

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.

1. 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.

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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](#).

The Netherlands Commercial Court holds its first hearing!

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Only six weeks after its establishment, the Netherlands Commercial Court (NCC) held its first hearing today, 18 February 2019 (see our previous post on the creation of the NCC). The NCC's maiden case *Elavon Financial Services DAC v. IPS Holding B.V. and others* was heard in summary proceedings and concerned an application for court permission to sell pledged shares (see [here](#)). The

application was filed on 11 February and the NCC set the hearing date one week later, thereby demonstrating its commitment to offer a fast and efficient forum for international commercial disputes.

The parties' contract entailed a choice of forum clause in favour of the court in Amsterdam. However, according to the new Article 30r (1) of the Dutch Code of Civil Procedure and Article 1.3.1. of the NCC Rules an action may be initiated in the NCC if the Amsterdam District Court has jurisdiction to hear the action and the parties have expressly agreed in writing to litigate in English before the NCC. Lacking an agreement in the initial contract, the parties in *Elavon Financial Services DAC v. IPS Holding B.V.* subsequently agreed by separate agreement to bring their case before the newly established chamber and thus to litigate in English, bearing the NCC's much higher, when compared to the regular Dutch courts, fees. Unlike other international commercial courts which during their first years of functioning were 'fed' with cases transferred from other domestic courts or chambers, the fact that the parties in the present case directly chose the NCC is a positive sign for the court's future case flow.

As we have reported on this blog before, the NCC is a specialized chamber of the Amsterdam District Court, established on 1 January 2019. It has jurisdiction in international civil and commercial disputes, on the basis of a choice of court agreement. The entire proceedings are in English, including the pronouncement of the judgment. Judges have been selected from the Netherlands on the basis of their extensive experience with international commercial cases and English language skills. The Netherlands Commercial Court of Appeal (NCCA) complements the NCC on appeal. Information on the NCC, a presentation of the court and the Rules of Procedure are available on the website of the Dutch judiciary. It advertises the court well, referring to "the reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide. And the Netherlands – and Amsterdam in particular – are a prime location for business, and a gateway to Europe." Since a number of years, the Dutch civil justice system has been ranked no. 1 in the WJP Rule of Law Index.

In part triggered by the uncertainties of Brexit and the impact this may have on the enforcement of English judgments in Europe in particular, more and more EU Member States have established or are about to establish international commercial courts with a view to accommodating and attracting high-value commercial disputes (see also our previous posts [here](#) and [here](#)). Notable similar

initiatives in Europe are the 'Frankfurt Justice Initiative' (for previous posts see [here](#) and [here](#)) and the Brussels International Business Court (see [here](#)). While international commercial courts are mushrooming in Europe, a proposal for a European Commercial Court has also come to the fore so as to effectively compete with similar courts outside Europe (see [here](#) and [here](#)).

The complexity of the post Brexit era for English LLPs and foreign legal professionals in EU Member States: a French perspective

Written by Sophie Hunter, University of London (SOAS)

In light of the turmoil in the UK Parliament since the start of 2019, the only certain thing about Brexit is that everything is uncertain. The Law Society of England and Wales has warned that “if the UK’s relationship with the rest of the EU were to change as the result of significant renegotiations, or the UK choosing to give up its membership, the effects would be felt throughout the legal profession.” As a result of Brexit, British firms and professionals will no longer be subject to European directives anymore. This foreshadows a great deal of complexity. Since British legal entities occupy a central place within the European legal market, stakes are high for both British and European lawyers. A quick overview of the challenges faced by English LLPs in France and the Paris Bar demonstrates a high level of complexity that, is not and, should be considered more carefully by politicians.

Currently, 1872 foreign lawyers from 92 different citizenships are registered at the Paris Bar, according to a report by Dominic Jensen, 181 are British citizens, out of which 72 are registered under their original professional titles pursuant to the European Directive 98/5/CE (70 solicitors and 2 barristers). From 61 foreign legal entities established in France, the majority are English limited liability

partnerships (LLP) which employ 1,600 lawyers. Some American law firms rely on the LLP structure as a strategy to establish themselves within the European legal market. According to the European Directive 98/5/CE, foreign legal entities of one Member State can be registered at the Bar of another Member State. The consequences of Brexit will be radical. Because the UK will no longer be part of the EU, foreign legal entities subject to English Law and established in EU Member States will no longer be recognized by the Bar of the host state, and thus will no longer be entitled to do business within its jurisdictions. For the Paris Bar, stakes are high since no other European capital has experienced such an important implementation of British and American law firms.

With the deadline of Brexit looming closer, no one has raised the topic of foreign lawyers and the exercise of their right to practice in European jurisdictions, in spite of numerous calls from The Law Society of England and Wales. While the UK is advocating for mutual recognition of professional qualifications, the French Bar led by Florent Loyseu de Grandmaison has drafted a report outlining various ways to solve this problem. According to a new ordinance published in April 2018, a foreign legal consultant can register with the Paris Bar to practice international law and any other type of law he or she is registered for, with the exception of European law and the law of Member States. The main concern of LLPs will focus primarily on how to continue to practice in France with little disruptions. LLPs owned by English solicitors will need to establish French legal entities owned and managed according to French and European Law. Most likely, English LLPs established in France will benefit from a new legal structure called AARPI, which stands for French limited partnership and mirrors the structure of LLPs. However it is not fully implemented within French legislation yet.

In a tensed climate between the UK and the EU, the fate of foreign legal consultants and entities seem more than ever uncertain. The example of France demonstrates, first, a high degree of complexity in the legislation that prevents LLPs to easily transpose their structure into the jurisdiction post Brexit, and a lack of preparation from both LLPs and the host state to face the practical consequences of Brexit. The UK and EU Member States will need to show a great deal of flexibility to quickly adapt legislation to incorporate English LLPs within their jurisdictions. Therefore, the fear of The Law Society of England and Wales which has repeatedly warned the UK government of the consequences of a “no deal” seem justified. Regardless of whether Brexit is implemented or postponed

on March 29, finding an appropriate answer to the dilemma faced by foreign legal professionals and LLPs across the continent should be a priority on the agenda.

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

Written by Stephan Walter, Research Fellow at the Institute for German and International Civil Procedure Law, University of Bonn, Germany

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

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

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

In a first step, the OGH held that Greece does indeed enjoy immunity from the Austrian jurisdiction. This is a major change of case law. Unlike the German

Federal Court of Justice (*Bundesgerichtshof*, BGH), the OGH repeatedly held the opposite (most recently six days after (!) the CJEU's *Kuhn* judgment in a decision of 21 November 2018, docket no. 6 Ob 164/18p). While, in principle, there is nothing wrong with changing the case law, it is somewhat astonishing that the OGH did this in a very superficial fashion (one sentence). In fact, the court merely backed up its claim with a reference to the CJEU's *Kuhn* judgment, although this judgment was not concerned with the question of immunity but solely the substantive scope of the Brussels Ibis Regulation. Because of the severe consequences of the OGH's new approach, it is incomprehensible that the OGH did not discuss why the CJEU's holding applies to the issue of state immunity as well.

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

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

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

The decision (in German) can be accessed [here](#).