The Treatment of Foreign Law – Note for the GEDIP meeting 2012 at The Hague*

At the 21st GEDIP meeting in Brussels, 16-18 September 2011, it was agreed that the sub-group "Foreign Law" would report at the next GEDIP meeting on two aspects of the treatment of foreign law:

(1) the question of the relationship between procedural autonomy of EU Member States and the effectiveness of EU Regulations on the conflict of laws when designating a foreign law, in particular whether, under these Regulations, the courts should ex officio apply the foreign law designated by the Regulations (**I.**), and

(2) the practical means of improving the determination, by the authorities of EU Member States of the content of the applicable foreign law (**II.**)

I. Are the courts of EU Member States obliged to apply of their own motion the choice of law rules contained in EU Regulations on the conflict of laws and the foreign law designated by such rules?

A. Question not left to domestic law

In the Note ("Reflections") for the 2011 Brussels meeting we argued that, contrary to the view advanced by some, in particular UK, authors,[1] it is not possible to conclude from the exclusion of "evidence and procedure" in Article 1(3) of both Rome I and Rome II that the treatment of foreign law is left simply to national law. As another UK author observes:

"First, it should be noted that Art 1 (3) is solely a restriction on the (vertical) scope of the Regulation. It does not designate the lex fori as applicable. Instead, for matters to which Art 1 (3) applies, Member State courts may continue to apply their pre-existing rules of private international law, which may or may not lead to application of the forum's own rules. Secondly (…) the concepts of "evidence" and "procedure" must be understood as autonomous concepts, to be given a uniform meaning independent of the forum's notions as to the reach of the law of evidence and the law of procedure (…). Thirdly (…) a strict interpretation of the concepts of "evidence" and "procedure" is justified, both by the Commission's view that Article 15 of the Regulation 'confers a very wide function on the law designated' (…) and by the stated objectives of the Regulation, namely that 'in order to improve the predictability of the outcome of litigation, certainty as to the law applicable', there is a need 'for the conflict-of-law rules in the Member State to designate the same national law irrespective of the country of the court in which an action is brought'(…)".[2]

Although the ECJ has not given an authoritative interpretation of the exclusion at this point, there is no doubt that this interpretation is a matter of autonomous European, not

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[1] See Reflections on the Application, Proof of, and Access to Foreign Law – Update 2011 (hereinafter "Reflections"), pp. 2-3.

[2] A. Dickinson, The Rome II Regulation: the Law Applicable to Non-contractual Obligations, Oxford UP, para 14.57. See also M. Illmer, "Neutrality matters – Some Thoughts About the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law", in (2009) 28 Civil Justice Quarterly 237, who moreover is critical of the language of Art 1(3) and arguing that the distinction that really matters is that between *lex causae* and *lex fori*.

of national law.[3] The answer to the question above must therefore be found in general EU principles.[4]

B. Primacy of European Law not decisive

On the other hand, the doctrine of *direct effect and primacy of European law* is not decisive either. This would have been different if the ECJ had followed the view of its Advocate General Darmon in *Verholen* (ECJ 11 July 1991, joined C-87-88-89/90) according to which national courts should raise *all* EU law provisions of their own motion. The AG's reasoning was that because *Simmenthal* (ECJ 9 March 1978, C-106/77) obliged the national courts not to apply a national rule that was contrary to a European rule, those courts should first of their own motion consider the relevant European rule.[5]

The ECJ did not, however, impose such a far-reaching duty on the national courts. Instead, it established the principle of procedural autonomy, which was first formulated in the *Rewe/Comet* cases (ECJ 16 December 1976, C-33/76 (par 5) and C-45/76 (par 13)):

"(...) in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter."

Later case law has confirmed and elaborated this principle of "procedural autonomy" and extended it to civil proceedings, most notably in *Van Schijndel*.[6] In *Van Schijndel, Peterbroeck* and *Van der Weerd* the principle of procedural autonomy was extended to civil proceedings:

"(…) 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.

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."

(…) Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions o f Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the

[3] For examples of autonomous definition by the ECJ of exclusions in the Brussels Convention and the Regulation regimes see, e.g., ECJ 15 May 2003, C-266/01 ("customs") and 2 July 2009, C-111/08 ("insolvency").

[4] See Reflections (*supra* fn 1), pp.3-4

[5] *Cf.* also the AG Bot in his Opinion in *Heemskerk* (ECJ 25 November 2008, C-455/06*)* urging the Court to go beyond the "genuine opportunity" criterion (*Van der Weerd,* fn 9 *infra*) requiring the national court to review of its own motion the legality of the relevant national administrative measure (para 127). The Court did not, however, follow its AG.

