

## 2<sup>ND</sup> INTERNATIONAL ROMAN LAW

### MOOT COURT & COLLOQUIUM

2-6 April 2009

Kavala – Colonia Augusta Iulia Philippensis

*In memoriam Professor P. Zepos*

*Fiscus v Irenaios, Bulgarus & Acacius*

*Agathon v Irenaios*

1. The facts of the case take place in Constantinople and the nearby sea side village *Ainos* during the reign of the Emperor Justinian I (527-565 AD).
2. *Bulgarus*, aged 43, is a high ranked official in the Imperial Government. He works under the *Megas Logothetes Konstantinos*, who is the head of all the *logothetai*, and personally responsible for the legal system and treasury. Since 547 AD *Bulgarus* has been entrusted with the management and supervision of public lands. *Bulgarus* is married to *Pulcheria*, daughter of *Irenaios*, a well known real estate developer of Constantinople. Together with his two sons-in-law, *Bulgarus* and *Acacius*, *Irenaios* has formed a *societas omnium bonorum quae ex quaestu veniunt*, trading under the name 'The Building Society of St Irenaios' for the purpose of engaging in the business of real estate and property development.
3. *Agathon*, aged 27, is an olive producer who lives with his wife, *Euphrosyne*, aged 21, and his 3 daughters, aged 5, 3 and 1, in the quiet and serene village of *Ainos*, which is situated at the south east of Constantinople. *Agathon* and his family live in a piece of land known in *Ainos* as *O Elaion*, over which *Agathon* had been granted the right of *emphyteusis* in perpetuity by the *Fiscus* in 551 AD for a *vectigal canon* of 50 *solidi per annum*. *Agathon* and *Euphrosyne* make their living from the production of olive oil.

4. As every noble family of Constantinople, *Bulgarus* and his family spend their summer vacations in *Ainos*, where they have built a summer house. In his last visit to *Ainos*, *Bulgarus* spotted a magnificent piece of land between *Agathon's Elaion* and the shore, which is known amongst locals as *Aqua Calida*, because of the hot water springs that exist in the lagoon.

5. *Aqua Calida* is a lagoon (see Annex I). On the west, it is separated of the sea by a narrow piece of land. On the north this narrow piece of land is interrupted for about 20 meters so that the sea and the lagoon are linked. The narrow of land then continues until it joins the mainland. On its east and south sides *Aqua Calida* is bounded by the *Elaion*. The lagoon is very shallow and it contains hot water springs and it has a significant pink flamingos population. In the middle of the lagoon there is a very small sandy island. *Aqua Calida* lies at the foot of a steep escarpment close to its boundary with the *Elaion*. Two derelict buildings once used by local fishermen, who sought refuge in the lagoon of *Aqua Calida*, are situated between the foot of the escarpment and the foreshore. They are accessible from the *Elaion*. But this is possible on foot only, by means of a gate and a stairway. Carts cannot be driven onto any part of the land on which *Aqua Calida* is situated.

6. Upon his return to Constantinople, *Bulgarus* identified *Aqua Calida* in the land registry as property of the *Fiscus* under his supervision and responsibility. He spoke to *Irenaios* and *Acacius* about *Aqua Calida*. They believed that it would be very profitable for their building society to acquire the land and turn it into a spa resort. Their greatest problem was to find a way of acquiring the land. *Bulgarus* and *Acacius* thought of their good friend, *Ephraim*, aged 53, who had been the Abbot of the Holy Monastery of the Burning Bush since 540 AD. *Irenaios* was slightly reluctant as he did not know *Ephraim* at all.

*Irenaios*: What kind of man is he? Is he one of those priestly ascetics concerned only with spiritual grace or one of those crafty men of God concerned rather with temporal gain?

*Acacius*: Regrettably, the Abbot seems to be one of the latter.

*Irenaios* (rubbing his hands): Oh good! He is one of our kind that we can do business with! *Bulgarus*, you should go and see him. See if you can figure out a way of arranging this. After all, you are in charge of the registry.

