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The Greek Sovereign Debt Rescheduling, EU Bail-in and Investment Arbitration

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The Greek Sovereign Debt Rescheduling, EU Bail-in and Investment Arbitration

1. Many readers of *Insight* spent July 2015 riveted to their screens watching the brinkmanship of the Greek national debt third bailout unfold. Few were aware that part of that debt – the one owed to private creditors – was being bitterly fought in fora other than the European Commission or the Greek Parliament; it was the subject of a number of claims filed before various courts of EU member States (Germany and, of course, Greece itself), the European Court of Human Rights (ECHR) and investment arbitral tribunals. This article offers an overview of recent litigation in relation to the Greek debt rescheduling and reflections on the future of sovereign debt-related claims before investment arbitral tribunals in the wake of the *Poštová Banka* award. It concludes with observations on the impact of recent EU bail-in regulation on property rights and possible challenges under investment protection laws.

2. **Background.** *Insight* readers are familiar with, or can easily access readily available resources dealing with, the history of the Greek national debt crisis and the country's inability to repay its debt initially due by June 2010. To prevent default and its expected systemic impact on the Eurozone, the Eurogroup[1] and the International Monetary Fund (IMF) extended a first bail-out of €110 bn to Greece on 11 April 2011. This program followed the signing of a Memorandum of Economic and Fiscal Policies on 3 May 2010 pursuant to which the Eurogroup, the IMF, the European Commission and the European Central Bank (ECB) agreed to increase their financial support to Greece in consideration of the country imposing austerity measures. In 2011, the national debt was restructured with a novel feature: a bail-in component labelled "Private Sector Involvement" (PSI) which in effect was a 53.3% nominal haircut in the principal and the interest due on Greek government bonds (GGBs)[2].

3. On 21 February 2012, the Eurogroup agreed with Greece to increase the financial package on condition that Greece implement a debt exchange program that included the PSI. On 23 February 2012, the Greek Parliament enacted Law No. 4050/2012 (the "Greek Bondholder Act" or the "Act") fixing the conditions of the exchange of eligible GGBs as follows:

- The holders of the initial GGBs were invited to exchange their bonds against new securities;
- The new securities resulting from the exchange would consist of a combination of:
  - (i) new bonds issued by the Hellenic Republic in a face amount of 31.5% of the nominal amount of the exchanged GGBs;
  - (ii) European Financial Stability Facility Notes with a maturity date of 2 years or less in nominal amount equal to 15% of the face amount of the exchanged GGBs;
  - (iii) detachable GDP-linked securities in a notional amount equal to the face amount of the new GGBs; and
  - (iv) 6-month European Financial Stability Facility Notes ("EFSF") in respect of the interest accrued on each tendered GGB.

4. While the exchange was not compulsory, the Act amended the terms of the bond loans by introducing a collective action clause (CAC). In effect, the Act replaced the unanimity requirement by providing that the exchange become binding on all eligible Greek law governed GGBs if at least two thirds of the aggregate principal amount of all eligible GGB holders voted in favour of the exchange.

5. The exchange was a success by all accounts. Of the € 177bn eligible GGBs issued or guaranteed by Greece and governed by Greek law, bondholders of € 152bn (85.5% of the outstanding bonds) participated in the exchange, and 94.23% of the participating bondholders voted in favour of the exchange. Thus, on 12 March 2012, Greece accepted the exchange and proceeded to deliver the new securities under the amended terms that applied to all the Greek law governed GGBs (including those not tendered for exchange). By paying the consideration indicated in the exchange offer,

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Greece discharged its obligations to the holders of the amended GGBs.

This exchange was challenged before Greek administrative courts, the ECHR[3] and ICSID. Other lawsuits are pending and more are expected to be filed. This article will offer a quick overview of the claims filed before Greek courts and the ECHR, and focus on the *Poštová Banka* award issued recently by an ICSID tribunal.

6. **The case before the Greek Council of State.** This first claim before the Greek Council of State predated the PSI. It challenged the constitutionality of the Memorandum of Understanding signed in May 2010 between Greece and the troika (member States of the Eurozone, ECB and IMF) and authorised by Law No. 3845/2010 in Greece. Amongst other austerity measures, the MOU provided for cuts in pensions and in civil servants' compensation. Several public sector employees and labour interest groups petitioned the administrative court requesting the payment of the full compensation and benefits to which they were entitled before the enactment of the law.

