Interpreting Choice-of-Law Clauses

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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.

Admissibility of a reference for a preliminary ruling regarding the issue of a certificate under Article 53 of Regulation No 1215/2012: On the legal nature of the judgment delivered

Case C-579/17

BUAK Bauarbeiter-Urlaubs- u. Abfertigungskasse v GRADBENIŠTVO KORANA

The CJEU published last week a judgment on a request for a preliminary ruling by the Vienna Labour and Social Security Court. The facts of the case are presented under recitals 21-31. The Austrian court referred the following question to the

Court:

'Is Article 1 of Regulation … No 1215/2012 … to be interpreted as meaning that proceedings involving the assertion of claims by [BUAK] for wage supplements against employers as a result of the posting to Austria of workers without a habitual place of work in Austria for the purposes of performing work or in connection with the hiring-out of workers, or against employers established outside Austria as a result of the employment of workers with a habitual place of work in Austria, constitute "civil and commercial matters" to which the aforementioned regulation applies, even where such claims by BUAK for wage supplements concern employment relationships governed by private law and serve to cover workers' claims to annual leave and payment in respect of annual leave, governed by private law and arising from employment relationships with employers, but nevertheless

– both the amount of the workers' claims against BUAK for annual leave pay and that of BUAK's claims against employers for wage supplements are determined not by contract or collective bargaining agreement but, instead, by decree of a Federal Minister,

– the wage supplements owed by employers to BUAK serve to cover not only the expenses for the payment in respect of annual leave payable to workers but also BUAK's expenses for administrative costs, and

– in connection with the pursuit and enforcement of its claims for such wage supplements, BUAK has more extensive powers by law than a private person, in that

– employers are required to submit reports to BUAK on specific occasions as well as at monthly intervals, using communication channels set up by BUAK, to take part in and allow BUAK's inspection measures, grant BUAK access to wage and business records and other documents, and provide information to BUAK, failing which a fine may be imposed, and

– in the event that an employer breaches its obligations to provide information, BUAK is entitled to calculate the wage supplements owed by the employer on the basis of BUAK's own investigations, whereby, in that case, BUAK has a claim for wage supplements in the amount calculated by BUAK, irrespective of the actual circumstances of the posting or employment?'

1. The admissibility of the request

Prior to answering the question referred, the Court examined the admissibility of the request. The novelty of the matter lies on the existence or non-existence of a judicial character for the issue of a certificate under Article 53 of Brussels I bis Regulation. In other words, the question was raised after the termination of the proceedings and the publication of the judgment. It came to the surface due to the reservations of the competent Austrian body to issue the above certificate, thus labelling the case with a civil or commercial nature. The answer was given in recital 41:

*Consequently, the procedure for the issue of a certificate under Article 53 of Regulation No 1215/2012, in circumstances such as those at issue in the main proceedings, **is judicial in character**, with the result that a national court ruling in the context of such a procedure is entitled to refer questions to the Court for a preliminary ruling.*

2. On the civil or commercial nature of the dispute

Following the affirmative answer to the admissibility issue, the Court proceeded to the examination of the legal nature of the case at hand. Its analysis extends to recitals 46-64, wherefrom the following could be highlighted:

- The exercise of public powers by one of the parties excludes a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 1215/2012 [Recital 49].
- The CJEU held that the Austrian court's powers were limited to a simple examination of the conditions for the application of Paragraph 33h (2b) of the BUAG, with the result that, if those conditions are satisfied, the court cannot carry out a detailed examination of the accuracy of the claim relied on by BUAK [Recital 57].
- In so far as Paragraph 33h (2b) of the BUAG places BUAK in a legal position which derogates from the rules of general law regulating the exercise of an action for payment, by attributing a constitutive effect to the determination by it of the claim and by excluding, according to the

referring court, the possibility for the court hearing such an action to control the validity of the information on which that determination is based, it must be concluded that that body acted, in that case, under a public law prerogative of its own conferred by law [Recital 60].

- In such a case, BUAK should be considered to be acting in the exercise of State authority in the context of a dispute such as that which led to the judgment delivered on 28 April 2017, which would have a major influence over the modalities for the exercise of that procedure, and therefore over its very nature, such that that dispute does not come within the concept of 'civil and commercial matters' or, therefore, within the scope of application of Regulation No 1215/2012 [Recital 61].

