B and D as well as Sec. IV. E.

[19] The states of the eurozone were represented by the European Commission as evidenced by the Memorandum of Understanding between the European Commission Acting on behalf of the euro area Member States and the Hellenic Republic, published in the *Drucksache des Deutschen Bundestages* 17/8731 (Official Materials of the Federal German House of Representatives) of Feb. 24, 2012 at 15 *et seq*.

[20] For further detail, *see* Sandrock, *supra* note 17, at 429.

[21] *See infra* Sec. II. B.

[22] *See infra* Sec. V.

II. THE TWO DEBT RESCUE PACKAGES[23] AND THE GREEK INVITATION MEMORANDUM OF FEBRUARY 24, 2012

A. *The Two Rescue Packages*

In mid-2010, the EU – acting on behalf of those of its member states which belong to the eurozone – together with the IMF and the ECB, passed their first rescue package providing for financial aid to Greece in an aggregate amount of € 110 billion. By virtue of that package, the European Financial Stability Facility ("EFSF") was created in the form of a special purpose vehicle that was primarily to address the Greek sovereign debt crisis. It is intended that the EFSF will end in 2013.[24] In February 2012, a second rescue package was prepared for Greece in the amount of € 165 billion. That second rescue program for Greece was established in the framework of the European Financial Stability Mechanism ("ESM" or "EFSM"), the basis for which had already been created by a European Council Regulation of 2010. The ESM has been organized to run for an indefinite period of time.[25] It provides for financial assistance to be extended to Greece in the amount of € 130 billion.[26]

B. *The Greek "Invitation Memorandum" of February 24, 2012*

On February 24, 2012, and as required by these rescue packages, Greece addressed an "Invitation Memorandum" to the private holders of its state bonds.[27]

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[23] In its judgment of September 7, 2011 (Docket no. 2 BvR 987/10), the German Federal Constitutional Court discussed in detail the legislative history of both rescue packages.

[24] In May 2010, the German Federal Parliament approved the rescue package, *promulgated* May 8, 2010, BGBl.II at 537 (Ger.)

[25] Commission Regulation No. 407/2010 of the European Council of May 11, 2010 establishing a European Financial Stabilization Mechanism, 2010 O.J. (L 118/1).

[26] In June 2010, the German Parliament ratified the rescue package with a two-thirds majority. *See* the Official Minutes on the 188th Meeting of the German Parliament on Friday, June 29, 2012 (Amtliches Protokoll der 188. Sitzung des Deutschen Bundestages am 29. Juni 2012). However, the ratification act was challenged on the very same day before the German Federal Constitutional Court by several claimants and groups of claimants (comprising approx. 37,000 claimants) alleging it violated the German Federal Constitution (*Grundgesetz*). By its judgments of September 12, 2012 (docket No. 2 BvR 1380/12 and docket No. 2 BvR 1824/12), the Constitutional Court approved of the ESM, but subject to two provisos: the German Government should take care that, by an additional understanding on the level of the law of nations, Germany's liability would remain capped at € 190 billion, unless the German Federal Parliament would explicitly vote to increase that limit; second, the ESM's language about "secrecy of all persons working for the ESM" (meant to inhibit leaks to bankers) would not prejudice the comprehensive information of the Parliament. *See* THE ECONOMIST, Sep. 15-21, 2012, at 23-24. Soon afterwards, the other states of the eurozone accepted the German reservations. The ESM is therefore scheduled to start its activities in October 2012.

[27] *Available at* http://pdma.greekbonds.gr/php/2012-05-28-15-51-31/2012.

In a nutshell, that Memorandum, which consisted of 74 pages of fine print, stipulated the following.[28]

The Memorandum contains an "Invitation Offer" addressed to all private holders of Greek state bonds whose titles had been issued on or before December 31, 2011 ("old" bonds). The nominal value of these bonds amounted to about € 206 billion.[29] The "Invitation Offer" called for a waiver by bondholders of an amount equal to 53.5% of the face value of their "old" bonds. In exchange for the remaining 46.5%, bondholders were offered three categories of "new" bonds, securities and notes.

As a replacement for 31.5% of the remaining 46.5% value of the "old" bonds, Greece was to issue "new" bonds classified into 20 different series with maturities between 11 to 30 years and an amortization period commencing on the 11th anniversary of the issue date. As a result, the bonds belonging to the first series of these "new" bonds would reach maturity in 2023, the bonds of the last series in 2042.[30] Differing amounts of interest were to be paid while the bonds were running.[31] The average rate of interest was 3.65%.[32] The "new" bonds were to be governed by the law of England and Wales.[33] *Pari passu* clauses were inserted into them.[34] But as of the end of March 2012, the "new" bonds were trading on stock exchanges at rates of only between 20% and 25%.

In exchange for the remaining 15% of the nominal value of the "old" bonds, bondholders were offered Private Involvement Sector Payment Notes ("PSI" or Payment Notes) with a maturity of 24 months guaranteed by the EFSF. Thus, with the "new" bonds (in replacement for 31.5% of the nominal value of the "old" bonds) and the PSI Payment Notes (in replacement for 15% of the nominal value of the "old" bonds), the value of the "old" bonds was exchanged at an aggregate percentage of 46.5 into new obligations. In addition, Greece added two further promises to its Exchange Offer. First, it issued GDP-linked securities to the benefit of the new bondholders, which would allow them to benefit from any performance of the Greek economy above program projections through the payment of an additional coupon.[35] Second, Greece was to issue short term EFSF

[28] *See* THE ECONOMIST, March 17, 2012 at 67.

[29] *See* Press Release of the Ministry of Finance of the Hellenic Republic of Feb. 24, 2012 at 1 ¶ 1, *available at* www.greekbonds.gr.

[30] *See* Memorandum, *supra* note 27, at 28 *et seq*.

[31] *See id.* at 31, Sec. 3.1.

[32] *See* the FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), a German daily newspaper, of Feb. 24, 2012 at 11 and the FAZ of Feb. 28, 2012 at 17.

[33] *See* Memorandum, *supra* note 27, at 38, Sec. 14.

[34] *See* Memorandum of Understanding between the EC acting on behalf of the Euro Member States, and the Hellenic Republic (undated) published in the *Drucksache des Deutschen Bundestages* 17/8731, *see supra* note 19 at 16.

[35] *See* Memorandum, *supra* note 19, at 31, 41 *et seq*.

notes in discharge of all unpaid interest accrued up to February 24, 2012 on the "old" bonds to be exchanged.[36]

In economic terms, the Greek Invitation Memorandum of February 24, 2012 caused the holders of all "old" bonds affected by it an average loss of 75%-80% of their bonds' nominal value.[37]

C. *Provisions in the "Invitation Offer" Dealing with Possible Non-Acceptance of the Invitation*

In a blunt message to private bondholders intending not to accept the "Invitation Offer" (so-called "holdout bondholders"), Greece stated it would pay no amount not contemplated by the Invitation Memorandum.[38] Thus, holdout bondholders could expect to receive no payment at all from Greece on "old" bonds unless they accepted the Greek Exchange Offer. This meant that they would lose 100% of the bonds' face value.

Greece nonetheless anticipated that some bondholders would refuse to accept the "Invitation Offer" and made provision for such holdout bondholders in the "Invitation Offer" itself. In this regard, it drew a distinction between "old" bonds that were subject to Greek law according to their general standard terms, on the one hand, and other "old" bonds governed by non-Greek law, on the other.

Greek law expressly governed the bulk, some 85.9%, of all "old" bonds. These bonds represented a face value of about € 177 billion. Some of these bonds already contained Collective Action Clauses. For those that did not, CAC clauses were subsequently inserted by operation of law through the Greek Bondholders Act 4050/2012. The "Invitation Offer" provided for a quorum of two-thirds of bondholders. If a two-thirds majority accepted, the "Invitation Offer" bound all bondholders, including those who had refused to accept it.[39] The two-thirds majority would be reached if the aggregate sum of bonds tendered for exchange reached € 58.94 billion.

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[36] *See* Press Release of the Ministry of Finance of the Hellenic Republic of Feb. 24, 2012, *supra* note 29, at 1.

[37] At an auction carried out on March 19, 2012, the "new" Greek bonds were sold at 21.5% of the face values of the "old" bonds they had replaced. Thus, the holders of the "old" bonds had suffered a loss of 78.5% of the face value of their holdings; *see* FRANKFURTER ALLGEMEINE ZEITUNG (FAZ), March 20, 2012 at 17. *See* also the issues of that newspaper of Feb. 29, 2012 at 19; of March 10, 2012 at 12 right col.; and of March 13, 2012 at 17 left col.

[38] *See* Press Release of the Ministry of Finance of the Hellenic Republic of March 23, 2012 at 1-2 reading as follows: "The Republic emphasized that it has, from the outset, advised its creditors that its economic program does not contemplate the availability of funds to make payments to private creditors that decline to participate in the PSI in excess of the amounts they would otherwise have received."

[39] *See* Press Release of the Ministry of Finance of the Hellenic Republic of Feb. 24, 2012, *supra* note 29, at 1.

Regarding bonds governed by non-Greek law (by English or Swiss law, for example), Greece intended to solicit the consent of their holders separately in accordance with the contracts governing the bonds.[40] Further, Greece made the proviso that it had the power to impose the acceptance of its "Invitation Offer," even without the consent of bondholders, by a sovereign act of state with respect to all "old" bonds issued before December 31, 2011.[41]

D. *Actual Acceptances and Non-Acceptances of the Invitation*

One must also draw a distinction between actual acceptance and non-acceptance of the "Invitation Offer." This is so because acceptance or non-acceptance was treated differently in respect of bonds governed by Greek law, on the one hand, and those governed by non-Greek law, on the other.

The holders of bonds governed by Greek law *de facto* tendered title to their bonds for exchange in the amount of approximately € 172 billion (the so-called compliance creditors).[42] To that group of bondholders must be added another group who, by virtue of CAC clauses, were also bound by the "Invitation Offer" although they never actually consented to it (compliance creditors by coercion). Therefore, in the aggregate, the holders of Greek-law governed bonds showing a face value of approximately € 177 billion accepted Greece's exchange offer. This resulted in a reduction of Greece's debt load by about € 94.69 billion.