7. Rejecting the claim, the court agreed with the Greek Government that the adopted austerity measures, albeit permanent, were justified amid the exceptional circumstances in order to remedy the budgetary problem and, in the longer term, to strengthen the country's financial stability. Comparing the situation to that of other states where the financial crisis brought similar reductions in compensation and pensions, the court found that the claimants had not demonstrated that their situation had so deteriorated that their very subsistence was at risk. The court indicated in its ruling that the Constitution provides no right to a given level of compensation or pension[4].

8. **The case before the ECHR.** A similar claim was brought before the European Court of Human Rights by two Greek civil servants. Again, it did not target the PSI specifically. The claimants argued that the austerity measures enacted by the Greek government breached article 1(1) of the Additional Protocol No. 1 of the European Convention on Human Rights in infringing their right to peaceful enjoyment of their possessions[5]. In rejecting the claims, the court ruled that the cut in the first claimant's salary (from €2,435 to €1,885) did not reach the level of putting that person's very subsistence in peril as provided under the Convention. Similarly, for the second claim brought by the civil servants union, the court ruled that the cut in the 13th and the 14th months' pensions did not give ground to annul the austerity measures, especially given that the cut was compensated by an exceptional bonus. Importantly, the court recognised a margin of appreciation for the government in deciding to take emergency measures to tackle the financial crisis[6].

9. **The (second) case before the Greek Council of State.** Contrary to the first claim brought before the Council of State, this second claim specifically challenged the PSI as enacted in the Greek Bondholder Act of 23 February 2012. It was brought by 28 Greek and foreign bond holders. The main ground for the claim was the introduction with retroactive effect of the CAC in pre-existing GGBs which, as claimed, infringed the constitutional right to property, the principle of equality and freedom of contract. The Greek government countered by underscoring the voluntary nature of the exchange: the triggering of the CAC was the result of the vote by the bondholders who chose to accept the majority rule. Without the CAC, the exchange would not have been possible and the bondholders would have stood to lose their investment in the event of a Greek bankruptcy or exit from the Eurozone. Moreover, the government denied any violation of the right to property since the exchange offered bondholders new bonds of the same market value as the replaced ones and with a better rating.
As to the claim of infringement of the constitutional principle of equality due to the exclusion from the PSI of Treasury GGBs of a duration of three and six months as well as bonds held by the ECB and national central banks, the government argued that this exclusion was justified by the EU's standards of risk that consider those particular securities as money market instruments as opposed to the riskier longer term bonds used as capital market instruments. Their inclusion in

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the exchange program would have frozen the corresponding treasury bill market and the government's short term financing needs for the six months preceding the exchange. Concerning the difference in the treatment with GGBs held by national central banks, it was argued that the very purpose of holding GGBs in the Eurosystem served the public interest through achieving EU monetary policy. The government submitted that this rationale differs substantially from the profit-driven approach of other bondholders.

10. The Council of State agreed with the government in a majority ruling and upheld the validity of the PSI[7]. It considered that unforeseen extraordinary events that prevented the government from repaying its debts justified applying the *rebus sic standibus* rule. Citing the provisions of the Constitution, the court characterised the financial crisis as a public necessity that permitted the limitation of property rights proportionately. It ruled that the exchange of the initial GGBs for the new securities was neither inadequate nor disproportionate, as the alternative would have led to the collapse of the national economy and the cessation of any repayment.

11. **The case before ICSID[8].** A Slovak holdout creditor of Greek GGBs, Poštová Banka, and its main shareholder, Istrokapital, a European company organised under the laws of Cyprus, chose to bring their claim that the PSI violated their investor rights before a different forum: ICSID. While this jurisdictional choice might appear bold compared to the more traditional venues described above, it rests on an encouraging line of case law where ICSID tribunals have construed a qualifying investment broadly so as to cover financial instruments. In at least five cases previously adjudicated, arbitral tribunals have decided that financial instruments may be characterised as investments in the absence of an explicit exclusion in the BIT[9]. More importantly, the alternative would have confronted the bondholder, Poštová Banka, with the unpromising prospect of having to bring a claim before the Greek courts as the bonds provided that the Greek courts had exclusive jurisdiction. (That said, even bondholders enjoying a foreign court jurisdiction clause in their bonds can consider bringing a claim before an ICSID tribunal). The appeal of ICSID lies in the limited success that holdout creditors have had in the past trying to find attachable assets of the respondent State to enforce the favourable judgments that they have obtained, for example, in the New York courts[10]. In contrast, the ICSID Convention requires courts in all 160 member States to recognise and enforce ICSID awards as an equivalent to a final judgment of local courts[11].

