JUDGMENT : Mr Justice Tomlinson: Commercial Court. 21st March 2003

1. There are before the court two applications both of which turn on Article 21 of the Brussels Convention.

2. In the action the Claimant sues to recover, principally from the First and/or the Second Defendant the balance outstanding under a loan agreement allegedly made in London in or about September 1991 pursuant to which the Claimant allegedly agreed to lend money to the Defendants. The First and Second Defendants are brothers.

3. It would appear that the Claimant had an interest in the company owning the vessel "Atlas Pride." In August 1991 that vessel was in difficulties. A Lloyd's Open Form Salvage Agreement was agreed under which a Tsavliris company was the contractor. According to the Claimant the Tsavliris interests requested financial assistance to enable them to carry out the salvage operation. According to the Claimant an agreement was made pursuant to which the Claimant advanced funds for that purpose against an undertaking that repayments would be made out of any salvage award made in favour of the Tsavliris interests. In addition to a provision for interest it was also agreed, according to the Claimant, that there would be paid to him or to his nominee 38% of the amount of any such award after deduction of various costs and expenses.

4. Pursuant to these agreements, it is said, the Claimant advanced to the Defendants initially US$748,000 and later a further US$2,216,000.

5. According to the Particulars of Claim a salvage award in the sum of US$7,253,262 was in July 1993 made in favour of the Tsvaliris interests.

6. It is said that there remains due and owing to the Claimant US$48,000 in respect of the first advance and US$746,232.24 in respect of the later advances. It is not clear to me whether any amount is claimed in respect of the award sharing agreement.

7. It would seem that the Claimant first launched proceedings in this jurisdiction to recover this debt in February 1998. This action was not served on the Defendants although they were notified of its existence and of its nature. For whatever reason the Claimant did not proceed with that action.

8. This action was issued on 7 November 2001 and immediate steps were taken to serve the First and Second Defendants at their English addresses. It is now accepted that they were properly served on 24 December 2001 and 23 November 2001 respectively. However on 8 November 2001 the Tsavliris interests retaliated by issuing an action before the Large[1] First Instance Court of Piraeus. In that action it is alleged that a Tavoulareas company "forced" the Tsavliris interests to agree to payment of 38% of the salvage award, less certain costs and expenses, under threat of revocation of the Lloyd's Form Salvage Agreement. It is alleged that pursuant to certain loan agreements made to finance the costs of the salvage operation the Claimant and one of the companies in which he was interested demanded from the Tsavliris interests a statement acknowledging that they owed to the Claimant or to his interests US$748,000 which would be repayable out of the salvage award. This was allegedly demanded by way of security for payment of the 38% share in the award. It is acknowledged that the Tsavliris interests received sums totalling US$2,216,000 pursuant to the loan arrangements which, it is said, was fully repaid with interest by 1996. Effectively what is sought is a declaration that the Tsavliris interests have no further liability to the Claimant or to the companies in which he is interested arising out of these various arrangements.

9. Evidence filed on behalf of the Claimant is to the effect that all of the relevant negotiations, meetings and discussions which led to the making of the agreement on which he sues took place in London including at the offices of the managing agents of the Atlas Pride and at the offices of the Tsavliris interests.

10. Evidence filed on behalf of the Defendants is to the effect that all of the relevant transactions took place in either Piraeus or Glyfada and in support of that assertion they point to the fact that three documents annexed to the Particulars of Claim and alleged to evidence the making of the agreements are written on stationery bearing the name Tsavliris Brothers and a Piraeus address. The stationery is not in fact the letterhead of any legal entity. It apparently comes from an internal stationery notepad. It is not beyond the bounds of possibility that there might be in the London offices of the Tsavliris interests the relevant stationery pad. At all events the loan agreement is said by the Defendants to have been concluded in Greece on 30 September 1991.

11. I cannot possibly resolve on this interlocutory application this stark dispute as to where the contract was made.

12. The Second Defendant lodged an Acknowledgment of Service in this action on 7 December 2001 indicating an intention to contest the jurisdiction of the court and on 21 December 2001 an application was issued seeking a declaration that the court has no jurisdiction or should not exercise it or should stay its proceedings pending the outcome of the Greek action. It was not made clear in the application on what basis that application was made.

13. The First Defendant was served on 24 December 2001 in circumstances on which I need not dwell. Suffice it to say that in consequence of his irritation he refused to accept the documents. However in response to an express invitation that they be forwarded to his office in Greece that was indeed done. In due course the documents were sent by the First Defendant to his London solicitors. By the time the latter attended at court to lodge an Acknowledgement of Service the Claimant had, on 17 January 2002, entered judgment in default. I have not seen the terms of this judgment. The First Defendant now seeks the same relief as does the Second Defendant and, additionally, the setting aside of the default judgment.

[1] This is the word used in the Greek Ministry of Foreign Affairs official translation. It may be that a more accurate translation would be "Multi-Member."