[6] ECJ 14 December 1995, C-430/93 and C 431/93 (joined).

parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim."[7]

The consequence is that *European law, as it stands, despite its primacy, does not presume its automatic application – its application* ex officio *– by the courts.*[8] This is, in principle, true, "*irrespective of the importance of the [Community] 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*".[9] [10]

Procedural autonomy is not without exceptions, however. The *Rewe/Comet* judgments (1) reserve "any relevant Community rules" interfering with domestic law. Moreover, the principles of (2) effectiveness and (3) equivalence may qualify the principle.

C. Rome I and II (and III) are not Community rules directly interfering with national law

The reservation made in *Rewe/Comet* of "any relevant Community rules" relating to jurisdiction and procedural rules etc., obviously covers measures concerning jurisdiction of courts taken on the basis of Art 81 TFEU, such as Brussels I and II.

Moreover, the Treaty freedoms, and the general discrimination prohibition, may directly interfere with national (domestic) substantive law. Examples include the rulings of the ECJ in *Data Delecta*, 26 September 1996, C-43/95, and *Saldanha*, 2 October 1997, C-122/96 where the rules of the codes on civil procedure requiring foreign nationals to provide security for the costs of civil proceedings were held contrary to the prohibition of discrimination on the ground of nationality, or *Dafeki*, 2 December 1997, C-336/94, where the free movement of workers had implications for the probative value of certificates on civil status.

With regard to the competition rules (Articles 101 and 102 TFEU), the ECJ has ruled that these "are matters of public policy which must be automatically be applied by the national court" (*Manfredi*, 13 July 2006, C-295-298/04 and *T-Mobile Netherlands*, 4 June 2009, C-8/08).

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[7] *Ibidem*, paras 20-22.

[8] *Cf.* H Schebesta, "Does the National Court Know European Law? A note on Ex Officio application after Asturcom", in European Review of Private Law 4 -2010 (847-880, at 857).

[9] *Van der Weerd*, par 41, cited in Reflections (fn 1) p. 5

[10] According to A.G. Jacobs in his Opinion in *Van Schijndel*,"*It is true that the public interest in the proper application of Community law must be taken into account, as well as the interests of the parties. However, the approach consistently taken over the years by the Court suggests that what is sufficient to satisfy the public interest in this respect corresponds precisely to the well established principles (…) that national courts must ensure the enforcement of Community rights where they are invoked in national proceedings in accordance with national procedural rules; and that the national rules need only be set aside where they make it impossible or unduly difficult for those rights to be enforced. (…)*
Moreover, if the view were taken that national procedural rules must always yield to Community law, that would (…) unduly subvert established principles underlying the legal systems of the Member States. It would go further than is necessary for effective judicial protection. (…)" (paras 26-27)

However, in general the legal system of the EU "continues to be based upon a decentralized system of enforcement, in which substantive EU law is mainly enforced by national courts according to the (diverging) rules of civil procedure".[11]

It is true that both Rome I and Rome II are aimed at furthering "the proper functioning of the internal market" (Recital 1 of both instruments), and that each Regulation contains a certain number of mandatory provisions, including regarding the protection of consumers and employees (Arts 6-8 Rome I) and unfair competition, restriction of competition and infringement of intellectual property rights (Arts 6 and 8 Rome II) – which we will examine in more detail below. But it is worth recalling at the outset that EU Regulations on the conflict of laws do *not* confer *substantive* rights (such to the right to enjoy unhindered competition, or, in litigation, the right to be exempted from the *cautio judicatum solvi*). They merely provide for certain choice of law rules. Obviously, in a case of conflict between EU choice of law rules and domestic choice of law rules, the former must prevail, but that is not the point that interests us. The question is rather whether national courts should apply the choice of law rules of EU Regulations of their own motion.

In this regard, however, it is difficult to see how each of these Regulations could be ranked at the same level as rules of public policy, such as Articles 101 and 102 TFEU. Whatever the precise meaning of infringement of "public policy" in EU law may be, in order to qualify as such,

> "the rule infringed must be designed to serve a fundamental objective of the Community legal order and it should play a significant role in the achievement of that objective. Next, the rule infringed must be laid down in the interest of third parties or the public in general and not merely in the interest of the persons directly involved".[12]

It is not evident that the provisions of Rome I and II *as a whole*, important though they are, "serve a fundamental objective of the Community legal order" or "play a significant role in the achievement of that objective". In any event, they are essentially designed to serve the interests of the parties. This also explains the large room they leave for party autonomy.[13]

Nevertheless, we should examine in more detail whether this conclusion should be different for *specific* provisions such as those on consumer protection and the other mandatory provisions in Rome I and Rome II mentioned above – and in Rome III. In this regard the developing case law of the ECJ on consumer protection is particularly relevant.

