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FOREIGN LAW AND ITS PERSPECTIVES FOR THE FUTURE AT THE EUROPEAN LEVEL

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PART III

RECOMMENDATIONS

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RECOMMENDATIONS

The purpose of this Part IV of the present study is that of formulating **recommendations** on the subject of the status and treatment of foreign law within the European Union. Adopting essentially the same structure which underlies the national contributions and has been followed in the summary of Part I, the present Part will address each of the following six topics in turn:

1. The **scope** of any European Union initiative;
2. The **introduction of foreign law into legal proceedings**, referring essentially to the manner in which the applicability of foreign law is determined;
3. **The establishment** of the **substance** of the applicable foreign law**;**
4. The **consequences** of impossibility of establishment of that substance;
5. Review by **superior instances** of the correct application of foreign law and;
6. The most appropriate approach to these issues when choice of law rules, as well as the foreign laws which they designate as being applicable, fall to be applied by a non-judicial authority.

In respect of each of the topics numbered 2 to 6, it would then be necessary to consider whether the European Union, under the current Treaty on the Functioning of the European Union, has the necessary powers to intervene and, if so, which form and direction such an intervention should take. At the present, relatively early, stage of experience with Community instruments laying down rules for the identification of applicable law, we will limit ourselves to the formulation, under a point 7, of some conclusions as to the views currently prevailing in Europe and some tentative suggestions of clearly appropriate improvements to the currently available means of accessing and applying foreign law within the European Union. To those suggestions, we will add, under a point 8, the gist of the suggestions most frequently made by the legal professionals who responded to the questionnaire which was circulated to them, as well as some proposals which we consider to be appropriate in the light of the entire empirical analysis conducted (Part II of the present Study).]

1. Scope

It is most often the judicial authorities of a Member State – "Member State of the judge seized" or "Forum State" – who must take into consideration **foreign law** through the application of provisions generally known as "provisions concerning applicable law" or "conflict of law rules." We will first examine the four main options open to the legislator (1.1), of which we will immediately exclude two (1.2) and indicate our preference for the third option but not without conceding several points in favour of the fourth option (1.3)

1.1. Four Options

The conflict of law rule can be based on **Community** or **non-Community** law (national law or an international convention). There are currently seven **Community instruments** containing provisions on applicable law, which we will refer to as **"Community conflict of law rules."** The instruments in question are:

- Four Regulations currently in force (as of 15 May 2011): Regulation 1346/2000 of 29 May 2000 on insolvency proceedings[1]; Regulation 593/2008 on the law applicable to contractual obligations (the "Rome I Regulation")[2]; Regulation 864/2007 on the law applicable to non-contractual obligations (the "Rome II Regulation")[3]; Regulation 4/2009 on the law applicable to maintenance obligations (the "Maintenance Regulation")[4], which, on the question of applicable law, refers back to the Protocol on the law applicable to maintenance obligations which was signed on 23 November 2007[5] in the framework of the Hague Conference on Private International Law and has not yet come into force .
- One regulation which has been adopted but not yet entered into force (it should become effective on 1 July 2012): Regulation n° 1259/2010 on the law applicable to divorce and judicial separation (the "Rome III Regulation")[6];
- Three proposals for additional regulations: Proposed Regulation on jurisdiction, applicable law and recognition and enforcement in the field of **successions** (hereinafter referred to as the "Proposed Succession Regulation")[7]; Proposed Regulation on jurisdiction, applicable law and recognition and enforcement in the field of **matrimonial property** (the "Proposed Matrimonial Property Regulation")[8]; Proposed Regulation on jurisdiction, applicable law and recognition and enforcement in the field of **property of registered partners** (the "Proposed Registered Partners' Property Regulation")[9]

Community conflict rules may designate the law of a **Member State** or a **non-member State** (third party State): this is the principle of their *universal* or *erga omnes* application that one finds in all of the eight instruments cited above.

Depending on the two factors discussed – Community or non-Community source of the relevant conflict law, on the one hand, and whether the designated law is that of a Member State or a non-member State, on the other hand – the European legislator has **four options** concerning the scope of any instrument contemplated in this domain. Indeed, such an instrument could apply:

1 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

2 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

3 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

4 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

5 Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, Convention No. 39 of the Hague Conference on Private International Law.

6 Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

7 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, COM(2009) 154.

8 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, {COM(2011) 125}, {COM(2011) 127,} {SEC(2011) 327}, {SEC(2011) 328}.

9 Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions on the property consequences of registered partnerships, {COM(2011) 125}, {COM(2011), 126}, {SEC(2011) 327}, {SEC(2011) 328}.