12. **Poštová Banka's purchase of GGBs.** Poštová Banka had purchased in early 2010 five series of GGBs, all dematerialised and governed by Greek law. The chain of securities issue and transfers works as follows: GGBs are issued by the Greek government through the Bank of Greece System to participants in the System. Participants are financial institutions and central securities depositories approved by the Bank of Greece. Those participants pay the value of the GGB to the government and deliver those bonds to 22 primary dealers, which are financial institutions appointed each year by the Greek government and the Greek Central Bank to provide securities services to the government. The 22 primary dealers pay the participants the financial consideration for the GGB and, in turn, sell the bonds on the secondary market. The sale of the GGBs on the secondary market occurs through universal depositaries such as Clearstream. The whole distribution process happens within one or two days of the issue of the GGBs.

13. Pursuant to Greek Law No. 2198 of 1994, only participants in the System administered by the Central Bank can hold title to the GGBs. Yet, those bonds purchased by the participants can be transferred to third party investors which, according to Law No. 2198, have a claim only against the participant to the System.

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14. Poštová Banka was neither a participant in the System nor a primary dealer. It therefore did not intervene in the process of issuance of the GGBs and their distribution to the secondary market. It voted against the exchange proposed by Greece. Upon delivery of the new securities, it sold the EFSF notes on the secondary market but kept the new GGBs and the GDP-linked securities received in the exchange. It subsequently purchased new exchanged bonds at a better price which, it was argued in the case, amounted to arbitrage rather than a long term investment.

15. **Istrokapital.** In October 2011, the National Bank of Slovakia expressed its concern to Poštová Banka as regards the bank's exposure to Greek Government Bonds. It was agreed that the risk from part of the Greek bond portfolio should be transferred to a shareholder of Poštová Banka. Istrokapital, Poštová Banka's majority shareholder, was selected to that end. However, the transfer did not take place directly to Istrokapital. Instead, Poštová Banka assigned part of its portfolio of the principal and interest of the GGBs to J&T Finance, a Czech company, which paid their nominal value. Istrokapital agreed that, notwithstanding the sale of shares, it would indemnify J&T Finance if the return on the value of the GGBs did not reach the acquisition cost.

16. **Jurisdiction.** Acting as respondent in the claim, Greece challenged the jurisdiction of the ICSID tribunal on, amongst other jurisdictional grounds, *ratione materiae* (the GGBs were not protected investments under either the BIT or the ICSID Convention) and *ratione personae* grounds (Istrokpital was not a protected investor under the BIT). This article will only address the first jurisdictional ground given its relevance to the characterisation of financial instruments as qualifying investments.

17. **Were the GGBs a qualifying investment under the Slovakia – Greece Treaty?** Greece argued that the GGBs were not protected investments either under the Slovakia-Greece BIT or the ICSID Convention - the reason being that Poštová Banka never held GGBs and was never a participant in the System. Instead, it acquired a stake in a pool of freely negotiable, fungible interests in GGBs through secondary market transactions, which is different from holding specific GGB securities[12].

18. Not surprisingly, the claimant bank relied heavily on the *Abaclat* and the *Ambiente Ufficio* awards[13] where the respective ICSID tribunals upheld their *ratione materiae* jurisdiction in respect of Italian bondholders' rights in Argentine bonds purchased from Italian banks, not from Argentina itself. The majority in those tribunals rejected attempts to separate the primary and secondary markets, in effect finding that investors in the secondary market had provided a contribution to the State, thus meeting an essential test of the definition of an investment.

19. In addition to amounting to a qualifying investment under the relevant treaty, the putative investment needs to be made in the territory of the host State. While it is possible to ascertain easily the location of an investment which comprises a physical project such as the building of a dam or a bridge, the localisation of dematerialised financial instruments may prove to be rather challenging if physical location criteria were to be required.

