Reflections on the Application, Proof of, and Access to Foreign Law –
A brief update in preparation of the 2011 GEDIP meeting to be held in Brussels, 16-18 September 2011

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For the 2010 GEDIP meeting, the authors prepared a report on the above-mentioned subject (hereinafter "the 2010 Report"), which was discussed by the Group at its meeting in Copenhagen, 17-19 September 2010. The debate suggested that the issue of the treatment of foreign law concerned not so much its applicability *ex officio* but rather access to its contents. It seemed to the Group that divergences concerning the status of foreign law in the various EU jurisdictions – notably between systems belonging to the Romano-Germanic tradition and those of the common law – are not as radical as is sometimes suggested. With regard to access to foreign law, the Group noted that while a system of direct co-operation, *e.g.*, though liaison judges, to facilitate access to the content of foreign law could be envisaged, this was not a ready-made solution and was likely to raise some issues of its own. Moreover, EU law was likely to have an impact on the treatment of foreign law: some conflict rules contained in regulations or directives are mandatory, and the principles of effectiveness and equivalence that control the application of EU law by national authorities must be respected by those authorities.

The Group concluded that the topic justified further study, in particular in light of the Valencia Report discussed in the 2010 Report and, specifically, in the context of the report to be prepared by the European Commission on the application of Rome II. It was decided to constitute a sub-group on the matter, consisting of M. Bogdan, H. Gaudemet Tallon, R. Morse, M. Pauknerová and H. van Loon (co-ordinator).[1]

The following is a short update of the 2010 Report, intended to permit a brief discussion at the 2011 Brussels GEDIP meeting, for which the authors are solely responsible.[2] In the absence of major new developments, the sub-group has not yet been convened. Depending on further developments in the first half of 2012 (see below), a fuller discussion could be envisaged at GEDIP's 2012 meeting.

While the Valencia Report was published earlier this year,[3] and the study of the *Institut de droit comparé* in Lausanne commissioned by the European Commission has been completed but not yet published – it will first be submitted for comments to the European Parliament, the European Council and the European Economic and Social Committee – the Commission has not

[1] See *Compte-rendu des séances de travail, Ch. IV, Problématique de la preuve et de l'accès au droit étranger* ; the 2010 Report appears in Annex IV of the *Compte-rendu* (accessible at http://www.gedip-egpil.eu/reunionstravail/gedip-reunions-20-fr.htm).
[2] We have benefitted from comments made by Michael Bogdan and Marc Fallon on an earlier version of this note.
[3] See C. Esplugues, J.L. Iglesias, G. Palao (eds.), *Application of Foreign Law* (Munich: Sellier, 2011), xxxiv + 409 pp.

been in a position to submit its report due on 20 August 2011 (Art. 30 of Rome II) on the application of Rome II, including "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". The Commission intends to do so by the middle of 2012.

The Commission kindly permitted advance consultation of the Synthesis Report including its Executive Summary.[4] It is interesting to see that this Report, while confirming the findings of the Valencia Report concerning the heterogeneity and specificity of the national norms concerning or relevant to the application of foreign law in civil matters, tends to draw the opposite conclusion from this, namely that it would *not* be possible to achieve a uniform application of foreign law in all EU Member States by means of uniform EU measures. Any such rules or procedures would have different effects in each Member State in to which they would be introduced. Therefore, different measures would need to be adopted specifically for individual legal systems. While the report does not exclude an EU instrument, it suggests such an instrument should be limited to EU conflict rules and the law designated by such rules. Also it should not necessarily have to provide for application of foreign law *ex officio*, given that the relevant EU instruments mostly permit the parties to choose the law of the forum as the applicable law. As noted, however, the EU organs have not yet determined their position with regard to the conclusion of the Lausanne study.

As far as developments at the Hague Conference on Private International Law are concerned, the Council on General Affairs and Policy of the Conference, at its April 2011 meeting, could not agree on any immediate next steps to be taken and decided that "the Permanent Bureau should continue monitoring developments but not at this point take any further steps in this area, and to revisit this issue at its next meeting".[5] Preceding the next meeting of the Council, in February 2012 a joint three-day EU-Hague Conference meeting will be held in Brussels on access to foreign law. At this meeting new light may be shed on the need for, and modalities of, any new instrument or practical tool to further international co-operation in this field.