- to all conflict rules, whether of Community or non-Community origin, which are in effect in the Member State forum, regardless of whether the designated law is that of a Member State or an non-member State (**"first option");**
- to all conflict rules, whether of Community or non-Community origin, which are in effect in the Member State forum, but only when the designated law is that of a Member State (**second option"**);
- only to Community conflict rules that are in effect in the Member State Forum regardless of whether they designate the law of a Member State or a non-member State (**"third option"**);
- only to Community conflict rules that are in effect in the Member State Forum and only where the law designated is that of a Member State (**"fourth option"**).

1.2. Exclusion of the First and Second Options

The European Union appears **not** to have the competence necessary for **either the first or the second** option. Indeed, it would appear that a uniform Community treatment of conflict rules and rules governing applicable law is justifiable only with respect to rules which are themselves **Community rules and, for that reason, uniform**.

The arguments likely to be advanced in support of European Union intervention – the Community law principles of "**effet utile**," **foreseeability and legal certainty** that underlie Community conflict rules, the principle of **protection of vested legal rights** under Community law and **protection of vested legal rights** under internal law, an effective **internal market** and the creation of an area of **liberty, security and justice** --presuppose specifically the context of *Community law,* in this case, **Community conflict of law rules,** and that it is precisely such rules and the applicable law such rules designate – which rules and laws are already applicable as a matter of principle in all the Member States -- that must be **executed**. This is illustrated by Hypothetical n°1 below:

Hypothetical n° 1. Two German citizens domiciled in England were married in London and settled in Italy several months after their marriage without losing their United Kingdom *domicile* as that term is defined under English law. The wife wishes to obtain an annulment of the marriage to her husband. She hesitates between an English forum and an Italian forum. In the absence of Community conflict rules on the subject, in the present case, the annulment of the marriage in Italy is governed by German law and in the U.K., by English law.

- First, this hypothetical does not concern a legal situation **created or sanctioned by a Community conflict rule.** As a result, the principal of equal protection of vested legal rights by Community law and internal law may not be invoked;
- Second, the imposition of uniformity upon the Italian and English *national* conflict rules concerning applicable law by a *Community* instrument would not result in increased **foreseeability and legal certainty** for the couple concerned; the applicable law, in any event, is not the same in the two countries.
- Consequently, a Community initiative concerning uniform treatment of a conflict rule which, itself, is not uniform – and concerning the uniform treatment of applicable law that can differ from one country to another – will not result in a **reduction in forum shopping** (the grounds for annulment being potentially different depending on the forum seized).

- Finally, for the same reasons, it is difficult to see how such an initiative could be justified based on the goal of an **effective internal market** and the creation of an area of **liberty, justice and security.**

It appears, then, that the scope of any potential European Union initiative should be limited to *Community conflict rules* and the law that they designate. We must then determine whether an additional restriction should be introduced depending on whether the law designated is that of a Member State or a third party state.

1.3. Choice Between the Third and the Fourth Option

With respect to the choice between the third option that targets Community conflict rules independently of whether the law they designate is, or is not, that of a Member State, and the fourth option that ultimately limits the scope of the proposed instrument to those Community conflict rules that designate the law of a Member State, we must distinguish between the treatment of a *conflict rule* and the treatment of *the law such rule designates as applicable.*

- With respect to the treatment of the *conflict rule,* in order to reflect and respect the principle of **universal application,** the instrument in question must **also apply universally**, *i.e.* regardless of whether the state whose law is designated is a Member State. Even if the instrument were to apply only to Community conflict rules, it must apply to all Community conflict rules and, more specifically to **all** cases to which they apply. It is therefore the **third option** that we must choose.
- With respect to the treatment of the *law designated* by the Community conflict rule, it would appear that the relevant principle should also be that of application of the instrument regardless of whether the law designated is that of a Member State. In choosing the third option, we should nonetheless make **important concessions** to the **fourth option** in the event that the common provisions envisioned are based on the existence of **Community judicial cooperation** mechanisms (such as the "European Judicial Network") or contemplate the creation of other mechanisms which would apply only among Member States. This is particularly the case for research methods which might be used and efforts likely to be made in order to establish the content of the designated law, some of which are only applicable with respect to Member State laws.

Even if we were to exclude non-Community conflict rules and the law that such rules designate, even where the designated law is that of a Member State, the scope of the instrument proposed remains important and is certainly destined to be expanded.