14. The principal ground upon which both applications is made is that by the time the Defendants were served with these proceedings the Greek court was already seised of its proceedings. It is said that the court must therefore grant relief pursuant to Article 21 of the Brussels Convention, including the setting aside of the default judgment. Mr Irvin for the Defendants also contended that Greece is the appropriate forum for the resolution of the dispute and that a stay might be granted on that ground. That would not of course in itself lead to the setting aside of the default judgment.

15. The document filed with the Greek court on 8 November 2001 in order to initiate the Defendants' proceedings alleges that the Claimant is resident in London and gives an address in Regent's Park. The Claimant has not lived at this address since 1992 and is in fact resident in Florida. The Claimant says that this incorrect address was deliberately given as a stratagem and that the Greek proceedings should be regarded as an improper attempt to abuse the provisions of the Convention. As I understand it it is not in dispute that the sending of the relevant documents to the Claimant's former address in London did not, pursuant to either Greek or English law, constitute good service upon him. However that is said by the Defendants to be irrelevant. Pursuant to the Greek procedure, because the Claimant had his domicile or residence outside the Greek jurisdiction, the proceedings were first served upon the relevant Public Prosecutor in order for him to set in train the steps required in order to ensure that the proceedings were brought to the attention of the Claimant.

    As a result of this it would seem that the relevant documents were in due course sent to, or attempted to be served at, the Claimant's former address. I was shown, although it was not formally in evidence, a letter suggesting, unsurprisingly, that "no reply" had been obtained. However it is also not in dispute that the Claimant is fully aware of the existence and nature of the Greek proceedings. His solicitor Mr Keates became aware of them on 28 December 2001when he first saw a letter addressed to him from the Defendants' solicitors, Messrs Constant and Constant, dated 21 December 2001. That letter enclosed the Defendants' application to contest the jurisdiction of the English court. It enclosed the evidence in support thereof, including a Witness Statement to which was exhibited a translation of the document initiating the Greek action. Mr Keates relayed this to the Claimant on the same day, 28 December. The Claimant saw the material and thus became aware of the proceedings brought against him on 31 December 2001. By then the Greek court had already fixed 17 January 2003 as the first hearing date. It is not in dispute that the Claimant would have had no difficulty in instructing lawyers and generally preparing himself so as to be in a position to defend himself in the proceedings brought against him, if necessary at the hearing on 17 January 2003. Equally, it is common ground that, since obtaining the "no reply" response from the out of date address, the Defendants have made no effort whatsoever to serve the proceedings upon the Claimant in the place in which he is in fact to be found, Florida. As I understand it the Defendants say that it is unnecessary that they should do so, it having been demonstrated that the existence and nature of the proceedings have been sufficiently brought to the attention of the Claimant to enable him to defend himself if he so wishes. Critically, the Defendants say that the Greek court would regard itself as seised of the proceedings against the Claimant at the latest as from service of proceedings upon the Public Prosecutor, notwithstanding he was given an address for the Claimant which was no longer correct. The Defendants submit therefore that it is wholly unnecessary to demonstrate good service upon the Claimant either in London or in Florida. It is said that service upon the Public Prosecutor, allegedly on 19 November 2001, is sufficient for the Greek court to regard itself as seised.

16. If the Greek court was indeed seised on 19 November 2001, then it was plainly seised before this court was seised of these proceedings.

17. Article 21 of the Brussels Convention provides: -

    " Where proceedings involving the same cause of action and between the same parties are brought in the Courts of different contracting states, any court other than the court first seised shall of its own motion stay proceedings until such time as the jurisdiction of the court first seised is established.

    When the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court."

    It is accepted by the Claimant for the purposes of this application that there is in the two sets of proceedings sufficient identity of causes of action and parties for Article 21 to be engaged. The court "first seised" is the one before which the requirements for proceedings to become definitively pending are first fulfilled – see ***Zelger v Salinitri*** 1994 ECJ 2397. The English court was seised of these proceedings as against the First Defendant on 24 December 2001 and as against the Second Defendant on 23 November 2001. The question is whether the Greek court was at those dates already seised of proceedings against the Claimant. As I understand it is said on the Defendants' behalf that the Greek court was so seised either on 8 November 2001 when the proceedings were issued or on 19 November 2001 on which date they were apparently served on the Public Prosecutor of the Court of First Instance of Piraeus, for onward dispatch to the Minister of Foreign Affairs who in turn had the obligation to forward the documents to the Claimant, one of the Defendants in the Greek proceedings, who was of course alleged to be resident in London. I say that it was on 19 November 2001 that the documents were " apparently" served on the Public Prosecutor because there is no very satisfactory evidence that that is in fact what occurred. Mr Dickinson in his Witness Statement of 21 December 2001 simply says that the proceedings were served on 19 November 2001 without saying how they were served. The Witness Statement of Maria Adamopoulos dated 16 May 2002 offers no evidence on the point. Professor Antapassis says in his Opinion of 21 June 2002 that it has been "brought to [his] attention" that the writ was so served although he does not say by

whom it was brought to his attention nor what was that person's source of knowledge. It transpires that the firm Antapassis and Albouras in which Professor Antapassis is a partner is acting for the Tsavliris interests in the current Greek proceedings so that it can no doubt be assumed that the information is in fact correct. However the position is not very satisfactory.

