The saga of the Greek State bonds and their haircut: Hellas triumphans in Luxemburg. Really?

By Prof. Dr. Peter Mankowski, University of Hamburg

The Greek State financial crisis has sent waves of political turmoil throughout the Eurozone and is certainly going to continue. It has provided much enrichment for International Procedural Law, yet not for the creditors of Greek State bonds. 'Haircut' has become an all too familiar notion and part of the Common Book of Prayers of State bonds. Some creditors, particularly from Germany and Austria, were not content with having their hair cut involuntarily and put it to the judicial test. Greece has thrown every hurdle in their way which she could possibly muster: service, immunity, lack of international jurisdiction. The service issue was sorted out by the CJEU in *Fahnenbrock* (Joined Cases C-226/13 et al., ECLI:EU:C:2015:383), already back in 2015. The German BGH and the Austrian OGH took fairly different approaches, the former granting immunity to Greece because of the haircut, the latter proceeding towards examining the heads of international jurisdiction under the Brussels Ibis Regulation. Quite consequently, the OGH referred some question concerning Art. 7 (1) Brussels Ibis Regulation to the CJEU. In its recent *Kuhn* decision (of 15 November 2018, Case C-308/17, ECLI:EU:C:2018:911), the CJEU answered that the entire Brussels Ibis Regulation would not be applicable by virtue of its Art. 1 (1) 2nd sentence since the CJEU believed the haircut to constitute an *actum iure imperii*. Rapporteur was the newly (only six days before) promoted Vice President *Rosario Silva de Lapuerta* from Spain. The core of the judgment is surprisingly succinct, not too say: short, comprising only some ten paragraphs:

> *34 Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of that regulation, it is otherwise where the public authority is acting in the exercise of its public powers (judgment of 15 February 2007, Lechouritou and Others, C?292/05, EU:C:2007:102, paragraph 31 and the case-law cited).*
>
> *35 That applies, namely, to disputes resulting from the exercise of public*

powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals (judgment of 15 February 2007, Lechouritou and Others, C?292/05, EU:C:2007:102, paragraph 34).

36 As regards the dispute in the main proceedings, it must, consequently, be established whether its origin stems from the acts of the Hellenic Republic, which arise from the exercise of public authority.

37 As stated by the Advocate General in points 62 et seq. of his Opinion, the manifestation of that exercise is the result of both the nature and the modalities of the changes to the contractual relationship between the Greek State and the holders of the securities at issue in the main proceedings and the exceptional context in which those changes took place.

38 Those securities, following the adoption of Law 4050/2012 by the Greek legislator and the retroactive introduction of a CAC according to that law, were replaced by new securities with a much lower nominal value. Such a substitution of securities was not provided for in the initial borrowing terms or in the Greek law in force at the time that the securities subject to those conditions were issued.

39 Thus, that retroactive introduction of a CAC allowed the Hellenic Republic to impose on all of the holders of securities a substantial amendment to the financial terms of those securities, including on those that would have sought to oppose that amendment.

40 Furthermore, the unprecedented reliance on the retroactive inclusion of a CAC and the resulting amendment to the financial terms took place in an exceptional context, in the circumstances of a serious financial crisis. They were namely dictated by the necessity, within the framework of an intergovernmental assistance mechanism, to restructure the Greek State's public debt and to prevent the risk of failure of the restructuring plan of that debt, to avoid that State failing to pay and to ensure the financial stability of the euro area. By declarations of 21 July and 26 October 2011, the euro area Heads of State or Government affirmed that, regarding the participation of the private sector, the situation of the Hellenic Republic called for an exceptional solution.

41 The exceptional nature of that situation also results from the fact that,

according to Article 12(3) of the EMS Treaty, CACs are to be included, as of 1 January 2013, in all new euro area government securities with maturity above one year, in a way which ensures that their legal impact be identical.

42 It follows that, having regard to the exceptional character of the conditions and the circumstances surrounding the adoption of Law 4050/2012, according to which the initial borrowing terms of the sovereign bonds at issue in the main proceedings were unilaterally and retroactively amended by the introduction of a CAC, and to the public interest objective that it pursues, the origin of the dispute in the main proceeding stems from the manifestation of public authority and results from the acts of the Greek State in the exercise of that public authority, in such a way that that dispute does not fall within 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 1215/2012.

43 In those circumstances, the answer to the question referred is that Article 1(1) of Regulation No 1215/2012 is to be interpreted as meaning that a dispute, such as that at issue in the main proceedings, relating to an action brought by a natural person having acquired bonds issued by a Member State, against that State and seeking to contest the exchange of those bonds with bonds of a lower value, imposed on that natural person by the effect of a law adopted in exceptional circumstances by the national legislator, according to which those terms were unilaterally and retroactively amended by the introduction of a CAC allowing a majority of holders of the relevant bonds to impose that exchange on the minority, does not fall within 'civil and commercial matters' within the meaning of that article.

This mirrors sometimes to the letter the core of the opinion delivered by A-G *Bot* from France (delivered on 4 July 2018, ECLI:EU:C:2018:528 paras. 62-76). Only rarely the CJEU has argued in such an openly political manner when deciding issues of the Brussels I/Ibis regime. The underlying *ratio* is evident: Greece must not fall for otherwise the Eurozone in its entirety is feared to break down. The individual creditors' particular interests are sacrificed for the common good of Greece, the Eurozone and the EU. (The so called Troika including the EU was mainly responsible for the introduction of the haircut into Greek law by demanding the reduction of Greece's public debt.)

Yet a second, more technical thought appears necessary: Hellas might have triumphed in the concrete case. But the victory she scored might turn out to be a Pyrrhic victory. Declaring Art. 1 (2) 2nd sentence Brussels Ibis Regulation operational wipes out for instance jurisdiction under Art. 7 (1) Brussels Ibis Regulation – but it also wipes out Art. 5 Brussels Ibis Regulation. Greece as the defendant is left to the possibly tender mercy of the *national* jurisdiction rules of her EU partner States once one is prepared to proceed to the realm of international jurisdiction. Hence, as to the admissibility of the claims all boils down to the question whether Greece enjoys immunity for her haircut administered. *Kuhn* in fact reduces the number of defenses available to Greece by one.