20. **Should there be a specific territorial link test for financial instruments?** The first tribunal to establish that financial instruments warranted a specific territorial connection test was the *Fedax* tribunal. It ruled that funds involved in international financial transactions need not be physically transferred to the territory of the beneficiary; they can be put at its disposal elsewhere:

> "*The important question is whether the funds made available are utilized by the beneficiary of the credit (…) so as to finance its various governmental needs*".[14]

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21. The majority in *Abaclat* followed the same line of reasoning, holding that:

> *"With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. [They] should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is were the invested funds ultimately made available to the Host State and did they support the latter's economic development".*[15]

22. Relying on the precedents cited above, the claimant *Poštová Banka* argued that it was sufficient that funds were put at the disposal of Greece to foster its economic development without the need to be linked to a specific project in Greece in the absence of an explicit requirement to that effect in the BIT. Territorial nexus, it submitted, should be assessed differently in relation to financial investments, for, as established in *Fedax* and *CSOB*, the funds are not physically transferred to the territory of the beneficiary, but put at its disposal. In this case, the claimant argued, the investment clearly involved a flow of funds into Greece. Not surprisingly, Greece rejected any idea that *Poštová Banka*'s purchase of GGBs on the secondary market could amount to a qualifying investment made in the territory of the Hellenic Republic. It also argued that secondary market purchases of interests in GGBs lacked territorial connection with the host State. As the purchase money was paid by the investor to Clearstream, this transaction did not involve inflow of funds into Greece and was not linked to any business undertaking in the Hellenic Republic. Poštova Banka's interests were held in accounts in Clearstream, maintained in Luxembourg and governed by Luxembourg law. Only participants in the System are considered to be the legal owners of the GGBs. In effect, Greece submitted, Poštová Banka was in contractual privity with Clearstream and not with Greece.

23. **The Vienna Convention on the Law of Treaties as an interpretation aid to the Slovakia – Greece Treaty.** Similar to many treaties, the Slovakia – Greece BIT provides a broad definition of "investment". Article 1 ("*Definitions*") provides

> *For the purposes of this Agreement:*
> *1. "Investment" means every kind of asset and in particular, though not exclusively includes: (…) a) movable and immovable property and any other property rights such as mortgages, liens or pledges, b) shares in and stock and debentures of a company and any other form of participation in a company, c) loans, claims to money or to any performance under contract having a financial value (…).*

24. In determining whether sub-paragraphs (a), (b) or (c) above should be construed as including sovereign bonds, the tribunal reviewed article 31(4) of the Vienna Convention on the Law of Treaties (1969) which requires interpretation of a treaty:

> *"(1)…in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

25. While the tribunal agreed with the claimants that the concept of "investment" as contained in the BIT is a broad one, it did not agree that a broad definition necessarily means that any and all categories of assets, of any nature whatsoever, may qualify as an "investment". The tribunal reviewed a number of ICSID awards rendered in similarly drafted BITs and concluded that interpreting a treaty in good faith requires providing some meaning to the examples listed in the treaty in order to be effective. If the interpretation stops at simply indicating that any asset is an investment, the examples listed in sub-paragraphs (a), (b) or (c) of article 1 of the BIT will be unnecessary, redundant or useless and it would have been sufficient to define investment as "any kind of assets of any nature" without including examples of what may constitute an investment.

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26. Having asserted this rule, the tribunal still had to deal with the precedents established by the *Abaclat* and the *Ambiente Ufficio* tribunals which, the claimant argued, upheld their *ratione materiae* jurisdiction on similarly-structured sovereign bonds. Rather than openly disavowing those tribunals, the tribunal in *Poštová Banka* identified differences in the terms of the relevant treaty that justified its reaching a different opinion. In offering illustrations of what may constitute an investment, the Slovakia-Greece BIT, contrary to the Argentina-Italy BIT, does not refer to "*public titles*" or to a general concept of "*obligations*". Neither does it refer to "*any right of economic nature conferred under law or contract*" that the *Abaclat* tribunal used as a linchpin to rule that the Argentine bonds were qualifying investments. Absent such terms in the BIT, the tribunal in *Poštová Banka* concluded that general references to company debentures in article 1(1)(b) and to claims of money in article 1(1)(c) could not be considered as including sovereign bonds. Specifically, the tribunal ruled that the reference to "debentures of a company" in article 1(1)(b) only refers to corporate debt, but not to sovereign debt. Similarly, the tribunal did not agree with the claimants that the GGBs fit into the category described in article 1(1)(c) as "*loans, claims to money or to any performance under contract having a financial value.*" In this respect, the tribunal made two important distinctions. Firstly, it distinguished between sovereign debt and corporate debt. It noted that sovereign debt differs from corporate debt in being a key instrument of monetary and economic policy and subject to a high degree of political influence and risk. Secondly, it also distinguished between loans and GGBs as follows:

> *"The creditor in a loan is generally a bank or group of banks, normally identified in the pertinent agreement. Bonds are generally held by a large group of creditors, generally anonymous. Moreover, unlike creditors in a loan, the creditors of bonds may change several times in a matter of days or even hours, as bonds are traded. The tradability of loans or syndicated loans is generally limited, and precisely because loans are generally not tradable, they are not subject to the restrictions or regulations that apply to securities. (…) Loans involve contractual privity between the lender and the debtor, while bonds do not involve contractual privity. The lender has a direct relationship with the debtor – in the case of public debt, the State – as party to the same contract – the loan agreement – while in the issuance of bonds the contractual relationship of the State is with the intermediaries – in the case at hand with the Participants and the Primary Dealers. The holders of the bonds – the ultimate creditors, holders of the bonds – have a contractual relationship with the intermediary or the clearing house where the bonds are acquired or both."*[16]

27. Applying those findings to the case, the tribunal noted that Poštová Banka acquired the GGBs under a contract with Clearstream and subsequently sold them back through Clearstream under the same contract. Thereafter, Poštová Banka assigned its rights to the GGBs to third parties. If Poštová Banka had granted a loan to Greece, as opposed to having acquired GGBs in the secondary market, it would have had a direct contractual relationship with Greece, and the fast tradability of the GGBs – without involving Greece – which allowed Poštová Banka to sell, repurchase, assign and reverse the assignment, in some cases in a matter of hours, without informing the State debtor of any step of the operation, would not have been possible. The Tribunal therefore concluded that it lacked the *ratione materiae* jurisdiction to adjudicate this dispute.

28. **Were the Greek GGBs a qualifying investment under the ICSID Convention?** Strictly, the tribunal's decision that the GGBs were not an "investment" under the BIT made it unnecessary for the tribunal to determine whether there should be a specific territorial nexus test for financial instruments with the host State or to examine the claim under the ICSID Convention. However, the majority of the tribunal did expand some *obiter* comments as to whether the GGBs amount to a qualifying investment under the ICSID

Convention. Contrary to the earlier part of the award, they are generally less persuasive.

29. Greece argued that the term 'investment' in Article 25(1) of the ICSID Convention has an objective meaning that cannot be varied by agreement between the parties. Invoking the classical criteria upheld in previous ICSID cases, it argued that an investment needs to meet four cumulative criteria for the purposes of Article 25(1): "(i) a contribution in money or other assets, (ii) a significant duration, (iii) an element of risk, and (iv) a contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State". Reviewing previous ICSID awards that held that debt instruments are protected investments[17], Greece argued that debt instruments do not automatically meet these criteria, which should be assessed on a case-by-case basis.

30. It is well known that the drafters of the ICSID Convention chose not to include a definition of investment within the convention. Some ICSID tribunals attempted to deal with this omission by identifying objective criteria for the definition of the term "investment" that they considered flowing from the object and purpose of the Convention. They considered that those criteria could not be varied in a BIT[18]. In a nutshell, those tribunals considered that the characterisation of an investment requires the meeting of core elements: a contribution of money or assets, duration and risk, all of which form part of the objective definition of the term "investment." In contrast, other ICSID tribunals have held that because the ICSID Convention provides no definition of the term "investment", the State parties can agree on a definition in the relevant BIT (the subjective approach)[19].