Bonds governed by English law represented a much smaller portion of the "old" bonds. They had a face value totaling only about € 21 billion. Out of these bonds, only a fraction with a face value of approximately € 13 billion was submitted to Greece for exchange.[43] This brought down Greece's liabilities by another € 6.96 billion. Thus, in summary, all acceptances of the Greek Invitation Offer reduced Greece's debt load by € 101.65 billion. The CAC clauses contained in the bonds governed by English law did not take effect since the requisite 75% majority was not reached.

Further, Greece had issued bonds governed by laws other than Greek, English or Swiss law. These bonds were denominated in Swiss francs, in Japanese yen and in euros. They all contained CAC clauses, but their standard terms required quorums of 66%, 75% and 100%.[44] As far as can be seen, whether these quorums were or were not actually reached has not been made public.

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[40] *See id.* at 2, which explains this as follows: "Under the collective action procedures introduced by the Greek Bondholders Act, the proposed amendment [of such Bondholder Act] will become binding on the holders of the Republic's Greek-law governed bonds issued prior to 31 December 2011 . . . if at least two-thirds by face amount of a quorum of these bonds, voting collectively without distinction by series, approve the proposed amendments."

[41] *See id.* at 3.

[42] *See* Press Release of the Ministry of Finance of the Hellenic Republic of March 9, 2012 at 12.

[43] *See* FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) of March 10, 2012 at 17.

[44] *See* FRANKFURTER ALLGEMEINE ZEITUNG (FAZ) of March 24, 2012 at 21.

In any event, a substantial portion of the holders of Greek state bonds (the so-called compliance bondholders including those by coercion) either *de facto* accepted or were presumed to have accepted the "Invitation Offer" contained in the Memorandum of February 24, 2012, while only a minority appears to have declined the Offer (the so-called holdout bondholders).

E. *Damages Potentially Recoverable by Private Holders of Greek State Bonds*

As the foregoing discussion of the Greek Invitation Memorandum suggests, some private holders of "old" Greek state bonds have sustained losses. They will therefore have occasion to explore whether they might be entitled to claim compensation from Greece for their harm.

Yet not all of the holders of "old" Greek state bonds have suffered economic losses. A certain number had protected themselves against a sovereign insolvency of Greece by taking credit default swaps ("CDS").[45] These CDS fell due when, on March 9, 2012, the EMEA[46] Determination Committee of the International Swaps and Derivatives Association ("ISDA") announced in its technical language the occurrence of a credit event following the exercise of Collective Action Clauses by the Hellenic Republic to amend the Greek-law governed bonds such that the number of holders of affected bonds to receive payments was reduced.[47] These holders of CDS received an aggregate amount of $ 3.36 billion from their insurers as compensation for their losses. These holders can thus hardly[48] be said to have sustained damages by virtue of the Greek Invitation Memorandum.

But there are other groups of private holders who suffered significant economic losses through the Memorandum of February 24, 2012.

III. DAMAGES RECOVERABLE UNDER GREEK DOMESTIC LAW AND BEFORE GREEK DOMESTIC COURTS?

We therefore consider below whether bondholders can potentially recover losses from Greece either by relying on Greek domestic law or by invoking international agreements, in particular BITs. The following analysis will focus as well on the ability of these bondholders to have their claims enforced, either

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[45] As to the operation of these instruments *see* Michael Waibel, *Steering Greece's debt restructuring through the CDS quicksand*, *available at* http://ssrn.com/abstract=2017772.

[46] Europe, Middle East, Africa Determinations Committee.

[47] *See* Press Release of The International Swaps and Derivatives Association, ISDA EMEA Determinations Committee: *Restruction Credit Event Has Occurred with Respect to the Hellenic Republic* (March 9, 2012), *available at* http://www2.isda.org/news/isda-emea-determinations-committee-restructuring-credit-event-has-occured-with-respect-to-the-hellenic-republic.

[48] They, of course, had to pay premiums for their CDS. The question whether and to what extent these bondholders could sue for restitution will not be examined in the ensuing discussion.

before national state courts, for example in England or in Switzerland, or before international arbitral tribunals, for example before the ICSID Centre in Washington, D.C. or before other international arbitral tribunals.

A. *Damages Sustained by Holdout Bondholders*

The holdout bondholders who refused to accept the Greek "Invitation Offer" remain in possession of their "old" bonds unless they have sold them in the meantime. They never voluntarily waived any rights embodied in the bonds and have instead retained 100% of their claims. The only disadvantage they sustained by the Greek Invitation Memorandum results from the blunt declaration of their sovereign debtor that it will not spend any funds to satisfy their claims. On an economic level, that was tantamount to an outright refusal to pay. But in standard legal terms, the holdout bondholders have not sustained any losses.

B. *Damages Sustained by Compliance Bondholders who in Express Terms Accepted the Greek "Invitation Offer"*

The situation is different for compliance bondholders who expressly accepted the Invitation in the Greek Memorandum of February 24, 2012. By accepting that Offer they have, in economic terms, lost 75%-80% of the face value of their "old" bonds. Their loss might be recoverable from Greece on the ground that they, when they declared their consent by tendering title for exchange, had no choice other than (i) either to accept the Greek "Invitation Offer," thereby losing 75%-80% the value of their "old" titles but saving 20%-25% of their claims, or (ii) to try to recoup their losses in expensive and cumbersome court proceedings. Thus, the compliance creditors found themselves in a predicament, left to choose between the Scylla and the Charybdis just described. In the language of a U.S. federal appeals court discussing unconscionability, the Greek Memorandum offered Greece's private bondholders no "meaningful choice" and the terms of the contract were "unreasonably favorable" for Greece.[49] Nevertheless, it is doubtful whether the compliance bondholders could derive any legal advantage from Greece's unfair bargaining position.

It would be uncertain even as a matter of U.S. law whether Greece's actions were unconscionable within the meaning of the U.S. Uniform Commercial Code[50]

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[49] *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445,449 (D.C. Cir. 1965).

[50] *See* U.C.C § 2-302. The RESTATEMENT (SECOND) OF CONTRACTS defines unconscionability in Comment d to § 208 as follows:

> gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of . . . compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Such unconscionability would, however, not *ipso iure* cause the nullity of the contract but would rather permit the court only to refuse to enforce the contract or the remainder of it or to limit the application of any unconscionable clause so as to avoid any unconscionable result.

or left the bondholders in a state of duress within the meaning of the Restatement (Second) of Contracts.[51] In any event, U.S. law is not applicable in the present context. This is so because Greece inserted into its "Invitation Offer" a choice-of-law clause by which each individual bondholder[52]

> (kk) . . . agrees that the Invitation . . . as well as any exchange of Designated Securities pursuant to the Invitation, and any non-contractual obligations arising out of or in connection with the Invitation, are governed by, and shall be construed in accordance with, the laws of the Republic [of Greece];

Thus the existence of damages claims has to be examined under the Greek Civil Code. From a U.S. perspective, the notion of unconscionability might seem best suited to describe the economic predicament in which the compliance bondholders found themselves. But that concept – which originates from and is accepted exclusively in Anglo-American law – is more or less unknown in civil-law countries.[53] Greek law, which belongs to the civil-law family, does not recognize it. In Greek law, the rules prohibiting transactions *contra bonos mores* seem to come closest to that concept. Sections 178 and 179 of the Greek Civil Code deal with contracts *contra bonos mores*. Section 178 declares them to be void *ab initio*. The two sections of the Greek Civil Code are worded as follows:[54]

> Art. 178: Legal transaction *contra bonos mores*
>
> A legal transaction *contra bonos mores* is void *ab initio*.

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[51] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 175-176. § 175 (1) provides:

> If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

§ 176(1)(d) specifies that a threat is improper if

> The threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

§ 176(2) adds that

> a threat is improper if the resulting exchange is not on fair terms, and . . . (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat.

[52] *See supra* note 27, at 24.

[53] *See* the detailed analysis of that concept from the angle of comparative law by Thomas Probst, *Coercion*, *in* Ernest A. Kramer & Thomas Probst, *Defects in the Contracting Process*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, Vol. VII: CONTRACTS IN GENERAL Ch. 11, at 173 (11-362), 178 (11-370 et seq.) (Arthur T. von Mehren ed., 2008).

[54] With acknowledgements to Ms. Anna Gkogka (then trainee at the law firm of Dabelstein & Passehl, at Hamburg) and to Dr. Jan Asmus Bischoff (attorney at that firm) for their help. Ms. Gkogka has translated these provisions into German, and the author of this article has further translated them into English.

Art. 179:

> A legal transaction violates *bonos mores* in particular when it excessively restricts a person's personal freedom or when the predicament or the inexperience of a party to a legal transaction is exploited, causing him to enter into a legal transaction in which the performance and its *quid pro quo* are out of proportion to each other, thereby enriching one party or a third person.

Ultimately, it is quite doubtful that the Greek Exchange Offer of February 24, 2012 meets the requirements of these Greek law provisions. Agreements between debtors close to insolvency, on the one hand, and creditors facing the risk of losing all their claims, on the other, are a commonplace feature in the manifold attempts to avert insolvencies. Such agreements cannot be hit by the sharp sword of nullity contemplated in Sections 178 and 179 of the Greek Civil Code. Such agreements do not violate *bonos mores* but rather try to remedy a threatening case of insolvency. Therefore, the kind of unconscionability or duress in which the compliance creditors found themselves when they accepted the Greek Exchange Offer of February 24, 2012 must be governed by considerations of equity rather than by those of strict law. But considerations of equity would materialize, if at all, in the law of unfair standard terms.[55] Yet we are not discussing here the standard terms that accompanied the "old" Greek state bonds.[56] We are rather presently examining the effect of the Greek "Invitation Offer" on the holders of "old" Greek bonds, which is a different subject. The Greek Exchange Offer cannot be qualified as a standard contract. Greece acted as a sovereign state power when it submitted its Exchange Offer to its bondholders. And in the law which governs the relations between sovereign states and their bondholders, rules of equity are unknown. That field is governed exclusively by rules of strict law.

