Groupe européen de droit international privé

European Group for Private International Law

20e réunion

Copenhague, 17-19 septembre 2010

Reflexions on the Application and Proof of, and Access to, Foreign Law

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Introduction

At its 1995 Geneva meeting, the Group discussed the question of the status ("condition") of foreign law on the basis of a report drawn up by Trevor Hartley, *Pleading and proof of foreign law* (1), which provided a synthesis of a comparison of the laws of Germany, Switzerland, France and England, and a short discussion on the possible impact of the Rome Convention on the Law Applicable to Contractual Obligations (2). The Group discussed the differences between the various legal systems as regards the applicability and proof of foreign law, and ways to overcome these differences, including by way of improvements to international cooperation. We also discussed the question ("*delicate*") of the impact of harmonisation of PIL on these differences, and made a distinction in that regard between international treaties and community law. Whereas conventions would generally not seem to have an impact on domestic procedure (except where reciprocity comes into play), we concluded that community law may well have such an impact in the light of the "*effet utile*" that EU Member States must uphold).

The latter question is important and would probably deserve a fresh discussion on the basis of a special study.

> The Hartley report argued that despite the Rome Convention's mandatory language, it followed from Art 1 (2) (h) jo Art 14 (3) – from which it appears that "*the rules on pleading and proof are clearly part of the law of evidence and procedure" – that they "cannot be affected by the Convention. Though there is no legal obligation on Contracting States to apply foreign law ex officio, it might be thought that failure to do so could undermine the objectives of the Convention. The most important objective, however, is to give the parties freedom to choose the governing law. Since this is meant to be for the benefit of the parties, it would seem perverse for a court to apply foreign law when neither of them wanted it to do so. It is suggested, therefore, that the spirit of the Rome Convention does not require ex officio application of foreign law in those cases in which the parties chose, or could have chosen, the applicable law*". Articles 5 and 6 do not alter this conclusion, because "*once litigation has begun, [the consumer's or employee's] economically weak position would hardly prevent him from pleading foreign law; so there is no reason why the court should be required to apply foreign law ex officio.*" The Hartley report admits however, that in exceptional cases, arising under Art 7(1) or 3(3), "*the spirit – though not the letter – of the Convention might make it desirable for a court to apply foreign law of its own motion.*" Meanwhile this question has become more controversial, even among British PIL experts. While Dicey, Morris & Collins (2006, 9-011) relying on the Giuliano-Lagarde Report [1980] O.J. C282, pp. 35-36, take a view similar to the Hartley report, Fentiman, International Commercial Litigation (2010, 4.89-4.90, see also 4.04) calls this position (at 4.90] "doubtful": "*How foreign law is pleaded is no doubt procedural, but whether foreign law must be pleaded , and thus whether English law may be substituted as the applicable law, is a choice of law issue, and as such is governed by the choice of law rules of the Convention and the Regulation [which are of a mandatory character]*". Hausmann , "Pleading and Proof of Foreign Law – a Comparative analysis" in The European Legal Forum (E) 1-2008, 1-14 (at I-7) agrees with Hartley/Dicey with respect to the cases where the parties chose, or could have chosen, the applicable law, but not in the case of mandatory protection of employees and consumers. He admits, though, that "*the practical effect of this solutions is limited, however, because under the Brussels I Regulation the jurisdiction in consumer and labour law cases normally lies with the courts in the State of the weaker party's residence which apply their own mandatory law, not foreign law*".

The instant paper aims to provide an overview of the work currently undertaken at the global and community level (I), to present the main conclusions of recent comparative work on the questions of the applicability and proof of, and access to, foreign law – in particular a recent detailed comparison for the EU members – (II), and to raise a few questions for discussion by the Group on possible ways to further overcome the current disparities (III).