- On the one hand, those areas that are currently subject to Community conflict rules already affect **a considerable part** of people's legal lives; these areas concern at once a person's **finances** (contractual and non-contractual obligations, support obligations) as well as **non-financial** aspects of their lives (divorce and separation); in particular, they concern equally areas in which Member States' legal systems allow a large degree of party autonomy (contractual obligations); those in which the degree of party autonomy allowed varies from one Member State to another or depending on the relevant point in time (support obligations, contracts with a "weak" party/adhesion contracts, successions), and those for which there is little or no party autonomy (divorce and separation).
- On the other hand, it is clear that any principle proposed is likely to apply to Community conflict rules that may be adopted **in the future** in other areas and to the foreign law that they **designate** (although we cannot exclude the possibility of adopting some adjustments

necessitated by the specificities of new areas). It is equally clear that these principles may be extended by Member States to **national conflict rules.**

Article 1 – Scope

1. This instrument applies to the treatment of provisions concerning applicable law included in the Regulations as well as in the other Community instruments, hereafter referred to as "Community conflict rules," and to the treatment of the law that these instruments designate as the applicable law when such law is foreign to the judge of the Member State who is seized of the matter.
2. This instrument is not intended to affect the treatment of provisions concerning applicable law of national law or as agreed to by the relevant parties or those of the law that is designated as the applicable law.
3. Unless otherwise provided, this instrument applies even where the Community conflict rule designates as applicable the law of a third party State.

2. Introduction of Foreign Law into Legal Proceedings

It is apparent from the summary of Part I of the present study that foreign law can be introduced into litigation by **different means**. First, it is possible to place the onus of invoking the application of foreign law exclusively upon the **interested party**. Secondly, it is possible to oblige the **judge** to determine *ex officio* the question of the applicability of foreign law and then to actually apply it, **again *ex officio***, even when that contradicts an agreement reached between the parties for the purpose of ensuring application of the law of the forum. Thirdly and by way of compromise, one could oblige the **judge** to determine *ex officio* the question of the applicability of foreign law, which is to say that he must draw the applicability of a foreign law to the attention of the parties, while leaving the parties the option of **agreeing upon its exclusion** in favour of the law of the forum. Each of these solutions will subsequently lead to its own problems.

Most Community conflict of law rules permit parties to reach enforceable agreements in the form of **choices of applicable law**. This raises the questions of whether such agreements are also possible **after the institution of proceedings** and of the **forms** which such agreements may take, which leads in turn to the question of the significance to be attributed to **silence on the point**. Some conclusions as to the desirability of **uniform resolution** of these questions will then be advanced.

2.1. Choice of the law of the forum

One of the peculiar characteristics of Community conflict of law rules is the wide room which they leave for **party autonomy**. The parties are logically accorded the right to designate the applicable law on subjects the material regulation of which is generally, or at least to a significant degree, left to the free will of the parties. These subjects include both **contractual and non-contractual obligations**, The right is however, also accorded in respect of subjects, such as **successions** and **matrimonial property,** for which the power of parties to themselves determine, at the « material » level, the nature of their legal relations is generally subjected to important limits and even in respect of subjects such as **divorce** or **judicial separation,** for which that power is practically nil**.** The Rome III Regulation is emblematic in this respect; the subject with which it deals is of a **non-property nature and is not open to party choice** under the legal systems of all the Member States which have opted in. Unlike certain non-European legal systems, notably those influenced by Islamic law, these uniformly prohibit spouses, from the moment at which they marry and until that at which they divorce or obtain a

judicial separation, from effectively **abandoning, modifying** or **adding** to the grounds for divorce or separation. The power to choose the applicable law is nevertheless given to spouses by the Regulation.

There remains the question of whether, under the Community conflict of law rules which permit party autonomy, the **law of the forum** systematically appears within the circle of "eligible" laws. The response is **affirmative** concerning the Community conflict of law rules which the Rome I and Rome II Regulations lay down in respect of contractual and non-contractual obligations: these conflict rules effectively permit a choice of **any law**, **including that of the forum,** whatever may be the connecting factor upon which the jurisdiction of the forum is founded. The Rome III Regulation and the Maintenance Regulation systematically allow a **choice of the law of the forum,** subject to certain remarks which will be made below. The Proposed Matrimonial Property Regulation does not list the law of the forum among the eligible laws, but the combination of the Community conflict of law rules and the relevant Community jurisdiction rules **inevitably leads to that result;** the jurisdiction of the forum can only be founded upon the habitual residence or the nationality of at least one of the spouses, which is to say in the courts of a State the law of which may be chosen by the spouses at any time after the celebration of their marriage.

2.2. Possibility of choice after proceedings have been instituted

This issue can be divided into **two subsidiary questions:** do the Community conflict of law rules deal with a choice made during the course of proceedings? If not, how is the issue to be dealt with?

It is unclear whether the relevant provisions of the Rome I and Rome II Regulations extend in scope to a **choice made during the course of proceedings**. On the contrary, a choice during proceedings is **expressly envisaged** by two other instruments: the Rome III Regulation and the Maintenance Regulation. The former permits a choice until the moment at which a particular court is actually seized of jurisdiction, after which a choice is possible in the form (if any) foreseen by the **law of the forum**. The distinction is of a procedural nature. The expression, « procedural accord», may be derived from Art. 7 of the Hague Conference's **Protocol of 23 November 2007 on applicable law,** according to which "the maintenance creditor and debtor, for the purpose only of a particular proceeding in a given State, may expressly designate the law of that State as applicable to a maintenance obligation". If the agreement is concluded before the commencement of proceedings, it must take a **particular form:** "A designation made before the institution of such proceedings shall be in an agreement, signed by both parties, in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference."[10] The form required of an agreement reached after the commencement of proceedings, while they are afoot, is left to the law of the forum.

