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Applicant in this case filed legal claims before a Dutch court of first instance in 2012. In 2013, a Spanish Court put Applicant under 'tutela' and appointed her son (and applicant in appeal) as her 'tutor'. Defendants claimed that, from that moment on, Applicant was incompetent to (further) appeal the case and that the tutor was not (timely) authorized by the Dutch courts to act on Applicant's behalf. One of the questions before the Supreme Court was whether the decision by the Spanish Court must be acknowledged in the Netherlands.

In its judgment, the Dutch Supreme Court points out that the Convention was signed, but not ratified by the Netherlands. Nevertheless, article 10:115 in the Dutch Civil Code is (already) reserved for the application of the Convention. Furthermore, the Secretary of the Department of Justice has explained that the reasons for not ratifying the Convention are of a financial nature: execution of the Convention requires time and resources, while encouraging the 'anticipatory

application' of the HCIPA seems to be working just as well. Because legislator and government seem to support the (anticipatory) application of the Convention, the Supreme Court does as well and, for the same reasons, has no objection to applying the Convention when the State whose ruling is under discussion is not a party to the treaty either (i.e. Spain).

This 'anticipatory application' was – although as such unknown in the Vienna Convention on the Law of Treaties – used before in the Netherlands. While in 1986 the Rome Convention was not yet into force, the Dutch Supreme Court applied article 4 Rome Convention in an anticipatory way to determine the applicable law in a French-Dutch purchase-agreement. In this case, the Supreme Court established two criteria for anticipatory application, presuming it concerns a multilateral treaty with the purpose of establishing uniform rules of international private law:

1. No essential difference exists between the international treaty rule and the customary law that has been developed under Dutch law;
2. the treaty is to be expected to come into force in the near future.

In 2018, the Supreme Court seems to follow these criteria. These criteria have pro's and con's, I'll name one of each. The application of a signed international treaty is off course to be encouraged, and the Vienna Convention states that after signature, no actions should be taken that go against the subject and purpose of the treaty. Problem is, if every State applies a treaty 'anticipatory' in a way that is not too much different from its own national law – criterion 1 – the treaty will be applied in as many different ways as there are States party to it. Should it take some time before the treaty comes into force, there won't be much 'uniform rules' left.

The decision ECLI:NL:HR:2018:147 (in Dutch) is available here.