Indeed *Bulgarus* met with Abbot *Ephraim* the next day to devise the following plan in order to bring *Aqua Calida* to the enjoyment of *Bulgarus* and his society. They agreed and performed the following acts. A few days before Christmas 552 AD, *Bulgarus* visited the Monastery in his official capacity in order to present *Aqua Calida* to the Monastery as part of the annual Imperial donation in the memory of the late Empress Theodora and for the salvation of her soul. He delivered to Abbot *Ephraim* an imperial letter (see Annex II) signed by His Imperial Majesty the Emperor granting *Aqua Calida* to the Monastery.

7. In one of the subsequent visits that Abbot *Ephraim* paid to *Bulgarus* in order to hear to the latter's confession, they discussed the recent donation. The following dialogue took place:

Abbot *Ephraim*: What am I supposed to make of His Majesty's wish that a church be built in *Aqua Calida*?

*Bulgarus*: This is a good question. His wish was rather unexpected! I suppose we can always build a chapel... You know, one of these small chapels in which hardly two people can fit in and dedicate it to Saint Agatha. That could do.

Abbot *Ephraim*: Perhaps... Are you going to keep it though, once you start building on the land?

*Bulgarus*: I don't know. Why do you care? Is it a sin?

Abbot *Ephraim* (winking): Well it is... But let's say that it is not an unredeemable one! What if we build it on the small island so that it doesn't take any of the solid land? It would also look so idyllic and couples might want to come and get married there. This would mean good business for both of us. The Monastery will profit from the ceremony and the rest of the services we can sell to our... faithful sheep, so to speak! Then the banquet and the honeymoon can take place in your hotel and spa resort!

*Bulgarus*: Oh *Ephraim*, old chap! How ingenious! I've always said what a great loss to the business world you monks are!

Abbot *Ephraim*: You think so? I had this vision the other night. Saint *Arsenios* appeared to me in my sleep and said 'Your prayers have been heard. There will be a time when monasteries will own *societates* "offshore" in Cyprus'. Do not ask me what an offshore *societas* is. I have no idea. But it sounds like big business to me!

*Bulgarus*: Right! You know I do not believe in visions. In any event, I think we are agreed. You will build the chapel of Saint Agatha on the island. Your monastery can also keep the island. There is no need to deliver it to us. Otherwise, the Emperor could get mad at you for selling the chapel dedicated to the memory of his prostitute, Theodora!

8. In order not to provoke suspicions, *Bulgarus* and Abbot *Ephraim* further agreed that the Monastery would keep *Aqua Calida* for 3 years in its possession and would then sell it (with the exception of the island) to *Acacius* for the price of 1,000 *solidi*. *Irenaios* would conclude the transaction with the Abbot and would receive *Aqua Calida* on behalf of the *societas*. Three years later, the chapel of Saint Agatha had been built in memory of the late Empress Theodora. As the Monastery was running low on cash, Abbot *Ephraim* sought to revise the agreement with *Bulgarus*. They agreed that the price of 1,000 *solidi* would be virtual. In return, *Bulgarus* would exercise his influence in the Imperial Court to secure a donation for the Monastery. Indeed *Bulgarus* succeeded in his task and *Megas Logothetes Konstantinos* decided to donate the sum of 3,000 *solidi* to the Monastery. Satisfied with this arrangement, two days before the Feast of the Holy Cross 555 AD Abbot *Ephraim* concluded the transaction in written form and the Monastery sold *Aqua Calida* to *Irenaios*, who received it on behalf of the *societas*. Abbot *Ephraim* delivered the keys to the gate of *Aqua Calida* to *Acacius* and said to *Irenaios*: 'There you go, my son'. *Irenaios* responded saying: 'You must be very content with the donation of 3,000 *solidi*'. 'Indeed, my son! Thank God that this 3,000 came along. Let them be blessed!'

9. The *societas* proceeded immediately to develop the land. The derelict shelters used by local fishermen until 480 AD were demolished. In their place, a

luxurious spa resort was built. However, accessibility always remained a problem. When the weather was favourable, the builders accessed and materials were transported to *Aqua Calida* by sea. In windy, rainy or stormy days, the builders and materials had to access *Aqua Calida* by land. For this reason, *Bulgarus*, *Acacius* and *Irenaios* decided to request *Agathon* to grant them a servitude *viae* over the *Elaion*.