31. In the *Poštová Banka* case, the tribunal did not choose between the objective and the subjective approach but its majority ventured to propose in *obiter* that an analysis applying the "objective" test would lead to the same conclusion with respect to GGBs as one applying the "subjective" test under the BIT. In particular, the majority found that the purchase and holding of the GGBs by the claimant bank did not amount to a contribution to an economic venture - the reason being that the State is not primarily engaged in economic ventures, but rather enters into various contracts to run its different administrations, pay its civil servants, ensure the functioning of its embassies, refinance part of its foreign debt, etc. The majority noted that the claimant bank did not argue that the money it paid for the GGBs, even if considered as ultimately benefitting Greece, was used in economically productive activities. Rather, it appears that the funds were used for Greece's budgetary needs, and particularly for repaying its debts. Citing the awards in ICSID cases *Fedax*, *CSOB, Joy Mining* and *Alps Finance*, the majority considered that financial instruments that are not linked with an economic venture cannot be considered as investments *per se.*

32. **Prospects for the future: sovereign debt and investment arbitration.** Until the rendering of the *Poštová Banka* award, *Abaclat* and *Ambiente Ufficio* were considered as compelling precedent. They were read as an assurance that any forced rescheduling of national debt, haircuts, compulsory introduction of CACs, conversion to equity and other State interference in the terms of sovereign bond loans would lead to a vindication of holdout creditors by way of awarding damages under the relevant BIT[20]. This of course would have to be qualified where the relevant treaty does not explicitly exclude sovereign debt from its definition of investment, but almost none did before the filing of the *Abaclat* claim in 2007. The award in the *Poštová Banka* case demonstrates the limit of that reasoning. Similarly-worded broad definitions of "investment" in BITs may lead to different awards.

33. While the majority reasoning (although *obiter*) concerning the objective characterisation of an investment under article 25 of the ICSID Convention is unconvincing and unlikely to be considered as persuasive by subsequent tribunals, the unanimous decision of the tribunal to give effect to the non-exhaustive list of illustrations of investments provided in the treaty, as opposed to stopping at the general definition of investment, is well argued and supported by a

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cogent interpretation of the Vienna Convention. In the end, each case will stand on the merits of its own facts and the terms of the particular BIT.

On 5 August 2015, Poštová Banka filed an application for partial annulment of the award.

34. **More prospects for the future: EU bail-in regulation and investment arbitration.** As indicated above, the Greek Bondholder Act and its PSI imports a bail-in feature that requires creditors, rather than tax payers, to bear the loss. On 15 May 2014, the European Parliament adopted the Bank Recovery and Resolution Directive (BRRD)[21]. It requires shareholders and unsecured creditors to bear the costs of recapitalising failing banks in the case of a resolution. This is achieved by cancelling shares and writing down debt or converting it into equity which is expected to increase the immediate loss-bearing capacity of the failing bank. It could be argued that this amounts to an interference with constitutional and ECHR-protected fundamental rights to property. While the challenge of the Greek austerity measures before the ECHR has shown that a law or a regulation that does not leave creditors worse off than what would be their situation in an insolvency is unlikely to be found a violation of their right to property[22], bailed-in creditors and shareholders of failing banks may seek to assert that the resolution decision violates investment law. Rather than arguing that EU law (in this case, the BRRD) itself violates investment law, they are likely to argue that it is the resolution decision itself which does so.

35. A possible ground could be expropriation: where the cancellation or conversion of debt deprives the creditor of its original property. As such, it could be considered as an expropriation even if the creditor obtains new shares in return[23]. Such a claim would be justified if the claimant establishes that the expropriation was implemented for a purpose other than a legitimate public purpose, was discriminatory or was made without proper compensation. Like the ECHR[24], an investment arbitration tribunal is expected to recognise a resolution authority's margin of appreciation when deciding when a resolution decision is to be taken. Should that decision appear to have been taken while the bank was not likely to fail, the bailed-in creditor's case would prevail.

36. As an alternative to expropriation, the bailed-in creditors might argue the violation of the standard of fair and equitable treatment. The outcome will largely depend on whether those creditors were given a right to challenge the resolution decision in judicial proceedings that protect their right to due process. As to the requirement of proportionality of the decision compared to the impaired investor's rights, BRRD requires that bail-in only be considered when the other resolution tools listed in BRRD article 37 do not allow bank recapitalisation. The challenge for the resolution authorities is likely to be the lack of transparency of the administrative process and the absence of any planned consultation with creditors. The future will tell how arbitral tribunals will assess these complex parameters.

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Endnotes

[1] The informal meeting of the finance ministers of the Eurozone.

[2] The equivalent to an overall loss of around 75%, see the Statement of the Eurogroup issued on 21 February 2012, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/128075.pdf (last visited 20 July 2015).

[3] See D. Tsibanoulis and I. Anagnostopoulos, "The Greek PSI and the litigation surrounding it", IRFS, 2014/2, 18, for a description of the litigation before the Greek Council of State.