One finds a broad **consensus** that, when a conflict of law rule permits a choice of the law of the forum, that choice may be made both **before and after** the commencement of legal proceedings. There is indeed no reason to prevent parties from doing during proceedings what they could do before the proceedings. The reasons which justify party autonomy (foreseeability, familiarity with one law, material interests) **support** the extension of the right of making a choice into the procedural phase.

[10] Art. 7, par. 2.

There is accordingly no need, for present purposes, to deal with the second subsidiary question of how the issue should be dealt with outside the scope of the Regulations.

2.3. Form of choice

It seems perfectly possible to conclude that, in the extent to which the Community conflict of law rules permit choice and to which a choice of the law of the forum is always admissible, the question of whether a judge must apply foreign law *ex officio*, including in cases where this thwarts the intention of the parties, **loses a great deal of its importance.** In choosing the law of the forum, in conformity with a Community conflict of law rule which gives them the power to do so, the parties are able to avoid the application of foreign law just as effectively as when employing some procedural tactic which renders the whole body of private international law irrelevant to the case. The question of the required form of such a choice then becomes of considerable importance. It is in particular interesting to consider whether a procedural choice must fulfil conditions different from those which are imposed for a choice made before the commencement of litigation.

3. Establishment of the content of applicable foreign law

Once the applicability of foreign law is clear, it is necessary to establish its content. The term, "**establishment**", seems preferable to that of "**proof**", in that the latter is naturally indicative of an **activity of the parties** – the judge doesn't "prove" anything – and is therefore not entirely neutral. Subject to that caveat, we will use the two terms interchangeably in the following discussion.
It should be noted that Community conflict of law rules sometimes foresee that **establishment of the content of foreign law before its applicability has been determined**, precisely in order to be able to determine whether it is applicable or inapplicable to the case at hand. Taking the examples of **contracts of employment and consumer contracts,** before one can tell whether the law – in our hypothesis, a foreign law – of the habitual residence or the place of employment is applicable in place of another law chosen by the parties – in our hypothesis, the law of the forum –, it is necessary to establish the content of the foreign law and check whether it may be more favourable to the employee or the consumer than the law of the forum. The former is applicable only if it is more protective; if it isn't, it won't be applied and the judge will be able to decide according to the law of the forum. The same is true of Community conflict of law rules as to formal validity: if, according to the law of the forum applicable to the question of substantive validity, an act was not done in a valid form, then this issue will be decided according to the foreign law applying at the place where the act was done.

Another preliminary point to note is that Community conflict of law rules may designate the **law of a Member State or that of a Non-Member State**; that is the effect of the principle of universal or *erga omnes* application. It may nevertheless be important to keep the distinction in mind, especially in respect of the onus and the methods of proof, but also in what concerns cost and perhaps even at the stage of correction by superior instances.

The process of establishing foreign law can be broken down into several elements. First, there is the division of labour between judges and parties, then there are the methods of proving foreign law and finally, there are costs involved.

3.1. Respective roles of judge and parties

A principle recognised in every country is that the parties are free to **help the judge** determine the content of foreign law, exactly as they do in respect of **domestic law.** This principle should certainly be maintained. There is no reason to think that the parties should be reduced to a lesser role than that which they play in respect of domestic law.

3.2. Methods of proving foreign law

The weight of opinion favours continued acceptance of the principle of **free choice** of the methods of proof, whether used by parties or used by judges. The judge retains the power, as in other respects, to attribute to each piece of evidence the degree of importance which he considers appropriate.

3.2.1. Freedom of choice of methods of proof

The national contributions to Part I of the present study show that both judges and parties actually use **different** methods of proving the content of foreign law**:** experts (including specialised institutions such as the *Max Planck Institut* at Hamburg, a CRIDON in France and the Swiss Institute of Comparative Law which provides services to judges both in Switzerland and abroad); ministries of justice and of foreign affairs; embassies and consular networks; personal acquaintances of the judge. The plurality of methods exists not only within the European Union, but also within each Member States, although the number and exact form of admissible methods varies between them. The national contributions indicate that none of the legal systems of Member States contain rules which oblige judges to utilise one method of proof to the exclusion of all others. In other words, there exists a largely **free choice of methods of proof.**

The **margin of appreciation** left to the individual judge in this respect forms part of his core responsibilities and certainly needs to be preserved. To oblige judges to adopt a particular method of proof of foreign law, would be to render them dependent upon the persons involved in applying the method and thus to make the advancement of the proceedings depend upon those persons. The only obligation which could properly be imposed upon a judicial officer in respect of foreign law would be to consult a judicial officer of the foreign country concerned. The practical question is then whether it would be feasible to oblige, for example, a judge of the English Commercial Court to pass through the European Judicial Network in order to obtain the opinion of, for example, a judge of a Lithuanian Regional Court on a question to which Lithuanian law is applicable. It is not difficult to imagine cases in which that procedure would introduce an unacceptable degree of delay and incomprehension into the English proceedings, which could in turn undermine the attractiveness of the Commercial Court as a dispute resolution forum. While there are certainly other types of cases in which cooperation through the European Judicial Network could be extremely helpful, it must be left up to individual judges to identify such cases.