I. Work Being Carried Out at the Global and the Community Level

A. Hague Conference on Private International Law

It was at the suggestion of the UK delegation that the Hague Conference decided in 2006 to undertake work on "the development of a new instrument for cross-border co-operation concerning the treatment of foreign law." The word "treatment" concealed an ambiguity: the British (Scottish) ambition was to harmonize the rules on the status, i.e. the applicability or at least proof of foreign law; other delegations were thinking more in terms of facilitating access to the content of foreign law through improved international administrative and/or judicial cooperation, without touching on domestic rules on procedure or evidence. The Permanent Bureau undertook a comparative study on both the status of and access to foreign law of 18 carefully selected jurisdictions (4), as well as on international instruments (5), and on the basis of this study a group of some 20 prominent experts was convened. The conclusion of the group was that, at least at the global level, there was no likelihood of success for harmonizing comprehensively the treatment (i.e. the rules on applicability and proof of) foreign law. On the other hand, several experts felt that there was a need to improve access to foreign law, particularly in the areas of family and of commercial law. The group recognised that the existing multilateral mechanisms, in particular the 1968 European Convention on Information an Foreign Law (the "London Convention") and the 1979 Interamerican Convention on Proof and Information on Foreign Law (the "Montevideo Convention"), (1) were regional and not global in nature, (2) were not the subject of regular review, and (3) did not take into account modern means of electronic communication (6).

An extensive questionnaire was then prepared regarding, *inter alia*, the status of implementation and operation of treaties on proof of or information on foreign law, and the availability of free public access to information on the content of law, to which 30 Member States responded. The responses brought to light mixed views on the operation of the London Convention, and also the increasing practical importance of information available online (7).

This latter finding led the Conference to convene in 2008 a meeting of 27 top experts on global cooperation on provision of online legal information on national laws and private international law experts. This group concluded that the increasing accessibility online of legal materials enables the resolution of certain – although by no means all – questions on the content of foreign law, thus reducing to a certain extent the need for international legal co-operative machinery. On the other hand, this development poses in itself some challenges, in particular in cross-border situations, which would benefit from some common guiding principles or rules (8).

The conclusion which suggested itself in the light of this global research was that it looked promising to start work on a new global international instrument consisting of three parts:

> (a) Part I: Facilitating access to online legal information on foreign law. This part would focus on assuring the free accessibility of a country's main legal materials, particularly legislation, case law and international agreements (and potentially doctrine that would be important in civil law jurisdictions) for online publication and re-publication / re-use; it could possibly provide some guidance on realistic quality standards or best practices for such free access and online publishing, and perhaps the provision of a permanent body of experts to monitor the development of practical standards and / or best practices in these areas, also with a view to the compatibility or "interoperability" of global online publishing standards.
> (b) Part II: Cross-border administrative and / or judicial co-operation. This part would provide for the handling of requests for information in response to concrete questions on the application of foreign law in relation to a specific matter that arises in court proceedings (and possibly also in other contexts), and for which information available online is not sufficient.
>
> (c) Part III: A global network of institutions and experts for more complex questions. This part would address situations where there may be a need for accessing more in-depth information on complex legal questions in specific areas (e.g., insolvency or inheritance), or in the course of complex litigation that involves the interface of multiple areas of foreign and / or local law(s). Here, one might think of a series of networks of qualified organisations (bar associations, comparative law institutes, organisations of notaries and other specialists, whose services would not be free) facilitated via the Permanent Bureau.

Put differently, it looked like an attractive project to modernize the cooperative machinery of the London/Montevideo Conventions (Part II), with special attention to the increasing significance of digitalization and online availability of legal information (Part I), and to the need to deal with complex legal issues in specific areas (Part III). It might also be thought that improving global access to foreign law could set the stage for further harmonization of treatment of foreign law globally, for example because this would assist in easing procedural issues around proof of foreign law (9).

At this point, however, no final conclusion has been reached within the Conference on future work based on the extensive research done.

B. European Union

According to Rome II, Art 30:

> 1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:
> (i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;…

and according to the relevant Commission Statement on this Review Clause:

> "*The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary*. (10)"

Art. 30 (1) (i) Rome II stands alone – a similar provision is lacking in Rome I, and indeed in all other Regulations adopted or in the pipeline (11). However, the project "Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe," awarded by the European Commission in 2008 to a team composed of different European academic and legal institutions directed by *José Luis Iglesias-Buhigues*, Professor of Private International Law at the University of Valencia has a wide coverage and covers, in principle, the whole field of civil and commercial law. The Final General Report surveys the situation in all EU Member States. In particular it includes the following topics: Factual/Legal Condition of Foreign Law Before National Courts; Introduction of Foreign Law in the Case; Ascertainment of the Content of Foreign Law; Application of Foreign Law, both by the Courts and by Non-Judicial Authorities; and Conclusions with Basic Principles. The Final General Report was delivered to the European Commission at the beginning of September 2010 (12).

