Deadline Extended! The Private Side of Transforming the World – UN Sustainable Development Goals 2030 and the Role of Private International Law

Outline and Call for Papers

Update!

The planned public conference has to be postponed due to the Covid-19 pandemic and will now take place at the Max Planck Institute in Hamburg on **September 9-11 2021**, one year later than originally announced.

On September 10-11 2020, we will instead hold a closed online workshop among the project participants in order to feedback on the draft papers.

Deadline extended: May 17!

On 25 September 2015 the UN General Assembly unanimously adopted the Resolution Transforming our world: the 2030 Agenda for Sustainable Development. The core of the Resolution consists of 17 Sustainable Development Goals (SDGs) with 169 associated targets, and many more indicators. The SDGs build on the earlier UN Millennium Development Goals, “continuing development priorities such as poverty eradication, health, education and food security and nutrition”. Yet, going “far beyond” the MDGs, they “[set] out a wide range of economic, social and environmental objectives”. The SDGs add new targets, such as migration (8.8; 10.7), the rule of law and access to justice (16.3), legal identity and birth registration (16.9), and multiple “green” goals. And, more than the

MDGs, they emphasize sustainability.

The SDGs have attracted significant attention. Although not undisputed – for example, regarding their assumption that economic growth may be decoupled from environmental degradation, and their lack of attention to the concerns of indigenous people – the SDGs have become a focal point for comprehensive thinking about the future of the world. This is so at least in the area of public law and public international law. With regard to private law, by contrast, there has been less attention, although the SDGs are directed not only to governments and parliaments, the UN and other international institutions, but also to "local authorities, indigenous peoples, civil society, business and the private sector, the scientific and academic community – and all people".

Certainly, public action and public law will not be enough if the goals are to be achieved. Even a spurious stroll through the SDGs demonstrates interplay with private international law (PIL). The SDGs name goals regarding **personal status and family relations**: "By 2030, provide legal identity for all, including birth registration" (16.9), or "Eliminate… forced marriage…"(5.3), both well-known themes of PIL. The SDGs focus on trade and thereby invoke **contract law** in multiple ways. On the one hand, they encourage freedom of contract when they call to "correct and prevent trade restrictions and distortions in world agricultural markets"… (2.b) or "promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms… as mutually agreed" (17.7). On the other hand, they insist on restrictions, for example, the "immediate and effective" eradication of forced labour, "modern slavery" and child trafficking ((8.7, 16.2); "by 2030 significantly reduce illicit financial and arms flows"…(16.4); "substantially reduce corruption and bribery in all their forms" (16.5). There is clearly also a role for **tort law**, including its application to cross-border situations, for example in order to fulfill goals regarding environmental protection and climate change.

Other targets concern not substantive private law, but **civil procedure**. Thus, the call to "ensure equal access to justice for all" (16.3) has traditionally been confined to equal treatment within one legal system. But as a global goal it invokes global equality: for instance, the ability for European victims of the Volkswagen Diesel scandal to access courts like US victims, the access to court of Latin American victims of oil pollution on a similar level to those in Alaska, and so forth. All of this has multiple implications in the sphere of cross-border civil procedure: the admissibility of global class actions and public interest actions, judicial jurisdiction and recognition and enforcement of judgments concerning corporate social and environmental responsibility, and so on.

Finally, the SDGs have an institutional component. SDG 16 calls, among others, for “strong institutions,” and it encourages cooperation. What comes into focus here, from a private international law perspective, are institutions like the Hague Conference and treaties like the Hague Conventions, but also other possible instruments of cooperation and institutionalization in the private international law realm.

All this suggests that there are plenty of reasons to examine the relationship between the SDGs and PIL. And since the 2030 Agenda explicitly calls on the private sector and the academic world to cooperate for its implementation, and time is running fast, such an examination is also timely, indeed urgent. With this in mind, Ralf Michaels**,** Verónica Ruiz Abou-Nigm and Hans van Loon are organizing a conference at the Max Planck Institute in Hamburg on **10-12 September 2020.** Speakers will systematically analyze the actual and potential role of Private International Law for each of the seventeen SDGs. The overall purpose is twofold:

(1) to raise awareness of the relations between the SDGs and private international law as it already exists around the world. Private international law is sometimes thought to deal with small, marginal issues. It will be important, for those inside and outside the discipline alike, to generate further awareness of how closely its tools and instruments, its methods and institutions, and its methodologies and techniques, are linked to the greatest challenges of our time.

(2) to explore the potential need and possibilities for private international law to respond to these challenges and to come up with concrete suggestions for adjustments, new orientations and regional or global projects. This exploration can aim to identify the need for further and/or new research agendas in specific fields; the development of new mechanisms and approaches, the usefulness of new international cooperation instruments, be it new Conventions at the Hague Conference or elsewhere, or be it new institutions.

Call for Papers

Submission deadline: May 17, 2019.

We are inviting contributions to this project. Interested applicants should submit the application by **May 17, 2019.** We ask you to **identify which of the 17 development goals you want to address**, which (if any) work you have already done in that area, and, in a few paragraphs (up to a **maximum of 500 words**), what you intend to focus on. **We plan to select participants and invite them by the end of May 2019.** Selected participants would be expected to come to Hamburg to present research findings in the conference, and to provide a **full draft paper by the end of June 2020** (in advance of the conference), for discussion and subsequent publication as part of an edited collection to be published after the conference. We expect to be able to fund all travel and accommodation costs. If you are interested, please send your brief application to Britta Arp (@sekretariat-michaels@mpipriv.de) in Hamburg. Please title your email "SDG2030 and PIL," and your document "SDG2030 and PIL_lastname". We look forward to hearing from you.

Ralf Michaels, Director, Max Planck Institute for Comparative and International Private Law, Hamburg;

Verónica Ruiz Abou-Nigm, Senior Lecturer in International Private Law, University of Edinburgh;

Hans van Loon, former Secretary General of the Hague Conference.

Resistance is Futile – How Private International Law Will Undermine National Attempts to Avoid

‘Upload Filters’ when Implementing the DSM Copyright Directive

Last week, the European Parliament adopted the highly controversial proposal for a new Copyright Directive (which is part of the EU Commission’s Digital Single Market Strategy). The proposal had been criticized by academics, NGOs, and stakeholders, culminating in an online petition with more than 5 million signatures (a world record just broken by last week’s Brexit petition) and public protests with more than 150,000 participants in more than 50 European (although mainly German) cities.

Under the impression of this opposition, one of the strongest proponents of the reform in the European Parliament, Germany’s *CDU*, has pledged to aim for a national implementation that would sidestep one of its most controversial elements, the requirement for online platforms to proactively filter uploads and block unlicensed content. The leader of Poland’s ruling party *PiS* appears to have recently made similar remarks.

But even if such national implementations were permissible under EU law, private international law seems to render their purported aim of making upload filters ‘unnecessary’ virtually impossible.