The Court dedicated only six recitals for the concept of social security and its exclusion pursuant to Article 1(2) (c) Brussels I bis Regulation [Recitals 65-70], concluding that, on the basis of facts delivered, the case does not come within the concept of social security for the purposes of the provision aforementioned.

3. Some thoughts on the ruling

The significance of the judgment is self-explanatory: Unlike its predecessor, the certificate under Art. 53 Brussels I bis is one of the core documents needed for *direct enforcement* in the country of destination. The previous exequatur stage is abolished; hence, the issue on the legal nature of the case is transferred to the court which would try the application for refusal. Therefore, the decision of the Austrian court to refer the matter to the CJEU should be endorsed; the same goes for the position of the latter in regards to the admissibility issue.

The case resembles a recent judgment of the Thessaloniki Court of 1st Instance, which refused to grant exequatur to a German Notice of the National Association of Statutory Health Insurance Physicians against a doctor of Greek origin, active in the region of Rhineland-Palatinate. As in the case of the Austrian BUAK, the notice was issued ex parte, but no court proceedings ensued in the country of origin. Moreover, the German authorities issued a certificate without questioning the legal nature of the matter at hand. Given that the case fell under the scope of Brussels I Regulation, the Greek judge denied exequatur, stating that the above notice was of an administrative nature, thus falling out of the Regulation's ambit.

The case is published in its original text in: *Armenopoulos 2018, pp. 812 et seq.* It is also reported in a case note I prepared for the German journal Praxis des Internationalen Privat- und Verfahrensrechts, see: Nichtanwendung der EuGVVO 2001 auf den Bescheid einer deutschen kassenärztlichen Vereinigung in Griechenland – LG Thessaloniki, 19.12.2017 – 19865/2017, IPRax (forthcoming).

What Does it Mean to Submit to a Foreign Forum?

The meaning of submission was the central question, though by no means the only one, in the Supreme Court of Canada's decision in *Barer v Knight Brothers LLC*, 2019 SCC 13 (available here). Knight sought enforcement of a Utah default judgment against Barer in Quebec. The issue was governed by Quebec's law on the recognition and enforcement of foreign judgments, which is set out in various provisions of the Civil Code of Quebec (so much statutory interpretation analysis ensued). Aspects of the decision may be of interest to those in other countries that have similar provisions in their own codes.

The court held that the Utah decision was enforceable in Quebec. Seven judges (Gascon J writing the majority decision) held that Barer had submitted to the Utah court's jurisdiction. Two judges held that he had not. One of them (Brown J) held that the Utah court had jurisdiction on another basis, and so concurred in the result, while the other (Cote J) held it did not, and so dissented.

The majority held that in his efforts to challenge the Utah's court's jurisdiction, Barer had presented substantive arguments going to the merits of the dispute (para 6). It analysed various possible steps in a foreign proceeding that either would or would not constitute submission (paras 59-63). It was invited by Barer to consider the "save your skin" approach to submission, which would recognize that a defendant who both challenged jurisdiction and raised substantive arguments would not be taken to have submitted. It rejected that approach (para 68). Its core concern was to protect "the plaintiff's legitimate interest in knowing

at some point in the proceedings, whether or not the defendant has submitted to the jurisdiction" (para 62). It added that "plaintiffs who invest time and resources in judicial proceedings in a jurisdiction are entitled to some certainty regarding whether or not the defendants have submitted to the court's jurisdiction" (para 67).

The majority acknowledged that in a case in which the process of the foreign forum required the raising of a substantive argument alongside a jurisdictional challenge, this could affect the determination of whether the defendant had submitted (para 75). But this was not such a case: the defendant had not established, as a factual matter, that this was such a feature of the Utah procedure (paras 75 and 78). Accordingly, the fact that Barer had raised a defence on the merits – that a pure economic loss rule barred the claim against him – amounted to submission (para 71).

