

International Swaps and Derivatives Association, Inc.
COLLATERAL LAW REFORM GROUP

GREECE

COUNTRY REPORT

Supplement to
*Collateral Arrangements in the European Financial Markets:
The Need for National Law Reform*

March 2000

European Office:
International Swaps and Derivatives Association, Inc.
One New Change
London EC4M 9QQ
Telephone: +44 171 330 3550
Fax: +44 171 330 3555

International Swaps and Derivatives Association, Inc.
COLLATERAL LAW REFORM GROUP

GREECE

Summary report on the legal framework for collateral arrangements for financial activity

Summary of the legal analysis under the laws of Greece applicable to collateral arrangements intended to secure financial trading activity in relation to privately negotiated derivative transactions, securities trading, securities repurchase transactions, stock lending and similar financial transactions in the wholesale financial markets. It is assumed that at least one of the parties involved is a financial institution (credit institution or investment firm) and that the collateral involved is cash, in euros or some other freely available currency, and/or fungible securities listed on a stock exchange or recognised market and held in immobilised or dematerialised form in a clearing system (“Fungible Securities”). References to “collateral” below indicate cash and Fungible Securities, unless otherwise specified.

This summary was prepared for the purpose of identifying possible areas of uncertainty or commercial impracticality arising under the laws of Greece in relation to collateral arrangements. It is not intended to be a definitive summary of the legal position relating to collateral in Greece and should not be relied on as such.

The position is stated as of December 1999.

This summary, prepared by the Collateral Law Reform Group, does not necessarily represent the views of ISDA or any of its members. It is a subjective assessment of the position in Greece and is simply intended to encourage debate and discussion of the relevant issues.

KEY POINTS FOR CONSIDERATION FOR GREECE

- (1) The owner of a share in a pool of Fungible Securities would have absolute title to the assets.
- (2) The *lex loci* of Fungible Securities held through an account in a clearing system would be the place where the securities are physically held.
- (3) Conflicts of law rules would apply the *lex loci* with respect to a holding or the transfer of Fungible Securities and the perfection of a security interest in Fungible Securities and Greek law or the governing law of any agreement to the creation of such a security interest.
- (4) If security assets are held by a third party bank or custodian the security interest must be notified to the third party.
- (5) No official registration of a security interest with any state agency is necessary.
- (6) A pledgee may use pledged assets as its own property with the consent of the other party.
- (7) Formal procedures apply to enforcement of a security interest.
- (8) Enforcement of a security interest may be delayed by several months.

- (9) Title transfer arrangements may be recharacterised.
- (10) Close-out netting under an ISDA Master Agreement is enforceable.
- (11) Contractual set-off is not enforceable on insolvency.
- (12) Third party claims will not disrupt set-off and netting between solvent counterparties.
- (13) Top-up collateral may be avoided as a preference.

1. Do the laws of Greece deal clearly with the nature of a participant's interest in a holding of Fungible Securities?

Yes.

2. How would such an interest be characterised under the laws of Greece?

The participant would have an *in rem* or proprietary right in Fungible Securities provided that its interest is adequately identifiable.

3. How would the location of Fungible Securities be determined under the laws of Greece?

The location of Fungible Securities would be determined by reference to the physical location of such securities

4. Under Greek conflict of laws rules, what law would govern:

(a) the characterisation of a person's holding of Fungible Securities?

The position is unclear.

(b) the creation of a security interest in cash or Fungible Securities?

Greek law does not distinguish between "creation" and "perfection" of a security interest. To the extent that creation is intended to refer to the contractual aspects of the security agreement between the two parties, creation would be governed by the law governing the relevant contract, which would normally be the law chosen by the parties, will apply. Where the securities are located in Greece, then Greek law would govern the creation of the security interest.

(c) the formal validity or perfection of a security interest in cash or Fungible Securities?

To the extent that perfection relates to the proprietary aspects of the security agreement between two parties and the rights of third parties in relation to the assets subject to the security interest, perfection would be governed by the law of the place where the relevant collateral is located.

(d) the effectiveness and formal validity of a transfer of title to Fungible Securities?

As to contractual aspects of the transfer agreement, the law governing the relevant contract, which would normally be the law chosen by the parties, will apply. As to proprietary aspects of any transfers under that agreement, particularly in relation to the rights of third parties, the law of the place of location of the relevant collateral, will apply.

5. What types of security interest may be created under the laws of Greece in:

- (a) cash?
- (b) Fungible Securities?

Where more than one type of security interest is possible, please indicate which type(s) would typically be used for collateral arrangements involving cash and/or Fungible Securities, and why.