Pending further consultations within the EU and the Hague Conference, we suggest that the Group at its Brussels meeting continues its discussion on the impact of EU law on the treatment of foreign law. As pointed out in the 2010 Report, this has become a controversial issue in legal literature. If the Group could agree on a common position, this would clarify the more general debate on the treatment of foreign law.

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[4] *Foreign law and its perspectives for the future at the European level, Synthesis Report with Recommendations*, 81 pp.

[5] See Conclusions and Recommendations adopted by the (2011) Council, accessible at http://www.hcch.net/upload/wop/genaff_concl2011e.pdf .

Clarification of this issue is also relevant in the context of the *Embryon de règlement portant code européen de droit international privé*, proposed by Paul Lagarde, which is also on the agenda of our Brussels meeting, and which contains, in its Chapter III "*Conflits de lois",* a number of provisions concerning the application of foreign law. In particular, according to draft Article 133:

"Le contenu du droit étranger applicable en vertu de la présente loi est établi d'office par le juge, qui peut requérir la collaboration des parties.
[En matière patrimoniale] les parties peuvent d'un commun accord renoncer à l'application du droit étranger au profit du droit du for.
Le droit du for est applicable lorsqu'il est manifestement impossible d'établir le contenu du droit étranger."

This proposal appears to be limited to the application of foreign law under the conflict of law rules that will form part of the *Embryon ("applicable en vertu de la présente loi"i)*, and not to extend to the treatment of foreign law generally, including where designated by national conflict rules. If the Group were to reach a conclusion on the impact of EU law on the treatment of foreign law, in particular on its applicability *ex officio* when designated by EU conflict rules, this may have a bearing on the draft provision, in particular its first paragraph, or its rationale.

The exclusion of "evidence and procedure" from the scope of EU regulations

The short way to deal with the issue is to look for the solution in the exclusion of "evidence and procedure" from the scope of EU conflict of law regulations. This exclusion appears in Article 1(3) of both Rome I and Rome II, and was preceded by Article 1(2)(h) of the 1980 Rome Convention. It is subject, in both cases, only to the Regulation provisions on burden of proof (and, in the case of Rome II, also on formal validity).

For some UK authors this exclusion decides the question. According to Dicey, Morris and Collins (2006, 9-011) referring to Article 1(2)(h) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations, "… it is apparently the case that whether a particular rule belongs to this category [i.e. evidence and procedure] is a matter for the law of the forum."[6] The fourth supplement (2010, S35-186), in its comments on Article 1(3) of Rome II, is less decided: "First, the exclusion of evidence and procedure *seems* to mean, that English practice in relation to the pleading and proof of foreign law continues to have effect. Secondly, while characterization of matters relating to evidence and procedure is primarily a matter for national law, it is possible that the European Court will regard itself as competent to determine

[6] As Dickinson in *The Rome II Regulation* (2009, 14.57) notes, however, Art. 1(3) does not designate the *lex fori* as applicable to evidence and procedure, but leaves the matter to national private international law.

the role and scope of evidence and procedure within the framework of the Regulation."[7] This is obviously a question the Group may wish to discuss.

Rome I and, in particular, Rome II provide expressly, and significantly, that certain matters that in the common law systems are, or were previously, characterized as procedural, are part of the applicable law (e.g. assessment of damages, limitation statutes, burden of proof)[8]. However, does it follow that, apart from these matters, characterization of any other matter relating to evidence and procedure is "primarily a matter for national law", so that national conflict rules apply, which may, or may not lead to the application of the *lex fori*? Rather, "evidence and procedure" should be understood as *autonomous* notions with a uniform meaning independent of the forum's notions.[9]

It is also to be noted that no exclusion of "evidence and procedure" appears in the chapters on applicable law contained in Rome III (Council Regulation 1259/2010 on enhanced co-operation in the area of the law applicable to divorce and legal separation[10]), nor in the proposed Regulations (1) 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, (2) on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and (3) *idem* of property of registered partners. All of these contain rules on choice of law by the parties and in the absence of such choice. No explanation is given for the absence of the exclusion in these texts.

It would therefore seem that it is not possible to conclude from the exclusion of "evidence and procedure" in Article 3(1) of Rome I and II that the treatment of foreign law is left (primarily) to national law. Rather, the reasoning should be based on general EU principles.