Background: Article 17 of the DSM Copyright Directive

Article 17 (formerly Article 13) can safely be qualified as one of the most significant elements of an otherwise rather underwhelming reform. It aims to address the so-called platform economy’s ‘value gap’, i.e. the observation that few technology giants like ‘GAFA’ (Google, Apple, Facebook, Amazon) keep the vast majority of the profits that are ultimately created by right holders. To this end, it carves out an exception from Art 14(1) of the e-Commerce Directive (Directive 2000/31/EC) and makes certain ‘online content-sharing service providers’ directly liable for copyright infringements by users.

Under Art 17(4) of the Directive, platforms will however be able to escape this liability by showing that they have

> *(a) made best efforts to obtain an authorisation, and*
>
> *(b) made, in accordance with high industry standards of professional diligence,* ***best efforts to ensure the unavailability of specific works and other subject matter*** *for which the rightholders have provided the service providers with the relevant and necessary information; and in any event*
>
> *(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made* ***best efforts to prevent their future uploads*** *in accordance with point (b).*

This mechanism has been heavily criticised for *de-facto* requiring platform hosts to proactively filter all uploads and automatically block unlicensed content. The ability of the necessary 'upload filters' to distinguish with sufficient certainty between unlawful uploads and permitted forms of use of protected content (eg for the purposes of criticism or parody) is very much open to debate – and so is their potential for abuse. In any case, it does not seem far-fetched to assume that platforms will err on the side of caution when filtering content this way, with potentially detrimental effects for freedom of expression.

In light of these risks, and of the resulting opposition from stakeholders, the German *CDU* has put forward ideas for a national implementation that aims to make upload filters 'unnecessary'. In essence, they propose to require platform hosts to conclude mandatory license agreements that cover unauthorised uploads (presumably through lump-sum payments to copyright collectives), thus replacing the requirement of making 'best efforts to ensure the unavailability of unlicensed content' according to Art 17(4) of the Directive.

Leaving all practical problems of the proposal aside, it is far from clear whether such a transposition would be permissible under EU law. First, because it is not easily reconcilable with the wording and purpose of Art 17. And second, because it would introduce a new exception to the authors' rights of communication and making available to the public under Art 3 of the Information Society Directive (Directive 2001/29/EC) without being mentioned in the exhaustive list of exceptions in Art 5(3) of this Directive.

Private International Law and the Territorial Scope of Copyright

But even if EU law would not prevent individual member states from transposing Art 17 of the Directive in a way that platforms were required to conclude mandatory license agreements instead of filtering content, private international law seems to severely reduce the practical effects of any such attempt.

According to Art 8(1) Rome II, the law applicable to copyright infringements is ‘the law of the country for which protection is claimed’ (colloquially known as the *lex loci protectionis*). This gives copyright holders the option to invoke any national law, provided that the alleged infringement falls under its (territorial and material) scope of application. With regard to copyright infringements on the internet, national courts (as well as the CJEU – see its decision in Case C-441/13 *Hejduk* on Art 5(3) Brussels I) tend to consider every country in which the content can be accessed as a separate place of infringement.

Accordingly, a right holder who seeks compensation for an unlicensed upload of their content to an online platform will regularly be able to invoke the national laws of every member state – most of which are unlikely to opt for a transposition that does not require upload filters. Thus, even if the German implementation would allow the upload in question by virtue of a mandatory license agreement, the platform would still be liable under other national implementations – unless it has *also* complied with the respective filtering requirements.

Now, considering the case law of the Court of Justice regarding other instruments of IP law (see, eg, Case C-5/11 *Donner*; Case C-173/11 *Football Dataco*), there may be room for a substantive requirement of targeting that could potentially reduce the number of applicable laws. But for the type of online platforms for which Art 17 is very clearly designed (most importantly, *YouTube*), it will rarely be possible to show that only audiences in certain member states have been targeted by content that has not been geographically restricted.

So either way, if a platform actually wanted to avail itself of the option not to proactively filter all uploads and, instead, pay for mandatory license agreements, its only option would be to geographically limit the availability of all content for which it has not obtained a (non-mandatory) license to users in countries that follow the German model. It is difficult to see how this would be possible… without filtering all uploaded content.

Recognition and Enforcement: 30 years from the entry into force of the Brussels Convention in Greece – A practitioner's account –

I. Introduction

It was the 3rd of March 1989, when an announcement was published in the Official Gazette of the Hellenic Republic, stating that the Brussels Convention would finally enter into force on April 1, 1989. Why finally? Because it took the state nearly a decade after the accession to the EC [1.1.1981] to activate the Brussels Convention in the country. After a long hibernation time, Law Nr. 1814/1988 was published in November 11, 1988, marking the official ratification of the Convention. In less than a year, the Convention became operative in the Greek legal order. Since that time, a great number of judgments were published in the legal press, some of them with elucidating notes and comments. Commentaries and monographs paved the path for widespread knowledge and ease of access to the new means of handling cross border cases within the EC.

Almost 12 years later, Regulation 44/2001 replaced the Brussels Convention. On the whole, the application of the Regulation in the country can be described as satisfactory. Courts proved to be open minded in exequatur proceedings, thus fulfilling the mandate for a free circulation of judgments dictated by the EU. Only minor issues cause some skepticism, the majority of which could have been solved by means of an implementing act to the Regulation. Regrettably enough, Greek governments persistently omit to issue any such acts in the course of communitarization in civil and commercial matters. Consequently, primarily academics, and later courts, were called to find viable solutions to problems faced or potentially confronted in the future.

II. Problems faced / solutions given

A problem causing doubts and confusion in Greece was the exact definition of the term used under Art. 36 Brussels Convention. Unlike the English version, where the same terminology is used [“may be appealed”], the Greek text showed a discrepancy, causing contradictory rulings. The issue reached the Supreme Court, which finally clarified the problem in 2001. In particular, the wording used in Articles 36.1, 37-40 Brussels Convention did not make specific reference to an *appeal*. Instead, the terminus used was the equivalent of “*recourse*”. For the purposes of Art. 37 Brussels Convention, the Hellenic Government declared that the “*recourse*” shall be filed at the Court of Appeal. It is an elementary rule in Greek civil practice, that all remedies against first instance decisions are filed with the secretariat of the court rendering the decision challenged. In light of this fact, several lawyers lodged the “*recourse*” there, i.e. at the competent 1st instance court. In the ensuing process before the CoA however, they were in for a surprise: Many appellate courts in the country repeatedly dismissed the “*recourse*” as inadmissible, because it was not filed properly. As a result, courts followed different directions which can be summarized as follows: The first view considered the “recourse” as a blend of 1st and 2nd instance legal remedies; consequently it reached the conclusion that ordinary rules of appeal proceedings are to be used in the process at hand, with the exception that the “*recourse*” shall be filed with the secretariat of the CoA, which was the competent one according to Art. 37 Brussels Convention. Furthermore, given the fact that the appellant is not obliged to serve the appeal under Greek law, the terms set under Art. 36.2 Brussels Convention & 43.5 Brussels I Reg. relate to the act of filing, not serving the document. The opposite view however confers to the recourse the nature of third party proceedings, thus changing the procedural requirements. In particular, by adopting this position, the appellant is burdened with the duty to serve the document within the term of one or two months respectively. The latter view has finally prevailed.