Therefore, although it is true that the compliance creditors found themselves in a situation involving a kind of unconscionability or duress in the weeks following February 24, 2012 when they had to decide whether to accept the Greek Offer, it is in no way evident that they can derive any legal advantage under Greek domestic law from their great predicament. Their interests could find protection, if at all, rather from BITs and other international agreements that embody the standard of "expropriation."[57]

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[55] *See, e.g.,* EC Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L95). For a broad comparative survey on the concept of unconscionability in the field of consumer protection, see Mel Kenny, James Devenney & Lorna Fox O'Mahony, *Conceptualizing Unconscionability in Europe: In the Kaleidoscope of Private and Public Law*, *in* UNCONSCIONABILITY IN EUROPEAN PRIVATE TRANSACTIONS: PROTECTING THE VULNERABLE 377-99 (Mel Kenny et al. eds., 2010).

[56] When issuing these bonds, Greece did not act as a private producer, and its bondholders were not consumers when they bought their bonds.

[57] Possibly also of "fair and equitable treatment."

C. *Damages Sustained by Compliance Bondholders to Whom CAC Clauses Applied*

One must also consider whether the same unconscionability/duress analysis holds for those compliance bondholders who were held to have accepted the Invitation Memorandum by virtue of CAC clauses. Their consent to the Greek "Invitation Offer" was not express but was rather constructively derived via the CAC clauses inserted into the standard terms of their "old" bonds.[58] In the absence of actual consent, one might speak of "compliance bondholders by coercion." In this respect, we have to distinguish between two categories of "compliance bondholders by coercion."

1. *Compliance Bondholders of Bonds Containing CAC Clauses* ab initio*,* i.e, *When The Bonds Were Issued*

Some of the "old" bonds contained CAC clauses *ab initio*, *i.e.*, at the time they were issued.[59] Thus, the owners of these bonds had effectively consented to all majority resolutions as of the time they bought the bonds. They were therefore also *ab initio* bound by all decisions later taken by the majority of their class. The validity of that binding effect can hardly be disputed. CAC clauses are a device fully recognized in the bond markets and have been used extensively for decades, above all in Great Britain.[60] But in view of their purely constructive consent to the "Invitation Offer," this minority of compliance bondholders found itself in the same kind of unconscionability and duress as the "normal" compliance bondholders described directly above. Indeed, they did not agree with the acceptance by the majority bondholders of the "Invitation Offer." They had either voted against it or had abstained when the resolution was passed. Despite their not having given consent, they were subjected to the Greek "Invitation Offer."

Therefore, the same legal conclusions must be drawn with respect to this first category of "compliance bondholders by coercion" as those described for "normal" compliance bondholders. At least on the level of Greek domestic law (this may – and will – be different on the level of international law[61]), they can

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[58] It was noted above (Sec. II. C) that, by virtue of those CAC clauses, the holders of these bonds were bound by the "Invitation Offer" although they never voluntarily accepted it by express declaration.

[59] *See supra* Sec. II. C.

[60] Normally, CAC clauses are found in international sovereign bonds governed by English law (that was different with sovereign bonds governed by New York law, which in 2001 represented a share of 59% of the value of all outstanding international sovereign bonds; among those N.Y. governed bonds, however, only one was equipped with a CAC clause). *See* Sean Hagen, *Designing a Legal Framework for Restructuring Sovereign Debt,* 36 GEO. J. INT'L L. 299, 302 n.11 and 317 *et seq.* with further references; WAIBEL, *supra* note 3, at 736-37.

[61] *See infra* Sec. IV.

hardly derive any legal benefit from their predicament. The same arguments apply as those just advanced in the previous sections of this analysis.

2. *Compliance Bondholders of Bonds that Had CAC Clauses Inserted by Virtue of Subsequent Greek Legislation*

As noted,[62] Greek legislative bodies inserted CAC Clauses into all Greek-law governed "old" bonds that did not yet contain such clauses. This was carried out through the Greek Bondholders Act 4050/2012, enacted one day before Greece passed its Memorandum of 2012.[63] Greece, in passing that Act, acted wholly within its legislative powers, not only vis-à-vis domestic but also vis-à-vis foreign bondholders affected by the Act. It is undisputed in conflict of laws that when parties agree that their contracts should be governed by a national law, they are not understood as referring to a "petrified" law, *i.e.*, a law whose rules cannot be amended after its choice as the *lex contractus*. On the contrary, it is a matter of course in private international law that reference to a foreign national law includes reference as well to statutory provisions or judge-made rules subsequently developed within that law – unless a so-called petrification clause has been inserted into a contract by which all later amendments to the law are deemed not to affect the provisions of the contract.[64]

As a result, the subsequent insertion of CAC clauses through the Greek Bondholders Act 4050/2012 into all Greek-law governed "old" bonds not yet containing such clauses *ab initio* was fully effective. By operation of these CAC clauses, the resolution of the majority bondholders to accept the Greek "Invitation Offer" of February 24, 2012 extends as well to all foreign minority bondholders. Their legal situation is no different from that of the first group of "compliance bondholders by coercion" examined in the previous section.[65] They likewise cannot derive any advantage under Greek law from the predicament in which they found themselves in the weeks following the Greek Exchange Offer of February 14, 2012.

D. *Summing Up*

The results of our analysis – made on the basis of Greek substantive law – are discouraging for bondholders. Holdout bondholders were not substantially affected as a legal matter by the Greek "Invitation Offer" since they did not accept it. They have retained the rights embodied in their "old" bonds. However, their losses, viewed from an economic perspective, are grave. Compliance

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[62] *See supra* Sec. II. C.

[63] That Act was passed by the Greek Parliament on February 23, 2012. *See* Press Release of the Hellenic Ministry of Finance of February 24, 2012, *supra* note 29, at 1.

[64] *See* Otto Sandrock, *'Versteinerungsklauseln' in Rechtswahlvereinbarungen für internationale Handelsverträge*, *in* IUS INTER NATIONAES: FESTSCHRIFT FÜR STEFAN RISENFELD AUS ANLASS SEINES 75. GEBURTSTAGES 211-36 (Erik Jayme ed., 1983) with comparable references to major Western laws.

[65] *See supra* Sec. III. C. 1.

bondholders, by contrast, suffered significant losses *eo ipso* from the "Invitation Offer" itself. Even so, they can hardly be viewed as entitled under applicable Greek domestic law to claim compensation from Greece, irrespective of whether they are to be classified as "normal" compliance bondholders or as "compliance bondholders by coercion."

E. *Damages Recoverable Before Greek Domestic Courts?*

Likewise on the level of procedural law, a suit by the compliance bondholders against Greece before Greek national courts is decidedly unlikely to afford them relief. Greece's Invitation Memorandum provided:[66]

> (ll) [the bondholder] irrevocably and unconditionally agrees for the benefit of the Republic . . . that the courts of the Republic are to have jurisdiction to settle any disputes which may arise out of or in connection with the Invitation . . . (including any dispute relating to any non-contractual obligations arising out of or in connection with the Invitation . . .) and that, accordingly, any suit, action or proceedings arising out of or in connection with such Invitation . . . may be brought in such courts . . . .

Thus, the authors of the Greek Invitation Memorandum vested Greek courts with jurisdiction to hear all disputes arising from its application, including application of its Exchange Offer. The Invitation Memorandum does not provide, however, that such jurisdiction should be exclusive.

The aforecited forum-selection clause in favor of Greece's domestic courts is of little practical value to aggrieved compliance bondholders since Greek courts would apply Greek domestic substantive law rules, which, as discussed,[67] provide no basis for claims for compensation. This in itself lends strong support to this article's primary thesis, *i.e.*, that the jurisdiction of national courts is generally of no help when sovereign debts are restructured. Domestic rules serve to enforce the will of the sovereign from which they emanate – a sovereign, in this case, who is in financial plight and who wants to rid itself of the financial burdens it believes it can no longer bear. Such sovereigns are hardly likely to lend support to the creditors, but rather to impose burdens on them.

IV. DAMAGES POTENTIALLY RECOVERABLE IN INTERNATIONAL ARBITRAL FORA AND UNDER RULES OF INTERNATIONAL SUBSTANTIVE LAW

There are, however, fora in which holders of Greek "old" state bonds might effectively bring their claims against Greece. Moreover, substantive rules of international law exist on which these holders could base claims for compensation.

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[66] *See* the Memorandum, *supra* note 27, at 24.
[67] *See supra* Sec. III. A-D.

A. *The Jurisdiction of National Courts Does Not Preclude the Jurisdiction of Arbitral Tribunals Derived from BITs*

It warrants noting at the outset that the fact that national courts were vested with jurisdiction to decide on these claims would not preclude the jurisdiction of arbitral tribunals derived from BITs.

1. *The Jurisdiction of National Courts as Provided for in the Standard Terms of the "Old" Bonds*

As shown above,[68] the standard terms of the "old" bonds provide they are to be governed either by Greek, English or Swiss national law. We have also seen[69] that bonds subject to Greek law constituted a great majority (85.9%) of all "old" bonds, with bonds governed by English law representing a much smaller share of the total. On the other hand, and as widely understood, the standard terms of the "old" bonds conferred jurisdiction on English and Swiss national courts. It follows from this that Greek national courts were not vested with jurisdiction to hear any bondholders' claims. This seems plausible since the Greek stock exchange was, and still is, too small to absorb bonds with a face value of several billions of euros. It would therefore have been inappropriate to confer jurisdiction on Greek courts. Thus, the standard terms of the "old" bonds appear to have conferred jurisdiction almost exclusively in English or Swiss national courts.

Vesting these national non-Greek courts with jurisdiction did not serve to exclude jurisdiction of arbitral tribunals derived from BITs.[70] This finds support in the fact that forum selection clauses embedded in the standard terms of the "old" bonds cover only claims under the bondholder contracts and not treaty claims under BITs. When an investor introduces a claim under the auspices of ICSID, he does not rely on his contractual position as it is described in his contract with its sovereign debtor but rather draws upon the privileges bestowed by a BIT – a BIT that has been concluded between the investor's home state and the investor's host state. In other words, the claim he raises is not a contract but a treaty claim.

Treaty claims cannot be affected by forum selection clauses in private contracts since such claims are regulated by sovereigns through inter-governmental agreements to the mutual benefit of their nationals. Such matters are the exclusive province of sovereigns and cannot be affected or disturbed by "private" forum selection clauses contained amongst the standard terms of bondholder contracts. It is beyond dispute, then, that the jurisdiction of international arbitral tribunals conferred by virtue of BITs subsists

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68 *Supra* Sec. II. C and D.