Procedural autonomy and its qualifications

As Harry Duintjer Tebbens has pointed out,[11] the starting point for such an analysis should be the "well-established principle of procedural autonomy of the member States in implementing subjective rights conferred by EU law", qualified by the principles of equivalence and

[7] Emphasis added.
[8] See on the significance of this step in particular for international tort litigation from an "Anglo-Common Law perspective", E. Schoeman, "Rome II and the substance-procedure dichotomy: crossing the Rubicon", in [2010] *Lloyd's Maritime and Commercial Law Quarterly*, vol 81, pp 81-94,
[9] *Cf.* the detailed analysis in Dickinson, *op. cit.* 14.57. Of course, at this point, in the absence of case law by the ECJ, the contours of these autonomous notions remain to be determined.
[10] Effective 1 July 2012.
[11] H. Duintjer Tebbens, "New Impulses for the Ascertainment of Foreign Law in Civil Proceedings: A question of (inter)networking", in K. Boele-Woelki, T. Einhorn. D. Girsberger and S. Symeonides (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (Eleven Schulthess, The Hague, 2010), pp. 636-652, in particular Ch. 5, "The Treatment of Foreign Law in the European Union".

effectiveness. The leading case here with regard to civil proceedings is *Van Schijndel en Van Veen*,[12] where the Court ruled:

"[…] 17. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law […]

18. The Court has also held that a rule of national law preventing the procedure laid down in Article 177 of the Treaty from being followed must be set aside […]

19. For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.

20. In the present case, the domestic law principle that in civil proceedings a court must or may raise points of its own motion is limited by its obligation to keep to the subject-matter of the dispute and to base its decision on the facts put before it.

21. That limitation is justified by the principle that, in a civil suit, it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. That principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas. […]"

Although the concept of *procedural autonomy* as defined by the Court is not crystal clear, and some have contested the very principle,[13] it is particularly relevant in the context of determining the impact of conflict rules contained in EU derived law. This is so because their impact in individual EU Member States will depend not on a single but on a variety of factors, which together shape and determine the operation in practice of each EU Member State's civil procedural system within which the EU conflict rules will operate.

[12] ECJ, 14 December 1995, C-430/93 and C-431/93, [1995] ECR I-4705, and *cf.* ECJ, 14 December 1995, Peterbroeck, Van Campenhout & CIE SCS v. Belgique, C-312/93[1995] ECR I-4599. See also Joined Cases C 222/05 -225/05, J. van der Weerd and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit, ECJ 7 June 2007, [2007] ECR I-4233.

[13] See M. Bobek, "Why There is No Principle of 'Procedural Autonomy' of the Member States", in B. de Witte and H. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2011)

As the Lausanne Institute report emphasises, the interaction between conflict of laws (in general) and civil procedure has several aspects:

- It starts with the judicial approach to the foreign element in the case that may lead to the application of foreign law. A timely detection of relevant foreign elements may condition the efficient application of the conflict rule and the foreign law designated thereby as much as the binding force of the conflict rule, or the foreign law, itself. Must the judge discover the foreign element *ex officio*, or is this left to the parties? In the latter case, if the facts do not disclose any foreign element, the law of the forum will apply whether or not the judge must *ex officio* apply the conflict rule (or the foreign substantive law designated thereby).
- A second aspect, then, is the procedural status of the conflict rule itself (mandatory or not, vis-à-vis the courts and the parties).
- A third concerns the procedural status of the foreign law designated by the conflict rule.
- A fourth, the procedural regime of ascertaining foreign law (questions of burden of proof, admissibility of proof, ways of accessing foreign law, costs).
- A fifth relates to the consequences of failure to determine foreign law.
- A sixth has to do with the role of appellate courts.
- A seventh concerns the specific procedures for non-judicial authorities: notaries, public registry officers, consular officers, etc.

Some of these aspects have deep ramifications in the civil procedure system of the Member State concerned (*e.g.*, the degree of its adversarial versus inquisitorial nature).