Following the entry into force of the Brussels I Regulation, the above issue has been made redundant, given that the Greek wording was streamlined to that of the English text. The Greek version of the Brussels I bis Regulation follows suit. However, it still affects the adjacent area of the Lugano Convention. A recent ruling of the Supreme Court bears witness to this assumption [SC 2078/2017, confirming Thessaloniki CoA 1042/2015, published in: Civil Procedure Law Review 2015, 351, note *Anthimos*: Filing does not suffice; service of the appeal to the appellee is imperative, otherwise the remedy is dismissed as inadmissible].

III. The Brussels I bis Regulation

Entering into the era of the Brussels I bis Regulation, we see however a remarkable absence of case law in regards to Chapter III on recognition and enforcement: For more than 4 years after the Regulation entered into force, there isn't a single judgment reported in the country, most notably on Section 3, which established the new system of the application for refusal of recognition and enforcement [Articles 45 et seq.]. In the sole case found, the creditor followed erroneously the previous system of exequatur, which led the court to dismiss the application as inadmissible [lack of locus standi].

Hence, the question: Is Greece the sole exception to other Member States' practice? I could associate the lack of case law with the devastating situation my country suffered over the last years: The Grexit-nightmare, financial instability and capital restrictions could serve as an explanation for this plunge.

However, to the extent of my ability to follow the German literature, I do not see any application of Chapter III in Germany either. It would be very interesting to find out by the readers of this blog, whether there's already some 'action' in other Member States.

The Council of the HCCH has spoken – the Conclusions & Recommendations are available

The Conclusions & Recommendations (C&R) of the governance body of the Hague Conference on Private International Law (HCCH) (*i.e.* the Council on General Affairs and Policy) are available in both English and French.

The conclusions that are worthy of note are the following:

The Parentage/Surrogacy Project is going ahead. The Council endorsed the continuation of the work in line with the latest report of the Experts' Group (see my previous post here). See C&R 7-12.

The Tourist and Visitors Project is also moving forward. See C&R 14-17.

A meeting of the Experts' Groups on these respective topics will take place in the near future.

As regards the HCCH publications, it should be noted that there were two Guides on family law, one Guide on the Evidence Convention and one WIPO-HCCH Guide on intellectual property that were submitted for approval to Council; the full titles of which are:

- The revised draft Practical Guide on the cross-border recognition and enforcement of agreements reached in the course of family matters involving children
- The revised draft Guide to Good Practice on Article 13(1)(b) of the 1980 Child Abduction Convention
- The draft Guide to Good Practice on the Use of Video-link under the Evidence Convention
- The WIPO-HCCH Guide on "When Private International Law meets Intellectual Property Law – A Guide for Judges"

See also my previous posts here (Child Abduction) and here (Evidence Convention).

The Council approved only one: the WIPO-HCCH Guide. With regard to the other three, the Council decided instead to put into place a procedure to obtain further comments from Members. Importantly, there were concerns expressed by Members regarding the two family law guides, which means that further work is needed. An important issue that might have played a role in these decisions is the massive amount of information that was submitted this year to Council.

Because of the complexity of the conclusions, I prefer to include some excerpts below:

"19. In light of concerns expressed, ***Council did not approve the revised draft Practical Guide [on the cross-border recognition and enforcement of***

agreements reached in the course of family law matters involving children]. Council asked that the draft Practical Guide be re-circulated to Members to provide additional comments within a three-month period. All comments received will be made available to other Members on the Secure Portal of the HCCH website. ***The draft Practical Guide would then be revised by the Experts' Group with a view, in particular, to increasing its readability for a wider audience.*** The finalised draft Practical Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Practical Guide would be taken to be approved; in the case of one or more objections, the draft Practical Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections."

"24. Council thanked the Working Group and stressed the importance of the ***Guide to Good Practice on Article 13(1)(b)***. In light of concerns expressed, ***Council did not approve*** the revised draft Guide. Council asked that the draft Guide be re-circulated to Members to provide additional comments within a two-month period. All comments received will be made available to other Members on the Secure Portal of the HCCH website. ***The draft Guide would then be revised by the Working Group.*** The finalised draft Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Guide would be taken to be approved; in the case of one or more objections, the draft Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections."

Council was more lenient with regard to the Video-link Guide:

"38. ***Council welcomed the preparation of the draft Guide to Good Practice on the Use of Video-Link under the Evidence Convention*** and thanked the Experts' Group. Council asked that the draft Guide be re-circulated to Members to provide additional comments within a one-month period. All comments received will be made available to other Members on the Secure Portal of the HCCH website. ***The draft Guide would then be revised by the Experts' Group.*** The finalised draft Guide would be circulated to Members for approval. In the absence of any objection within one month, the draft Guide would be taken to be approved; in the case of one or more objections, the draft Guide would be put to Council at its 2020 meeting, without any further work being undertaken. Council requested that the Permanent Bureau immediately notify the Members of any objections."

All this means that these three Guides are not final and readers must await the revised versions, which might or might not need to be submitted to the next meeting of the Council in March 2020. I advise you then to be patient.

The International Business Courts saga continued: NCC First Judgment – BIBC Proposal unplugged

Written by Georgia Antonopoulou and Xandra Kramer, Erasmus University Rotterdam (PhD candidate and PI ERC consolidator project Building EU Civil Justice)

1. Mushrooming International Business Courts on the Eve of Brexit

Readers of this blog will have followed the developments on the international business courts and international commercial chambers being established around Europe and elsewhere. While many of the initiatives to set up such a court or special chamber date from before the Brexit vote, it is clear that the UK leaving the EU has boosted these and is considered to be a big game changer. It remains to be seen whether it really is, but in any case the creation of courts and procedures designed to deal with international commercial disputes efficiently is very interesting!

The Netherlands was one of the countries where, after the Senate came close to torpedoing the proposal (see our earlier blogpost), such an international commercial court (chamber) was created. The Netherlands Commercial Court (NCC) opened its doors on 1 January 2019, and it gave its first judgment on 8

March 2019 (see 2). Meanwhile, in Belgium the proposal for the Brussels International Business Court (BIBC) seems to be effectively unplugged due to lack of political support (see 3).

2. The First NCC Judgment

As reported earlier on this blog, on 18 February 2019 the Netherlands Commercial Court (NCC) held its first hearing (see here). The NCC' s first case *Elavon Financial Services DAC* v. *IPS Holding B.V. and others* was held in summary proceedings and concerned an application for court permission to privately sell pledged shares under Article 3:251 (1) Dutch Civil Code. The NCC scheduled a second hearing on 25 February 2019, offering the interested parties that did not appear before court the opportunity to be heard. However, these notified the court about their intention not to attend the hearing and leave the application uncontested. As a result, the NCC cancelled the planned hearing and gave its first judgment granting the requested permission on 8 March 2019 (see here). Our discussion will focus on the NCC's judgment regarding the four main jurisdictional requirements and aims at offering a sneak preview on the Court's future case law on the matter.