Meanwhile, the European Commission had invited a Tender to submit a new Study on Foreign Law and its Perspective for the Future at European Level (13), again aimed at making a comparative analysis of the situation in the 27 Member States:

> *"as regards the way in which foreign law is treated in the different jurisdictions and the effects and consequences of the different models; the extent to which foreign law is applied by judicial and extrajudicial authorities in practice and the practical difficulties encountered in this area. The study should also give an overview of access to information on the content of foreign law, including what means are available, difficulties encountered and the need for improvements at the EC level." The study should give statistics over the period 2005-2009 on the application of foreign law in civil and commercial cases. The study should "cover early experience on the application of [Rome II] and analyse whether general conclusions are confirmed in the application of Rome II." Regarding access to foreign law the study should "describe the means used to access information on the content of foreign law by judges, extrajudicial authorities, legal professionals and, as far as possible, the public at large; the functioning of the [London Convention and its Protocol] in respect to civil and commercial matters among the Member States of the EC; as well as the difficulties in searching for access to the content of foreign law at the litigation or pre-litigation stage."*

II. Recent Comparative Work on the Questions of the Applicability and Proof of, and Access to, Foreign Law (with a focus on the Valencia Report)

Questions of the applicability and proof of, and access to, foreign law have been studied by a number of scholars, including *Yates* (14), *Hartley* (15), *Jänterä-Jareborg* (16), *Hausmann*,(17) *Fentiman* (18), *Geeroms* (19) and many others. These various studies approach the topic from different angles, applying various classifications. Often they start from the difference between the "fact approach" and the "law approach"; some differentiate between an active and passive approach of the courts to foreign law; they may make a distinction according to *ex officio* application of foreign law, or application at the parties' request; or to the civil law or the common law approaches with further differentiations based on legal families, etc. The whole picture is rich and complex.

The Feasibility Study on the Treatment of Foreign Law summary tables carried out by the Hague Conference on Private International Law apply the following subdivisions to the issues:

I. Nature of Conflict of Law Rules: Mandatory or Optional ("*fakultatives Kollisionsrecht*")
II. Ascertaining foreign law: (a) who and for which issues? (b) (i) fact or law; (ii) means; and (iii) costs
III. Effects of failure to establish foreign law (substitution law)
IV. (a) Review of application of conflict of law rules; (b) Review of application of foreign law

The Valencia Report starts from the historical classification between “law as law” and “law as a fact”, but finds that a third category exists in which foreign law is neither clearly considered as law nor as pure fact, but is treated as possessing a hybrid nature. The Report basically differentiates among:

- Countries endorsing the legal nature of foreign law, including Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Slovakia, Slovenia and Sweden (20) (Romania could also be included into this category, although some suggest that it follows a hybrid approach);
- Countries endorsing the factual nature of foreign law, including the United Kingdom, Malta, Cyprus and Ireland, and also Luxembourg and Spain (21);
- Countries endorsing the hybrid nature of foreign law, including Latvia, Lithuania and the Netherlands. (22)

The Report points out that, in principle, the legal or factual nature accorded to foreign law directly influences its procedural treatment before national judges. Questions of law are considered by the court *ex officio*, they are subject to the principle “*iura novit curia*”, and to judicial review by upper courts(23). Questions of fact, on the other hand, are beyond the scope of judicial notice and therefore must be pleaded by the parties. They are subject to evidence provided by the parties and are not subject to review by the upper courts. Consequently the classification assigned to foreign law, theoretically, dramatically affects the role played by the parties and judges with regard to both the pleading and the ascertainment of the content of foreign law. (24)

Although most EU Member States uphold the legal nature of foreign law, the study reveals that the reality is much more complex than the theory. When foreign law is applied by national courts, these three approaches – as the Valencia Report stresses – tend to merge and no straightforward classification can be fully upheld (25).

Global research in this area carried out within the Hague Conference on Private International Law concerns itself with eleven jurisdictions outside the EU and with seven representative EU countries (Finland, France, Germany, the Netherlands, Spain, Sweden, and the UK), while the Valencia Report focuses entirely on the EU, and includes all EU Member States. This corresponds, of course, to the fact that the latter is a European research project funded by the European Commission. A question which deserves further discussion, however (see infra Part III), is whether measures improving the effectiveness of the treatment of foreign law can be contemplated within the framework of the European Union only, or if global measures may be required for any EU system to function properly.

In this paper we would like to draw attention to some selected problems of the comparative treatment of foreign law and illustrate these problems by examples drawn from various EU Member States. This non-exhaustive survey follows the subdivision of the Hague Conference on Private International Law Feasibility Study summary tables, mainly focussing the first two categories (I: Nature of conflict of law rules, and II. Ascertaining foreign law), which have the greatest practical relevancy. As will become evident from this survey, it is extremely difficult, even at the European level, to find common denominators.