18. It was also held by the European Court in ***Zelger v Salinitri*** that it is to be determined in accordance with the national law of the court concerned what are the requirements for proceedings before it to become definitively pending.

19. Mr Shepherd for the Claimant submitted that the position here is very straightforward. He referred me to Council Regulation (EC) no. 1348/2000 of 29 May 2000 "on the service in Member States of judicial and extrajudicial documents in civil or commercial matters" which became binding and directly applicable in the Member States on 31 May 2001. Mr Shepherd suggests that pursuant to this regulation service must be effected in accordance with the law of the receiving state. Since it has not been, the Greek court cannot yet be seised. He prays in aid the decision of Hart J in ***Phillips v Symes*** 2002 1 WLR 853. In that case Hart J said,: -

"*18. In the context of whether a court is seised of proceedings for the purposes of article 21, the question whether those proceedings have been served is not determined by the foreign domestic rules of procedure. This was settled in* ***Molins plc v GD SpA*** *[2000] 1 WLR 1741,1754. Where reliance is sought to be placed on service of proceedings from the courts of one contracting state on persons in another state, service must be in accordance with Article IV of the Protocol annexed to the Brussels Convention, set out in Schedule 1 to the 1982 Act. That provides:*

" Judicial and extrajudicial documents drawn up in one contracting state which have to be served ….. in another contracting state shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the contracting states."

19. Two such conventions are potentially applicable here, namely the Hague Convention on the Service Abroad of Judicial and Exrajudicial Documents in Civil and Commercial Matters (1965) (Cmnd 3986), the Hague Convention, and a convention between the United Kingdom and Greece signed on 27 February 1936 and ratified on 16 November 1937 (Cmd 5643).

20. Article 2(a) of the 1937 Convention provides:

" When judicial or extrajudicial documents drawn up in the territory of one of the high contracting parties are required by a judicial authority situated therein to be served on persons in the territory of the other high contracting party, such documents may be served on the recipient, whatever his nationality, by any of the methods provided in articles 3 and 4 in all cases where such method of service is recognised by the law of the country or origin."

Article 4 provides, so far as material:

" (a) Service may be effected, without any request to or intervention of the authorities of the country of execution, by any of the following methods… (2) By an agent appointed for the purpose either by the judicial authority of the country of origin or by the party on whose application the document was issued; (3) Through the post; or (4) By any other method of service which is not illegal, under the law existing at the time of service, in the country of execution…(d) It is understood that the question of the validity of any service effected by the use of any of the methods referred to in paragraph (a) of this article will remain a matter for the free determination of the respective courts of the high contracting parties in accordance with their laws." "

20. ***Molins v GD*** was concerned with a contest as between Italian and English jurisdiction. It was there apparently common ground that under Italian law service was necessary before proceedings could be definitively pending. No question arose as to the validity of any method of service which did not involve transmission of the court documents to the place of residence or domicile of the Defendant. The question which arose was as to the effectiveness under Italian law of retrospective validation of irregular service. The Court of Appeal pointed out that the Italian court could not be regarded as seised on the basis of retrospective validation until such validation had occurred. Hence the case turned on the question whether service by fax sent to an addressee in England was valid, as to which Aldous LJ said, at p.1754: - *" Once it is established, as it is, that service is required for proceedings to be definitively pending under Italian law, then the decision as to whether service took place depends upon whether service was effected as required by Article IV of the Protocol to the Brussels Convention. In so far as Italian law differs it is irrelevant."*

21. It was to that passage that Hart J referred at paragraph 18 of his judgment in ***Phillips***. I am concerned with a wholly different problem. The suggestion before me is that under Greek law transmission of the documents from the Greek jurisdiction to the English jurisdiction and service in England is not required in order for the Greek proceedings to become definitively pending.