(a) Jurisdiction of the Amsterdam District Court

Unlike what the name suggests, the NCC is not a self-standing court but a chamber of the Amsterdam District Court (see the new Article 30r (1) Dutch Code of Civil Procedure (DCCP) and Article 1.1.1. NCC Rules). Therefore, the jurisdiction of the NCC depends on the jurisdiction of the Amsterdam District Court (Article 30r (1) DCCP and Article 1.3.1. (a) and (c) NCC Rules). The Court confirmed its international and territorial jurisdiction based on a contractual choice-of-court agreement in favour of the Amsterdam District Court (Article 25 (1) Brussels Regulation Recast). With regard to the interested parties that were not a party to the agreement, the Court based its jurisdiction on the fact that they either entered an appearance or sent a notice to the Court acknowledging its jurisdiction without raising any objections (Article 26 (1) Brussels Regulation Recast and Article 25 Lugano Convention). Regarding the subject-matter jurisdiction of the Amsterdam District Court, Article 3:251 (1) Dutch Civil Code explicitly places applications for the private sell of pledged assets under the jurisdiction of the provisional relief judge of the District Court.

(b) Civil or commercial matter within the parties' autonomy

Second, the dispute concerned a civil or commercial matter that lies within the parties' autonomy (Article 30r (1) Dutch Code of Civil Procedure and Article 1.3.1. (a) NCC Rules).

(c) Internationality

Third, the NCC solely deals with international, cross-border disputes. So as to define the notion of internationality, the Explanatory Notes to Article 1.3.1. (b) NCC Rules entail a list of alternative, broad criteria that gives the dispute the required internationality (see Annex I, Explanatory Notes). The application in question was filed by Elavon Financial Services DAC, a company established in Ireland, and some of the interested parties are Dutch subsidiaries of a Swiss parent company (Explanatory Notes to Article 1.3.1. (b)). Although, pursuant to the Explanatory Notes, these circumstances were sufficient to establish the matter's international character, the court went on to address other cross-border elements present in the case. Based on a broad understanding of a dispute's international character, the court underlined that some of the interested parties are internationally active, operate or at least plan to operate business abroad (see also The Hague Court of Appeal, ECLI:NL:GHSGR:2011:BR1381). Similar to the rules of other countries' international commercial courts, the NCC Rules qualify a case as international when the dispute arises from an agreement prepared in a language other than Dutch. Since the documents related to the application were drafted in English, the NCC regarded the English language of the contract as another international element.

(d) NCC Agreement

The fourth requirement for the NCC's jurisdiction is that the parties should have expressly agreed in writing for the proceedings to be in English and according to the NCC Rules (Article 30r (1) Rv and Article 1.3.1. (d) NCC Rules). Since the NCC, unlike the rest of the Dutch courts, conducts proceedings entirely in English and applies its own rules of civil procedure the parties' agreement justifies such a deviation and ensures that the parties wilfully found themselves before the newly established chamber. In the present matter, the parties signed a pre-application agreement and expressly agreed on the NCC' s jurisdiction to hear their case. Although, two of the interested parties were not signatories to that agreement one of them appeared before the court leaving the NCC’ s jurisdiction uncontested and the other did not raise any objections against the chamber’ s jurisdiction in its communication with the court (see also Article 2.2.1 NCC Rules and the Explanatory Rules).

(3) The Fate of the Belgian BIBC Proposal

As reported on this blog, the proposal to create the Brussels International Business Court was brought before Parliament in May 2018. Interesting features of this proposal are that the rules of procedure are based on those of the UNCITRAL Model Law on International Commercial Arbitration and that cases are heard by three judges, including two lay judges. The proposal has been criticized from the outset (see for some interesting initial thoughts Geert Van Calster’s blogpost). As in the Netherlands, many discussions evolved around the fear for a two-tiered justice system, giving big commercial parties bringing high value claims a preferential treatment over ordinary court cases (see for the discussions in the Netherlands our earlier blogpost). The Belgian Ministry of Justice and Prime Minister presented the English language court as an asset in times of Brexit and efforts were made to adjust the proposal to get it through.

Over the last week it became clear that there is insufficient political backing for the proposal after one of the big parties withdrew its support (see De Standaard). Other – mostly left-wing parties – had expressed their concerns earlier and the proposed court has been referred to as a ‘caviar court’ and a ‘court for the super rich’. But probably the most fierce opponent is the judiciary itself. Arguments range from principled two-tiered justice fears (including for instance by the First President of the Court of Cassation) to concerns about the feasibility to attract litigation in the Brussels courts and the costs involved in establishing this new ‘vip court’. The message seems to be: we have enough problems as it is. Referring to the Dutch NCC and the French International Commercial Chamber, the Minister of Justice, Koen Geens, said that withdrawing the BIBC proposal would be a missed opportunity and that he can counter the arguments against the establishment of the BIBC. However, as it looks now it seems highly unlikely that Belgium will be among the countries that will have an international business court in the near future.

Brexit: Three modest proposals

After last Thursday’s EU summit, which resulted in a double-barreled “flextension” of the date for Brexit, all cards are on the table again. Insofar, it is worth noticing that the German journalist *Harald Martenstein*, in his weekly column for the Berlin-based “Tagesspiegel”, has recently offered three innovative solutions for the Brexit dilemma:

The first one may be called the “one island, two countries” proposal: Great Britain would be split into two parts, one leaving the EU, the other remaining. All Britons would then be granted double citizenship and be free to make up their minds according to their preferences.

The second solution that the columnist proposes takes up the frequently raised demand for a second referendum that should overturn the first Brexit vote. Well, if there is going to be a second referendum, why not a third or even a fourth one? Thus, *Martenstein* suggests that, in the future, a referendum should be held every year on 2 January; for the remaining part of the year, the United Kingdom would then be either in or out of the EU.

Thirdly and finally, if all else fails, *Martenstein* argues that the UK might simply turn the tables and offer the other Member States the possibility of leaving the EU as well and joining the UK instead, which would then change its name to “Greatest Britain Ever”.

Obviously, the proposals made by the columnist are meant as a satirical comment. Yet, there are some elements of reality contained in his mockery: who knows whether, in case of a hard Brexit, Scotland (or Northern Ireland) would stay a part of the UK or whether a new referendum on seceding from the UK – and re-joining the EU – would be organized? And already today, numerous Britons are applying for a double citizenship in order to keep a foothold in the EU. Who knows whether a second referendum on Brexit will take place and whether it will actually settle the matter once and for all? And wasn’t the EU summit an attempt by the EU-27 to avoid the Brexit populist contagion from spreading to the continent via the impending EU parliamentary elections? In sum, the situation is increasingly reminiscent of a book title by *Paul Watzlawick*: hopeless, but not serious…

Interpreting Choice-of-Law Clauses

Written by John Coyle, the Reef C. Ivey II Term Professor of Law, Associate Professor of Law at the University of North Carolina School of Law

Over the past few decades, the concept of party autonomy has moved to the forefront of private international law scholarship. The question of whether (and to what extent) private actors may choose the law that will govern their relationship has generated extensive commentary and discussion. The result? An ever-expanding literature on the role of party autonomy in private international law.