[4] Symboulion Epikrateias, 668/2012, 624, Armenopoulos (Greece).

[5] *Koufaki and Adedy v Greece*, 57657/12 and 57665/12.

[6] See also the Northern Rock case, endnote 22 below.

[7] Decision No. 1116/2014 of 31 March 2014. Seven out of the 28 judges dissented in finding that the PSI was contrary to the Greek constitution and the ECHR.

[8] Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic, ICSID Case No. ARB/13/8.

[9] *Fedax v Venezuela,* ICSID case ARB/96/3; *CSOB v Slovakia*, ICSID case ARB/97/4; *Abaclat v Argentina*, ICSID case ARB/07/05; *Ambiente Ufficio v Argentina*, ICSID case ARB/08/9; *Deutsche Bank v Sri Lanka,* ICSID case ARB/09/2. Two additional ICSID cases could be added to this list with the respective tribunals finding that a loan is a qualifying investment under the relevant treaty: *Alpha Projektholding v Ukraine*, ICSID case ARB/07/16 and *Oko Pankki Oyj and others v Estonia*, ICSID case ARB/04/6. However, in both awards, the relevant finding is limited and the reasoning almost non-existent.

[10] *EM Ltd. v Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007), cert. den., 76 U.S.L.W. 3156 (2007).

[11] Note however the mishaps of a number of investors who won favourable ICSID awards but failed to enforce on the State's assets on grounds of immunity, see *AIG v Kazakhstan*, [2005] EWHC 2239 (Comm) and *Liberian Eastern Timber Corp (LETCO) v Liberia*, 650 F.Supp. 73 (SDNY 1986). Article 55 of the ICSID Convention preserves national immunity laws in the matter of execution of ICSID awards.

[12] Under its general terms and conditions, applicable to the purchases made by Poštová banka, Clearstream opens an account for the deposit of securities for each of its customers. The securities received by Clearstream are treated as fungible and "[n]o Customer shall have any right to specific securities but, each Customer will instead be entitled, subject to these General Terms and Conditions, to require CBL [Clearstream Banking, Luxembourg] to deliver to the Customer or a third party an amount of securities of an issue equivalent to the amount credited to any securities account in the Customer´s name, without regard to the certificate numbers of any securities certificates.", Award, paragraph 268.

[13] See endnote 9 above

[14] *Fedax*, at paragraph 41.

[15] *Abaclat*, at paragraph 374. Also relied upon by the tribunal in the *Deutsche Bank* case (see paragraph 288 of the award). See also the strong dissent of the minority in both tribunals who rejected any idea for a distinct rule for financial instruments.

[16] Award, paragraph 337.

[17] *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3; *Abaclat & Ors. v. Argentine Republic*, ICSID Case No. ARB/07/5; *Ambiente Ufficio S.p.A & Ors. v. Argentine Republic*, ICSID Case No. ARB/08/9.

[18] *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7; *Phoenix v. Czech Republic*, ¶ 96; *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award of November 26, 2009, ¶ 180 and ¶ 207.

[19] *Československa Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4; *Malaysian Historical Salvors, SDN, BHD v. Malaysia,* ICSID Case No. ARB/05/10.

[20] It is commonly considered that an investment arbitral tribunal can award damages to remedy the illegal act of the host State. It is open to debate as to whether it can also compel the State to reverse an act or to freeze it temporarily. This was attempted in an ICC case where the arbitral tribunal asked the Cypriot Government to hold off its announced plan to sell a liquidated bank acting as claimant in the case (see http://cyprus-mail.com/2015/03/16/central-bank-accused-of-seeking-to-rescind-fbme-licence, last visited 20 July 2015).

[21] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

[22] See paragraph 8 above. In the case of the British Government bail-out of Northern Rock, the ECHR deferred to the government's appreciation to decide upon the compensation for shareholders who suffered losses due to the nationalisation, *cf. Dennis Grainger and others v UK*, ECHR, app. 34940/10, 10 July 2012, paragraph 39.

[23] M. Müller, « Creditor protection in bank resolution », Capital Markets Law Journal, Vol. 10, No. 3, p. 290, and the UNCITRAL and ICSID awards cited in footnote 131.

[24] See endnote 22 above on the Northern Rock case.

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