2.1. Nature of Conflict of Law Rules: Mandatory or Optional

The Valencia Report notes that as a matter of principle, conflict of law rules have a mandatory character in many EU Member States, namely in Austria, Belgium, Bulgaria, Czech Republic, Estonia, Germany, Greece, Hungary, Italy, Poland, Portugal, Spain, Slovakia, Slovenia, or the Netherlands. Conflict rules lack mandatory character in some other EU Member States like Luxembourg, Cyprus, Ireland, and the United Kingdom. No definitive answer was provided for Malta. (26)

The Hague Conference Feasibility Study notes that, for example, in Germany, courts must introduce foreign law if the parties fail to do so, except where parties contractually agree to applicable law (which is not always possible) or where the same result can be reached through an application of the *lex fori*. (27) In the United Kingdom the court will not introduce foreign law *ex proprio motu*; a party wishing to rely on foreign law must plead it like any other fact. (28) In Spain, conflict of law rules have to be applied *ex officio* by the judge. In principle, this is the same regardless of whether the conflict of law rule is contained in an internal instrument, Community text or international convention. (29) These are just a few examples of the range of approaches to this issue taken within EU Member States.

The Valencia Report further notes that in some other EU Member States the character of conflict of law rules depends on the nature of the issues, as is the case for example in France, Denmark, Finland and Sweden (30). For example in Sweden “indispositive” and “dispositive” cases are distinguished, and are, respectively, cases concerning rights of which the parties may not dispose (i.e., where a settlement is not permitted) and cases where the issue is at the parties’ disposal, permitting a settlement. If in a dispositive case the parties choose to refrain from referring to foreign connecting factors, the court cannot apply the conflict rules and foreign law on its own initiative. On the other hand, issues of paternity (31) are indispositive and the law of the child’s habitual residence will be applied *ex officio* by the Swedish court, irrespective of the parties’ wishes. (32)

The authors of the Valencia Report suggest, referring to *Fentiman* (33), *Hausmann* (34), and *Jänterä-Jareborg* (35), that conflict of law rules embodied in international conventions, and EU Regulations

are considered to be mandatory, and therefore must be applied by national courts, irrespective of roles assigned to the court or to the parties. (36) Under this proposed viewpoint, conflict of law rules contained in EU instruments would be considered mandatory in any case and national courts would indeed have a "duty to apply foreign law" under these rules, irrespective of traditional approaches of national courts. However, as was noted above, this conclusion is not a universally shared opinion, and represents a matter which our Group may wish to discuss in more detail. (37)

2.2. Ascertaining Foreign Law: Who or for Which Issues?

Who pleads and proves or ascertains foreign law is, again, normally linked to the factual or legal condition assigned to foreign law. Thus, for example, according to the Hague Conference Feasibility Study, in Germany, courts must ascertain relevant foreign law rules as they are applied in the foreign jurisdiction. (38) On the other hand, in the UK, parties wishing to rely on foreign law bear the burden of proving the contents of the relevant foreign law, although courts may take judicial notice of the laws of England, Scotland and Northern Ireland (39). In the Netherlands, courts must ascertain relevant foreign law, but are allowed to seek advice from the parties. Courts are not bound by the opinion or interpretation of parties regarding the content of foreign law, and parties need not prove the content of the relevant foreign law in the event of a defended action. (40)

As is pointed out by the Valencia Report, irrespective of the prevailing position as to the condition assigned to foreign law, manifold situations exist within EU Member States in relation to the role played by the judge and the parties towards ascertaining foreign law.

The Valencia Report notes that an interesting pattern is evidenced in certain EU Member States which take as a first principle the legal nature of foreign law, such as Scandinavian countries and France. (41) In these jurisdictions the role played by the courts and the parties as regards the pleading and proof of foreign law is very much dependent on the mandatory or non-mandatory character of conflict of law rules and on the basis of the availability of dispositive and indispositive rights. (42) In cases in which conflict of law rules must be compulsorily applied by the court, the position of the parties becomes rather passive in relation to the pleading of foreign law, whereas in those situations where the choice of law rule is deemed facultative, parties generally play a more active role in the pleading and ascertainment of foreign law. (43)