- (a) Under Greek law, the principal types of security device in relation to moveables, tangible and intangible, are a pledge and an assignment. Assuming that cash collateral is in fact provided by way of deposit, then the collateral provider may grant a pledge of that deposit to the collateral taker, even if the collateral taker is also the person with whom the deposit is made (that is, debtor in respect of the deposit). The collateral taker may also allow the person with whom a deposit is made to use the underlying collateral provided that the person with whom the deposit is made is not in breach of its contractual obligations. .
- (b) Both devices mentioned in (a) above may be used in relation to Fungible Securities.

In relation to cash, the security devices typically chosen are either pledge or assignment. In relation to Fungible Securities, the most usual form of security interest is a pledge.

6. In relation to each of these types of security interest, describe briefly any filing, registration, notification, notarisation or other formal requirement necessary to ensure validity of (or “perfect”) the security interest? In relation to each type of security interest, please indicate the consequence of failing to comply with the relevant requirement

The relevant formalities depend on the type of security interest created and also the nature of the collateral asset. In relation to a pledge of a debt claim (cash collateral) or Fungible Securities, the principal requirements are:

- (a) a written pledge agreement, including a description of the collateral;
- (b) notarisation of the pledge agreement or official certification of the date of the document by a public authority, notary or court’s bailiff; and
- (c) delivery of the property to the pledgee or a third party custodian for the pledgee.

In relation to the assignment of a claim/receivable (cash collateral or a claim against a custodian of Fungible Securities), the principal requirements are:

- (a) ability to identify the claim/receivable with sufficient particularity;
- (b) the claim must be assignable by its own terms;

- (c) delivery to the assignee of documents evidencing the claim or entry into a “public document” to vest the assignee with the right to pursue the claim where this is requested by the assignee;
- (d) notice of the assignment (by assignor or assignee) to the third party debtor.

7. In relation to each type of security interest, indicate whether the collateral receiver is entitled to use the collateral as though it were the absolute owner of the collateral, including the right to sell, lend or re-pledge (rehypothecate) the collateral to a third party.

The collateral receiver may use collateral received under a pledge provided that it has the consent of the collateral giver, either by an express provision in the security agreement or otherwise.

In relation to an assignment, the collateral receiver is entitled to use the collateral as though it were the absolute owner of the collateral, subject to the terms of the relevant agreement. These will usually require the collateral receiver to return equivalent collateral upon termination of the underlying agreement. Any retransfer or pledge should also be notified to a third party obligor holding the collateral.

8. Briefly describe the enforcement procedures for each type of security interest commonly used for collateral in relation to financial activity. For example, is court approval required before the security interest may be enforced and/or is some form of auction procedure required. Indicate any practical difficulties typically encountered and also the relative efficiency and speed (or lack of same) of such procedures. Comment in particular on the possibility of a stay or freeze in the event that the collateral provider is subject to formal insolvency proceedings of any type.

In the case of a pledge, enforcement is by public auction, which normally entails delay due to formalities involved. A provision in a pledge agreement permitting sale of collateral assets by the pledgee upon default of the pledgor is void. Formalities are cumbersome, and delay can be measured in months or even years. Alternatively a creditor may institute proceedings for compulsory execution as an unsecured creditor although in this case the creditor's rights are subordinated to those of other secured creditors or rank equally with the rights of other unsecured creditors.

Enforcement of an assignment always requires a court judgement. Where an assignment is executed as a notarial deed this will expedite the proceedings since a notarial deed is an enforceable title. Enforcement will be in accordance with the terms of the agreement.

Insolvency proceedings do not freeze the enforcement of a pledge. In relation to an assignment, the creditor would have to file his claim in the same way as unsecured creditors in order to obtain satisfaction from the proceeds of liquidation.

- 9.a. In relation to local law collateral arrangements based on transfer of title, please indicate whether there is a risk that the courts of Greece would recharacterise the transfer of title as the creation of a form of security interest? If so, please give some indication of the degree of that risk (for example, very low, low, medium, high, very high). Please indicate the consequences of such a recharacterisation.**

A debtor may grant the equivalent of security in the form of a fiduciary transfer in relation to moveables. A fiduciary transfer does not seem to be used in relation to cash collateral. A fiduciary transfer is treated as a transfer of ownership in order to secure the transferor's obligations under the underlying agreement. Normally absolute ownership is deemed to have been transferred to the creditor who is entitled to use the collateral as owner thereof, subject to the provisions of the agreement. The collateral receiver is entitled to use the collateral as though it were absolute owner of the collateral subject to the terms of the agreement which usually require the collateral receiver to return equivalent collateral upon termination of the underlying agreement. Therefore the extent to which the transferor is able to restrict use of the collateral is determined by the security agreement.

In order for the creditor to have effective protection under a fiduciary transfer the creditor must acquire possession of the assets. If necessary this may require the creditor to bring an action against the debtor claiming delivery or recovery of possession. The majority view is that the discharge of the parties' obligations is then determined by the agreement. Whether the transferee has an obligation to return the self-same assets to the extent it still holds these at maturity is also subject to the terms of the agreement. If the transferor defaults and the transferee has used the assets then the obligation of the transferee to return equivalent assets is extinguished. Where the transferor defaults and the transferee has not used the assets, then the transferee may use or dispose of the assets as owner thereof. On the other hand if the transferee were to become insolvent, these assets would be available to creditors of the transferee to the extent that they are still held by the transferee.