Another question which logically arises is that of whether certain **methods of proof should be entirely excluded**. There is currently no reason to think that this step needs to be taken and even if there were, the problem of the need for a legal basis would arise. Whether the European Union currently has the power to imperatively prescribe one method of proof or prohibit another one, is doubtful.

Any initiative to be taken should therefore aim at **providing additional facilities to judges** and perhaps also to parties, of which the judges or parties may or may not decide to make use. Rather than restricting currently existing procedural options (the civil procedure laws of Member States rarely list the admissible means of proof, by the way), steps should be taken to enlarge the gambit of possibilities.

3.2.2. Some methods

a) London Convention

The 1968 London Convention is generally welcomed by commentators, but hardly used in practice. The principal complaints made about it are that it is little known and works too slowly. Regrettable is also that it cannot be directly used by notaries or by legal representatives of parties to litigation. On the other hand, the system of Central Authorities or Contact Points foreseen by the Convention has proved very effective in other treaty frameworks. The London Convention Contact Points meet regularly and do their best to work efficiently. Further improvements at the level of the Convention's Member States are conceivable, but it appears easier and more effective to reinforce the European Judicial Network which is already in place throughout the European Union.

b) European Judicial Network

There is a general feeling that the European Judicial Network has enormous potential and that that potential is far from fully realised at the present day. The Network permits a judge in one Member State to help a judge of another Member State. It is interesting that this mechanism is not expressly envisaged by international treaties, which arrange for information about foreign law to be supplied by authorities which have no responsibility for its application. Direct, inter-judicial contact has many advantages. The disadvantages fall within the scope of the responsibility of judges and can be managed by them.

An inexorable prerequisite to the responsibility of judges is the margin of appreciation left open to them. Questions of law and questions of fact are very closely linked to each other, so it is hardly advisable to bind a judge to an opinion given by an expert, even if that expert is a judge of the country the law of which is being applied. Judicial policy has a major role to play and then there is the issue of the division of costs generated by the provision of judicial legal opinions.

Some degree of judicial "further education" is probably also required. The preparation of respectable translations of the principal Codes and Laws of each Member State into English and French could be encouraged, made available to all judicial officers and serve as one of the bases of training in comparative law.

c) European Centres of Expertise

An alternative possibility is the creation of a European Centre of Expertise. It would employ legal experts trained in the Member States the laws of which they will be called upon to apply. Authorities, both judicial and non-judicial, of all Member States would be entitled to call upon the Centre's services. Depending upon the number of opinions requested, which will obviously increase over time, it should become possible and even advisable for the Centre to employ more than one legal expert from each Member State, permitting them to specialise in particular areas of law. The establishment and functioning of the Centre would be financed either by the European Union, or by

the Member States. The *Swiss Institute of Comparé Law* in Lausanne, Switzerland is apparently the only existing institution which functions in that manner and thus represents a useful model for the future EU institution. Legal opinions given by the Centre will not be binding upon the judges who request them, but will enjoy a high degree of prestige in the light of the independence and competence of the institution which has prepared them.

Another option would be that of the certification of institutions (like the *Max Planck Institut* at Hamburg and the five French *Centres de Recherches, d'Information et de Documentation Notariales*) already existing in Member States, according to pre-defined certification criteria and under the condition that they treat enquiries from authorities of other Member States in exactly the same manner as national enquiries. The services provided by the institutions could be directly invoiced to the judicial and other authorities which use them.

3.3. Costs

There is a certain degree of **convergence** amongst the different legal systems within the European Union to the effect that the cost of a foreign legal opinion prepared at the request of a party is generally **to be borne by that party**, in the same manner as the party's costs of establishing the content of domestic law. Legal aid is again generally available to cover the necessary expenses of obtaining such an opinion. One could imagine that it is realistic to envisage **higher expenses** in cases involving the application of foreign law, given the need of each party to be represented not only by a lawyer with expertise in the law of the forum, even if only for procedural purposes, but also by a (normally different) lawyer with expertise in the issues which are governed by foreign law. It appears that the existing Community instruments on the subject of legal aid can be interpreted to that effect.
Various legal orders have divergent approaches to the costs of steps taken by judges. The costs of research conducted by or at the request of judges are often added to the court fees which parties to litigation are required to pay. As a matter of principle, in terms of the cost of obtaining justice, it is certainly correct to say that court fees should not discourage applications to the courts or encourage parties to make applications to foreign courts rather than those near their homes. The fact that foreign law is applicable, instead of the law of the forum, should therefore have no effect upon the level of the court fees which are charged to the parties. It is not impossible to imagine that the costs of applying foreign law will be borne in the first instance by the forum (i.e. the Member State in the courts of which the foreign law is applied) and that a system can be developed to subsequently share those costs between the forum State and the Member State the law of which was applied.