In this post, I want to call attention to a related issue that has attracted considerably less scholarly attention. This is the issue of how to *interpret* the contractual language by which private actors exercise their autonomy to choose a governing law. (I explored this issue in a recent article.) Over the past several decades, the courts in the United States have developed several interpretive rules of thumb—canons of construction, to use a fancy term—that assign meaning to ambiguous words and phrases that frequently appear in choice-of-law clauses. I discuss several of these interpretive rules—and the various ways in which parties can contract around them—after the jump.

The first, and arguably the least controversial, of these interpretive rules is the *canon in favor of internal law*. When presented with a choice-of-law clause that selects the "laws" of a given jurisdiction, courts in the United States will generally interpret the word "laws" to refer to the internal law of the chosen jurisdiction (excluding its conflicts rules) rather than the whole law of the chosen jurisdiction (including its conflicts rules). This interpretive rule is eminently sensible. Since the entire point of a choice-of-law clause is to reduce legal uncertainty, it would defeat the purpose to interpret the clause to select the conflicts rules of the chosen jurisdiction, which could in turn result in the application of the law of a different jurisdiction.

The second interpretive rule is the *canon in favor of federal inclusion and preemption*. This canon requires a bit of explanation for those not familiar with the U.S. legal system. Most U.S. choice-of-law clauses select the laws of one of the fifty states (e.g. New York) rather than the nation (i.e. the United States). When a clause selects the "laws" of New York, however, it is not clear whether the parties are selecting the laws of New York *to the exclusion* of any relevant provisions of federal law or whether they are selecting the laws of New York *including* any relevant provisions of federal law. U.S. courts have consistently adopted the latter interpretation. When the parties select the laws of New York, they are presumed to have *also* selected any applicable federal statutes and federal treaties. In the event of a conflict between federal law and state law, moreover, the federal law will prevail.

As a practical matter, this interpretive rule is most often relevant in the context of international sales agreements. The United States is a party to the United Nations Convention on Contracts for the International Sale of Goods (CISG), which covers much of the same ground as Article 2 of the Uniform Commercial Code (UCC). When the parties to an international sales agreement select the "laws" of New York to govern their agreement, they may *think* that they are getting New York's version of the UCC. Instead, they will get the CISG. This is because the "laws" of New York will be deemed to include any relevant provisions of federal law (including the CISG) and that treaty will, in turn, be deemed to preempt UCC Article 2. (I discuss the relationship between choice-of-law clauses and the CISG in greater depth here.)

The third interpretive rule is the *canon of linguistic equivalence*. This canon holds that a choice-of-law clause stating that the contract shall be "interpreted" or "construed" in accordance with the laws of a given state is the linguistic equivalent of a clause stating that the contract shall be "governed" by the laws of that state. This conclusion is by no means inevitable. Indeed, some court in the United States have declined to follow this canon. Most U.S. courts, however, have reasoned that while there may *technically* be a linguistic distinction between the words "interpreted" and "construed," on the one hand, and the word "governed," on the other, most contracting parties are completely unaware of the distinction when it comes to their choice-of-law clauses. Most courts have also reasoned that contracting parties rarely, if ever, intend to select one law to govern *interpretive* issues arising under the contract while leaving unanswered the question of what law will govern the parties' *substantive rights and obligations* under that same contract. Accordingly, they read the words "interpret" and "construe" to be the linguistic equivalent of "governed."

I refer to the fourth collection of interpretive rules, collectively, as the *canons relating to scope*. These canons help the courts determine whether a choice-of-law clause applies exclusively to *contract claims* brought by one contracting party against the other or whether that clause also selects the law for any *tort and statutory claims* that may be brought alongside the contract claims. The highest court in New York has held that a generic choice-of-law clause—one which states that the agreement "shall be governed by the laws of the State of New York"—only covers contract claims. The highest court in California, by comparison, has interpreted the same language to cover any contract, tort, or statutory claims brought by one party against the other. Courts in Texas and Florida have followed New York's lead on this issue. Courts in Minnesota and Virginia have followed California's lead.

To make things even more complicated, U.S. courts have yet to reach a consensus on how to select the relevant body of interpretive rules. The courts in California have held one should apply the canons followed by *the jurisdiction named in the clause* to interpret the clause. The courts in New York, by contrast, have held that one should apply the canons followed by *the forum state* to interpret the clause. The California courts clearly have the better of the argument—there is absolutely no reason to deny the parties the power to choose the law that will be applied to interpret their choice-of-law clause—but several states have followed New York's lead. The result is a baffling and befuddling jurisprudence relating to the scope of generic choice-of-law clauses.

Sophisticated parties may, of course, contract around each of the interpretive default rules discussed above. To preempt the canon in favor of internal law, they can include the phrase "without regard to conflict of laws" in their choice-of-law clause. To preempt the canon of federal inclusion and preemption, they can state that "the CISG shall not apply" to their agreement. To preempt the canon of linguistic equivalence, they can simply state that the contract shall be "governed" by the laws of the chosen state. And to preempt the canons relating to scope, they can either state that claims "relating to" the contract shall be covered by the clause (if they want a broad scope) or that the clause only applies to "legal suits for breach of contract" (if they want a narrow scope). To date, however, many U.S. parties have failed to update their choice-of-law clauses to account for these judicial decisions.

I recently reviewed the choice-of-law clauses in 351 bond indentures filed with the U.S. Securities and Exchange Commission (SEC) in 2016 that selected New York law. I discovered that (a) only 55% excluded the conflicts rules of the chosen jurisdiction, (b) only 83% contained the phrase "governed by," and (c) only 12% addressed the issue of scope. Chris Drahozal and I also recently reviewed the choice-of-law clauses in 157 international supply agreements filed with the SEC between 2011 and 2015. We discovered that (i) only 78% excluded the conflicts rules of the chosen jurisdiction, (ii) only 90% contained the phrase "governed by," and (iii) only 20% addressed the issue of scope. These findings suggest that the feedback loop between judicial decisions *interpreting* contract language and the lawyers tasked with *drafting* this language does not always function effectively. Contract drafters, it would appear, do not always take the necessary steps to rework their choice-of-law clauses to account for judicial decisions interpreting language that commonly appears in these clauses.

Going forward, it would be fascinating to know whether any *non-U.S. courts* have developed their own interpretive rules that assign meaning to ambiguous words and phrases contained in choice-of-law clauses selecting non-U.S. law. If anyone is aware of any academic papers that have explored this issue from a non-U.S. perspective, I would be very grateful if you could bring that work to my attention and the attention of the broader community in the Comment section below.

Recognition and Enforcement of Chinese Monetary Judgments in Australia based on Chinese Citizenship

The Australian common law does not require reciprocity for recognizing and enforcing foreign judgments. Therefore, although Chinese courts have never recognized and enforced an Australian monetary judgment, Australian courts have recognized and enforced Chinese judgments. Thus far, there have been two Chinese judgments recognized and enforced in Australia (both in the State of Victoria). In both cases, the Australian judges considered whether the Chinese courts had international jurisdiction based on the defendants' citizenship/nationality.