10. Later in autumn 555 AD, *Agathon* agreed to sell to them a servitude *viae* in return for 1.5% of the annual profit the spa resort would produce. They all went to the notary public of *Ainos* and they agreed the following in written: ‘I, *Agathon*, son of *Iosif* the Deaf, agree to establish, sell and transfer a servitude *viae* over the *Elaion* along the route known as the Fisherman’s Path to *Irenaios* for the purposes of his enjoyment of *Aqua Calida*. In return for this servitude *viae* that *Agathon* establishes, sells and transfers I, *Irenaios*, son of *Isidoros Philanthropinos*, agree that at the end of each year and before expenses are deduced 1.5 % of the profit derived from *Aqua Calida* will be paid to *Agathon*’.

11. The *societas* constructed at its expenses a lower branch road, which led from the public road to the gate on the eastern boundary of *Aqua Calida* along the path that fishermen would use to access the public road in the old days (‘the Fisherman’s Path’). It ran in a slightly boomerang-shaped line down a fairly steep slope from the main public road. It was about 100 meters long and was of hardcore and pozzolanic mortar construction. It was bordered on the north side by a fence. The lands to the south were left unfenced. The lower branch road was used by the employees of the *societas* who carried materials to *Aqua Calida* either on foot or on horse-drawn carts. *Agathon* never objected to this practice, although several of his olives trees had to be destroyed for this purpose.

12. Yet, it was not possible for any cart to gain access beyond the gate onto *Aqua Calida* by reason of the steep escarpment. Therefore, bulky goods or numerous items had to be off-loaded and carried down by hand, piece by piece. All the more so, the lower branch road was not wide enough to permit carts to turn on it. They had to be driven to some convenient place where they could manoeuvre for this purpose on the *Elaion*. It was not possible for the driver of a

cart who wished to enter *Aqua Calida* from the branch road to do so without parking his cart elsewhere. Parking of carts could take place, and had taken place, at the top of the lower branch road. But a driver who chose to do this would have to make a significantly steep pedestrian descent and climb back up again in open and exposed country. During the construction of the resort, parking of carts had also taken place on the top of the lower branch road itself or on unfenced land of the *Elaion* estate bordering the lower branch road, but lying outside the territory on which the servitude had been established. *Agathon* though did not object to this latter practice as he was not particularly obstructed in his enjoyment of the *Elaion* and wished to act as a good and assisting neighbour.

13. Seven years after the completion of the construction activities in 562 AD, the resort became a popular destination for the ruling class and jet set of Constantinople. Even during winter months, ministers of the Crown, nobility, businessmen, military and Court officials would come to relax for a few days in *Aqua Calida* and benefit from the warm waters of the springs. They would drive their carts to *Aqua Calida* and park them in the *Elaion*, frequently in the shade of *Agathon's* olive trees, without seeking prior authorisation from *Agathon*. During summer the situation was even more intolerable. A substantial part of the *Elaion*, significantly bigger than the Fisherman's Path that he had allowed *Irenaios* to use, had been converted to a very busy parking spot, both by the guests staying in *Aqua Calida* and those stopping by to use the exquisite beach for a few hours. This had serious consequences on *Agathon*, as he was severely obstructed from collecting his harvest of olives from the trees situated in the area that had become the parking space. Whenever he would try to harvest his olives in the parking space area, he had to confront the slaves who were looking after the carts while their masters were in *Aqua Calida*. This was a troublesome affair as the slaves were frequently rather stubborn and uncooperative.

14. *Agathon* tried several times to meet *Irenaios* and discuss the problem, but he was told that the latter was either away or busy. On the Feast of the Transfiguration of the Saviour 562 AD, *Agathon* went again to *Aqua Calida* to meet *Irenaios*, resolved that this time would be the last one he was going up

and down the hill in such a heat. Having arrived in the reception area, he was greeted by *Acacius* who however asked him to pass by *Aqua Calida* on another day, for *Irenaios* was having lunch with three of his best clients, the Imperial Equerry, the *Megas Logothetes Konstantinos* and the Imperial *Cubicularius*. This proving the straw that broke the camel's back, *Agathon* lost his temper. He started to yell at *Acacius* saying that the *societas* was exploiting his kindness. In order not to disturb the serenity the distinguished guests were enjoying, *Acacius* tried to calm down *Agathon*, but in vain. *Agathon* declared that the intrusion of the guests in his olive grove was intolerable and that the agreement should be either dissolved for the future or the sum paid to him should be tripled to match the disturbances he suffered.