In dissent, Justice Cote finds the majority's test for submission to be "too strict" (para 212). She urged a "more flexible approach" which would allow a defendant to raise substantive arguments alongside a jurisdictional challenge (para 213). In her view, if "a broad range of arguments may convince a Utah court that it lacks jurisdiction over a matter … A defendant must be allowed to present those arguments" (para 219). While Gascon J put the onus of showing that the Utah process required raising substantive arguments at a particular time on the defendant, Cote J put that onus on the plaintiff, the party seeking to enforce the foreign judgment (para 223).

Brown J's concurring decision did not comment at any length on the test for submission. He held that "I agree with my colleague Cote J. that Mr. Barer has not submitted to the jurisdiction of the Utah court merely by presenting *one* argument pertaining to the merits of the action in his Motion to Dismiss" (para 146; emphasis in original). This is consistent with Cote J's approach to the meaning of submission.

There is a further interesting dimension to the reasons. Cote J held, in the alternative, that even if Barer had submitted, the plaintiff also had to show a real and substantial connection between the dispute and Utah before the judgment could be enforced (para 234). This engaged her in a complex argument about the scheme and wording of the Civil Code. Having identified this additional legal requirement, she held this was a case in which the submission itself (if

established) was not a sufficiently strong connection to Utah and so the decision should nonetheless not be enforced (para 268). In contrast, Brown J held that there was no separate requirement to show such a connection to Utah (paras 135 and 141-42). Showing the submission was all that was required. The majority refused to resolve this interpretive dispute (para 88), holding only that on the facts of this case Barer's submission "clearly establishes a substantial connection between the dispute and the Utah court" (para 88).

The judges disagreed about several other aspects of the case. Put briefly and at the risk of oversimplification, Brown J relied primarily on the notion that all parties and aspects of the dispute should have been before the Utah court. Barer was sufficiently connected with various aspects of the dispute, over which Utah clearly did have jurisdiction, that its jurisdiction over him was proper (see paras 99, 154 and 161-62). Neither Cote J nor Gascon J agreed with that approach. There are also disputes about what types of evidence are proper for establishing the requirements for recognition and enforcement and what law applies to various aspects of the analysis.

In a small tangent, the majority decision criticized the "presumption of similarity" doctrine for cases in which the content of foreign law is not properly proven and it offered a more modern explanation of why forum law is applied in such cases (para 76).

Recognition of Surnames in Greece – Where do we go from here? –

The recognition of surnames determined abroad by virtue of a judgment or an administrative act has never attracted the attention of academics in Greece. The frequency of appearance concerning reported judgments is also scarce. In practice however, applications are filed regularly, mostly related with non EU-

Member States. Until recently, recognition was granted by courts of law, save some minor exceptions, where the public order clause was invoked to deny recognition. A ruling of the Thessaloniki Court of Appeal from 2017 brings however an unexpected problem to surface.

I. The legal status in Greece

Name and surname issues are regulated by a decree published in 1957, as amended. For a person to change her/his name, there are certain requirements and an administrative procedure to be followed. The applicant has to prove the existence of a reason, such as psychological problems due to cacophonous sound of the surname, its pronunciation difficulty or hilarious meaning, its bad reputation or connotation, the lack of any contact with the applicant's father, whose last name she/he uses, etc. In case of acceptance, the competent Mayor issues an act, granting the right of the petitioner to carry the new surname. If the application is dismissed, the applicant may file a recourse before the General Secretary of the territorially competent Decentralized Administration unit. The Council of State, i.e. the highest administrative court in Greece, serves as the last resort for the applicant.

II. The treatment of foreign judgments / administrative acts

The above decree does not regulate the situation where a person of double nationality (one of which is of course Greek) requests the registration of a foreign judgment or administrative act, whereupon a change of surname has been determined. Being confronted with relevant petitions, the Greek administration sought the assistance of the Legal Council of State, i.e. an advisory body at the service of state authorities. By virtue of a legal opinion issued in 1991, the Legal Council stated that registration may not take place prior to court recognition of the foreign judgment, pursuant to standard procedures provided for by the Greek Code of Civil Procedure [= GCCP]. In this fashion, the ball was sent to the courts.