4. Consequences of impossibility of establishment of foreign law

A relatively clear consensus exists among the Member States as to the normal consequence of a failure to determine the content of the foreign law applicable to a legal issue: the **law of the forum is applied** to resolve that issue. That rather practical reaction cannot be criticised in point of principle, given the frequency with which Community conflict of law rules include the law of the forum within the circle of potentially applicable laws.

At the same time, it is legitimate to ask (and the question is indeed often posed) whether a **claim based on foreign law** should not simply be rejected if the claimant is unable to meet his onus of establishing the foreign law to the satisfaction of the judge. This might be considered a question of procedure, rather than a point of private international law, but it would have the effect of avoiding the application of foreign law, just as much as would a principle of the conflict of laws.

The only effective manner in which this dilemma can be resolved it that of avoidance: it should be practically possible, amongst the Member States of the European Union, to ensure the possibility of establishing every aspect of the law of each Member State before the courts of any of the Member States. The **essential recommendation** of the present Study in this respect is to **improve access to intra-EU law**, to a point where the dilemma of how to proceed in case of a failure to prove the content of the law of another Member State will no longer arise.

There remains the question of whether a uniform rule in this respect should be imposed upon Member States in the short term, while the means of access to their laws in other Member States are being improved. Such imposition does not seem advisable. The interests of justice demand that judges retain the power to have recourse to other solutions than an application of the law of the forum in individual cases where such application would lead to an inequitable result.

5. Correction by superior instances

For the purposes of discussion, it is useful to distinguish two situations: first, where a judge has applied the law of the forum instead of the applicable foreign law (or some other foreign law instead of the applicable foreign law); secondly, where a judge has incorrectly established the content of the applicable foreign law. The present context does not require discussion of a third variation, namely where a judge has applied foreign law instead of the correctly applicable law of the forum.

5.1. Application of the law of the forum instead of the applicable foreign law

A failure to apply a correctly applicable law may have one of three causes, which are not always clearly distinguished: a) the judge applied the law of the forum because he didn't consider that option, which was not discussed during the proceedings; b) the judge applied the law of the forum because he incorrectly interpreted the relevant principle of the conflict of laws; c) the judge applied the law of the forum because he was unable to establish the content of the applicable foreign law.

5.1.1. Foreign law not pleaded

There would be little point is discussing the largely hypothetical question of whether parties should be somehow obliged to plead issues of foreign law in all cases in which they arise. At least in so far as civil litigation is adversarial in nature, judges are normally not in a position to be able to determine that cases involved foreign aspects which parties did not wish to raise. The issue is actually dealt with in jurisprudence, although it has not yet been addressed by Community conflict of law rules, when a party wishes to rely upon foreign law for the first time at the appellate level. A uniform solution to that problem can apparently not be envisaged at the present time, even if the diversity of approaches taken by national courts certainly reduces legal certainty.

5.1.2. Erroneous interpretation of conflict of law rules

The juridical issue here is that of the last moment at which the error of private international law can be relied upon and in which context. The legal systems of the Member States generally agree that this is open to parties to litigation even at the second instance of appeal, given that the error is uniformly regarded as an error of law. Major differences exist, on the other hand, as to whether the

appellate court can rectify the error by itself applying the correct system of foreign law to the facts found at first instance, or must return the case to the judge of first instance for a (relatively costly and lengthy) retrial.

5.1.3. Content of foreign law not established

In cases in which the content of foreign law could not be satisfactorily established, it is sometimes said that the judge did not make sufficient efforts to discover the relevant foreign rules or to encourage the parties to discover them. This is even a ground of appeal in certain legal systems. It presupposes that there are established standards of how and how far research into foreign law is to be conducted. These are effectively standards of proof and cannot be uniformly formulated for all cases. They depend upon both the exact issue to be solved and the nature of the applicable foreign law. Even within national legal orders, this is often a disputed matter of judicial policy, largely determined by the personalities and interests of leading judges. The question must be left to the national legal orders of the Member States, although the European Union may have an interest in encouraging them to gradually harmonise their rules.

5.2. Incorrect application of foreign law

A majority of the Member States permit appellate courts to correct mistakes made at first instance in respect of the content of foreign law and its application to the facts. It is interesting to note that this possibility exists even within those legal systems which leave it to the parties to take the initiative of raising foreign legal issues if they so desire. Among the legal systems which provide a **second level of appeal,** normally only on point of law, there is a great deal of divergence on the issue of whether points of foreign law can qualify for review.