The Valencia Report notes that in countries endorsing the factual nature of foreign law the attitude of courts is commonly rather passive. However, in Spain, despite the factual condition accorded to foreign law, under the Spanish CC, Spanish conflict of law rules are applied by courts and authorities *ex officio*. That is, courts must apply Spanish conflict rules on a mandatory basis to all situations in which a foreign element is deemed to exist. Therefore it is solely for the court to establish whether foreign or domestic law should be applied to the dispute, on the basis of the facts provided by the parties. (44) Parties then bear the sole responsibility of proving the content of foreign law. (45)

The Valencia Report stresses that European legal reality very seldom—almost never—reflects a straightforward implementation of the theoretical classification first made in favour of the legal, factual or hybrid nature of foreign law. The Report adds that contradictions only increase when one adds two additional issues, namely, the active cooperation, in practice, between the parties and the courts with regard to the ascertainment of foreign law and the application of the principle "*iura novit curia*." (46) The Report finds that again, while jurisdictions may embrace the theory of *iura novit curia*, which is normally linked to a classification of foreign law as law, procedural systems and practices within jurisdictions often reflect the awareness that it may be difficult for a national judge to "know the law" of a foreign jurisdiction, and in a number of jurisdictions, the legal status of foreign law, counter-intuitively, does not necessarily lead to a presumption of *iura novit curia*.

2.3. Ascertaining Foreign Law: Fact or Law

As has already been mentioned, the Valencia Report identifies a third category (*tertium genus*) of a hybrid nature, under which foreign law is neither clearly considered as law nor as pure fact. (47)

After examining in detail approaches taken to the nature of foreign law in all EU Member States, the Report arrives at the conclusion that there is a lack of a valid and effective response to this diversity. The analysis of the different national solutions coexisting in the territory of the EU reveals that in many cases, ascribing legal, factual or hybrid nature to foreign law has a very relative value and lacks clear legal foundations on too many occasions. Again, the results of the practical workings of the national systems do not usually elicit a straightforward extrapolation in relation to some questions very much linked to the procedural treatment of foreign law before courts: for example, the pleading of foreign law, the ascertainment of its content, the validity of the "*iura novit curia*" principle, and the functioning of the whole appeal system as to judgments rendered by lower courts which have applied foreign law. (48)

2.4. Ascertaining Foreign Law: Means and Costs

The diversity among jurisdictions of means employed and costs borne in the ascertaining of foreign law is large. For instance, according to the Hague Conference Feasibility Study, in the Netherlands, the means of ascertaining foreign law include: using a court-appointed expert or party-appointed experts; judicial knowledge; seeking assistance from the International Legal Institute in The Hague, the T.M.C. Asser Institute for International Law; and consulting foreign legislation, case law and

academic writings directly. Where judicial knowledge is used or parties are ordered to provide information regarding the content of foreign law, the court incurs the costs of ascertaining the foreign law. However, where an expert is used, costs will be borne by the unsuccessful party. Where the London Convention is used, costs for ascertaining the relevant foreign law will be borne by the replying Contracting State. (49)

Means of ascertaining the relevant foreign law in France include: seeking assistance from the parties, who provide *certificats de coutume*; referring to a court-appointed expert; referring to the *Bureau de l'entraide civile commerciale et internationale* or to the *Centre d'information et de renseignements juridiques internationaux*; using (extremely rarely) the London Convention; and, consulting foreign legislation, case-law and academic writings directly. The cost of establishing the content of foreign law is borne by the parties. Where the court ascertains the content of the applicable foreign law, either through the information services of the Ministry of Justice or under a legal assistance convention, the establishment of the foreign law is free to parties. Parties, however, have to bear the cost of providing *certificats de coutume*, by far the most common method of establishing the content of foreign law. Legal aid can be obtained. (50)

2.5 . Effects of Failure to Establish Foreign Law (Substitution Law)

Again, both the Hague Conference Feasibility Study and the Valencia Report note a diversity among jurisdictions—and often inconsistencies within a given jurisdiction— with respect to the consequences of failing to adequately ascertain or prove the content of foreign law, whether the burden of ascertainment falls on the judicial authority, parties to litigation, or otherwise.