69 *Supra* Sec. II. C.

70 *See* Peter Griffin & Anita Farren, *How ICSID Can Protect Sovereign Bondholders*, 24 INT'L FIN. L. REV. 21, 24 (2005). An opposite view is taken by WAIBEL, *supra* note 3, at 714.

notwithstanding any possible forum selection clauses in bondholder contracts that provide for the exclusive jurisdiction of national courts.

2. *The Award of an ICSID Arbitral Tribunal in the Matter of* Abaclat v. The Argentine Republic

This conclusion is further supported by an ICSID award of August 4, 2011[71] in the matter of *Abaclat* v. *The Argentine Republic*.[72]

The award dealt with claims by some 160,000 Italian investors who had sued the Republic of Argentina. The Italian investors had been the owners of Argentine state bonds that remained unpaid after Argentina fell into insolvency in December 2001. In January 2001, Argentina had ceased payments on all of its state bonds, which had an aggregate face value of approximately $100 billion. Then, in January 2002, Argentina abolished parity between the peso and the U.S. dollar through its Emergency and Reform Law. This "pesification" was followed by a substantial devaluation of the peso.[73] Three years later, in January 2005, Argentina submitted an "Exchange Offer" to its bondholders by which it promised to exchange its former bonds denominated in U.S. dollars against certain new bonds denominated in pesos.[74] The 160,000 Italian claimants rejected the offer as being too low to compensate them for the value of their former bonds and initiated arbitration against Argentina in 2006 seeking compensation for their losses. Argentina subsequently submitted another Exchange Offer in April 2010. Again, the 160,000 claimants viewed this offer as still less favorable than the Exchange Offer 2005[75] and further pursued their arbitration against Argentina.

They based their claims on Article 8(3) of the Argentine-Italian BIT of 1990, which provides:

> . . . each Contracting Party grants its anticipated and irrevocable consent that any dispute [between itself and an investor from the other Contracting State] may be subject to arbitration.

Argentina challenged the jurisdiction of the arbitral tribunal, arguing, *inter alia,* that the claim would work a denial of justice because a class action was inadmissible under the rules of the ICSID Convention.[76] In a detailed, carefully

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[71] The Panel was composed of Profesor Pierre Tercier (CH, as successor to the late Dr. Robert Briner, CH), as president, and Professor George Abi-Saab (Egypt) and Professor Albert Jan van den Berg (NL) as co-arbitrators.

[72] ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, *available at* http://icsid-worldbank.org, listed there in the register of cases and decisions. As to the basic distinction between contract and treaty claims elaborated in that award, *see* Szodruch, *supra* note 17, at 151 *et seq*.

[73] *See* the Award at 28 ¶ 60.

[74] *See id*. at 34 ¶ 77. That "Exchange Offer" was accepted by 76.15% of all holders.

[75] *See id*. at 50-51 ¶¶ 92-97. Some of the claimants accepted that offer, however.

[76] *See id*. at 80 ¶ 234 (i).

researched and carefully drafted award,[77] the arbitral tribunal rejected Argentina's arguments, declared itself to be vested with jurisdiction and found the class action of the Italian claimants to be admissible. Hence, it opened the proceedings for a discussion of the substantive issues in dispute.[78]

The situation in Greece since 2010 is similar to that of Argentina in the years 2001 *et seq*. As discussed above,[79] Greece responded to its financial crisis of 2010-2012 by amending its Bondholders Act and issuing its Invitation Memorandum of February 24, 2012, thereby forcing its private bondholders to waive their original claims and to be satisfied with "new" bonds having 20%-25% of the value of "old" bonds. The conclusions reached in the *Abaclat* award are therefore applicable *mutatis mutandis* to the problem under consideration here. They confirm the supposition that forum selection clauses in the standard terms of the contracts between bondholders and Greece conferring jurisdiction upon national courts do not serve to rob arbitral tribunals of their jurisdiction based on BITs. Indeed, this seems a matter of no real dispute. The *Abaclat* tribunal was never even called on to consider whether some putative clash existed between

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[77] The award comprised 283 pages.

[78] The arguments endorsed by the arbitral tribunal in its *Abaclat* award are so persuasive that they need to be recited here. The arbitral tribunal distinguished as follows between contract and treaty claims:

> 323. In the present case, the situation is somewhat peculiar, since the debtor is a sovereign State. Argentina, which considered itself insolvent, decided to promulgate a law entitling it not to perform part of its obligations, which Argentina had undertaken prior to such law, and fixing sovereignly the modalities and terms of such liberation. Such a behavior derives from Argentina's exercise of sovereign power. Thus, what Argentina did, it did based on its sovereign power; it is neither based on nor does it derive from any contractual argument or mechanism.
>
> 324. In other words, the present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants.
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> 325. … It is only relevant to note that the dispute, and in particular Claimants' claims and Argentina's defense thereto, relate to the actions Argentina took in order to remedy its financial insolvency. Such actions were based on a sovereign decision of Argentina outside of a contractual framework. Thus, Argentina's actions were the expression of State power and not of rights or obligations Argentina had as a debtor under a specific contract.
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> 326. Consequently, the Tribunal considers that the claims brought forward by Claimants in the present arbitration are not pure contractual claims but treaty claims based on acts of a sovereign, which Claimants allege are in breach of Argentina's obligations under the BIT.

[79] *See* Sec. II. C.

jurisdiction afforded by contractual forum selection clauses and the BIT-based jurisdiction of ICSID.

B. *The Availability of BITs as Bases for Arbitral Jurisdiction*

Greece has entered into BITs[80] with some thirty other states,[81] including Germany.[82] But amongst those 30-odd BIT partner states are only a few, *e.g.*, Cyprus and Germany, whose nationals are likely to own significant portfolios of Greek bonds. By the same token, there are no Greek BITs protecting the nationals of some states of major economic importance – states whose nationals very likely have significant amounts of Greek state bonds in their portfolios – notably, the United Kingdom, France, Italy and Spain. In a similar vein, while Greece has entered into BITs with great world powers, *e.g.*, with Russia and China, it has concluded no BIT with the United States. On the whole, then, Greece has not concluded BITs with states in which leading stock exchanges are domiciled (*e.g.*, the United Kingdom or the United States).

It therefore remains the case that many holders of Greek bonds cannot look to a BIT in the hope of asserting a claim in arbitration. However, the German-Greek BIT does stand out as one that could serve as a meaningful basis of arbitral jurisdiction.[83] It warrants considering this BIT in some detail. This is so first and foremost because German banks and insurance companies held large stocks of Greek state bonds before the inception of the Greek financial crisis. Moreover, a close examination of the German-Greek BIT highlights the potential difficulties one confronts in attempting to use a BIT to establish arbitral jurisdiction in restructuring matters. Finally, the author of this article is himself of German nationality and so feels more competent to examine these issues.

C. *The German-Greek BIT of March 27, 1961*

The German-Greek BIT of March 27, 1961[84] does not in itself *ipso iure* establish a jurisdictional basis for a claim in arbitration by private German

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[80] *See* the ICSID Database of BITs, *available at* http://icsid.worldbank.org/ICSID/common/Print.jsp.

[81] Albania, Algeria, Armenia, Bulgaria, Chile, China, Croatia, Cuba, Cyprus, Czech Republic, Egypt, Estonia, Georgia, Germany, Hungary, Iran, Jordan, Kazakhstan, South Korea, Latvia, Lebanon, Lithuania, Mexico, Moldova, Morocco, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Tunisia, Turkey, Ukraine, Uzbekistan, Zaire.

[82] Signed on March 27, 1961; entered into force on July 15, 1963.

[83] *See supra* note 82.

[84] *See supra* note 82. There are two authentic versions of this treaty, one in German and another in Greek. The title of the German version is: "*Vertrag zwischen der Bundesrepublik Deutschland und dem Koenigreich Griechenland ueber die Foerderung und den gegenseitigen Schutz von Kapitalanlagen*" (translated into English: "Agreement between the Federal Republic of Germany and the Kingdom of Greece on the Promotion and the Mutual Protection of Capital Investments").

bondholders against Greece. This is so because, by virtue of its Article 11, only the Contracting Parties themselves, *i.e.*, Germany and Greece as state entities, are entitled to force the other to resolve a dispute in arbitration. [85] In other words, there is no express language in the German-Greek BIT authorizing a national of one of the Contracting Parties to seek to resolve a dispute with the other Contracting Party. Thus, the German-Greek BIT – signed in 1961 and ratified in 1963 – belongs to the "older" category of BITs, which did not expressly confer on a foreign investor the power to compel its host state to arbitrate a dispute. BITs of that kind became popular only many years later.

D. *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*[86]

German holders of "old" Greek state bonds may, however, draw on the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention") in seeking to establish the jurisdiction of arbitral tribunals to hear claims against Greece. The ICSID Convention entered into effect on October 14, 1966.[87] Greece acceded to it as of April 5, 1966, with Germany acceding as of April 18, 1969.[88]

Article 25(1) of the ICSID Convention provides that the jurisdiction of the ICSID Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. Thus, the following prerequisites must be met: (1) The claimant must be a national of either of the Contracting States; (2) the dispute between the parties must arise out of an "investment"; and (3) the parties to the dispute must have consented in writing to submit their dispute to the Centre. The first of these prerequisites (requiring that the respective claimant be a national of one of the Contracting Parties) is clear and simple and does not admit of any doubt. It is only a national in the strict sense of that term, and not a mere resident of one of the Contracting Parties, who can sue a Contracting Party. Thus, only German nationals could potentially sue Greece before an ICSID arbitral tribunal – mere residents of Germany could not. But the precise contours of the remaining two prerequisites (the meaning of "investment" and of "consent in writing") are less certain. We

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[85] Article 11 provides that the Contracting Parties must first consult with one another amicably to solve any dispute regarding the interpretation or the application of the Agreement (¶ 1). Failing to reach a solution this way, each Contracting State is authorized to demand the formation of an arbitral tribunal whose composition etc. is then regulated in detail (¶¶ 2-7).

[86] *See* also arguments presented by Otto Sandrock in his article *Ersatzansprüche geschädigter deutscher Inhaber von griechischen Staatsanleihen*, *supra* note 17, at 434 *et seq*.