15. At that point, *Irenaios* walked out to inquire what was happening. There he confronted a raging *Agathon*. 'Your demands are unreasonable, *Agathon*. We have signed an agreement and you cannot go back on it' he said. *Agathon* replied 'Unreasonable? The parked carts occupy triple the space over which I ceded you a servitude! Besides, when we signed the contract, I established the servitude in your name. Not for all these people! You better pay adequate compensation if you wish to keep the servitude!' *Irenaios* answered calmly: 'This is your problem. Not mine.' This very statement drove *Agathon* mad. He shouted with all the power of his voice so that the distinguished guests could hear every word: 'My problem? My problem, you say? Of course, now that you together with that impostor, that thief son-in-law of yours and that simonist old monk, Abbot *Ephraim*, have done your job, you do not care about me! Oh yes, I know how you became owner of this land. It was misappropriated from the State, by you lot of cronyist gangsters! And then, as if this was not illegal enough, you go on to cause all these problems to us, law abiding citizens, who live in peace and quiet and pay our taxes to the Emperor!' Worried that his guests would hear these accusations, *Irenaios* interrupted *Agathon* saying in a very bass and loud voice: 'How dare you? Get out of here, you insolent peasant!' Amidst loud confrontation remarks, *Agathon* was thrown out of *Aqua Calida* by three of *Irenaios*' slaves.

16. *Agathon* left for his house in a state of fury, but decided not to react immediately. 'Revenge is a dish best serve cold' his wife, *Euphrosyne*, told him. Thus *Agathon* decided to put up with the situation for a few more weeks while her husband was waiting for the right moment to act. He knew that *Aqua Calida* would be fully booked on the weekend of the Dormition of the *Theotokos*. A few days before the said feast he had a stone wall erected along the east side of *Aqua Calida*, thus blocking access to and from *Aqua Calida* through his land. He also erected a stone wall along the boundaries of the *Elaion* that prevented all strangers from having access to the *Elaion*. He kept the keys to the gate to himself. Fearful of the imminent loss of business, *Irenaios* and *Bulgarus* paid a visit to *Agathon* in his house in the estate. They were both in a state of panic. This time though *Agathon* asked for 15% of the annual net profits in order to open the gates.

17. They were about to agree on 6.5% when *Euphrosyne*, who was eavesdropping behind the door, walked in the room holding the plaster in her hand and waving it at *Agathon*. She yelled at him, saying: 'You idiot! They are going to trick you again like last time! Ah... poor me! I wasted the best years of my life with a greasy oil man like you! I should have listened to mama and married *Nikolaos* the Butcher! He would treat me like a queen, instead of having me locked in a hat in an olive grove like you do!' Faced with such a resolved woman and such convincing argumentation, *Irenaios* and *Bulgarus* departed.