This matter lies near the heart of each national judicial order and any changes are likely to be extremely difficult to introduce. It is also difficult to justify Community interference to this extent. A supposed principle of equal treatment of foreign law and domestic law amongst Member States might be imagined in order to ensure the equal protection of the law of each Member State for the benefit of persons whose affairs are governed by the law of that State and for those whose affairs are governed by the law of a different Member State. This would mean that the "foreign" character of the applicable rules of law should not impact upon the quality of their application, which in turn would require correction of errors of foreign law on the same bases as the correction of errors of the forum's own law. An alternative principle would be that of correction of errors of foreign law according to the rules of review in force in the relevant foreign country. That would be extremely complicated however, and it is possible that some of the means of review foreseen in individual Member States are completely inconsistent with the judicial structures of other Member States. It is better to leave it up to each national legal system to fix the methods and criteria of correction of judicial errors. Differences in the treatment of judicial errors under the forum's procedures as compared to the procedures of a relevant foreign system are rarely so important as to practically impact upon substantive rights. Faced with difficult questions under foreign law, national courts at all levels should be strongly encouraged to accept the solutions proposed by the courts of the foreign country concerned, rather than to elucidate their own solutions. It must also be accepted that laws cannot be absolutely perfectly clear, especially in their application to unexpected types of cases, which tend to arise more frequently abroad than at home, so that there will always be plenty of scope to argue that errors of foreign law have been committed, no matter how carefully and advisedly the judge proceeded.

A reasonable conclusion is probably that judgments applying foreign law should be reviewable on the same grounds as those which apply domestic law. Unification of the methods of review or of the means or consequences of correction of judicial errors would not appear desirable and in any case probably lacks any legal basis under European Law, given that errors of foreign law do not impact upon the functioning of the Internal Market to such a degree as would justify Community intervention.

6. Application by non-judicial authorities

Attention will be paid here to national authorities which act in a constructive manner in order to create legal rights or a legal status. They normally act in non-litigious cases. A good example is that of a notary who becomes involved in a client's affairs in order to make a will or other testamentary instrument, to liquidate a deceased estate, to execute a matrimonial property agreement or to effect a transfer of real property.

An initially relevant question is that of whether parties should be encouraged to select a notary who will execute documents according to the formal requirements of the law which is applicable to the substance of the transaction or situation. Notaries are certainly free to advise parties to consult a notary in the Member State the law of which is applicable to questions of substantive validity. If the parties insist on proceeding with the notary initially consulted, he will however, in most countries, be unable to escape from his duty to perform the acts required of him. As a kind of public officer, a notary is usually unable to refuse to act in cases where his act would be formally admissible, as such a refusal would amount to a denial of justice.

That position gives rise to a series of further questions: Should notaries be obliged to inform clients that their circumstances give rise to issues of conflict of law and depending upon the view taken in the Member State by which the notary was appointed, that they can choose to ignore those issues? Must he make his own determination of whether a foreign law is applicable? If so, how should he go about establishing its content? These questions are conceptually difficult, in that a notary is simultaneously an agent of the legal system which gives him certain powers and a representative of the persons who engage his services.

6.1. Introduction of foreign law

A common denominator among the rules governing the notaries of Member States is that notaries are obliged to learn the rules of conflict of laws and to understand the options which those rules leave open to their clients, so that they can properly advise their clients as to the likely consequences of the legally highly significant acts which the clients propose to undertake. At the most basic level, the notary must draw the attention of his client to the right of the latter to make a **choice of applicable law**, if the rules of conflict of laws so provide. In any case, he should not hide the fact that the client has the right to choose a foreign applicable law, for fear that the person might decide not to engage his services and decide instead to consult a notary of the relevant foreign country. Whether the notary is then required to learn enough about a possibly applicable foreign law to be able to objectively advise the client of the advantages and disadvantages of choosing that foreign law, instead of the law of the forum, remains much less clear. In respect of matters for which no party choice of law is admissible, the position of notaries when their clients insist on ignoring the

rules of conflict of laws, so as to effectively choose the law of the forum, is effectively the same as that of judges.

6.2. Establishment of the content of foreign law

To the extent that notaries may be required, by law or by their professional standards, to at least consider the contents of foreign law, there is no doubt that they could benefit enormously from the facilities offered by the *European Judicial Network.* The matters which clients bring before notaries are often very delicate and where they involve foreign elements, can often be properly and confidentially dealt with only by legal professionals who hold the same position in the relevant foreign country as does the local notary. Probably mainly for that reason, notaries around the globe have already established interest and contact networks, which appear to be quite heavily utilised. It might nevertheless be useful to establish a specifically European institution, managed by notaries according to the principles of cooperation among EU Member States. The French CRIDON could serve as a model in this respect.