22. The Greek Code of Civil Procedure provides, so far as relevant: -

" Article 134

SERVICE ON PERSON/LEGAL ENTITIES DOMICILED OUT OF THE (GREEK) JURISDICTION

1. If the person or legal entity on whom service is to be effected has their domicile or seat out of jurisdiction, the service is effected on the Public Prosecutor of the court where the cause of action remains pending or where the action is to be brought or the one which ordered the judgment being served…

2. *In the case of paragraph 1 the request of service must specify with accuracy the place and address of the recipient of service.*
3. *The Public Prosecutor – upon receipt of the document – should dispatch without undue/culpable delay to the (Greek) Minister of Foreign Affairs who has the obligation to forward the document to the person/legal entity on whom service is to be effected.*

Article 159

CASES OF INVALIDITY

Infringement of a provision which regulates the procedure and mainly the legal formalities of a procedural instrument entails invalidity which is to be determined and pronounced/ordered by the court

1. *if compliance with the provision is expressly required by the law, on penalty of being declared void,*
2. *if for this particular breach the judicial means of "cassation" (i.e. appeal to the Supreme Court) or "re-hearing" are permitted,*
3. *in all other cases, if the judge determines that the infringement (of such provision) has caused the party (who claims invalidity) detriment which cannot be compensated other than by declaration of nullity.*

Article 215

COMMENCEMENT OF PROCEEDINGS

1. *Proceedings are commenced by filing the "action" (i.e. lawsuit) with the Registry Office of the court before which the action is being brought, and by the service of a lawsuit copy on the defendant…..*

Article 221

CONSEQUENCES OF ISSUE OF PROCEDINGS AND SERVICE OF ACTION

1. *Upon the issue of proceedings pursuant to Art.215, the filing of lawsuit results to:*

   a) pendency of action, b) inability to vary the jurisdiction and competence of the relevant court c) priority amongst more than one competent court, and the service of lawsuit leads to all the results that substantive law stipulates are derived from instituting proceedings.
2. *Pending trial, the filing of an application aiming at the rejection, acknowledgement or formation (of a cause of action) as well as a plea of set-off entail pendency of action. "*

23. What is said is that under Greek law where the Defendant is domiciled or resident outside Greece service upon the Public Prosecutor satisfies the requirements for proceedings before the Greek court to become definitively pending. Thus I am not concerned with the effectiveness of service outside Greece. I am not sure quite how the argument was put before Hart J. It was not in fact in that case critical for the Defendant to rely upon service on the Public Prosecutor in Greece on 23 February – he could rely, as he did, on service effected in England on 26 (or 27) February. The date he had to beat was 28 February on which date English proceedings were served on him by the Claimants. At paragraph 21 of his judgment, p.861 of the report, Hart J said:- *" Mr Steinfeld submitted on behalf of the administrators that service on the Greek public prosecutor was not good service for Brussels Convention purposes. I accept that submission: nothing in either the 1937 Convention or the Hague Convention legitimises it."*

I do not know what is the argument to which Mr Steinfeld was responding. Still less do I know what was the evidence of Greek Law before Hart J. In the context of the argument with which I am confronted the fact that nothing in either the 1937 Convention or the Hague Convention legitimises service on the Public Prosecutor is nothing to the point. Those Conventions are concerned with documents drawn up in one state which have to be served in another. The question with which I am concerned, in accordance with the ruling of the European Court in **Zelger v Salinitri**, is whether under Greek law the requirements for a suit to become definitively pending, may, in the case of a defendant who has his seat or domicile elsewhere than in Greece, be satisfied by something other than service in the state in which he has that seat or domicile. With undisguised reluctance on the facts of this case I conclude that I am not bound by the decision in ***Molins*** to conclude that the provisions of Greek law are irrelevant. With equal reluctance I conclude that Hart J's observation in ***Phillips v Symes*** does not provide me with an answer to Mr Irvin's submissions.

24. I should set out the relevant parts of Regulation 1348/2000. This provides, so far as material,: -

" Whereas:

……

(11) Given the differences between the Member States as regards their rules of procedure, the material date for the purposes of service varies from one Member State to another. Having regard to such situations and the possible difficulties that may arise, this Regulation should provide for a system where it is the law of the receiving Member State which determines the date of service. However, if the relevant documents in the context of proceeding to be brought or pending in the Member State of origin are to be served within a specified period, the date to be taken into consideration with respect to the applicant shall be that determined according to the law of the Member State of origin. A Member State is, however, authorised to derogate from the aforementioned provisions for a transitional period of five years, for appropriate reasons. Such a derogation may be renewed by a Member State at five year intervals due to reasons related to its legal system.

(12) This regulation prevails over the provisions contained in bilateral or multilateral agreements or arrangements having the same scope, concluded by the Member State, and in particular the Protocol annexed to the Brussels Convention of 27 September 1968(1) and the Hague Convention of 15 November 1965 in relations between

the Member States party thereto. This Regulation does not preclude Member States from maintaining or concluding agreements or arrangements to expedite or simplify the transmission of documents, provided that they are compatible with the Regulation.

Article 1

Scope

1.1 This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there.

7.1 The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular form requested by the transmitting agency, unless such a method is incompatible with the law of that Member State.

9.1 Without prejudice to Article 8, the date of service of a document pursuant to Article 7 shall be the date on which it is served in accordance with the law of the Member State addressed.