Equivalence

It would seem that *equivalence* of application of domestic and EU conflict rules, or of the substantive foreign laws designated by such rules, is not the problem. On the contrary, any divergences in the application of EU conflict rules (and of foreign law) among EU Member States, are likely to be the result of *assimilation* with the application of domestic conflict rules (and of foreign law) under the respective civil procedure systems of the Member States, and not of any discrimination favouring national conflict rules over EU conflict rules. All EU States dispose of domestic codes or systems of PIL and / or international civil procedure.[14]

Effectiveness

The real issue, therefore, is whether the principle of *effectiveness* of (conflict provisions of) EU law qualifies the principle of procedural autonomy in respect of EU rules on conflict of laws.

[14] The 1992 Osnabrück Colloquium on the Outlook for PIL held shortly after the fall of the Berlin Wall, had already demonstrated the remarkable ideological resistance of PIL traditions in Eastern Europe under Soviet domination, see C. von Bar (ed.) *Perspektiven des Internationalen Privatrechts nach dem Ende der Spaltung Europas* (C. Heymans, Cologne, etc, 1993).

A common feature of many EU conflict rules is the wide room they leave for party autonomy. The parties may generally – subject to certain restrictions and exceptions – regulate the substance of their legal relationships by designating the applicable law, not only in the field of contracts under Rome I but also of non-contractual obligations in the context of Rome II, and, in the future, in respect of successions and matrimonial property and even in respect of divorce or judicial separation under Rome III – a novelty for a number of EU national PIL systems. The efficiency of rules based on party autonomy will essentially depend on the use made of them by the parties and the advice of practitioners (lawyers, notaries, mediators, etc). The "public interest" is not involved, at least not in the individual case (with regard to limitations to choice of law by the parties and the protection of weaker parties see below). There are ways to stimulate, or educate, the parties and their advisers to make wider use of party autonomy, but this is not the task of the civil procedure system. This conclusion is reinforced by the fact that the choice of law offered by EU law generally includes the law of the forum (Rome I and II; Rome III and the Maintenance Regulation, via the 2007 Hague Protocol, even systematically allow a choice for the *lex fori*). To the extent that the parties may opt for the *lex fori*, or the combination of jurisdictional rules and choice of law rules leads to the application of the *lex fori*, the question of the efficiency of the conflict rule becomes almost a non issue.

Freedom of the parties to designate the law presumes that they agree to that choice or at least that a choice of law made by one party is not contested (as in the many default cases). Where that is not the case and the objective EU conflict rule applies, there may be a risk, depending on the national procedural system, that this rule and the foreign law designated by it may not be applied. But again, it is up to (one of) the parties to raise the applicability of the foreign law. Provided that under the national procedural system the parties have that opportunity – as they generally have in the civil procedural systems of the EU Member States – the principle of efficiency does not, it would seem, require national courts to raise pleas based on EU law of their own motion. As the ECJ puts it in *Van der Weerd*:

"41. It follows that the principle of effectiveness does not, in circumstances such as those which arise in the main proceedings, impose a duty on national courts to raise a plea based on a Community provision of their own motion, irrespective of the importance of that provision to the Community legal order, where the parties are given a genuine opportunity to raise a plea based on Community law before a national court. (…)"

Interestingly, the Lausanne team has made a preliminary study of the application of Rome II. Obviously the number of cases is still limited, but the study, which covers Bulgaria, Finland, Germany, the Netherlands and the United Kingdom, found no evictions of the applicable law in favour of the *lex fori*. Significantly, several of the UK cases concerned traffic accidents – which are specially mentioned in Article 30 (review clause).

The words in *Van der Weerd*, *"Irrespective of the importance of that provision to the Community legal order, where the parties are given a genuine opportunity to raise a plea based on Community law before a national court."* also seem to include the case of mandatory conflict rules, in particular those protecting weaker parties such as consumers and employees. But this is certainly a matter that deserves further discussion by the Group.