[87] *See* Article 68 of the Convention, pursuant to which it was to enter into effect 30 days after at least 20 states had deposited their instruments of ratification, acceptance or approval.

[88] *See* the list of contracting states on the website of the ICSID.

must therefore consider whether these two prerequisites would be met were a German national to sue Greece before an ICSID arbitral tribunal for damages it sustained from the non-performance of an obligation resulting from an "old" Greek state bond.

1. *The Requirement of an "Investment" Within the Meaning of Article 25 of the ICSID Convention*

The requirement of an "investment" enshrined in Article 25 of the ICSID Convention is considered to be an anchor provision within the overall framework of the Convention. An award by an ICSID tribunal in the well known *Salini* matter[89] suggests that an "investment" consists in four elements:

> (i) contributions; (ii) a certain duration of the performance of the contract; (iii) a participation in the risks of the transaction; (iv) the contribution to the economic development of the host State of the investment.

Later ICSID awards have either followed or modified this *Salini* test.[90] But in the special context of the German-Greek BIT of 1961, the *Salini* test overlaps with

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[89] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, decision on jurisdiction of July 23, 2001.

[90] *See* Joy Mining Machinery Ltd. v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, award on jurisdiction of August 6, 2004, ¶¶ 51-53 (defining "investment" as follows: "[It] should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and … it should constitute a significant contribution to the host State's development"); Bayindir Insaat Turizm Ticaret Ve Sanayi A. v. Islamic Republic of Pakistan, ICSID Case No. RB/03/29, decision on jurisdiction of November 14, 2005, ¶ 137 (confirming the "investment" test in the *Salini* decision and stating that the investment project must represent a "significant contribution to the Host State's development"); Jan de Nul N. V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, decision on jurisdiction of June 16, 2006, ¶ 91 (concurring with the *Salini* decision); Patrick Mitchell v. The Democratic Republic of Congo, ICSID Case No. ARB/99/7, decision of November 1, 2006 on the Application for Annulment of the Award, ¶¶ 23, 31 (following the *Salini* decision in principle but ruling that "the existence of a contribution to the economic development of the host State as an essential . . . characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful," but that it "suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case"); Malaysian Historical Salvors SDN BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10, award on jurisdiction of May 17, 2007, ¶ 106 (basically following the *Salini* decision but distinguishing between two alternatives: "Where the facts are strongly in favour of a finding in each of the relevant hallmarks of 'investment', a tribunal can confirm its jurisdiction in strong standard terms . . . Where the facts clearly show that one or more of the relevant hallmarks of 'investment' are missing, a tribunal may uphold the jurisdictional challenge of a respondent in strong standard terms . . .").

the notion of "capital investment" (*Kapitalanlage*) used in Article 8(1) of the BIT. That provision reads:

> (1) The term "capital investment" [*Kapitalanlagen*] comprises all property assets [*Vermögenswerte*], in particular, but not exclusively: a) property in tangible goods and in real estate as well as in other rights in rem, like mortgages, liens, usufructs and similar rights; b) shares in and other investments in companies; c) accounts receivable or claims for performance with an economic value; d) copyrights, rights in industrial property, know how, trade names and good will; e) concessions.[91]

It seems clear that this provision is of an all-encompassing character, extending the notion of "capital investment" to all legal rights of any economic value. It therefore seems justified to assume that the loans made to Greece by the German holders of "old" Greek state bonds come within the definition of "capital investment." It is true that there exists as yet no case law confirming this interpretation. It should be noted in this regard, however, that ICSID tribunals have employed Article 25 of the ICSID Convention as a guide to assessing the meaning of "investment" in BITs. This line of authority should reasonably serve as precedent in construing the German-Greek BIT of 1961 since that treaty belongs to the field of investment law.

Two awards are on point in this regard.[92] Both confirm the understanding that when German nationals extended loans to Greece by buying Greek state bonds, those loans qualified as "capital investments" under the ICSID Convention. In the matter of *Fedax*,[93] an ICSID tribunal found an investment within the meaning of the ICSID Convention where holders of mature promissory notes issued by

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That line of jurisprudence later was essentially modified by the award of July 24, 2008 in *Biwater Gauff (Tantania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 [hereinafter Biwater Award] and by the decision on the Application for Annulment of April 16, 2009 in *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10. In ¶¶ 316-18 of the *Bywater Award*, the tribunal ruled that the test in the *Salini* decision could not exclusively control the interpretation of the term "investment."

[91] The authoritative German version of that provision reads: "(1) Der Ausdruck "Kapitalanlagen" umfasst alle Vermögenswerte, insbesondere, aber nicht ausschließlich: a) Eigentum an beweglichen und unbeweglichen Sachen sowie sonstige dingliche Rechte wie Hypotheken, Pfandrechte, Nießbrauch oder dergleichen; b) Anteilsrechte an Gesellschaften und andere Arten von Beteiligungen; c) Ansprüche auf Geld oder Leistungen, die einen wirtschaftlichen Wert haben; d) Urheberrechte, Rechte des gewerblichen Eigentums, technische Verfahren, Handelsnamen und good will; e) Konzessionen."

[92] *See* also the early and very basic study by George R. Delaume, *ICSID and the Transnational Financial Community*, 1 ICSID REV.-FILJ 242 (1986).

[93] Fedax v. Venezuela, Case No. ARB/96/3, Award on jurisdiction of July 11, 1997, 37 I.L.M. 1378 ¶ 43 (1998); *see* also the Award in that matter of March 9, 1998, *available at* http://italaw.com/documents/Fedax/March_1998.pdf.

Venezuela to an enterprise in Curaçao (Dutch Antilles) demanded payment.[94] In the matter of *Ceskoslovenska Obchodni Banka, A.S. (COB)* v. *The Slovak Republic*,[95] another ICSID tribunal recognized a loan as the object of an investment under the ICSID Convention. The objections raised against such broad interpretation of the term "investment"[96] are not persuasive in the present context since Article 8 of the German-Greek BIT not only justifies but requires such extensive interpretation.

In summary, we conclude from the perspective of the term "investment" that the ICSID Centre would enjoy jurisdiction to hear cases in which German holders of "old" Greek state bonds sue Greece for damages.

2. *The Requirement of a "Consent in Writing" Within the Meaning of Article 25 of the ICSID Convention*

Finding that Greece gave "consent in writing" to submit disputes with German bondholders to the ICSID Centre proves more difficult. Greece has signed no express declaration manifesting such intent. Indeed, and as noted above,[97] Greece agreed in express terms in its 1961 BIT with Germany to arbitrate investment disputes only with Germany, not with any of Germany's nationals.

Still, this restrictive approach must give way to a more liberal principle developed in modern state practice. Specifically, the Most Favored Nation ("MFN") Clause contained in Article 3(5) of the German-Greek BIT might serve as the basis for concluding that Greece provided the requisite "consent in writing." That provision reads:[98]

> (5) With respect to the issues regulated in this Article [*ie.*, that the capital investments of the nationals of both Contracting States shall enjoy full protection and security] the nationals and companies of one Contracting States enjoy the status of most favored nations on the territory of the other Contracting State.

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[94] The arbitral tribunal considered the status of promissory notes under the Venezuelan Law of Public Credit as important evidence that the type of investment involved is not merely a short term, occasional financial arrangement, such as could happen with investments that come in for quick gains and leave immediately thereafter – *i.e.*, "volatile capital." It continued by noting that the basic features of an investment had been described (that was at a time when the *Salini* test had not yet been developed) as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and significance for the host States' development." *Id*. at ¶ 43.

[95] Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction of December 1, 2000, *available at* http://icsid.worldbank.org.

[96] *See* WAIBEL, *supra* note 3, at 711.

[97] *Supra* Sec. IV. C.

[98] Translation by the author. The authoritative German version reads: "(5) Hinsichtlich der in diesem Artikel geregelten Gegenstände [daß nämlich die Kapitalanlagen der deutschen Gläubiger in Griechenland vollen Schutz und Sicherheit genießen sollen] genießen die Staatsangehörigen und Gesellschaften eines Vertragsteils auf dem Hoheitsgebiet des anderen Vertragsteils Meistbegünstigung."

As noted above,[99] Greece has concluded BITs with some 30 States. Unlike the German-Greek BIT of 1961, some later Greek BITs permit investors of the other Contracting States to sue a Contracting State in arbitration.[100] One of those, the Greek-Mexican BIT of November 30, 2000,[101] could potentially be used as an instrument to give German investors equal footing with Mexican investors. In that regard, the arbitration clause in Article 10 of the Greek-Mexican BIT might serve as a tool. That Article reads:

> Such a dispute [between a Contracting Party and an investor of the other Contracting Party] should, if possible, be settled through consultations. If it is not so settled, the investor may choose to submit it for resolution c) by arbitration in accordance with this Article under: i) . . . the . . . ("ICSID Convention") if the Contracting Party of the investor and the Contracting Party, party to the dispute are both parties to the ICSID-Convention . . . ."

The question therefore arises whether German bondholders could bring claims against Greece before the ICSID Centre in Washington, D.C. on the combined force of the MFN clause in the German-Greek BIT of 1961 and the arbitration clause in the Greek-Mexican BIT of 2000.

The answer to that question turns on two issues. First, one must determine whether an investor can invoke an MFN clause to achieve parity in matters only of substantive law or whether the investor can rely on the clause to achieve procedural parity as well, *e.g.*, the right to bring a claim to arbitration. Second, assuming the MFN clause does extend to procedural matters, one must determine whether the MFN clause in the German-Greek BIT of 1961 could serve to "import" a procedural advantage given to investors in the Greek-Mexican BIT of 2000, notwithstanding that the former was concluded some forty years before the latter.

a. *Do MFN clauses extend to mere procedural matters?*

The question whether an MFN clause extends to procedural matters has generated significant debate. Some ICSID tribunals have answered the question in the positive, concluding that MFN clauses may also cover procedural advantages.[102] The first modern award addressing the question was issued in

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[99] *Supra* Sec. IV. B.

[100] *See, e.g.*, the Agreement between the Government of the Hellenic Republic of Greece and the Government of the Republic of South Africa on the Promotion and Mutual Protection of Investments of November 19, 1998 which entered into force on September 5, 2001 and whose text is *available at* http://www.unctadxi.org/templates/DocSearch_779.aspx.