9.2 However, where a document shall be served within a particular period in the context of proceedings to be brought or pending in the Member State of origin, the date to be taken into account with respect to the applicant shall be that fixed by the law of that Member State. "

The scope of this Regulation is as set out in Article 1. Like the earlier conventions to which Hart J referred, it is concerned with the efficacy of service in one Member State of proceedings emanating from another. The Regulation seems to me of no relevance to the argument that, under Greek law, service in another Member State of proceedings impleading a person domiciled or resident in that state is not a prerequisite of such proceedings becoming definitively pending in Greece. For present purposes I need not pause to consider the significance of the fact that the Claimant is not in fact domiciled or resident in a Member State.

25. In his Witness Statement of 4 November 2002 Mr Papadimitriou, the Claimant's expert witness in Greek law, says in terms that in this instance the Greek court would apply Regulation 1348 and not the provisions of the Greek Code of Civil Procedure or the Hague Convention 1965 in order to judge whether there was good service or not. However he prefaces this opinion by saying "as the Greek lawsuit was allegedly served in England" whereas of course it was not so served. There are similarly confusing references to service in England in some of the evidence served by the Defendants, in particular, in paragraph 10 of the Witness Statement of Maria Adamopoulos to which I have already referred. For the reasons which I have already given these inaccurate suggestions seem to me not to address the point at issue, which is as to the efficacy of service on the Public Prosecutor to satisfy the Greek requirements for an action to become definitively pending.

The Witness Statement of Mr Papadimitriou also contains the following paragraph: - *" Although EC Regulation 1348/2000 provides for the date of service for other requirements for good service between Member States, the matters concerning the validity of service, such as the place and the date on which the judicial document should be served is left to national law. The Court of First Instance of Piraeus will apply the Greek Code of Civil Procedure in order to decide if the service of a lawsuit is valid and, therefore, if the proceedings were properly commenced."*

This may well in part be a reference to Article 9.2(2) of the Regulation, although it seems to go somewhat further than the subject matter thereof. As I understand Article 9.2 it is dealing, for example, with questions of the applicable period of limitation or prescription, which are to be determined in accordance with the law of the Member State in which the relevant proceedings are pending. However the passage from the opinion of Mr Papadimitriou which I have quoted perhaps comes close to recognition that, at any rate as a matter of Greek law, Regulation 1348 does not purport to detract from the effect of the ruling of the European Court in ***Zelger v Salinitri*** that it is to be determined in accordance with the national law of the court concerned what are the requirements for proceedings before it to become definitively pending.

26. As to the debate concerning the efficacy of service upon the Public Prosecutor, Mr Papadimitriou says, at pp.8 and 9 of his opinion:-

" In view of the above, it is questionable whether the above service of the document created litispendency according to the provisions of Greek Law. In particular, according to article 215 of the Greek Code of Civil Procedure, "a lawsuit is commenced by the filing of the instrument at the Court Registry and by its service to the defendant." The above commencement of the lawsuit results according to article 221 of the Greek Civil Code of Civil Procedure to litispendency. On the basis of the above provision it is generally accepted that under Greek Law, a lawsuit is not commenced until and unless valid service on the defendant has been made. The mere filing of the lawsuit before the Clerk of the Court is not sufficient to create litispendency (Aerios Pagos (Supreme Court of Greece) 1761/1985,EEN 1986,649,Athens Court of Appeals 3470/1996 EllDni 1997,1588).

As it has been pointed out (Vathrakokilis, Code of Civil Procedure, Athens 1994, under the article 221), a lawsuit that has not been served cannot create litispendency if the defendant does not appear in person or by a representative or if the defendant appears and pleads that the service was defective. On the other hand, it is also supported that the defects of service have no effect on litispendency except for the case where the defendant can show that the defect caused him unrecoverable detriment according to 159 par.3 of the Greek Code of Civil Procedure. If the Court accepts that such detriment occurred, the proceedings are considered as if not commenced and therefore lis pendens is not created (Vathrakokilis, supra).

The lawsuit of Mr Tsavliris et. al. does not in my opinion create litispendency regardless of which of the above two theories are implemented. According to the first view if the defendant does not appear at the Multi-Membered Court

of First Instance of Piraeus or if he appears and pleads that there was lack of service, the Court is likely to dismiss the lawsuit as irreceivable. Correspondingly, under the second view the defendant may appear at the hearing before the Multi-membered Court of Piraeus and plead that the lack or the defects of service caused him detriment according to 159 par.3 of the Greek Code of Civil Procedure. He may then show detriment by submitting, for example, that the English Courts stayed the proceedings brought by him due to the filing of the action before the Multi-Membered Court of First Instance of Piraeus, which, however, was never properly served to him. In such a case, if the Greek Court accepts that such detriment occurred, it will also dismiss the lawsuit of Mr Tsavliris et.al."