D. Lessons from the evolving case law of the ECJ in consumer matters.

In a certain number of cases, in particular concerning *consumer protection* (in internal, not cross-border situations), the ECJ has found that the public interest *does* require national courts to apply Community law ex officio – and thus to make the

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[11] M. Ebers, "ECJ (First Chamber) 6 October 2009, Case C-40/08, *Asturcom Telecomunicaiones SL v. Cristina Rodríguez Nogueira*", in European Review of Private Law 4-2010, (823-846, at 824).
[12] See S. Prechal and Natalya Shelkoplyas, "National Procedures, Public Policy and EC Law. From Van Schijndel to Eco Swiss and Beyond", in European Review of Private Law 5-2004, 589-611, at 610.
[13] See Reflections (*supra* fn 1), p. 7. But see also *infra F. Discussion.*

exception referred to in *Van Schijndel*, *Peterbroeck* and *Van der Weerd* where the public interest requires the national court's intervention. However, the Court walks a tight rope between enforcing EU Consumer law and respecting national procedural autonomy: the protection of consumers is strong, but it is not absolute.

According to *Océano Grupo*, 27 June 2000, C-240 and 244/98, national courts have the power to review of their own motion whether an exclusive jurisdiction clause is unfair in terms of Art 6 of Unfair Contract Terms Directive 93/13/EEC. In *Cofidis*, 21 November 2002, C-473/00, this power to review was extended to nullity of unfair clauses in general, not just jurisdiction clauses. In *Mostaza Claro*, 26 October 2006, C-168/05, the ECJ went further and found that national courts have not only the power, but *must, ex officio*, determine whether an arbitration agreement is void, and *must* annul that award where the agreement contains an unfair term. In *Pannon*, 4 June 2009, C-243/08, the Court confirmed that the national court must of its own motion examine the issue of the possible unfairness of a contractual term, "where the necessary legal and factual elements are available". However, if the consumer, after having been informed of the clause by the court, nevertheless wishes to be bound by it, then the court is not required to apply that clause. *Pannon* was confirmed by *Pénzügli*, 9 November 2010, C-137/08 (decided by a Grand Chamber) and, most recently, by *Banco de Crédito*, 14 June 2012, C-618/10.

In *Rampion*, 4 October 2007, C-429/05, the ECJ affirmed that this case law on the Unfair Contract Terms Directive could be transposed to the Consumer Credit Directive 87/102/EEC, and that the *ex officio* obligation applies regardless of whether it is the consumer or the professional who starts the proceedings (similarly *Pohotovost'*, 16 November 2010, C-76/10). In *Martín Martín*, 17 December 2007, C-227/08, the ECJ ruled that the provisions of the Doorstep Selling Directive 85/577/EEC also allow the court to declare of its own motion that the consumer was not informed of his right to withdraw from the contract, even though the consumer had not pleaded this at any stage of the proceedings.

That the courts do not in all cases have an *ex officio* obligation to enforce consumer law was brought out by *Asturcom* 6 October 2009, C-40/08, which turned again on the Unfair Contract Terms Directive. In this case the question was whether the court in an action for enforcement of a final arbitration award made in the absence of a consumer, must determine of its own motion whether the arbitration agreement is unfair and void, and therefore annul the agreement, even if it the arbitration award is *res judicata*.

Advocate General Trstenjak affirmed the question. She analysed the case under the viewpoint of procedural autonomy qualified by the principles of effectiveness and equivalence. She took the first limb, *effectiveness*, understood as principle of effective judicial protection (access to justice), as the ground for her opinion that

"above all in view of the need for effective consumer protection and having regard to the case law of the Court of Justice which expressly requires positive action unconnected with the actual parties to the contract (..) it may be necessary, in exceptional cases, to disregard the principle of res judicata."[14]

She reasoned that in *Océano* and *Mostaza*, among others, the ECJ had held that the unbalance between parties in the consumer context must be corrected, even if the consumer does not act. In the AG's view, the consumer could not be required to file an action for annulment of invalid arbitration proceedings. The

[14] Opinion of AG Trstenjak, delivered in Asturcom, para. 75.

national court being the first judicial instance to assess the unfairness of the unfair arbitration agreement, should therefore, of its own motion, declare the award null and void.

Like the AG, the ECJ took the *Van Schijndel* procedural autonomy approach as its starting point.[15] The ECJ first examined the case under the viewpoint of "effectiveness", which, rather than giving it the extended interpretation of the AG, it understood, as it had done in *Van Schijndel*, simply as: do the national procedural rules make the application of European law impossible or excessively difficult? The Court found that, in this light, the procedures of Spanish law for challenging the arbitral award were acceptable. Therefore, the Court, contrary to its AG, found that the Spanish procedural rules did not violate the principle of effectiveness. The *res judicata* status of the arbitral award was therefore to be respected.