[101] The text of that BIT is *available at* http://www.unctadxi.org/templates/DocSearch_779.aspx. It entered into force on September 17, 2002.

[102] *See* Andreas R. Ziegler, *The Nascent International Law on Most-Favoured Nation (MFN) Clauses in Bilateral Investment Treaties (BITs),* 2010 EUROPEAN Y.B. INT'L

2000[103] in the now-famous *Maffezini* case.[104] In that award, an ICSID tribunal ruled that MFN clauses could extend to mere procedural advantages, with the result that an investor claiming under one BIT could demand, by virtue of an MFN clause in that BIT, that a procedural advantage be afforded to him if the respondent state had granted more favorable procedural advantages to investors under other BITs. A considerable number of subsequent ICSID awards have confirmed that ruling.[105]

ECON. L. 77, 81-89; Gabriel Egli, *Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favoured-Nation Clauses to Dispute Resolution Provisions*, 34 PEPPERDINE L. REV. 1045, 1065 *et seq.* (2007); CARSTEN SCHMIDT, PROZESSUALE MEISTBEGÜNSTIGUNG IM VÖLKERRECHTLICHEN INVESTITIONSSCHUTZ (Frankfurt a. M. 2008) (Schriftenreihe der August Maria Berges Stiftung für Arbitrales Recht vol. 20).

[103] Emilio Augustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction of Jan. 25, 2000 (English translation of the award which had been handed down in Spanish, in 16 ICSID REV.-FILJ 212 (2001).

[104] The claimant Maffezini, an Argentine national, had made an investment in Galicia, Spain. He claimed Spain had violated provisions of the Argentine-Spanish BIT of 1991 and introduced a claim for compensation against Spain before an ICSID arbitral tribunal. However, Article X(3)(a) of the Argentine-Spanish BIT (whose text is reprinted in para. 19 of the award) provided that an investor had to sue the respondent Kingdom of Spain before a Spanish state court prior to introducing his claim before an ICSID tribunal. Only after a blocking or freeze period of 18 months had elapsed after its introduction before a state court could an investor sue the respondent State in arbitration. Maffezini, however, relied on the MFN clause in Article IX of the Argentine-Spanish BIT (*see* text of it in para. 38 of the award) and invoked, in conjunction with that, the Chile-Spain BIT also concluded in 1991 (*see* para. 1 *in fine* of that award). The Chile-Spain BIT was more favorable for Maffezini since it did not contain a blocking or freeze period.

[105] *See* Siemens AG v. Argentine Republic, ICSID Case No. ARB/02/8, Decicion on Jurisdiction of August 3, 2004, http://italaw.com/documents/SiemensJurisdiction-English-3August2004.pdf (similar to the *Maffezini* case, the dispute concerned the applicability of an 18-month blocking or freeze period; *Siemens* relied, on the one hand, on an MFN clause in the Argentine-German BIT and, on the other, on several other BITs, by which Argentina had granted to private investors of other states direct access to an ICSID arbitral tribunal without the necessity to observe a blocking or freeze period; *sub* ¶ 103 of the award the tribunal followed Siemens' argument); MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of May 21, 2004, http://www.asil.org/ilib/MTDvChile.pdf (the two claimant Malaysian companies had sued MTD Chile under the Malaysian-Chile BIT; they relied on the MFN clause contained in that BIT and, in conjunction with that, invoked the more favorable procedural regulations which Chile had granted to Denmark und Croatia in BITs; the tribunal followed the arguments of the two claimants); Gas Natural SDG S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction of June 17, 2005, http://italaw.com/documents/GasNaturalSDG-DecisionPreliminaryQuestionsJurisdiction.pdf (an Argentine investor relied on the MFN clause contained in the Argentine-Spanish BIT and demanded the application of the more favorable arbitration rules which Spain had granted to investors from other states; the tribunal granted claimant's motion); Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua v.

Still, this understanding cannot be regarded as firmly established or universally recognized. A number of other arbitral tribunals have refused to give MFN clauses this effect and have withheld procedural advantages from private investors that are enjoyed by other investors in like circumstances under other BITs.[106]

Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006, http://italaw.com/documents/Suez-Jurisdiction.pdf (British and Spanish investors relied on MFN clauses contained in the Argentine-British and Argentine-Spanish BITs to secure relief from provisions in the BITs requiring them to sue Argentina before its own state courts prior to suing it before an ICSID tribunal; they invoked the Argentine-French BIT, which did not require investors to introduce claims before state courts prior to suing before ICSID arbitral tribunals; under paras. 52-66 of its award (at 29-38) the tribunal followed the arguments of the two claimants); National Grid PLC v. The Argentine Republic, Arbitration under UNCITRAL Rules, Decision on Jurisdiction of June 6, 2006, http://italaw.com/documents/NationalGrid-Jurisdiction-En.pdf (the British claimant relied, on the one hand, on the MFN clause in the Argentine-British BIT and, on the other hand, on the BIT concluded between Argentina and the U.S. in order to avoid an 18-month blocking or freeze period prescribed in that BIT and requiring claimants to sue Argentina before its state courts prior to introducing claims before ICSID tribunals; but pursuant to the Argentine-U.S. BIT such blocking or freeze period did not have to be observed; under paras. 52-94 of the award (at 15-32) the arbitral tribunal followed the arguments of the claimant); Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic and AWG Group Ltd. v. the Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction of August 3, 2006, http://italaw.vom/documents/SuezVivendiAWGjurisdiction.pdf (a Spanish and a British investor relied, on the one hand, on MFN clauses in the BITs their home-countries had concluded with Argentina; these BITs required them to sue before Argentine state courts prior to seeking protection under the arbitral jurisdiction of the ICSID and, on the other hand, the investors invoked the Argentine-French BIT which did not contain such clause but under which a direct claim before an ICSID arbitral tribunal was admissible, under paras. 52-68 of its award (at 26-52) the tribunal followed their arguments).

[106] *See* Salini Costruttori SpA and Italstrade Sp v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 15, 2004, 20 ICSID REV.-FILJ 148 (2005) (an Italian investor relied on a MFN clause contained in the Italian-Jordanian BIT with a view to availing himself of more favorable powers which Jordan had granted, in respective BITs, to investors from the UK and from the U.S.; the arbitral tribunal declined, however, to follow the arguments of the Italian investor) (for an award in another *Salini* matter, *i.e.* a decision on jurisdiction *see* note 89 *supra*); Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005, http://italaw.com/documents/plamavbulgaria.pdf (a Cypriot investor had sued Bulgaria on the basis of an arbitration clause contained in the Cypriot-Bulgarian BIT; the investor relied on the MFN clause contained in that BIT and claimed that Part III of the Energy Charter Treaty ("ECT") be applied in which an arbitration clause was enshrined more favorable to him; both Cyprus and Bulgaria are members of the ECT; the arbitral tribunal declined to extend the MFN clause as claimed by the investor); Vladimir Berschader and Moise Berschader v. The Russian Federation, SCC Stockholm Chamber of Commerce, Case No. 080/2004, Award of April 21, 2006,

This more restrictive approach is found in ICSID awards and in awards rendered under the auspices of arbitral institutions other than ICSID. The tribunal in the case of *RosinvestUK Ltd.* v. *the Russian Federation*[107] only hesitantly permitted the use of an MFN clause to import more favorable procedural provisions (the ambit of an arbitral jurisdiction) from a more recent BIT into an "older" BIT.[108] The tribunal held it necessary to carefully weigh, as against each other, the ambit of the MFN clause and the gain in procedural advantage depending on the interpretation of the arbitration clause. It stated:

> The Tribunal agrees with the Parties that different conclusions can indeed be drawn from them [the precedents] depending on how one evaluates their various wordings of the arbitration clause and MFN clauses and their similarities in allowing generalizations.[109]

The tribunal in *Wintershall Aktiengesellschaft* v. *Argentine Republic*[110] likewise addressed an attempt to rely on an MFN clause to extend procedural powers accorded under one (more recent) BIT to another (older) BIT. In that special case, the tribunal rejected the attempt.[111]

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http://italaw.com/documents/BerschaderFinalAward.pdf (two Belgian investors relied on an MFN clause contained in the Belgian-Russian BIT with a view to availing themselves of more favorable procedural regulations which Russia had granted in later BITs to investors of other states; the arbitral tribunal declined such extension by virtue of an MFN clause; *see* p. 544 of the Award); Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award of September 13, 2006, http://italaw.com/documents/Telenorv.HungaryAward_000.pdf (a Norwegian investor relied on an MFN clause contained in the Norwegian-Hungarian BIT with a view of being able to avail himself of more favorable procedural regulations which Hungary had granted in later BITs to investors of other states; the arbitral tribunal declined such extension; *see* ¶¶ 83-101 at 46-55 of the Award).

[107] SCC (Stockholm Chamber of Commerce) Case No. Arbitration V 079/2005, Award on Jurisdiction of October 2007 (day of the award not cited), http://italaw.com/documents/RosInvestjurisdiction_decision_2007_10.pdf. The Award was confirmed by a judgment handed down by the Swedish Supreme Court on November 12, 2010 (docket No. Ö 2301-09; reports in English available on the internet).

[108] Under the relevant British-Russia BIT, a British investor was allowed to introduce into his arbitral proceedings with the Russian Federation as a matter in dispute (i) the amount of compensation he claimed on account of a confiscation of his property, and (ii) other issues of compensation; the MFN clause he invoked was held to entitle him to rely on provisions in a Danish-Russian BIT which covered such compensation claims.

[109] Award at p. 82 *et seq. sub* ¶ 137.

[110] ICSID Case No. ARB/04, Award of December 12, 2008, *available in* the internet documentation under http:///icsidworldbank.org.

