

Provisional text

JUDGMENT OF THE COURT (First Chamber)

15 November 2018(\*)

(Reference for a preliminary ruling — Regulation (EU) No 1215/2012 — Jurisdiction in civil and commercial matters — Scope — Article 1(1) — Concept of ‘civil and commercial matters’ — Bonds issued by a Member State — Involvement of the private sector in the restructuring of public debt of that State — Unilateral and retroactive adjustment of the borrowing terms — Collective action clauses — Action brought against the State by private creditors who hold those bonds as natural persons — Liability of the State for acts and omissions in the exercise of State authority)

In Case C-308/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 25 April 2017, received at the Court on 29 May 2017, in the proceedings

**Hellenische Republik**

v

**Leo Kuhn,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), Vice-President, acting as President of the First Chamber, J.-C. Bonichot, E. Regan, C.G. Fernlund and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2018,

after considering the observations submitted on behalf of:

- the Hellenische Republik, by K. Kitzberger, Rechtsanwältin,
- L. Kuhn, by M. Brand, Rechtsanwalt,
- the Greek Government, by K. Boskovits and by S. Charitaki, M. Vlassi and S. Papaioannou, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, and by P. Pucciariello, avvocato dello Stato,
- the Portuguese Government, by L. Inez Fernandes, M. Figueiredo and P. Lacerda, acting as Agents,
- the European Commission, by M. Wilderspin and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the hearing on 4 July 2018,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 7(1)(a) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).
- 2 The request has been made in proceedings between the Hellenische Republik (Hellenic Republic) and Mr Leo Kuhn concerning a claim to obtain fulfilment of the borrowing terms of bonds issued by that Member State or compensation for the non-fulfilment of those terms.

### Legal context

#### *The ESM Treaty*

- 3 On 2 February 2012, the Treaty establishing the European Stability Mechanism was concluded in Brussels (Belgium) between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland ('the ESM Treaty'). Article 12(3) of that Treaty provides that collective action clauses 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 is identical.

#### *European Union law*

- 4 Recitals 4, 15 and 16 of Regulation No 1215/2012 read:

'(4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

...

- (15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
- (16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.'

- 5 Article 1(1) of that regulation provides:

'This Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State

for acts and omissions in the exercise of State authority (*acta iure imperii*).’

6 Article 4(1) of that regulation provides:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

7 Article 7(1)(a) of that regulation is worded as follows:

‘A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question.’

### ***Greek law***

8 According to the order for reference, the Greek Central Bank’s securities settlement system includes accounts opened in the name of each participant that was authorised, by the Governor of that central bank, to take part in that system.

9 Pursuant to Article 6(2) of Law 2198/1994, the participants in the Greek Central Bank’s securities settlement system may issue rights over bonds to third party investors, but the legal act by which those rights are issued is effective only between the parties concerned and expressly does not operate to the benefit or detriment of the Hellenic Republic.

10 Under Article 6(4) of that law, a bond is transferred on being credited to the account of the participant in the system.

11 Moreover, Law 4050/2012 of 23 February 2012 on ‘Rules relating to the adjustment of securities issued or guaranteed by the Greek State with the bond holders’ consent’ (FEK A’ 36/23.2.2012) provides, in essence, for the submission of a ‘restructuring’ offer to certain holders of Greek sovereign bonds, by which the Greek State invites those holders to decide whether they accept the amendment to the eligible securities that are the object of the offer.

12 According to Article 1(4) of that law, the adjustment of the securities referred to requires the constitution of a quorum representing 50% of the total of the outstanding bonds concerned, and a qualified majority corresponding to two thirds of the participating capital.

13 Article 1(9) of that law also provides for the introduction of a restructuring clause or ‘collective action clause’ (‘CAC’) allowing the amendment to the initial borrowing terms by decisions adopted by a qualified majority, of the remaining capital owed and applying also to the minority.

14 According to that provision, the decision adopted by the bondholders to accept or refuse the restructuring offer made by the Greek State is to apply *erga omnes*, is binding on all the bondholders concerned, and overrides any general or specific law, any administrative decisions, and any contracts which conflict with it.

### **The dispute in the main proceedings and the question referred for a preliminary ruling**

15 At an unspecified date, prior to the year 2011, M Kuhn, residing in Vienna (Austria), acquired, through a custodian bank established in Austria, sovereign bonds with a nominal value of EUR 35 000 issued by the Hellenic Republic, subject to Greek law and traded at the Athens stock exchange (Greece) as ‘uncertificated’, that is to say book-entry, securities. Those securities were registered in the Greek Central Bank’s securities settlement system.