The first case is *Liu v Ma*.[1] The plaintiff sought to recognize and enforce a default Chinese judgment (worth RMB 3,900,000) against the defendants. The defendants defaulted in the Australian judgment recognition and enforcement (hereinafter 'JRE') proceedings. By applying Australian law, the Supreme Court of Victoria held that the Chinese court had international jurisdiction over the defendants because they were born in China and held a Chinese passport, they had substantial activities or financial affairs in China, and Chinese law does not recognize dual nationality.

The second case, *Suzhou Haishun Investment Management Co Ltd v Zhao & Ors*, was rendered recently on 27 February 2019.[2] It is a summary judgment but, in contrast to *Liu*, the defendant thoroughly argued her case in the Australian JRE court. The plaintiff sought to recognize and enforce three Chinese judgments (worth RMB 20,000,000). The plaintiff brought Chinese proceedings against a Ms. Zhao and her company where she was the director and the sole shareholder. A few days before the Chinese proceeding was commenced, Ms. Zhao was informed that the plaintiff intended to sue her, and she left China with no intention to return. However, Ms. Zhao was still registered to an address in the Chinese court's jurisdiction under the hukou system (China's system of household registration). She possessed a Chinese identity card and held a Chinese passport.

The plaintiff tried various ways to serve Ms. Zhao but was unsuccessful. Finally, the service was conducted by public announcement. Ms. Zhao defaulted in the Chinese proceedings. But at the first hearing, a man purporting to be an employee of Ms. Zhao's company appeared before the Chinese judge. This man was asked by the Chinese judge whether he knew Ms. Zhao, to which he responded that she was 'the boss.' Although this man did not hold Ms. Zhao's power of attorney, he nevertheless indicated that he had with him documents verifying that Ms. Zhao was diagnosed with depression which explained why she could not attend the hearing. The Chinese court held that Ms. Zhao was aware of the proceedings and service by the public announcement was effective. Chinese judgments were rendered against Ms. Zhao and her company. Her company had no assets in China, so the plaintiff went to Australia to locate Ms. Zhao. The Australian court held that service by the public announcement was legal according to Chinese Civil Procedural law and there was no denial of natural justice. The Australian court also held that the Chinese court had international jurisdiction. First, because the parties submitted to the Chinese court by a choice of court clause in the loan contracts. Second, Ms. Zhao was a citizen of China, possessed a Chinese passport, held an identity card and submitted to the jurisdiction of the Chinese Court by agreement, so it is not necessary to decide whether she was considered by Chinese law to be domiciled in China.

Although the defendant's citizenship is not a ground for Australian courts to exercise direct jurisdiction, it remains to be ground in the Australian JRE proceedings to determine whether a foreign court has international jurisdiction. In *Independent Trustee Services Ltd v Morris*,[3] the plaintiff applied to enforce a UK judgment in Australia on the ground that the defendant had an active UK citizenship. The defendant was a UK citizen and held a UK passport issued in 2003 and current until 2013, and he used this passport to travel to Australia. The Supreme Court of New South Wales found that the defendant's citizenship was not some relic of an early stage of his life but was an active part of his present situation on which he had relied for international travel and for other purposes. It held that the UK judgment should be recognized and enforced because citizenship of a foreign country means allegiance to the foreign country, and it is a recognized ground of international jurisdiction on which the effectiveness of foreign judgments is accepted under the common law. However, even the judge deciding *Morris* acknowledges the 'absence of citation in the English authorities of any case in which this ground of jurisdiction has been contested and upheld after argument'.[4] *Liu* cites the English case *Emanuel v Symon**[5]**,* which found that a foreign court has international jurisdiction if the defendant is a subject of the foreign country in which the judgment has been obtained. However, this is a dictum rather than a holding. As Dicey, Morris and Collins The Conflict of Laws indicates there is no actual decision in English common law which supports that the courts of a foreign country might have jurisdiction over a person if he was a subject or citizen of that country. Private International Law in Australia by Reid Mortensen and et al also considers active citizenship is a dubious ground of international jurisdiction.

The cases involving Chinese citizenship and Hukou are more complicated. First, the fact that China does not recognize dual citizenship does not mean China is necessarily a Chinese citizen's domicile. A Chinese citizen automatically loses his/her Chinese citizenship only when a Chinese citizen has obtained foreign citizenship and resides overseas.[6] It is not uncommon that a Chinese citizen may reside overseas under a foreign permanent residency visa. Second, these groups of Chinese citizens still maintain a registered address in China (Hukou). This is because every Chinese citizen must have a Hukou even if s/he resides abroad. This Hukou may enable them to receive Chinese pension and voter registration. Third, under Chinese civil procedure law, a Chinese court has jurisdiction on a Chinese citizen when his or her Hukou is in its jurisdiction,[7] even if the Chinese citizen (defendant) is not present in China when the initiating process is commenced. If all other service methods are not successful, people's courts can use a public announcement to effect service. The question is whether Australian courts recognize and enforce the consequent Chinese default judgment based on the defendant's citizenship. I would suggest Australian courts to be cautious to follow *Liu* and *Zhao* regarding the issue of citizenship. The classical grounds for international jurisdiction are presence and submission. Service by a public announcement is hard to establish international jurisdiction on a defendant who is neither present nor submitted. Citizenship as a ground of international jurisdiction has been doubted by three English High Court judges[8] and rejected by the Irish High Court.[9] Additionally, *Liu* is a default judgment, so the citizenship issue has not been contested, and the defendant in *Zhao* submits to Chinese court by a choice of court clause.

[1] *Liu v Ma & anor* [2017] VSC 810.

[2] *Suzhou Haishun Investment Management Co Ltd v Zhao & Ors* [2019] VSC 110.

[3] *Independent Trustee Services Ltd v Morris* [2010] NSWSC 1218.

[4] Ibid, para 28.

[5] *Emanuel v Symon[1908] 1 KB 302.*

[6] Art. 9 of the Chinese Nationality Law, http://www.mps.gov.cn/n2254996/n2254998/c5713964/content.html.

[7] Under the Hague Service Convention, service on Hukou may not be upheld if the defendant can demonstrate that his habitual residence is different. If a Chinese citizen leaves its Hukou address and resides in another address continuously for more than one year, the latter address becomes his habitual residence and the court in that address also has jurisdiction.

[8] *Blohn v Desser [1962] 2 Q.B. 116, 123*; *Rossano v Manufacturers' Life Insurance Co Ltd [1963] 2 Q.B. 352, 382–383*; *Vogel v RA Kohnstamm Ltd [1973] Q.B. 133*; see also *Patterson v D'Agostino (1975) 58 D.L.R. (3d) 63*(Ont). Dicey, Morris and Collins The Conflict of Laws (15th ed) 14-085.

[9] *Rainford v Newell-Roberts [1962] I.R. 95*.

A King without Land – the Assignee under the Commission's

Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims

Professor Dr. Robert Freitag, Friedrich-Alexander-University Erlangen, has kindly provided us with his thoughts on the proposal for a Regulation on Third-Party Effects of Assigment:

Article 14 para. (1) of Regulation Rome I subjects the relationship between assignor and assignee under a voluntary assignment of a claim to the law that applies to the contract between the assignor and assignee. Pursuant to recital (38) of the regulation, the relevant law is to govern the "property aspects of an assignment, as between assignor and assignee". It is a much debated question whether article 14 para. (1) of Regulation Rome I also applies to the third-party effects of assignments, i.e. to "proprietary effects of assignments such as the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, creditors of the assignor and other third parties" (for this definition see article 2 lit. (2) of the Commission's 2018 proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM(2018)096 final).