For instance the Hague Conference Feasibility Study notes that in Sweden, there is a "tendency" to apply Swedish law (i.e. lex fori) where there is a failure to establish foreign law, but that some legal writers maintain that the effects (including potentially the dismissal of the case) of failure to establish foreign law should vary according to the circumstances of an individual case. (51) In the United Kingdom, Ireland, Malta and Cyprus, because of the factual nature of foreign law, lex fori will be systematically applied when the content of foreign law has not been adequately established by the pleading of parties. (52)

The Valencia Report further catalogues variations with respect to the resort to application of *lex fori* among judges in EU Member States, noting also that other alternatives to the application of *lex fori* in default of ascertainment of foreign law exist in a number of jurisdictions. These alternative solutions, however, tend to be "highly theoretical or isolated" or to "coexist with a vigorous trend in favour of the *lex fori*" and therefore lack application. (53) These alternatives may include the application of the law of a third state having a closer connection to the dispute, the application of what the court believes to be the content of foreign law, and a number of other solutions.

2.6. Application of Foreign Law

Finally, it is important to mention briefly the issue of how foreign law is applied by judicial authorities once its content has been ascertained by way of the relevant method. The Valencia Report notes that EU national modes of dealing with this "very difficult issue" and inconsistencies therein may affect the quality of justice rendered by European courts. (54)

The Report notes two main trends in the ways that EU Member States will apply foreign law in their national courts: 1) foreign law is applied as national law, taking into account the way it is interpreted and applied in the country of origin; and 2) foreign law is applied as foreign law, also taking into account the way it is interpreted and applied in the country of origin. The Report notes that in several Member States where foreign law should be applied in the same manner as it is applied in the country of origin, practice shows that sometimes the foreign law tends to be applied on the same basis as domestic law. Further, a number of other shortcomings in application of foreign law are noted, in particular as to consistencies in the ways of filling possible gaps existing in the foreign law.

2.7. Final Conclusions of the Valencia Report

The Valencia Report arrives at a number of final conclusions. Firstly, it points out that its comprehensive analysis of the current situation in the European Union on "the application of foreign law by judicial and non-judicial authorities depicts a highly unsatisfactory situation". Countries whose legal systems embody clear and certain rules regarding the treatment of foreign law by courts coexist with other Member States where either no explicit solutions are encountered or the solutions employed are a consequence of case law or academic interpretation. These latter solutions are almost unanimously inconsistent with the position taken concerning the theoretical nature of foreign law before courts. Further, in too many cases precedents are obscure, not well-settled, and usually subject to court or academic scrutiny and exceptions.

The existing differences are not only limited to the very relevant questions of the theoretical nature assigned to foreign law or of the respective roles played by parties and courts. Many other inconsistencies persist: for instance, the specific means available and employed to ascertain the content of foreign law, the issue of when and how foreign law is considered to be sufficiently proven, the consequences arising out of the lack of its proof, nuances in the way foreign law is applied, etc.

The authors of the Valencia Report are of the view that this situation undermines the on-going process of harmonisation of private international law and private law in Europe and frustrates the objectives of the several conflict of law rules drafted by the European legislator. It amounts to a high level of legal uncertainty and thus undermines the legal expectations of citizens in Europe. It increases legal risks and costs and can foster the final application of the *lex fori* by courts. These wide and lasting differences run against the principles of legal certainty, predictability and harmony of results, all of which are broadly accepted within the European Union. The authors of the Valencia Report thus assert that the current situation has a truly negative influence on both the operation of the EU system of private international law and on the consolidation of the European Area of Justice. (55)

The Valencia Report suggests a solution which corresponds to the current disparate situation and to the urgent need to unify—at least to a certain extent— the treatment of foreign law in Europe: namely, the drafting of some common, clear rules or principles on this issue. The Report suggests that this will not only provide European courts with the necessary tools with which to successfully address this problematic issue, but it will also provide European citizens with a higher level of legal certainty, make the functioning of the European Area of Justice more efficient, and enhance and make more effective the process of harmonisation of private international law and private law in Europe.

The Report is accompanied by a set of “Principles for a Future EU Regulation on the Application of Foreign Law” (or, the “Madrid Principles”), upon which a general European instrument on the ascertainment of content and manner of application of foreign law could be based. It is suggested that a Regulation seems to be the most suitable instrument to achieve the envisioned policy goals (see Annex I).

III. The Way Forward

Even if it were agreed that the rules on applicable law contained in EU (56) legislation are mandatory and must be applied *ex officio* by the courts in the EU, this would likely only be the first step in a range of measures that would be needed to ensure complete uniformity of application of these rules throughout the EU. One would have to consider interfering with entrenched practices of civil procedure, with both legal (e.g., consequences of failure to establish foreign law, review on appeal, etc.) and practical (e.g., means and costs, etc.) aspects relevant to the topic.

Where to end, or: where to start? And how dramatic is the current situation, in particular from the perspective of the parties?

