When Rome meets Greece: could Rome I help the Greek debt restructuring?

Among all the buzz about a possible (but much feared) 'Grexit', there are two elements in the story of the Greek debt restructuring (diplomatically called 'Private Sector Involvement') which should be of interest for conflict lawyers.

First the fact that the governing law of the Greek bonds was one of the central issues in the discussion which led to the restructuring. The law governing sovereign bonds is usually only a side issue which does not attract much attention – probably because so many of the bonds issued are governed either by English law or the law of New York. The Greek bonds (issued or guaranteed by Greece) which were subject of the restructuring were overwhelmingly governed by Greek law. This peculiar feature gave Greece much more leeway vis-à-vis the bondholders, as Greece could modify its law and by doing so directly impact the terms of the debt. To give one element of comparison, when Argentina restructured its debt in 2005, the vast majority of the bonds concerned were governed by either English law or the law of New York, as is common in the market.

Greece will, however, no be able to repeat this trick twice. This distinctive feature of the Greek bonds which were eligible for the swap (for a total amount of EUR 206 billion), will indeed disappear. The new bonds which were offered to the existing bondholders as compensation for the substantial haircut they had to swallow, are issued under English law while the older bonds (tendered in the exchange) were mostly Greek law bonds. This choice of law does make a difference as it means that investors holding the new bonds will not be subject to a change in Greek legislation which Greece could unilaterally decide to impose.

The second element worth noticing is the nature of the law adopted by Greece as part of its restructuring operation. The Act which was rushed through the Greek Parliament (but had been anticipated by some highly knowledgeable commentators), inserted so-called collective action clauses (CAC's) in the documentation. This meant altering the terms of the debt, in a retroactive fashion.

This move has been much discussed : rating agencies had warned that activating the CAC's would trigger lowering the issue ratings on the debt issues concerned, ISDA's determination committee also decided that the use of collective action clauses meant that a so-called Restructuring Credit Event had occurred and some have even warned that this move could be challenged under the BIT's signed by Greece. Although the use of CAC's has been widely promoted over the past decade, with the EU recently adopting its own versions of the CAC's, the use of these clauses in the sovereign debt market remains a relatively novel phenomenon.

The Greek Act (Law 4050/2012 adopted by the Greek Parliament on 23 February 2012) introducing CACs in the terms of the outstanding Greek bonds allows for one single vote across all issues, an interesting feature. Even more interesting is that the law provides that its provisions

> *"aim to protect the supreme public interest, are mandatory rules effective immediately, prevail any contrary legislation of general or special provisions…" (translation courtesy of Andrea Koutras' blog).*

This is a clear reference to Article 9 of the Rome I Regulation and an attempt to strengthen the Greek legislation by elevating it to the status of 'overriding mandatory provisions'. It remains to be seen whether this will be sufficient to ensure that the law will be applied whenever investors (private or institutional) institute legal proceedings against what some of them have deemed to be a 'forced expropriation'. It is indeed almost inevitable that the whole operation will lead to much litigation, which will raise interesting features of investment law and even human rights. Another issue which will be discussed is whether the Greek Mopping Up Law will be applied at all by courts and possibly arbitral tribunals called to decide on claims filed by investors. Given the limitations imposed by Article 9.3 of the Rome I Regulation on the application of foreign mandatory rules, the Regulation may offer a very limited protection to Greece if investors who have not accepted the bond swap but were nonetheless forced to take part on the basis of the CAC's, succeed in bringing proceedings outside Greece.

Editors' note: Patrick Wautelet is a professor of law at Liege University.