In the light of the unequivocal statement at the end of the first paragraph which I have cited, I would find it difficult to conclude that the Greek action was definitively pending on 8 November when it was issued and filed. In any event, such a conclusion seems to me to run counter to the plain and obvious meaning of Articles 215 and 221. Thereafter Mr Papadimitriou acknowledges the existence of two views. The relevant "defect of service" is the giving of the wrong address to the Public Prosecutor.

27. The Defendants seek to rely upon two statements from Professor Antapassis and two statements from Mr Tzioumas, of the firm of Aristides Economides and Co. The Claimant has invited me to disregard at any rate the two more recent statements of those gentlemen, that from Professor Antapassis on the footing that he could not be relied upon to be objective having regard to the fact that his firm is conducting the Greek proceedings on behalf of the Defendants, that of Mr Tzioumas on the rather spurious ground that it was for reliance upon a statement from his principal Mr Economides that leave was given. Leave in that form was sought because it was thought, wrongly, that it was Mr Economides who was the author of the earlier report, whereas in fact it was Mr Tzioumas who prepared it. Although the application notice in this regard referred only to the most recent Witness Statement of Professor Antapassis, Mr Shepherd in making his application objected to any evidence being adduced from Professor Antapassis on the ground that he lacked the capacity to be an independent expert. It is surprising that that challenge was not made earlier, bearing in mind that in his witness statement of 21 June 2002, which the Claimant had had for some time, Professor Antapassis said at p.3:- *" I have been the legal adviser of the Tsavliris Group of Companies for the last 30 years. Notwithstanding my professional commitment to the Group, I am in a position to present objectively my legal opinion, based on the aforementioned material facts."*

I should mention also that Professor Antapassis is the Professor of Commercial and Shipping Law at the Faculty of Law and President of the Faculty of Law in the University of Athens. The Claimant also sought to exclude from consideration translations of Greek legal materials on the grounds that those translations have been furnished later than ordered. Mr Shepherd very realistically recognised that the court was likely to admit all of this evidence, subject to arguments of weight, unless satisfied that the Claimant had suffered prejudice in consequence of the particular breaches of orders made. I consider that it is appropriate that I should take the evidence into account, and I would add that it would be quite wrong, in the absence of seeing and hearing him, to conclude that Professor Antapassis is incapable of giving the court independent assistance as to the law of Greece.

28. Therein however lies a much more serious problem. The parties made no provision for any of these Greek lawyers to attend to give oral evidence and to be cross-examined. I am expected to reach a conclusion as to the law of Greece without the benefit of that exercise. This is not a satisfactory way to proceed. The situation is doubly unsatisfactory because the reports have been prepared by the witnesses in English which is obviously not their mother tongue and, with all due respect to their generally excellent command of the language, on some of the more abstruse points their meaning is not always entirely clear. Furthermore the translations of some of the basic Greek legal materials beg certain questions. I must however do the best I can.

29. In the Witness Statement of Professor Antapassis dated 21 June 2002 there appear the following passages:-

" The litigation action before the Multi-Member Court of First Instance of Piraeus is finalised on the 19-11-2001(i.e. the date of the service of the writ on all of the Defendants.)……

In accordance with the provisions of the Greek Civil Procedural Code the court is seised of jurisdiction when the action is brought against the relevant parties i.e when it is filed and served to the defendants. From the date of its filing, the litigation is considered pending and moreover the jurisdiction of the competent Court is irrevocably determined (article 221 of the Greek Civil Procedural Code). Therefore, in our case, under Greek Procedural law, the Greek Court is considered seised on 8-11-2001.

It follows from the above that no matter which view one should adopt, the Multi-member Court of First Instance of Piraeus is the "first seised," pursuant to Art.21 of the Brussels Convention.

It should be noted however that the procedural rules (referred above) apply only if the writ has been properly served on the defendant. In the event that the defendant has his residence or seat abroad, a copy of the action must be served on him containing a writ of summons for the defendant to appear before the Court, where the case is pending. The service is considered – according to the prevailing view in theory –to have been completed when the aforementioned copy of the writ is served in the Public Prosecutor of the Court where the action is pending and the place and address of the residence of the defendant abroad is included in the relevant order attached thereto.

According to the recent case law of the Supreme Court Article 134 of the Greek Civil Procedural Code, (i.e. service of the writ on the Public Prosecutor in the event that the defendant is resident abroad) is still effective, even though the provisions of the International Convention of Hague have been incorporated into Greek Procedural Law (Act 1334/1983). Therefore, according to the prevailing view the International Convention of Hague has not directly modify the relevant provisions of the Greek Procedural law; thus, the service of the writ on the Public Prosecutor, provided it is made in conformity to the general terms of the convention, continues to be valid/legal way of service of

the writ. Therefore, as soon as the writ is handed over to the Public Prosecutor, pursuant to Article 134 of the Greek Civil Procedural Code, the consequences of the action come into effect and in particular the litigation is considered pending. Yet, the service of the writ should be made at the correct and true address of the defendant. Otherwise, the service of the writ is null and void. The burden of proof regarding the accuracy of the address is upon the party making the service.