> In his 1996 ICLQ article based on his GEDIP Report Trevor Hartley concluded that “*as far as the pleading and proof of foreign law are concerned, the legal systems of Europe may best be represented as a continuum, with Germany at one end and England at the other. Though the contrast between each country and its successor along the line may not be great, there is nevertheless a significant difference between countries at opposite ends of the scale. ....Nevertheless, the practical difficulties, even between England and Germany, should not be exaggerated. Parties do not take part in legal proceedings unless they hope to be successful, and litigants in English proceedings will usually plead and prove foreign law if its application would be in their interests. They will normally omit to do so only where they believe it to be the same as English law. The main exceptions occur where a party is unaware that foreign law is applicable, ignorant of its content or unable to prove it. Except where these circumstances exist, the English system will produce the same result as the German. Differences of outcome are most likely to occur, therefore, where the parties lack the resources to obtain good-quality legal advice and representation.*” (57)

Despite the fact that the Madrid Principles drafted by the Valencia Project look reasonable and useful in the longer perspective, we should be aware that it will not necessarily be possible to proceed radically in this sphere. It may be doubted whether the EU Member States will be interested and willing to participate in such a Regulation. This relates in particular to the common law EU Member States whose traditional rules would be most affected by these Principles but also to several other EU Member States which do not exactly follow the principle of *ex officio* application of foreign law by the national authority. Such a Regulation would comprise an intervention into the national civil procedure law and that Member States are rather sensitive regarding any changes of national law in this respect.

Arguably, therefore, as a first step, the most practical and reasonable approach would be not to take measures to impose or enforce across the board mandatory application of conflict rules and foreign law within the EU, but to facilitate access to the content of foreign law (including, as the case may be, foreign conflict of law rules).

The discussions within the Hague Conference have shown that this is, at this point, at the global level possibly the only feasible approach. The EU, as a Hague Conference Member, has been supportive of such work. The EU might consider making a special effort in the context of a Hague Conference initiative of this kind, since, to the extent that the applicable law rules contained in EU Regulations apply universally, i.e. whether or not the law designated is the law of an EU Member or of a non-EU State, the EU will need global cooperation to provide effective mechanisms for accessing and ascertaining the content of foreign law.

A first blueprint of such modern and effective mechanisms, based on input from expert meetings and practitioner consultations undertaken by the Hague Conference, has already been sketched out in this paper, above (see Part I A). This blueprint, in the form of a new three-chapter Hague Convention, although still in a preliminary draft form, may hold the promise of flexible, effective, and low-cost international mechanisms to share precise, quality information on the laws of national jurisdictions around the world. The blueprint envisages building on existing endeavours and networks and would improve upon existing models (such as the London Convention) to ensure the most prompt, accurate, and suitable information needed would be provided, while incurring minimal costs to governments. The proposed Chapter III, for instance, would likely work with established private international law research institutes and existing international and national bar associations to efficiently link up international experts in specified areas of private law, at no or very negligible costs to governments.

The proposed Chapter I of such a Convention merely enshrines existing basic standards of open publication and accessibility of national and regional laws found in practice, legislation and constitutions (58) throughout the world, within the frame of the inescapable modern reality of information technology and the Internet. The electronic publication of legal materials is often provided by academic or research institutes, who may embrace a "multiple stakeholder" funding model with minimal or no reliance on governmental funding. Regardless, most modern jurisdictions publish their principal laws online as a matter of course, and see the numerous benefits of doing so, not least that online publication is cheaper than print publication. We are definitely moving from a paper world to a digital world, also in this field. However, this new reality inevitably raises new questions as to standards that will need to be addressed, and experts working in this field have suggested that the Hague Conference could assist in this respect (for instance, by hosting or facilitating a standing global experts group on the topic).

There is no doubt that major international law firms already have their own informal networks and mechanisms for contacting experts on foreign law or garnering information on foreign law. However, from consultations with legal practitioners around the world, it is clear that there are a whole range of potential beneficiaries from the establishment of new mechanisms in this area, including non-judicial actors (such as notaries) and others who must, in a non-litigious context, deal with private international law and foreign law issues on a daily or weekly basis, not to mention lawyers practicing in small or medium-sized law firms or as sole practitioners. That judges in national jurisdictions around the world would stand to benefit from improved mechanisms in this area is evident.