[111] A German investor had introduced a claim against Argentina before an ICSID arbitral tribunal while relying on an MFN clause embodied in the Argentine-German BIT to avoid a blocking or freeze period of 18 months (also embodied in that BIT) before the German investor could sue Argentina before an arbitral tribunal. At great length the

b. *The application of the doctrine to the claims of German holders of Greek state bonds*

Yet there are strong arguments supporting the proposition that the MFN clause in the German-Greek BIT of 1961 can be utilized to "import" the procedural advantage accorded to the private investors by the Greek-Mexican BIT (of 2000). First, the German-Greek BIT of 1961 contains Art. 3(1), by which Greece promised "full protection and security" to the investments made by German investors. That provision reads:

> Capital investments of nationals and companies of a Contracting State shall enjoy full protection and security in the territory of the other Contracting State.[112]

Further, pursuant to paragraph 2 of that Article,[113] the confiscation of an investment is permissible only for purposes of general welfare, and the compensation given for such confiscation must reflect the value of the confiscated asset and must be effective, prompt and capable of being transferred.[114] In the preamble of their BIT itself, the Contracting Parties agreed that the protection of capital investments is apt to stimulate economic initiatives and to increase the welfare of both States.[115] Thus, the Contracting States regarded the "full security and protection" of the capital investments of their nationals and companies made in the territory of the other Contracting State as their key policy underlying their BIT.

It is necessary in light of that policy to integrate into the German-Greek BIT of 1961 the modern insight that a claim by a foreign investor against its host State must lie so as to provide the promised "full protection and security." One might even posit that the presumed intention of the Contracting Parties (when they

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arbitral tribunal discussed the precedents which had established that doctrine. But it concluded that the doctrine was not persuasive. *See* ¶¶ 97-121 of the award.

[112] Translation by the author.

[113] In its authoritative German version, Article 3(2) reads: "Kapitalanlagen von Staatsangehörigen und Gesellschaften eines Vertragsstaats dürfen im Hoheitsgebiet des anderen Vertragsstaats nur zum allgemeinen Wohl und gegen Entschädigung enteignet werden. Die Entschädigung muss dem Wert der enteigneten Kapitalanlage entsprechen, tatsächlich verwertbar und frei transferierbar sein sowie nach den Rechtsvorschriften eines jeden Vertragsstaates entweder im voraus oder mindestens unverzüglich geleistet werden. Spätestens im Zeitpunkt der Enteignung muß in geeigneter Weise für die Festsetzung und Leistung der Entschädigung Vorsorge getroffen sein. . . ."

[114] It is obvious that the famous Hull formula (1938) has been used as a template. As to that formula, see ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 397-402 (2005). *See also* Rudolf Dolzer, *New Foundations of the Law of Expropriation*, 75 AJIL 553, 557 (1981) and Richard B. Lillich, *International Claims: The Settlement by Lump Sum Agreements*, *in* INTERNATIONAL ARBITRATION: LIBER AMICORUM MARTIN DOMKE 143-56 (Pieter Sanders ed., 1967).

[115] That part of the Preamble reads in its authoritative German version: "IN DER ERKENNTNIS, daß ein vertraglicher Schutz dieser Kapitalanlagen geeignet ist, die private wirtschaftliche Initiative zu beleben und den Wohlstand beider Völker zu mehren. . . ."

entered into their BIT) extended to the introduction of a direct claim of an investor against its host state. If the Contracting Parties could have foreseen in 1961 the widespread emergence of investor-State arbitration, they would certainly have made express provision for such arbitration in their BIT. Importing the arbitration clause of the Greek-Mexican BIT of 2000 through the German-Greek BIT's MFN clause therefore seems justified.

E. *Rules of Substantive Law in BITs Allowing the Recovery of Damages Sustained*

There are also rules of substantive law in the German-Greek BIT of 1961 and in other BITs[116] that would allow both holdout bondholders as well as compliance bondholders to recover damages.

The rule protecting investments against expropriation, embodied in Article 3 of the German-Greek BIT of 1961, was cited above.[117] According to jurisprudence developed in a long line of ICSID awards, such rules grant protection not only against direct but also indirect expropriations. In a relatively early award of 2001, in the matter *Ronald S. Lauder* v. *The Czech Republic*,[118] the tribunal reached that conclusion on the basis of Article III(1) of the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment.[119] Article III(1) of that Treaty provides:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation").

The tribunal commented with respect to that Article:[120]

> The concept of indirect (or "*de facto*," or "*creeping*") expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralizes the enjoyment of the property. It is generally accepted that a wide variety of measures are susceptible to lead to indirect expropriation, and each case is therefore to be decided on the basis of its attending circumstances.

The arbitral tribunal further referred in its award[121] to a decision by the European Court of Human Rights in *Mellacher and Others* v. *Austria*,[122] where it

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116 Rules providing for compensation in case of the expropriation of an investment, be it direct or indirect, are at the core of almost all BITs.

117 *Supra* Sec. IV. D. 2. (b).

118 Rendered on September 3, 2001 (available on the internet).

119 Signed on October 22, 1991, entered into force on December 19, 1992. *See* http://www.gov/documents/organization/435567.pdf.

120 Para. 200 of its award. *See also* Alexander Szodruch, *supra* note 17, at 157 *et seq.*

121 *Lauder*, ¶ 200.

was held that a "formal" expropriation is a measure aimed at a "transfer of property," while a "*de facto*" expropriation occurs when a State deprives the owner of his "right to use, let or sell (his) property."

It is true that Greece did not expropriate the private owners of its "old" state bonds bondholders by an overt act, for example by a blunt Parliamentary Act of Nationalization. But it did invite private bondholders to exchange their "old" bonds against "new" ones – bonds which, in economic terms, were worth 75%-80% less than their "old" ones. Thus, both groups of private holders of Greek state bonds suffered losses. On the one hand, the holdout bondholders became victims of an indirect expropriation of their "old" bonds by the Greek Invitation Memorandum since Greece, in connection with that Memorandum, bluntly declared that it would not spend any funds to satisfy their claims.[123] That was tantamount to an outright refusal to pay. The holdout bondholders were thereby deprived of enjoying the full use of the ownership in their "old" bonds. When, on the other hand, the compliance bondholders accepted the Greek "Invitation Offer," they found themselves in a state of unconscionablenes or duress,[124] which supports the proposition that the Exchange Offer qualified as an indirect expropriation.

The conclusion is therefore irrefutable that – in stark contrast to Greek domestic law – the rules against expropriations in the German BIT of 1961 might very well protect German bondholders in their dispute with their sovereign Greek debtor. The thirty-odd BITs Greece has entered into with other states will likewise protect the investments of those states' nationals against the creeping expropriation that Greece subtly carried out against the holders of its "old" bonds. Above all, arbitral tribunals will be prepared to weigh the legitimate interests of all bondholders against the defenses brought forward by the respective sovereign debtor states.

V. A SPECIAL CASE: AN EVENTUAL EXIT OF GREECE FROM THE EUROZONE ("GREXIT")

One special case – a still hypothetical one at the time this article was written – must also be examined. This involves the possible exit of Greece from the eurozone ("Grexit"). Here again, the question arises whether disputes arising out of such "Grexit" would have to be brought before national state courts (and which ones?) or whether the parties would be entitled to bring such disputes before international arbitral tribunals.

There are several alternative ways in which "Grexit" could occur.

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[122] 1989 Eur.Ct.H.R. (Ser. A, No. 169).
[123] *See supra* Sec. II. C.
[124] *See supra* Sec. III. B and C.

A. *A "Grexit" Following the Eventual Termination, by Greece, of its "Invitation Offer"*

One possible iteration of "Grexit" involves Greece itself taking the initiative to leave the eurozone. In the Exchange Offer contained in its Invitation Memorandum of February 24, 2012, Greece retained sole discretion to terminate its Invitation to private bondholders at any time. Clause (nn) of its section on "Bondholders' Agreements, Acknowledgments, Representations, Warranties and Undertakings" states:[125]

> (nn) it [the bondholder] understands that the Republic may, at its sole discretion, extend, re-open, amend, waive any condition of or terminate the Invitation at any time, in whole or in part, … .

Reference was made above[126] to a proviso in the "Invitation Offer" by which bondholders agree that the Invitation as well as any exchange of Designated Securities pursuant to it, and any non-contractual obligations arising out of or in connection with it, are governed by, and shall be construed in accordance with, the laws of Greece. It was also mentioned above[127] that the bondholders in the Memorandum irrevocably and unconditionally acknowledge that the Greek courts will have jurisdiction to settle any disputes which may arise out of or in connection with the "Invitation Offer" and that, accordingly, any suit, action or proceedings arising out of or in connection with the Invitation may be brought in Greek courts.[128] Hence, if Greece, by virtue of the clause (nn) cited above, should indeed terminate its "Invitation Offer," its Exchange Offer would likewise come to an end. It will remain an open question at this stage in our analysis whether that termination would have the retroactive effect of terminating the "new" bonds and validly re-instating the "old" ones.

1. *The Effect of Such Termination on the Holdout Bondholders*

In either event, the first iteration of "Grexit" would not affect the position of those German holders of "old" Greek state bonds who never accepted the Greek Invitation Memorandum of February 24, 2012 (the so-called holdout creditors). Their contracts on the "old" bonds continued to remain in force as before. The Greek Invitation Memorandum had no meaning for them. Therefore, in the first alternative of "Grexit" discussed here, no problems would arise with respect to the legal position of these bondholders.

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[125] *See* the Offer, *supra* note 27, at 24.
[126] *See supra* Sec. III. B.
[127] *See supra* Sec. III. E.
[128] *See* the Offer, *supra* note 27, at 24.

2. *The Effect of Such Termination on the Compliance Bondholders*

The story would be different, however, for the so-called compliance creditors who expressly accepted the Greek Invitation Memorandum (compliance bondholders) or whose consent was imposed upon them by virtue of CAC clauses (the so-called compliance bondholders by coercion). The validity of their "old" bonds expired, and the "old" bonds were replaced by "new" ones. The question therefore arises in what manner a possible termination by Greece of its "Invitation Offer" would affect the holders of these "new" bonds.

Should Greece opt to terminate its Exchange Offer, the validity of these holders' agreements with Greece on the "new" bonds might become void or might be voidable. This might present a case of *rebus sic stantibus,* frustration, unforeseen circumstances or whatever other term of that kind (impossibility of performance) one might use. We have already seen[129] that the parties to the Memorandum have agreed it will be governed by Greek domestic law. Article 388 of the Civil Code could thus be on point. That provision, which relates to situations of *rebus sic stantibus* etc., reads:[130]

> In case of a subsequent change in the circumstances on which the contracting parties, under consideration of the principles of good faith and of fairness in transactions, have mainly founded a reciprocal contract, the change being due to extraordinary and unforeseen events, and where because of such a change the obligation of the promisor – in comparison with the obligation of the promisee – has become excessively onerous, the court may, at the request of the promisor, reduce his obligation to the proper extent, or decree the discharge of the contract as a whole or to the extent of the non-performed part. In the case in which the discharge of the contract has been decreed, all the obligations arising from it cease to exist, and the parties are mutually obliged to return all they have received according to the provisions relating to unjustifiable enrichment.[131]

The question how this provision would be applied to the situation of German bondholders after a possible "Grexit" proves a difficult one to answer.[132] It is

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[129] *Supra* Sec. II. C.