Notwithstanding the above, it has always been accepted that if the address of the person to whom the writ is addressed is erroneously reported (or not reported at all) in the writ, the service is invalid, if and only if that error/omission has caused irrevocable damage to the party concerned (article 159 par.3 of the Greek Civil Procedural Code.) The writ is invalid provided that the party has not been given the opportunity to defend himself properly (art.160 par.1 of the Greek Civil Procedural Code) i.e. he has not been given the opportunity of a "fair trial." The burden of proof is upon the party to whom the writ is addressed i.e his has to prove that the service of the writ to a fictitious or untrue address caused an irrevocable damage to him.

In our case the defendant Peter Tavoulareas became fully aware of the action brought before the Multi-member Court of First Instance of Piraeus, on the 12 April 2002,the latest; therefore he has substantial time to prepare his defence since the hearing of the "Greek" action is on 1 January 2003. Consequently, since the service of the action on Peter Tavoulareas is valid, the Multi-member Court of First Instance of Piraeus is the Court first seised and, thus, the English Court, being the second one, must stay its proceedings."

30. It is not entirely clear to me which of 8 or 19 November 2001 Professor Antapassis is proffering as his preferred date of seisin. Mr Tzioumas opts unequivocally for the earlier date. Both appear to recognise that seisin as of that date may be subject to a condition subsequent in the shape of service, but both are consistent in their view that in so far as Greek law requires service as a condition of the proceedings becoming definitively pending, this is in this context achieved by service on the Public Prosecutor.

31. In his second report Professor Antapassis says this:-

" Theories of Litispendency: at what point in time the litigation in Greece became pending "

The crucial issue is at what point in time the litigation in Greece became pending i.e at the time of the filing or at the time of the service of the writ. This will be determined by the interpretation of Art.221 in conjunction with Articles 215, 226, 233&271 of the Greek Code of Civil Procedure.

There have been two theories of litispendency:

*According to the prevailing in case law theory, (see Piraeus Court of Appeal 315/2987,Ell/Dni (1988), 728, Aegean Court of Appeal 209/2000 and also Vathrakokilis, Code of Civil Procedure, art.221, page 24 and art.215, page 1099, Beys, Dike 2,750), the mere **filing of the lawsuit** creates litispendency provided that the service of the writ will be followed. Therefore, the service of the writ is not a conditio sine qua non of the "existence/substance" of the lawsuit. In the event, that the Defendants have not been properly served, the Court is not entitled – by its own motion – to reject the writ; the writ is not invalid and, subsequently, the hearing is not inadmissible, unless the Defendant (being present at the hearing and having the burden of proof) proves that the defective service caused him irrevocable damage pursuant to Art.159 par.3 of the Greek Code of Civil Procedure (see AP (Supreme Court) 204/78, NoB 27, 46). Moreover, this deficiency can be "rectified," if the Defendant takes part in the proceedings, thus waiving (expressly or by conduct) his right to that effect.*

All these are factual matters that will be solely decided by the Greek Court.

Mr Papadimitriou is trying to preempt the Greek proceedings, by alleging that the service of the "Greek" writ is defective, therefore the Court will "dismiss the lawsuit as irreceivable" or that the deficiencies in the writ have caused an irrevocable damage to the Defendant. However, as already stated, the English Court is prevented from deciding these factual matters i.e substituting the Greek judge; it is only entitled to examine whether on the balance of probabilities the preconditions of Art.221 of the Greek Code of Civil Procedure have been fulfilled i.e. whether aa) the filing of the suit has been effected and bb) the writ has been served to the Public Prosecutor for further transmission. Moreover, the interpretation of Art.159 par.3 of the Greek Code of Civil Procedure adopted by Mr Papadimitriou is totally incorrect and inconsistent with the Greek authorities. The defendant cannot plead that the stay of the English proceedings will be to his detriment, as Mr Papadimitriou seems to support. In any case, this matter will be decided by the Greek Court and not the English Court.

It has however been supported (see Vathrakokilis, Code of Civil Procedure, art.215, page 1100) that the service of the writ is a conditio sine qua non of the validity of the lawsuit; however, the invalidity resulting from the defective service can be "rectified" by the Defendants appearance at the hearing and by him not contesting the deficiency in question.

In my opinion the above theory is not correct. The reason being that if the defective service of the writ would render the lawsuit invalid, the court would have been obliged – by its own motion – to reject the lawsuit, irrespective of whether the Defendant would be present or not. In other words, the appearance of the Defendant at the hearing waiving the right to contest the respective deficiency could not be possible to "rectify" the "invalid/ non-existent" lawsuit. Moreover, this approach could not be compatible with the provisions of Articles 241, 271, par. 1&2 and par.1&2 CCP, which clearly state that, irrespective of whether the writ has not been served at all or has not been properly served, the Court is entitled to carry on the proceedings, in case the Defendant is present, or postpone the hearing until proper service of the writ is effected."