Regarding a proposed Chapter II, the precise nature of cross-border cooperation that would be fleshed out has been, at this time, left intentionally vague, because it will need more discussion both at the international and the national levels. It could encompass either or both administrative or judicial cooperation mechanisms, such as the certication of state law arising in cases pending in another jurisdiction by the state's highest court as known in the USA. Indeed, the International Hague Network of Judges, developed under the auspices of the Hague Conference, and at present focusing on the area of international child protection, has provided the Permanent Bureau with a great deal of experience in the limitations and the potentials of direct judicial communications for the purpose of ascertainment of foreign legal information.

Conclusion

The topic of application and proof of, and of access to, foreign law is vast and complex. The Valencia report demonstrates great differences not only with respect to the status of conflict rules and of foreign law, and the role of the courts – or indeed non-judicial authorities – and/or the parties within the EU Member States, but also many other differences relating to means available to ascertain the content of foreign law, cost issues, the way foreign law is applied, and the effects of failure to establish foreign law.

If it were agreed that the conflict rules contained in EU Regulations are mandatory and must be applied by the courts and indeed by non-judicial authorities, and foreign law designated by these conflict rules must be applied *ex officio* by those courts and authorities, that conclusion would resolve the existing differences within the EU as regards the applicability of foreign law, at least in theory. But it would leave, and perhaps exacerbate, many other questions, in particular given the fact that these conflict rules of universal application.

A pragmatic approach, therefore, seems advisable. Perhaps, within the framework of the EU, the "appropriate measures" to be taken "if necessary" referred to in the Commission Statement on the Treatment of Foreign Law appended to the Rome II Regulation, should put the emphasis on developing mechanisms to facilitate access to foreign law. However, this will not resolve some of the most difficult problems for the Member States' courts and authorities, and the parties in this respect, i.e. the ascertainment of foreign law from jurisdictions outside the EU, in particular the USA, Latin America, Asia-Pacific, the Gulf/Middle East and Africa. In such cases, machinery developed by the EU to facilitate the access to foreign law, no matter how sophisticated, will not be enough. It would seem, therefore, that special efforts within the EU, aimed at providing uniform solutions for the ascertainment of foreign law, should best be made in coordination with a possible project on accessing foreign law in the context of the Hague Conference on Private International Law.

ANNEX I

“PRINCIPLES FOR A FUTURE EU REGULATION ON THE APPLICATION OF FOREIGN LAW

Prepared by the Members of the Team “European Union Action Grant Project – Civil Justice JLS/CJ/2007-1/03”

(Madrid, Colegio Nacional de Registradores de España, February 2010)

Principle I

A general European instrument on the ascertainment of content and manner of application of foreign law seems to be necessary. A Regulation seems to be the most suitable instrument to achieve this goal.

Principle II

This Regulation should have a broad scope and apply to both judicial and non-judicial authorities. Member States will provide a list of those non-judicial authorities covered by this Regulation.

Principle III

The Regulation should have a general scope of application notwithstanding the fact that third countries laws can be applied.

Principle IV

Application of foreign law should be made ex officio by the national authority, which must use its best endeavours to ascertain the content of foreign law.

Principle V

Any possible means of helping the national authority to ascertain the content of foreign law should be explored. Cooperation with other national authorities and/or the parties should be encouraged in order to ascertain the content of foreign law in a reasonable time and in a fair manner.

Principle VI

The content of foreign law should be ascertained in accordance with the Procedural Law of the national authority. The national authority may use, inter alia and in addition to the instruments set forth by international conventions, the information achieved through national and foreign public authorities; they can also ask for the assistance of experts and specialized institutions. The use of the European Judicial Network and other similar networks should be encouraged.

Principle VII

The ascertainment of foreign law does not exclude its non application on grounds of public policy.

Principle VIII

In those cases where the parties are entitled under national law to legal aid, such legal aid should extend to cover costs associated with the proof of foreign law.

Principle IX

If in the view of the national authority, a) there has been no adequate ascertainment of the content of foreign law in a reasonable time, or b) it is found that upon ascertainment of foreign law it is inadequate to address the issue in question, the lex fori shall be applied.

Principle X

Any decision or finding as to the content of foreign law, or for the purposes of paragraph 9 above, shall be open to review subject to national law. Specific grounds for review will be set forth by national law.

Principle XI

Conclusion of agreements with third countries as to the ascertainment of the content of foreign law should be encouraged. In particular, cooperation with intergovernmental organisations such as The Hague Conference on Private International Law should be supported.

Page d'accueil

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Dernière mise à jour le 13-09-2010