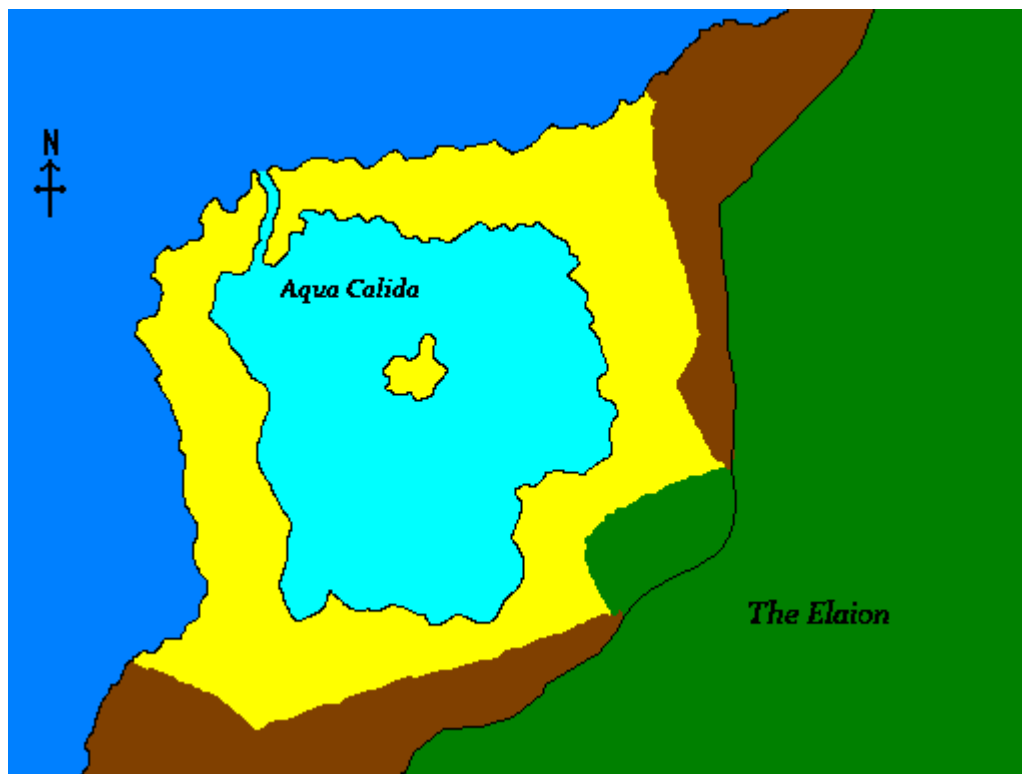
18. The gates remained closed which unsurprisingly turned out to be an economic disaster for *Aqua Calida*. As if this was not enough of a disaster, *Megas Logothetes Konstantinos* summoned the three partners together with Abbot *Ephraim* to the Imperial Palace and asked for explanations on the allegations that *Agathon* had made. He did not find their explanations satisfactory and warned them that he would take action to recover the estate of *Aqua Calida* and forfeit the profits they had realised from its exploitation as a spa resort.

19. *Megas Logothetes Konstantinos* and *Agathon* have mandated the same lawyers to act on their behalf in the following actions against *Irenaios*:



1. A *rei vindicatio* brought by the *Fiscus* against *Irenaios*, *Acacius* and *Bulgarus* for the purpose of recovering *Aqua Calida* and all the profits that they have realised by exploiting it.
2. An *actio negatoria* brought by *Agathon* against *Irenaios* for the purpose of declaring that the servitude created over the *Elaion* did not include a right of guests of *Aqua Calida* to park carts on its territory or of *Irenaios* and his partners to park their carts outside the designated area.

ANNEX I



Deep blue: sea

Light blue: lagoon

Yellow: sandy beach

Brown: cliffs

Green: accessible land

## ANNEX II

### The original text in Latin prevails over the English translation

***In nomine Domini Nostri Iesu Christi***

***Imperator Caesar Flavius Iustinianus***

***Alamannicus Gothicus Francicus Germanicus Anticus***

***Alanicus Vandalicus Africanus***

***Pius Felix Inclitus Victor ac Triumphator Semper Augustus***

*Beatissimo ac reverentissimo patri Ephraim, archimandritae sacri monasterii Rubi Ardentis, gratia, pax, caritas, gaudium, longanimitas, misericordia a Deo Patre omnipotente et Iesu Christo filio eius et Spiritu Sancto tecum.*

*Unde ut non monasterii apex vilescat, sed magis amplius potentia decoretur, ecce tam Aquam Calidam nostram saepefato beatissimo archimandritae nostro Ephraim, contradentes atque relinquentes eius vel successorum ipsius potestati et ditioni firma imperiali censura per hanc nostram divalem sacram et pragmaticum constitutum decernimus disponendam atque iuri sacri monasterii Rubi Ardentis concedimus permanendam, ut ecclesia sanctae Agathae aedificetur in gloriosam memoriam augustae imperatricis Theodoraе.*