III. The practice of the courts

Until recently, Greek courts reacted in a rather formal and simplistic way: Reference to the applicable provisions of the GCCP, presentation of facts, brief scrutiny on the merits and the documents produced, and recognition was granted. There are two exceptions to the rule. The first one is a reported case from 1996

[Athens 1st Instance Court Nr. 4817/1996, published in: Hellenic Justice 1997, p. 452], where a court order by the Supreme Court of Queensland was denied recognition, because it was based on the applicant's wish to give up his surname and acquire a new one, without any examination by the Australian court. The Greek court invoked the public policy clause, stating that the issue goes beyond private autonomy, and is differently regulated in Greece. The same outcome appeared 32 years later in the course of an application for the recognition of an act issued by the Civil Registry of Suchoj Log, Sverdlovsk Oblast: In a ruling from last year, the Thessaloniki 1st Instance Court refused recognition on public policy grounds, because the procedure followed in Russia contravened mandatory rules of Greek law on the change of surnames [Thessaloniki 1st Instance Court Nr. 8636/2018, unreported].

A different stance was however opted by the Piraeus Court of Appeal with respect to an act issued by the Mayor of Vienna: After quashing the first instance decision, which dismissed the application as legally unfounded, the appellate court stayed proceedings, requesting a legal opinion on the procedure followed for the change of surnames pursuant to Austrian law. Upon submission of the legal opinion, the court proceeded to a brief analysis, whose outcome was the recognition of the Austrian act. In particular, the court confirmed that the procedure followed was in accordance with Austrian law [*Bundesgesetz vom 22. März 1988 über die Änderung von Familiennamen und Vornamen (Namensänderungsgesetz – NÄG)*]. Hence, no public policy reservations were in place [Piraeus Court of Appeal Nr. 141/2017, unreported].

IV. The Game Changer

The complacency era though seems to be over: In a judgment of the Thessaloniki CoA issued end 2017, things are turning upside-down. The application for the recognition of a registration made by the Civil Registry of Predgorny, District of Stavropol, was denied recognition, this time not on public order grounds, but on lack of civil courts' jurisdiction. The court stated that the recognition of a foreign administrative act may not be examined by a civil court, if the subject matter at stake (change of surname) is considered to be an administrative matter according to domestic law. Bearing in mind that the change of surname is a genuinely administrative procedure in Greece (see under I), civil courts have no jurisdiction to try such an application.

V. Repercussions and the way ahead

What would be the consequences of this ruling in regards to the overall landscape?

First of all, there could be a sheer confusion in practice: If the administration demands court recognition, and courts decline their jurisdiction, stagnation is at the gates. A ping pong game will start between them, and the ball will be the poor applicant, trapped in the middle. Needless to say, there is no other judicial path for recognition. The Code of Administrative Procedure does not contain any provisions on the matter.

Secondly, is it to be expected that the same stance will prevail with respect to judgments or administrative acts coming from EU Member States? A spillover effect is not to be excluded. Courts seem to be encapsulated in their national niche. It is remarkable that no reference is made to the case law of the CJEU, even in the case regarding the Austrian Mayor's act.

Therefore, an intervention by the legislator is urgently needed, otherwise we're heading for stormy weather.

Much-awaited draft guidelines on the grave risk exception of the Child Abduction Convention (Art. 13(1)(b)) have been submitted for approval

After years in the making, the revised HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention has been completed and is accessible here. It has been submitted to the governance body of the Hague

Conference on Private International Law (*i.e.* the Council on General Affairs and Policy) for approval.

There are five exceptions under the Child Abduction Convention and this is one of them; see also Arts 12(2), 13(1)(a), 13(2) and 20 of the Convention. Under this exception, the judicial or administrative authority of the requested State *may* refuse to return the child to his or her State of habitual residence following a wrongful removal or retention.

According to the latest survey of the Hague Conference of applications made in 2015, the refusals on the basis of Article 13(1)(b) of the Child Abduction Convention amount to 18% of the total judicial refusals. Thus, this is the most frequently raised exception. Other grounds for judicial refusal relate to the scope of the Convention (such as the lack of habitual residence or rights of custody). See the survey available here (p. 15).

