The Aftermath of the CJEU's Kuhn Judgment – Hellas triumphans in Vienna. Really.

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Claims brought by creditors of Greek state bonds against Greece in connection with the 2012 haircut do not fall under the substantive scope of the Brussels Ibis Regulation because they stem from the exercise of public authority. Hence, they cannot be regarded as civil and commercial matters in the sense of Article 1(1) Brussels Ibis Regulation. This is the essence of the CJEU's *Kuhn* judgment (of 15 November 2018, Case C-308/17, ECLI:EU:C:2018:911), which was already discussed on this blog.

In said blog post, it was rightly pointed out that the judgment could be nothing but a Pyrrhic victory for Greece. Not least the – now possible – application of national (sometimes exorbitant) jurisdictional rules was considered to have the potential to backfire. This was, however, only the case, if Greece was not granted immunity in the first place. In short: the fallout of the CJEU's judgment was hardly predictable.

A recent decision rendered by the Austrian Supreme Court of Justice (*Oberster Gerichtshof*, OGH) introduces some clarity – at least with regard to litigation in Austria. The decision (of 22 January 2019, docket no. 10 Ob 103/18x) concerned the case that gave rise to the preliminary reference.

In a first step, the OGH held that Greece does indeed enjoy immunity from the Austrian jurisdiction. This is a major change of case law. Unlike the German Federal Court of Justice (*Bundesgerichtshof*, BGH), the OGH repeatedly held the opposite (most recently six days after (!) the CJEU's *Kuhn* judgment in a decision of 21 November 2018, docket no. 6 Ob 164/18p). While, in principle, there is nothing wrong with changing the case law, it is somewhat astonishing that the OGH did this in a very superficial fashion (one sentence). In fact, the court merely backed up its claim with a reference to the CJEU's *Kuhn* judgment, although this judgment was not concerned with the question of immunity but solely the

substantive scope of the Brussels Ibis Regulation. Because of the severe consequences of the OGH's new approach, it is incomprehensible that the OGH did not discuss why the CJEU's holding applies to the issue of state immunity as well.

Ironically, the OGH declared itself – by virtue of section 42(3) of the Austrian Law on Jurisdiction (*Jurisdiktionsnorm*, JN) in conjunction with section 528(2) no. 2 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO) – bound by the finding of the court of previous instance that Greece did not enjoy immunity because the court of second instance upheld said finding.

Consequently, the OGH examined if Austrian courts had international jurisdiction based on the Austrian autonomous rules on jurisdiction. According to section 99 JN, jurisdiction can be established by the presence of assets in Austria (comparable to section 23 German Code of Civil Procedure). However, the OGH declined jurisdiction based on section 99 JN because the claimant had not relied upon this head of jurisdiction during the court proceedings. Therefore, the OGH found that Austrian courts had no international jurisdiction and dismissed the claim. This reasoning is hardly convincing. It is true that Austrian courts are – in principle – bound by the statement of the claimant when they examine their jurisdiction (see section 41(2) JN) and that the claimant did not rely upon section 99 JN. However, up until now, the OGH always applied the Brussels Ibis Regulation to claims in connection with the haircut. The court never – not even in the preliminary reference – questioned the applicability of the Regulation. Hence, one is inclined to ask: why should a claimant rely on the autonomous rules on jurisdiction if it is standing case law that they do not apply? Why did the OGH not remit the matter to the lower instance court, giving the claimant at least the chance to rely on section 99 JN (or Austrian autonomous rules on jurisdiction in general)? Is this not a prime example of a denial of justice? Be that as it may, the court's one-sentence (!) reasoning leaves at least a bitter taste.

What's the bottom line? Thanks to the *Kuhn* judgment, Greece now enjoys immunity from Austrian jurisdiction regarding claims in connection with the 2012 haircut. Consequently, Austria's (exorbitant) section 99 JN is out of the equation. Therefore, the OGH has turned Greece's Pyrrhic victory in the CJEU's Kuhn judgment into a clear victory. While the OGH's reasoning is far from bulletproof, the door to the Austrian courts has closed.

The decision (in German) can be accessed here.