32. It is extremely unsatisfactory to be asked to choose between the views of the experts on Greek law without their having had the opportunity to explain and expand upon what they have said. Not without reluctance I have

concluded that I should prefer the approach of Professor Antapassis and Mr Tzioumas, essentially for three reasons, none of which really relate to the content of Greek law but all of which relate essentially to matters of common sense upon which I can form my own unaided view. First, it seems to me that the view of Mr Papadimitriou on this point is fairly tentative – he says that it is "questionable" whether litispendency was created. Second, I do not know what exactly Mr Papadimitriou means by "irreceivable" when he suggests that the Greek Court is likely to dismiss the lawsuit on that ground. Thirdly I do not see how logically the fact that the English action had been stayed could be regarded as irrevocable detriment to the Claimant flowing from the Defendants' breach of Article 134(2) consisting in furnishing an inaccurate address to the Public Prosecutor. As I understand it the same result would have followed had the correct address been given – in either case the action is in the eyes of the Greek court definitively pending at latest upon service on the Public Prosecutor.

33. For all these reasons I consider that the Claimant's action should be stayed. The default judgment must be set aside as obtained in circumstances where the Greek Court was already seised of the dispute.

34. However in the very unusual circumstances of this case where it has not been possible to examine the Greek law experts I do not propose at this stage to decline jurisdiction. The Claimant has not yet attempted to counterclaim in the Greek proceedings, and the Greek lawyers have not expressly dealt with that question. There is no suggestion that the Claimant will be unable to counterclaim. There is a passing reference in the first report of Mr Tzioumas where he asserts that the Claimant is "in the position to contest the action with all available means of defence and counter attack, if he really wishes to do so," but I do not think that that is sufficient to enable me to conclude without more that the Greek court will entertain a counterclaim in the current proceedings. If the Claimant wishes to participate in those proceedings in that way he may wish to consider an application to the Greek court for the timetable currently fixed to be varied. As I understand it the Piraeus Court on 8 November 2001 fixed 17 January 2003 as the first hearing date. I do not of course know what form that hearing would have taken had the parties not requested its adjournment. When the matter was adjourned on that day the new date was set as 25 September 2004. Again I have no idea whether this timetable would have been adopted in the very different situation of a claimant or counter-claimant seeking monetary relief as opposed to a declaration of non liability.

I also retain some residual doubt as to the approach which the Greek court will adopt in the event that the Claimant seeks to persuade it and succeeds in persuading it that the furnishing of an incorrect address was here a deliberate tactical ploy. The Defendants' evidence deployed before me does not deny the Claimant's assertion (Keates 1 par.10) that they knew that the Claimant did not reside in London. He apparently left his London address in 1992 and has since then resided in the USA from where he has corresponded with the Defendants. Apparently part of the debt was discharged by payment sent to the USA. The Defendants acknowledge that their action in Greece was brought in an attempt to establish Greece as the applicable forum once it became apparent that the Claimant would bring proceedings in London. Mr Irvin told me on instructions from the Defendants that the London address had been used in the past and was believed to be still current. Mr Shepherd was unable to suggest any advantage which would accrue to the Defendants in consequence of furnishing an incorrect address but this is of course a matter for the Greek court. There may be considerations of which I am currently unaware, possibly arising out of the circumstance that the Claimant is not domiciled or resident in a Member State.

Furthermore it is obviously for the Greek Court to determine what, in accordance with their procedures, is the significance of the fact that the Defendants have taken no steps whatever to effect service upon the Claimant in Florida or elsewhere once it became apparent, if they did not know already, that he was no longer resident in London. Thus it is for the Greek court to determine whether, as Mr Shepherd contends, the Defendants have attempted to abuse the provisions of the Convention.

35. In view of my conclusions it is unnecessary to decide whether this court has a residual discretion to stay on forum non conveniens grounds. Even if the court has such a discretion, which I rather doubt, I would not have exercised it in that manner. The Claimant is resident in Florida. The Defendants are both British nationals. The Defendants are well-known members of the Greek shipping community and spend a considerable amount of time working out of the London offices of the Tsavliris Group. On the evidence their principal residences appear to be in England, although no doubt they have homes elsewhere. It is in dispute whether the agreement was made in London or in Athens, but on any view it arose out of a Lloyd's Open Form Salvage Agreement which would have provided for London Arbitration and must have been subject to English Law. The Defendants have not even come close to demonstrating that Greece is a more appropriate forum for the resolution of this dispute let alone that it is the appropriate forum.

Philip Shepherd (instructed by Messrs Howe and Keates) for the Claimant
Peter Irvin (instructed by Messrs Constant and Constant) for the Defendants