- 16 Those sovereign bonds, maturing on 20 February 2012, were credited to the account held by Mr Kuhn in that custodian bank. The bonds are bearer securities which confer entitlement to repayment of the capital on maturity and to the payment of interest, according to the terms of those bonds.
- 17 The referring court takes the view that there is no contractual relationship between Mr Kuhn and the Hellenic Republic.
- 18 According to that court, it follows from the provisions of Law 2198/1994 and from the terms of the sovereign bonds at issue that, first, the participants in the securities settlement system of the Greek Central Bank became the holders and creditors of those bonds, transferred on being credited to the participants' accounts, provided that, if those participants can grant rights over those bonds to third-party investors, the transaction by which those rights are granted is effective only between the parties concerned and expressly does not operate to the benefit or detriment of the Hellenic Republic.
- 19 Following the adoption of Law 4050/2012, the Hellenic Republic converted the bonds acquired by Mr Kuhn by replacing them with new sovereign bonds of a lower nominal value.
- 20 The referring court states that, according to Mr Kuhn's claims, the Hellenic Republic has, until the day of that conversion, paid interest into an account opened in his name at a bank established in Austria. That court specifies that Mr Kuhn claims to have sold the converted bonds for EUR 7 831.58, sustaining a loss of EUR 28 673.42, that sum corresponding to the nominal value of the bonds upon maturity, dated 20 February 2012, plus interest and costs.
- 21 Mr Kuhn brought an action before the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Law Matters, Vienna, Austria) against the Hellenic Republic, with the aim of obtaining the fulfilment of the terms of the bonds at issue or compensation for non-fulfilment of those terms.
- 22 By order of 8 January 2016, that court declared that it lacked international jurisdiction to hear and determine those proceedings.
- 23 Hearing the case on appeal against that order, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), by order of 25 February 2016, rejected the Austrian plea of lack of jurisdiction on the ground that Mr Kuhn's request was based not on a Greek legislative act, but on the initial terms of the sovereign bonds at issue and that the competent court is designated by Greek law, in the present case the one located at the creditor's domicile, the place where the pecuniary debt was to be performed.
- 24 The Hellenic Republic formed an 'extraordinary appeal' against that order, before the Oberster Gerichtshof (Supreme Court, Austria).
- 25 According to that court, to the extent that Mr Kuhn claims the fulfilment, by the Hellenic Republic, of the terms of the sovereign bonds at issue, he is correct in referring to an alleged legal relationship between himself, as acquirer of those bonds, and the Hellenic Republic, as creditor of the bonds, in such a way that there exists a 'secondary' contractual claim under Article 7(1) of Regulation No 1215/2012.
- 26 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 7(1)(a) of Regulation [No 1215/2012] be interpreted as meaning that:

- even in the case — as in the present proceedings — of the repeated contractual transfer of a claim, the place of performance within the meaning of that provision is determined by the first contractual agreement;
- in the case of the assertion of a claim seeking compliance with the terms of a government bond — such as that issued by the Hellenic Republic in the present case — or seeking compensation for non-

fulfilment of that claim, the actual place of performance is established immediately upon the payment of interest from that government bond into an account of a person holding a domestic securities portfolio;

- the fact that the first contractual agreement established a legal place of performance within the meaning of [that agreement], precludes the assumption that the subsequent actual performance of a contract establishes a — further — place of performance within the meaning of [that] provision?’

### Consideration of the question referred

- 27 By its question, the referring court asks, in essence, if, in a situation such as that in the main proceedings, in which a person has acquired, through a custodian bank, sovereign bonds issued by a Member State, Article(7)(1)(a) of Regulation No 1215/2012 must be interpreted to the effect that the ‘the place of performance of the obligation in question’ is determined by the borrowing terms established at the time that the bonds were issued or by the place of effective fulfilment of those terms, such as the payment of interest.
- 28 The Hellenic Republic and the Greek and Italian governments claim that the dispute in the main proceeding does not fall within ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation No 1215/2012, in so far as the dispute concerns the sovereign right of a Member State to legislate in order to restructure its public debt.
- 29 Consequently, it is necessary to determine, as a preliminary point, whether a dispute such as that in the main proceedings may be regarded as falling within ‘civil and commercial matters’ in accordance with Article 1(1).
- 30 According to that provision, Regulation No 1215/2012 is not to extend, in particular, to ‘the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)’.
- 31 In so far as Regulation No 1215/2012 repeals and replaces Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), it should be observed that the Court’s interpretation of the provisions of the latter regulation also applies to Regulation No 1215/2012, whenever the provisions of the two instruments of EU law may be regarded as equivalent (judgments of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881, paragraph 26, and of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193, paragraph 31).
- 32 That is the case of Article 1(1) of Regulation No 44/2001 and Article 1(1) of Regulation No 1215/2012, which limit the applicability of those regulations to ‘civil and commercial matters’, without, however, defining the content and scope of that notion, in relation to which the Court has held that that notion is to be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of those regulations and, second, to the general principles which stem from the corpus of the national legal systems (judgments of 11 June 2015, *Fahnenbrock and Others*, C-226/13, C-245/13 and C-247/13, EU:C:2015:383, paragraph 35, and of 9 March 2017, *Pula Parking*, C-551/15, EU:C:2017:193, paragraph 33).
- 33 That interpretation results in the exclusion of certain legal actions and judicial decisions from the scope of Regulation No 1215/2012, by reason either of the legal relationships between the parties to the action or of the subject matter of the action (judgment of 15 February 2007, *Lechouritou and Others*, C-292/05, EU:C:2007:102, paragraph 30 and the case-law cited).
- 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.

## Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Article 1(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 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.**

[Signatures]

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\* Language of the case: German.