*Haec vero omnia, quas per hanc nostram imperialem sacram et per alia divalia decreta statuimus atque confirmavimus, usque in finem mundi illibata et inconcussa permanenda decernimus; unde coram Deo vivo, qui nos regnare praecepit, et coram terribili eius iudicio obtestamus per hoc nostrum imperialem constitutum omnes nostros successores imperatores vel cunctos optimates, satrapes etiam, amplissimum senatum et universum populum in toto orbe terrarum nunc et in posterum cunctis retro temporibus imperio nostro subiacenti, nulli eorum quoquo modo licere, haec, quae a nobis imperiali sanctione sacri monasterii Rubi Ardentis concessa sunt, refragare aut confringere vel in quoquam convelli. Si quis autem, quod non credimus, in hoc temerator aut contemptor extiterit, aeternis condemnationibus subiaceat innodatus, et sanctos dei principes apostolorum Petrum et Paulum sibi in praesenti et futura vita*

*sentiat contrarios, atque in inferno inferiori concrematus, cum diabolo et omnibus deficiat impiis.*

*Huius vero imperialis decreti nostri paginam propriis manibus roborantes super venerandum corpus beati Andreae, posuimus, ibique eidem Dei apostolo spondentes, nos cuncta inviolabiliter conservare et nostris successoribus imperatoribus conservanda in mandatis relinqui, reverentissimo archimandritae nostro Ephraim eiusque per eum cunctis successoribus, Domino Deo et salvatore nostro Iesu Christo annuente, tradidimus perenniter atque feliciter possidenda.*

*Et subscriptio imperialis: Divinitas vos conservet per multos annos.*

*Data undecimo kalendas Decembres Constantinopoli Lampadio et Oreste viris clarissimis consulibus.*

***In the Name of Our Lord Jesus Christ***

***The Emperor Ceasar Flavius Justinian***

***Conqueror of the Alamanni, the Goths, the Franks, the Germans,***

***the Antes, the Alani, the Vandals, the Africans***

***Pious, Prosperous, Renowned, Victorious and Triumphant, Ever August***

*To the most blessed and reverend father Ephraim, abbot of the holy monastery of the Burning Bush, grace, peace, charity, rejoicing, long-suffering, mercy, be with you from God the Father almighty and from Jesus Christ his Son and from the Holy Ghost.*

*In order that the apex of the monastery may not deteriorate, but may rather be adorned with power: behold we – delivering to the oft-mentioned most blessed abbot Ephraim, our Aqua Calida and relinquishing them, by our inviolable gift, to the power and sway of himself or the successors of his power – do decree, by this our godlike charter and imperial constitution, that it shall be so arranged; and do concede that it shall lawfully remain with the holy monastery of the Burning Bush, so that a church of saint Agatha be erected in the glorious memory of the august empress Theodora.*

*We decree, moreover, that all these things which, through this our imperial charter and through other godlike commands, we have established and confirmed, shall remain uninjured and unshaken until the end of the world.*

*Wherefore, before the living God, who commanded us to reign, and in the face of his terrible judgment, we conjure, through this our imperial decree, all the emperors our successors, and all our nobles, the satraps also and the most glorious senate, and all the people in the whole world now and in all times previously subject to our rule: that no one of them, in any way allow himself to oppose or disregard, or in any way seize, these things which, by our imperial sanction, have been conceded to the holy monastery of the Burning Bush. If anyone, moreover, – which we do not believe – prove a scorner or despiser in this matter, he shall be subject and bound over to eternal damnation; and shall feel that the holy chiefs of the apostles of God, Peter and Paul, will be opposed to him in the present and in the future life. And, being burned in the nethermost hell, he shall perish with the devil and all the impious.*

*The page, moreover, of this our imperial decree, we, confirming it with our own hands, did place above the venerable body of Saint Andrew; and there, promising to that same apostle of God that we would preserve inviolably all its provisions, and would leave in our commands to all the emperors our successors to preserve them, we did hand it over, to be enduringly and happily possessed, to our most reverend abbot Ephraim, and, through him, to all his successors -God our Lord and Saviour Jesus Christ consenting.*

*And the imperial subscription: May the Divinity preserve you for many years.*

*Given at Constantinople the eleventh day of the Calends of December Lampadius and Orestes, most illustrious men, being consuls.*