Article 13(1)(b) contains the following three different types of risk:

- a grave risk that the return would expose the child to physical harm;
- a grave risk that the return would expose the child to psychological harm; or
- a grave risk that the return would otherwise place the child in an intolerable situation.

Particularly useful for practitioners are the examples of assertions that can be raised under this exception, which include but are not limited to (see paras 53-77):

- Domestic violence against the child and / or the taking parent
- Economic or developmental disadvantages to the child upon return
- Risks associated with circumstances in the State of habitual residence
- Risks associated with the child's health
- The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence
- Separation from the child's sibling(s)

In my opinion, the Child Abduction Convention, and in particular this exception, can no longer be interpreted in a vacuum and one should also look to the human rights case law which is quickly developing in this area (in addition to the

applicable regional regulations).

The U.S. Arbitration-Litigation Paradox

The U.S. Supreme Court is well-known for its liberal pro-arbitration policy. In *The Arbitration-Litigation Paradox*, forthcoming in the Vanderbilt Law Review, I argue that the U.S. Supreme Court's supposedly pro-arbitration stance isn't as pro-arbitration as it seems. This is because the Court's hostility to litigation gets in the way of courts' ability to support arbitration—especially international commercial arbitration.

This is the arbitration-litigation paradox in the United States: On one hand, the U.S. Supreme Court's hostility to litigation *seems* to complement its pro-arbitration policy. Rising barriers to U.S. court access in general, and in particular in transnational cases (as I have explored elsewhere), seems consistent with a U.S. Supreme Court that embraces arbitration as an efficient method for enforcing disputes. Often, enforcement of arbitration clauses in these cases leads to closing off access to courts, as Myriam Gilles and others have documented.

But there's a problem. As is perhaps obvious to experts, arbitration relies on courts—for enforcing arbitration agreements and awards, and for helping pending arbitration do what it needs to do. So closing off access to courts can close access to the litigation *that supports* arbitration. And indeed, recent Supreme Court cases narrowing U.S. courts' personal jurisdiction over foreign defendants have been applied to bar arbitral award enforcement actions. Courts have also relied on forum non conveniens to dismiss award-enforcement actions.

That's one way in which trends that limit litigation can have negative effects on the system of arbitration. But there's another way that the Court's hostility to litigation interacts with its pro-arbitration stance, and that's in the arbitration cases themselves.

The Supreme Court has a busy arbitration docket, but rarely hears international commercial arbitration cases. Instead, it hears domestic arbitration cases in which it often states that the "essence" of arbitration is that it is speedy, inexpensive, individualized, and efficient—everything that litigation is not.

(As an aside, this description of the stark distinction between arbitration and litigation is widely stated, but it's a caricature. The increasingly judicialized example of international commercial arbitration shows this is demonstrably false. As practiced today, international commercial arbitration can be neither fast, nor cheap, nor informal.)

But in the United States, arbitration law is mostly trans-substantive. That means that decisions involving consumer or employment contracts often apply equally to the next case involving insurance contracts or international commercial contracts.

In the paper, I argue that the Court's tendency to focus on arbitration's "essential" characteristics, and to enforce these artificial distinctions between arbitration and litigation, can be harmful for the next case involving international commercial arbitration. It could undermine the likelihood of enforcement of arbitration awards where the arbitral procedure resembled litigation or deviated from the Court's vision of the "essential virtues" of arbitration.

To prevent this result, I argue that any revisions of the U.S. Federal Arbitration Act should pay special attention not only to fixing the rules about consumer and employment arbitration, but also to making sure that international commercial arbitration is properly supported. In the meantime, lower federal courts should pay no heed to the Supreme Court's seeming devotion to enforcing false distinctions between arbitration and litigation, particularly in the international commercial context.

In 2018, the Dutch Supreme Court

found a Spanish judgment applicable in the Netherlands, based on the Hague Convention on the International Protection of Adults. Minor detail: neither the Netherlands nor Spain is a party to this Convention.

Written by Dr. Anneloes Kuiper, Assistant Professor at Utrecht University, the Netherlands

In 2018, the Dutch Supreme Court found a Spanish judgment applicable in the Netherlands, based on the Hague Convention on the International Protection of Adults. Minor detail: neither the Netherlands nor Spain is a party to this Convention.

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.