[130] Translation into English taken from Pan. J. Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1948*, 11 MODERN L. REV. 36, 42 (1948).

[131] *See* the in-depth analysis by Anastassios Valtoudis, National Report on Greece for *Unexpected Circumstances in Contract Law*, Ewoud Hondius & Hans-Christoph Grigoleit Reporters (members of the "Trento Group on Unexpected Circumstances" in the Project "The Common Law of European Contract"), *available at* http://unexpected-circumstances.org/GREECE VALTOUDIS.doc.

[132] Let us assume all criteria enumerated in this provision would be met – certainly a daring assumption. The relevant contract would be the Greek Invitation Memorandum of February 24, 2012, on the one hand, and the acceptance of it by the compliance creditors, on the other. The parties to these contracts would have concluded it – we suppose – on the assumption that Greece could be rescued from an otherwise impending insolvency. The

impossible at this point to gauge with any real precision how a Greek court would answer the manifold questions of interpretation that would arise in applying the article in that context. In all events, it seems unlikely that the Greek courts, in applying Article 388 of the Greek Civil Code, would find that all obligations arising from the Invitation Memorandum had ceased to exist and that the parties would be mutually obligated to return all benefit received according to provisions relating to unjust enrichment.

German compliance bondholders would probably find themselves in the same legal position as German holdout bondholders, whose legal position was described directly above[133]: Their contracts on the "old" bonds would ultimately be reinstated and would continue to remain in force as before.

B. *A "Grexit" Following a* de facto *Insolvency of Greece*

A *de facto* insolvency of Greece would of course affect the position both of holdout bondholders and that of compliance bondholders. Both groups of bondholders would no longer have a debtor capable of satisfying their claims for the repayment of capital and interest.

1. *Consequences in General*

Greece, in this iteration of "Grexit," would no longer have euros at its disposal to pay, for example, its public servants, its retirees and its other domestic creditors, not to mention its foreign creditors. To satisfy its domestic creditors, Greece would need to issue IOUs or registered warrants. These instruments are known from other *de facto* insolvencies of sovereign states. They are informal documents, usually not hand-signed, acknowledging the issuers' debts.[134] They differ from promissory notes in that they are not negotiable and normally do not specify interest, maturities or repayment terms (such as the time and place of

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fact that insolvency has occurred in spite of these expectations, would have to be qualified as the extraordinary and unforeseen event in the meaning of Article 388. Because of such an event the obligation of the promisor – in comparison to the obligation of the promisee – should have become excessively onerous to him. But who would then be the promisor in considering the principles of good faith and fairness in transactions? If Greece is viewed as the promisor, the situation would be as follows: By virtue of the Memorandum, Greece has, in economic standard terms, been freed from a debt load of about 75%-80% of its outstanding state bonds (with interest) but would still be obliged to pay to the German bondholders the remaining 20%-25%. Would that avoidance of an obligation in conjunction with its continuing obligations be too onerous for Greece? If German bondholders are rather viewed as the promisors, the opposite question would arise: Would their loss of about 75%-80% of the economic value of their bonds have to be considered as too onerous while they would still be entitled to claim 20%-25% of it from Greece?

[133] *Supra* Sec. V.A.1.

[134] Registered warrants had been issued by the State of California during its 2009 cash crisis. *See* http://www.sco.ca.gov./eo_news_registeredwarrants.html.

repayment). Another form of substitute for legal tender would be so-called "scrip," a kind of instrument which has been used during transient times of insolvency, for example, by local communities in Germany or during the late 2000 recession in the U.S. by U.S. local communities. Such scrip too would not constitute legal tender but would substitute only certain units of currency.[135] Of course, at the final stage of this type of "Grexit," Greece would have to introduce a new currency which – perhaps running parallel to the euro – would then constitute legal tender.[136]

IOUs or scrip could of course not be used to satisfy the claims of foreign bondholders.

2. *The Position of Foreign Holdout Bondholders*

Foreign bondholders would be affected by a *de facto* insolvency of Greece in another way. Here again, one must distinguish between holdout bondholders and compliance bondholders.

The insolvency of states is not regulated by any statutory provisions, either on the level of the law of nations or on the level of the EU. Consequently, no express rules of a transnational character could be applied in such a situation. Should Greece *de facto* become insolvent, the foreign holdout creditors would have retained their "old" bonds and with them their claims for payment of the capital and the interest embodied in them. The only loss they would suffer would be of an economic nature and result purely from the insolvency of their sovereign debtor. But from a legal perspective, their situation would be the same as prior to the Memorandum of February 24, 2012. They could attempt to remedy or alleviate their economic loss by trying to obtain a legal title enforceable against the property of their sovereign debtor outside of its territory. Foreign holdout creditors would thus face economic but not legal problems.

However, the legal position of compliance bondholders might differ from that of holdout bondholders.

3. *The Position of Foreign Compliance Bondholders*

Compliance bondholders have either accepted Greece's Invitation Memorandum of February 24, 2012 or are presumed to have consented thereto. They would be bound by their actual or presumed declarations in spite of Greece's insolvency. Therefore, their "old" bonds were effectively replaced by "new" bonds. The fact that Greece would be insolvent would not *eo ipso* invalidate the issuance of the "new" bonds. On the contrary, the Memorandum on the basis of

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[135] *See* Irving Fisher, Stamp Scrip (New York 1933), *available at* http://userpage.fu.berlin.de/roehrigerw/fisher.

[136] Perhaps, in the tradition of the old drachme, the new currency unit would be called the "new drachme." It is a matter of course that, in terms of exchange rates, such "new drachme" would have much less value than a euro.

which the exchange took place would remain in effect. But Greece's *de facto* insolvency might affect the validity of its Memorandum in another way. We have seen already[137] that the parties to the Memorandum have agreed it will be governed by Greek domestic law. Here again, Article 388 of its Civil Code, which governs cases of *rebus sic stantibus*, etc., could conceivably be on point. However, as discussed above,[138] the potential utility of that article cannot be gauged with any precision since its application relies primarily within the discretion of the Greek courts.

C. *A "Grexit" Regulated by Statutory Norms of the EU*

Finally, the EU might regulate an eventual "Grexit." No one could divine at this stage the form such a "Grexit" might take; its precise contours would be fashioned at the discretion of the EU legislator.

One layer of uncertainty in respect of this form of "Grexit" relates to jurisdiction over disputes concerning the interpretation and execution of statutory EU regulations implementing the "Grexit." Such jurisdiction would most likely be conferred upon the European Court of Justice.

D. *Result: International Arbitration as Loser*

Thus, whatever form "Grexit" might take, international arbitration would be the loser in its competition with national state courts or the European Court of Justice.

VI. SUMMING UP AND CONCLUSIONS

In recent times, international arbitration has all too often been neglected when sovereign debts were to be restructured. This has again become evident in the financial crisis that hit Greece in 2008.

First, when the EU, the IMF and the ECB prepared their two rescue packages *inter alia* for Greece in 2010 and 2012, they did not by express terms confer jurisdiction upon international arbitral tribunals to hear disputes over the interpretation and application of the new arrangements to which they had agreed.[139] Second, when Greece issued its Invitation Memorandum of February 24, 2012, and when it offered in that Invitation to exchange "old" bonds for "new," it established no international arbitration mechanism but rather provided for the jurisdiction of its national courts.[140] Third, international arbitration would again lose out to national courts or the European Court of Justice should Greece

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[137] *Supra* Sec. III. B.
[138] *See supra* Sec. V. A. 2.
[139] *See supra* Sec. II. A.
[140] *See supra* Sec. II. B.

leave the eurozone.[141] Thus, there is no arbitration scheme already in place, nor is there one on the immediate horizon, that would serve to balance the interests of debtor states, on the one hand, and aggrieved private bondholders, on the other. In no aspect of the Greek financial crisis has international arbitration been expressly adopted for the resolution of disputes. Rather, the Greek national courts have been permitted to fill the gap and to assert jurisdiction.[142] Instead, in the standard terms accompanying the bondholder contracts, national courts of other states had already *ab initio* been entrusted with jurisdiction prior to any attempt to restructure Greece's debts.[143]

This is unfortunate in view of the many advantages international arbitration offers. Again, these advantages, both procedural and substantive in nature, are easily enumerated.[144] First, there is worldwide enforceability, which is to a great extent guaranteed by the ICSID Convention and, for awards rendered by other international arbitral tribunals, by the New York Convention of 1958. Second, BITs and similar international conventions supply more appropriate substantive rules to create a balance between the interests of sovereign debtors close to insolvency, on the one hand, and private investors whose assets are at stake, on the other. National laws, by contrast, too often try to minimize as much as possible any liability of the sovereign debtor and tend to reduce to a minimum the claims of private bondholders. Third, national idiosyncrasies could be avoided if arbitral tribunals could decide on conflicts between private bondholders and sovereign debtors. Reputable, well-recognized and decades-old international arbitration institutions would certainly be ready to offer their services.[145] One might also consider the creation of a specialized arbitral institution entrusted with resolving issues and disputes relating to the restructuring of Greece's debts. A look into past centuries might be helpful in this respect.

It must be recalled in all this that some private bondholders can already avail themselves of international arbitration in a bid to have their legitimate interests safeguarded. Some BITs offer support for such claims, both in providing a basis for arbitral jurisdiction as well as in protecting bondholders against expropriations in any form.[146]

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[141] *See supra* Sec. V.

[142] *See supra* Sec. III.

[143] *See supra* Sec. IV. A.

[144] *See supra* Sec. I. A and B.

[145] *E.g.*, the ICSID Centre in Washington, D.C.; the International Court of Arbitration of the International Chamber of Commerce in Paris; the London International Court of Arbitration; or The German Institution of Arbitration in Cologne/Berlin.

[146] *See supra* Sec. IV.