If the agreement does not qualify as a fiduciary transfer there would be a risk of recharacterisation of a title transfer arrangement as a pledge. The level of this risk is difficult to quantify. If recharacterised as a pledge, then the collateral arrangement could be invalid unless the formalities for creation and perfection of a pledge have been complied with. If invalid, the transferee must return the collateral, without the benefit of any set-off, and must prove its claims against the insolvent as an unsecured creditor.

- 9.b. If the agreement is governed by a foreign system of law that does not recharacterise, would the risk of recharacterisation under domestic law still be present?**

To the extent there is a risk under domestic law this would still be present in relation to a foreign law agreement where the collateral is located in Greece.

- 10. Is close-out netting, for example, under a 1992 ISDA Master Agreement, enforceable under the laws of Greece? If so, but subject to certain limitations (for example, as to the nature of the counterparty or types of transaction included within the netting), please indicate briefly what those limitations are.**

Although close-out netting is in principle permitted by law, where payments are received during the suspect period by a person with knowledge that the debtor is unable to continue to pay its debts as they fall due, then such payments may be regarded as preferential payments and would be voidable upon commencement of bankruptcy proceedings. Where close-out netting occurs prior to the initiation of bankruptcy proceedings the following should be noted. If a termination payment is paid before the suspect period begins then payment may not be

challenged. However if a termination payment is paid during the suspect period then this may be voidable in the event the creditor receiving payment had knowledge that the debtor was unable to pay its debts (on a balance sheet basis). If any termination payment due is not paid then the creditor may prove for this amount in the bankruptcy proceedings as an unsecured creditor or may seek to enforce any security for its claim.

- 11. Is contractual set-off and/or insolvency set-off enforceable in the event of formal insolvency proceedings in the courts of Greece in relation to a counterparty organised in Greece? Please indicate the answer in relation to each type of formal insolvency proceeding (including rehabilitation or reorganisation proceedings such as administration or *redressement judiciaire*) possible in Greece in relation to a corporate entity (including a financial institution). Comment in particular on the possibility of a stay or freeze in the event that the collateral provider is subject to formal insolvency proceedings of any type.**

The exercise of contractual or other rights of set-off in the context of bankruptcy proceedings would only be allowed with approval of the bankruptcy courts and to the extent that the requirements for solvent set-off (both claims must be mutual, liquidated, matured, of the same nature and legally payable) are fulfilled prior to the declaration of bankruptcy. In the context of rehabilitation or reorganisation proceedings ("special insolvency proceedings"), there are provisions which enable a receiver, creditors and the insolvent party to agree to set off claims, again subject to court approval. It is also conceivable that a receiver may seek to attach collateral (including title transfer collateral) by injunction in the event that the collateral provider is subject to bankruptcy or special insolvency proceedings pending the resolution of proceedings for the recovery of such collateral (for example under preference rules).

- 12. Would the exercise of netting or set-off rights under a title transfer collateral arrangement be vulnerable to the rights of third parties in the event of the insolvency of the collateral giver? For example, would it be possible for the collateral giver to disrupt (deliberately or inadvertently) the netting or set-off by assigning to a third party creditor its right to redelivery of equivalent collateral under the collateral arrangement? Could that right to redelivery be attached by a third party creditor of the collateral giver free of the collateral taker's netting or set-off rights under the collateral arrangement?**

The position is unclear but it is unlikely that a third party creditor of the collateral giver would be entitled to attach rights to redelivery of equivalent collateral free of the collateral receiver's rights of netting or set-off under the collateral agreement.

- 13. In relation to mark-to-market collateral arrangements, is there any risk under the preference (or similar) rules of Greece that "top-up" deliveries of collateral would be vulnerable to avoidance if made during a relevant period prior to the insolvency of the collateral giver?**

Top-up deliveries of collateral would not be vulnerable to avoidance if made prior to the suspect period, but would be vulnerable to avoidance if made during the applicable suspect period. The suspect period is fixed retrospectively by the courts and may be up to a maximum of two years (or two years and ten days in certain cases) before the date upon which the debtor is declared bankrupt. Top-up deliveries of collateral would be vulnerable if they fell within the suspect period and are given as security for a pre-existing debt.

- 14. Please add any additional comments on the general legal framework for collateral arrangements under the laws of Greece, whether based on creation of a security interest or on title transfer, highlighting any difficulties that should be addressed in any project for collateral law reform in that country.**

No additional comments.

The Collateral Law Reform Group acknowledges the assistance of M & P Bernitsas, Athens in the preparation of this report. That firm, however, accepts no liability in relation to this report.