Only a short time ago, a German court has asked the CJEU for guidance on the matter (see here). The Commission clearly assumes that article 14 of Regulation Rome I leaves the matter to the autonomous conflict-rules of the Member States and has already expressed this view in its follow up-report under article 27 para. (2) of Regulation Rome I presented in 2016 (see COM(2016)626, p. 3). It has repeated this position in recital (11) of the aforementioned proposal for a regulation on the third-party effects of assignments dated 12 March 2018 and the Parliament has followed suite by demanding merely editorial changes to recital (11) of the proposed regulation (see Parliament resolution on the proposal adopted in the first reading on 13 February 2019, document P8_TA(2019)0086, as well as the Explanatory Statement by the Committee on Legal Affairs dated 16 July 2018, document A8-0261/2018, p. 18). It is not astounding that the Council, whose reluctance to accept a different stance of Regulation Rome I on third-party effects of assignments has caused the aforementioned legal uncertainty, at least implicitly subscribes to this position by discussing "only" the conflict of laws-rules proposed by article 4 of the proposal (see namely the Presidency's suggestions in Council document 13936/18 dated 8 November 2018).

Ultimately, the answer to this question as well as the outcome of the proceedings before the CJEU are not decisive when dealing with the Commission's 2018 proposal. The European legislator may at any time either complement or ? explicitly or at least implicitly ? modify article 14 of Regulation Rome I. The Commission has therefore proposed to start a legislative procedure destined to lead to the adoption of a new regulation exclusively addressing the conflict of laws-issues pertaining to the third-party effects of assignments. Under the proposal, the relevant conflict-rules shall be placed completely outside the realm of Regulation Rome I which shall not be touched at all. This approach is due to the wish of the Commission to cover the assignment of and pledges relating to "financial collateral" within the meaning of article 1 para. (4) of Directive 2002/47/EC and including inter alia, the assignment or pledge of securities (especially of shares and bonds). An integration of the new conflict rules into Regulation Rome I would therefore collide with the latter's article 1 para. (2) lit. (d) and lit. (f) exempting matters relating to tradeable securities and to company law from the scope of its application.

As to the law which is to govern the third-party effects of assignments, article 4 para. (1) of the Commission's proposal designates the law of the habitual reference of the assignor (at least as a general rule). The Parliament has mainly endorsed this approach (see document P8_TA(2019)0086 cited above), whereas the debates in the council on this point were so controversial as to hinder that an agreement on a common position could be reached as yet (see Council document 14498/18 dated 23 November 2018). Without having to dwell on this discussion, it is worth stressing one issue of major importance which, until now, has been left out of the equation: The Commission's proposal as well as any other solution favoring the application of any law other than that designated by the existing article 14 para. (1) of Regulation Rome I will lead to a situation under which the proprietary effects of an assignment will be subjected to a split legal regime: As regards the relationship between assignor and assignee, article 14 para. (1) Rome I will continue to apply and the assignee will become "owner" of the claim (if only in relation to the assignor) under the condition that the assignments complies with the law which governs the obligation which gave rise to the assignment. In contrast, with regard to competing assignments and any other third-party effects of the assignment, including the question whether in case of insolvency of the assignor the assigned claim will be part of the insolvent assignor's estate administered by an insolvency administrator, the assignee will only be considered owner of the claim if the assignment is validly executed under the law designated by the new regulation.

It is mandatory that this duplicity of legal regimes is to be avoided for dogmatic as well as for practical reasons. On the dogmatic level, it is not conceivable to speak of "proprietary effects" of an assignment under article 14 para. (1) of Regulation Rome I if these effects are exclusively limited to the relationship between the assignor and the assignee. It is the essence of any property right that the owner's title in the asset is effective *erga omnes*, i.e. that it prevails over any competing right or claim of any third party. There undoubtedly exist exceptions to this rule, namely it is conceivable to consider a transfer of property ineffective in relation to a limited number of persons (the transfer being "relatively ineffective" in this case). However, a "transfer" of title is no transfer in the legal sense if it only were to be valid exclusively in relation to the transferor (the transfer being only "relatively effective" in this case). An "owner" of property who can rely on his "title" neither in relation to competing assignees nor in relation to the creditors of the assignor but only *inter partes* has not received any proprietary position exceeding a position under a merely obligatory agreement between those parties. This finding has significant practical consequences: First of all, it is out of the question for the assignee to activate in his balance sheet a claim "validly assigned" to him solely under article 14 para. (1) of Regulation Rome I, but not under the conflict rules of the proposed new regulation. Second, if one considers that an assignment under article 14 para. (1) of Regulation Rome I will render the assignee "proprietor" of the claim at least *inter partes*, the assignor will have fulfilled his obligation to transfer the relevant claim to the assignee. It is most unfortunate for the assignee that, although performance has been duly rendered to him, he will not have received any valuable title in the claim. It is highly debatable whether the assignee may claim damages from the assignor in case his legal position is successfully contested under the law applicable to the third-party effects despite the fact that performance has been duly rendered to him under the law relevant in his relation to the assignor. It is also unclear whether, unless the parties have explicitly agreed otherwise, the assignee may beforehand request that the assignor also complies with the law applicable under the new regulation at all.

This being premised, the European legislator, when deciding on a conflict of laws-rules on the third-party effects of assignments, must extend its scope of application also to the “proprietary” effects of the assignment as between the assignor and the assignee. One option would be to implement the rule to be agreed on for the new regulation also in article 14 para. (1) of Regulation Rome I. This approach would, however, lead to legal uncertainty as to the respective scope of application of the regulations dealing with assignments. The preferable approach therefore consists of creating a unique conflict of laws-regime for assignments outside Regulation Rome I. This regime would cover all assignments regardless of the legal cause of the transfer as well as all proprietary aspects of the transfer *inter partes* and *erga omnes* which would be subjected them to the same law. Consequently, article 14 of Regulation Rome I would have to be abolished and the contents of article 14 para. (2), (3) of Regulation Rome I would have to be implemented in the new regulation.

The Italian Supreme Court rules on the effects of the opposition to a European Order for Payment

In case of opposition to a European Order for Payment, Article 17 (1) of Regulation (EC) No 1896/2006 (latest consolidated version) states: “the proceedings shall continue before the competent courts of the Member State of origin unless the claimant has explicitly requested that the proceedings be terminated in that event. The proceedings shall continue in accordance with the rules of: (a) the European Small Claims Procedure laid down in Regulation (EC) No 861/2007, if applicable; or (b) any appropriate national civil procedure”.

Moreover: 1) the transfer to civil proceedings is governed by the law of the State where the order has been issued, 2) this law must not prejudice the claimant's position in the subsequent proceedings, and 3) the claimant is to be informed both of the opposition and of any transfer to civil proceedings.