7. Conclusions Concerning the Legal Framework

7.1. Introduction of Foreign Law into the Proceedings

The issue of whether Community conflict of law rules should be applied *ex officio*, regardless of the wishes of the parties, is much **less acute** than it would appear at first sight, given that the relevant Community instruments mostly permit the parties to choose the law of the forum as the applicable law.

A Community instrument could specify that parties have the **right to make a choice of applicable law** during the course of proceedings. Those instruments which currently refer to the issue indicate that it is to be determined according to the law of the forum. This *renvoi* creates a risk of uncertainty and inconsistency of choice of applicable law.

Community conflict of law rules are less liberal in certain cases, notably where one of the parties is considered “weaker” than the other, or where mandatory rules of a Third State seek to apply. In these limited cases, if the possible relevance of Community conflict of law rules appears from the facts pleaded by the parties, then the principle of the “effet utile” of Community law should require **judges** to at least **draw the attention of the parties** to those rules *ex officio*.

7.2. Establishment of the Content of Applicable Foreign law

The **freedom of the parties to assist the judge** in establishing the content of foreign law, as is the case with the content of domestic law, should be maintained. The right of the judge to require the parties to give assistance does not need to be the subject of uniform regulation. The principle of free choice of methods of proof should also be retained.

The **costs** of the application of foreign law could be **borne by the Member States**, so as not to discourage parties from raising issues of foreign law where they are applicable. For other factual measures to facilitate access to foreign law, see below (2.).

7.3. Consequences of impossibility of establishment of foreign law

The logical consequence of failure to establish the content of the applicable foreign law is the application of the law of the forum. It should nevertheless be open to individual Member States to provide for **alternative consequences** in particular cases, for example where the validity of a formal document executed according to foreign law has not been proven. Judges could also retain the power to devise alternative solutions, such as striking out a claim, in individual cases in which the application of the law of the forum would lead to injustice.

7.4. Correction by superior instances

One option to increase control on foreign law would imply that judgments applying foreign law be reviewable on the same grounds as those which apply domestic law. As this measure would go very far, already an increased willingness (or duty) to intervene on the application of foreign law if it is unreasonable might be an option.

7.5. Application by non-judicial authorities

Ideally, notaries in each Member State should ***ex officio* draw to the attention** of their clients any potential conflict between the notarisation requirements of the forum and those of the Member State the law of which is applicable to the client's situation or transaction and then proceed to carry out their notarial duties in conformity with that applicable law. This manner of proceeding should not impact upon the costs to be borne by the clients.

To the degree that the laws of the Member States concerning the functions of notaries can be rendered less divergent over time, it will become gradually less onerous for notaries to conform to the previous recommendation.

8. Recommendation on Facilitating Access to Foreign Law

A large number of respondents in the empirical study proposed the creation of a generally **accessible electronic database** of foreign law, with information in English or translated into all official languages. This proposal seems worthy to be pursued further. Ideally, such a database should also contain references to case law. In fact, language was an important aspect mentioned in the context of the creation of a database. Within the same line of thought, others proposed simply the creation of an overview with links to official websites or increased awareness of the existing possibilities. In fact, it would appear reasonable to **improve the quality of official information** on the internet and to improve systems of national legal information by adding information on foreign law (libraries, databases). In a second step, these could be combined into a European database with relevant information (legislation and case-law) on all legal systems. This appears to be a huge, daunting task, but it would reduce costs and facilitate access effectively.

Propositions for **improved institutional mechanisms** ranged from making authorities (especially the ministry of justice or foreign affairs) more responsive or more open to requests from individuals, to the creation of an independent institution giving information on foreign law. An option would consist in **establishing a European Centre of Expertise**. It would be highly desirable, in order to ensure the quality of the opinions given by it, that the Centre employ jurists who have been trained in the Member States upon the laws of which they advise. Ideally, users would not have to bear the costs of use of these mechanisms.

Several respondents did not go so far as to require the creation of new institutions, but limited themselves to the idea of *networks*. Several respondents mentioned the need to improve the existing networks (judicial and notarial) and make them better known among the legal professions; others proposed that the existing networks become more active. Other respondents again proposed to create a network of independent experts on foreign law, or just expressed the wish to have better links with their foreign colleagues. In fact, it appears a valid option to effectively reinforce the **European Judicial Network**. There is certainly benefit in permitting a judge of one Member State to consult a judge of another Member State, particularly on a subject in which the latter, but not necessarily the former is specialised. Responsibility for deciding the issue must nevertheless remain with the requesting judge, who is free to accept or reject the advice which the requested judge provides.

The last proposal that was mentioned by several respondent concerns **education and training** in foreign law. While some respondents stressed the need to open up legal education in general in order to include foreign law, others just pointed towards the need for training of lawyers and judges active in international cases.

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