In this regard, the principle of effectiveness would definitely be jeopardised if the mandatory *jurisdictional* provisions of, for example, Brussels I in respect of weaker parties were not applied correctly. These jurisdictional provisions, precisely because they generally provide the weaker party to access the court of its residence, are clearly concerned with the "opportunity to raise a plea based on Community law before a national court." But provided that these jurisdictional provisions are respected,[15] and the weaker party has been given access to the court of its residence, then, in principle, the mandatory protective rules of the *lex fori* will be applied. And if, exceptionally, a foreign law should be applied, as Trevor Hartley has observed, that party will have the right to raise its applicability.[16]

But one may have a different view, and, with reference to *Van Schijndel* § 21*,* take the view that (1) the limitations of EU conflict of law provisions with respect to the freedom of the parties to designate the applicable law and (2) the protection of weaker parties provided by EU conflict rules are, or may be, matters of public interest such that court intervention with regard to jurisdictional provisions is not enough, and court intervention is also required with regard to conflict of law provisions.[17] It is not obvious, however, how this position can be reconciled with the case law of the ECJ, including *Van der Weerd.*

The tentative conclusion would seem that given the broad scope that EU conflict rules provide to party autonomy, and, in other cases, the fact that the parties, including weaker parties, generally have the opportunity to raise the applicability of the conflict rule and of the foreign law designated by it, the principle of effectiveness does not impose general restrictions on the civil procedure systems of EU Member States.[18] As Harry Duintjer Tebbens concludes: "At present, the actual impact of EU choice-of-law rules appears tied to the way each member State's procedural system treats the domestic counterparts of those rules. (…) On the other hand, if it were demonstrated that the lack of uniform procedural treatment constitutes a

[15] See with regard to consumer protection, ECJ, 27 June 2000, C-240/98 (Océano Gruppo v. Roció Murciano Quintero), on the interpretation of Council Directive 93/13/EEC with regard to an unfair jurisdiction clause; ECJ 12 May 2005 (Société du Péloux v.Axa Belgium and others), on the effect of a jurisdiction clause conforming with Art.12 (3) of the 1968 Brussels Convention as amended, on a weaker third party who has not subscribed to such a jurisdiction clause; and ECJ, 6 October 2009, C-40/08, (Asturcom v. Christina Rodriguez Nogueira), again on the interpretation of Directive 93/13, regarding the assessment of the unfairness of an arbitration clause.

[16] See 2010 Report, p. 1

[17] *Cf* Océano Gruppo (supra fn.15) which refers broadly to « unfair terms in consumer contracts ».

[18] *Cf.* in respect of the UK position, Dickinson, *op. cit.*, 14.57: "On balance, the current English procedural rules appear justifiable, as being consistent with both the principle of equivalence and the principle of effectiveness".

serious obstacle to the proper conduct of cross-border litigation, the legislation of the Union could adopt measures to remedy the situation."[19]

If this were demonstrated, what could be done? Michael Bogdan, suggests the following,

"as a possible compromise between the ex officio application of foreign law in some Member States (such as Germany) and application of foreign law merely upon request by at least one of the parties (e.g. in England). A compromise is desirable if we want to achieve the main purpose of EU conflict rules, namely the application of the same substantive rules regardless of the Member State of the forum. The fact that most EU conflict rules allow the parties to agree on the application of lex fori does not fully legitimize varying outcomes, depending on the Member State of the forum, in those cases where the parties have made no such agreement. My idea how to give EU conflict rules the necessary effectiveness is to impose on the national courts the duty to bring, on their own initiative, the conflict-of-laws issue to the attention of the parties in order to give them an opportunity to either agree on the application of lex fori or request the application of foreign law applicable pursuant to the EU conflict rules. Whether this method could be characterized as ex officio (the court raises the conflict issue of its own motion) or not (the court will not apply foreign law unless it is requested by at least one of the parties) is of theoretical rather than practical interest.
This suggestion is suitable for all those disputes where settlement is permitted, regardless of whether the EU conflict rule concerned allows the parties to agree, in advance, on the applicable law. In all such cases, the parties should be allowed to decide, after the dispute has arisen, that the costs in terms of money and time of the application of foreign law would simply not be justified, for example in view of the limited value of the dispute."

This is certainly an interesting idea. The question remains, whether this would require an EU instrument. If so, the further question is whether this should be in the form of a regulation or a directive. But this will require more discussion and study, and it would still seem that, as tentatively concluded by the Group at its Copenhagen meeting in 2010, the most important immediate issue from a practical perspective remains that of accessing foreign law, also in the pre-litigation and non-litigation contexts.

[19] *Op. cit.* at p. 646, referring to Art. 81(2)(f) of the TFEU, which, as he points out, has not affected the UK's and Ireland's faculty not to opt-in when such measures are decided.