Recital 24 of Regulation (EC) No 1896/2006 makes it clear that the opposition leads "to an automatic transfer of the case to ordinary civil proceedings", adding that "the concept of ordinary civil proceedings should not necessarily be interpreted within the meaning of national law".

The effects of the opposition in the CJEU's case-law

The CJEU in turn has consistently stressed, on the one hand, that Article 17 produces only said effects and, on the other hand, that the transfer to ordinary civil proceedings is automatic (13 June 2013, Case C-144/12, *Goldbet*, para. 31; see also 4 September 2014, Joined Cases C-119/13 and C-120/13, *eco cosmetics*, para. 38).

In *Flight Refund* (10 March 2016, Case C-94/14), the Court sketched a slightly different scenario when holding that "the proceedings automatically *continue* […] in the Member State of origin of the order […]", but further confirming that the continuation occurs "in accordance with the rules of ordinary civil procedure […]" (para. 52; emphasis added).

No national provisions for the transfer: how to fill the gap according to the Italian Supreme Court

What seems definite from the foregoing is that, if the claimant were not to request the termination of the proceedings, the opposition triggers the transfer to ordinary national civil procedure (or to the European Small Claims Procedure) under the law of the Member State of origin.

But, what if the *lex fori* does not provide rules as to the transfer?

An answer comes from the Italian Supreme Court (*Corte di Cassazione*) in a recent judgment (31 January 2019 no 2840). Although the *Corte di Cassazione* has reasoned under the initial version of the Regulation (EC) No 1896/2006, it infers from this latter certain principles which may be also applied to the latest version.

The Italian Court holds, in fact, that the continuation of the proceedings is not a matter left to national law, but it is directly governed by the Regulation through the reference to the national provisions that apply to ordinary civil proceedings.

The Member State has to apply the ordinary, normal form of national proceedings which apply to the disputed claim as if the claimant resorted directly to them.

In case the national legal order lacks rules to govern the transfer and determine the specific ordinary civil proceeding triggered by the opposition, the *Corte di Cassazione* puts forward the following solution.

First, the judge who issued the order is entitled not only to inform the claimant of the opposition, but also to give him a term to bring the action under the ordinary procedural rules. Second, the claimant may choose, among the ordinary civil proceedings, those that better suit the claim for which he resorted to the European procedure.

The Regulation does not allow the judge to lead the transfer, especially by determining the national rules governing the ordinary proceeding.

On the contrary, a national rule in case the claimant does not comply with the term to bring the action exists whereby the proceeding is extinguished (Article 307 (3), Italian Code of Civil Procedure).

A new "choice" for the claimant

The Italian Supreme Court finds in the Regulation the ground for providing the claimant with a sort of "choice of proceedings".

Recalling the emphasis that both the Regulation and the CJEU put on the automatism in the "continuation/transfer" to the ordinary civil proceeding, what automatically comes out from the judgment of the *Corte di Cassazione* seems such "choice of proceedings" rather than the very "continuation/transfer".

Moreover, on closer inspection, since the would-be ordinary proceeding is extinguished if the claimant makes the term to bring the action expire, the real "choice" lies between the continuation or the termination of the whole proceeding.

Perhaps the "choice" is not well founded in the Regulation, but…

The Italian Supreme Court's effort to counterweigh the lack of national provisions is certainly worthwhile. As is it that to forge the transfer regime in compliance with the Regulation.

However, just reasoning with the Regulation in mind, one may wonder whether the aforementioned “choice” is actually well founded.

According to the Italian Supreme Court, the Regulation entitles the claimant to “explicitly” choose what national proceeding is to be applied. Furthermore, even though the claimant has not explicitly requested under the Regulation to terminate the proceedings following the debtor’s opposition, he is again requested, this time under Italian law, to possibly reveal such willingness by making the term expire without bringing the action.

Where is in the Regulation the room for such “choices”? Actually, where is the room for “choices” other than that to explicitly oppose to the transfer?

These doubts increase under the latest version of the Regulation.

Pursuant to Article 7 (4), the claimant may indicate to the court “which, if any, of the procedures listed in points (a) and (b) of Article 17(1) he requests to be applied to his claim in the subsequent civil proceedings”, unless he indicates to the court that “he opposes a transfer to civil proceedings [...] in the event of opposition by the defendant”.

Article 17, which gives the claimant the alternative between the European Small Claims Procedure and any appropriate national civil procedure, adds that where the claimant has not indicated one of these procedures (or he has requested the application of the European Small Claims Procedure to a claim that does not fall within the scope of Regulation (EC) No 861/2007), “the proceedings shall be transferred to the *appropriate* national civil procedure” (para. 2; emphasis added).

Consequently, the Appendix 2 to the Application for a European Order for Payment (form A) puts in the claimant’s hand the option to request: 1) the discontinuance of the proceedings, or 2) the continuation in accordance with the rule of the European Small Claim Procedure, if applicable, or 3) the continuation in accordance with any appropriate national civil procedure.

Once again, where is the room for “choices” other than that to explicitly oppose to the transfer, or to request that the proceedings be continued under the European Small Claim Procedure or under the appropriate national civil procedure? Moreover, may the judgment as to the "appropriateness" of the national civil procedure be left to the claimant? May it be left to him even when the request to apply the European Small Claim Procedure is ungrounded because the claim falls outside the scope of Regulation (EC) No 861/2007? Who decides about the lack of "appropriateness"? Accordingly, what happens in case the claimant brings an action for civil proceedings that are not "appropriate" or suitable for the claim he sought to satisfy through the European Order for Payment procedure?

…the "choice" logically is the best way not to prejudice the claimant

All things considered, a room in the Regulation (EC) No 1896/2006 seems to unfold more for further judge's burdens than for further claimant's "choices" when it comes to governing the transfer under Article 17 in absence of specific national provisions.

However, it's worth recalling that Article 17 (3) provides that "where the claimant has pursued his claim through the European order for payment procedure, nothing under national law shall prejudice his position in subsequent civil proceedings".

It goes without saying that the claimant is not prejudiced, but fully protected, if he may even choose the national civil proceedings after the debtor's opposition and benefits from a second choice between continuing or terminating the whole proceeding.

What about the defendant?

Despite being inclined to safeguard the claimant, the Regulation pays close attention also to the rights of the defendant.

Therefore, it should not be underestimated, as a concluding remark, that "[i]n the European order for payment, the defendant shall be informed that […] where a statement of opposition is lodged, the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure […]" (Article 12 (4)(c)).

It is debatable whether, from the defendant's standpoint, the "accordance" with the rules of ordinary civil procedure may also include – in the silence of the Regulation and in absence of national rules governing the transfer – the "accordance" with the claimant's choice of the national procedure that the defendant may eventually undergo.

The doubts increase if one considers that, unlike the claimant, who would benefit from a series of choices, the defendant has only two means (except for the remedies) to impinge on the procedural destiny of the disputed claim (to pay the amount or to oppose the order), which both result in the European procedure's closing.

Ultimately, the idea that the claimant may choose the national civil proceeding and profits from a second choice between continuing or terminating the whole proceeding seems to unbalance the position in which the Regulation has placed the claimant and the defendant after the order has been issued.