Next, the Court examined the case under the viewpoint of the "equivalence" test: the conditions imposed by domestic law under which the courts apply a rule of Community law of their own motion must not be less favourable than those governing the application by the courts of their own motion of rules of domestic law of the same ranking. The Court emphasised the privileged mandatory nature of Article 6(1) of the Unfair Terms Directive "and its general purpose which is essential to the tasks of the Community", and ruled that

"Accordingly, in view of the nature and importance of the public interest underlying the protection which Directive 93/13 confers on consumers, Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy".[16]

Therefore, the national court was obliged to apply the directive of its own motion (only) where it has either the duty or the power to do so for national rules of public policy. In other words, the Spanish court, while it should respect the *res judicata* effect of the arbitral award, had to refuse its enforcement (only) if it had the duty or power to do so under Spanish procedural law for public policy reasons.

Asturcom thus illustrates the carefulness – coupled with a certain creativity in the use of the criteria of "equivalence" and "effectiveness" – with which the ECJ approaches the challenge of *"establish[ing] a balance between the need to respect the procedural autonomy of the legal systems of the member States and the need to ensure the effective protection of Community rights in the national courts."*[17] As a rule, given the weak bargaining power of the consumers, their lack of information and the costs they face, national courts must, of their own motion, ensure the application of EU consumer protection rules. But exceptionally, where an arbitral award has become *res judicata*, the ECJ accepts that its enforcement must be refused on the ground that it infringes public policy *if* the national court has the duty or power to do so *under national law*.

The conclusion from all this is that the Court, while attaching great importance – as a matter of public policy – to consumer protection through European legislation, still recognises that this protection must be effectuated in the context of domestic jurisdictional and procedural rules.

E. The application of choice of law rules contained in EU Regulations in the context of the domestic legal systems of EU Member States

In our 2011 Note we referred to the findings of the in-depth *Study on Foreign Law and its Perspectives for the Future at European level* commissioned by the European

[15] In earlier consumer decisions, the Court had often based itself directly on a teleological interpretation of the consumer protective EU provisions – *Asturcom* is important also because it brings EU consumer law back under the procedural autonomy approach, see Schebesta, (*supra* fn. 8), 854.
[16] Asturcom, par. 52.
[17] Advocate General Jacobs, *supra* fn 10, para 18.

Commission drawn up by the *Institut de Droit Comparé* in Lausanne.[18] The study confirms the findings of the Valencia Report[19] that the national legal norms currently in force in the 27 EU Member States concerning the application of foreign law in civil proceedings are extremely heterogeneous and particular in nature, and vary according to the status of the choice of law rule, the method of determining the content of foreign law including burden and admissibility of proof and of assessing foreign law and costs, the consequences of impossibility of establishing the content of the foreign law, the control of the application of the foreign law by superior courts, and their application by judicial or non-judicial authorities.

Regarding the *status* of the choice of law rules, the study found that:

- (1) in the majority of EU Member States the court must apply the relevant conflict of law rules *ex officio* – but for varying reasons (mandatory character of the choice of law rule as part of the binding law of the forum (Germany); inquisitorial nature of the civil procedure (Greece); duty to apply domestic and foreign law on an equal footing (Poland)). On the other hand,

- (2) in the UK, Ireland, Cyprus and Malta, no such *ex officio* duty exists, although the court may have discretionary powers to bring up the question of foreign law in the event of the parties' silence. Finally,

- (3) in "dual" systems some choice of law rules are considered as mandatory and others as optional. However, the criteria for distinguishing between these two categories differ, according to the "dispositive" or "non-dispositive" nature of the rights (France), the mandatory or non-mandatory proceedings (Sweden), or the nature of the issue at stake (Luxembourg, Slovenia).

Moreover, even where the choice of law rules must be applied *ex officio*, the procedural status of the foreign element leading to the references of foreign law varies. While in some EU Member States the court is obliged to discover foreign elements in the case *ex officio* (this is generally the rule in the Central and Eastern European Member States – because of the "residually inquisitorial" character of the civil procedure in these countries – and in Italy, Spain and Portugal – as a consequence or the mandatory character of the choice of law rule), in other continental EU Member States the court is generally (Netherlands), or depending on the nature of the proceedings (Sweden, Finland), or on the nature of the rights at stake (France, Belgium, Luxembourg), not bound to discern foreign elements through independent investigation of the facts of the case.

While Rome I and II, III and the Successions Regulation – as all Regulations – have a direct effect within the domestic legal order of the Member States, their choice of law provisions do not as such alter these differences, no more than multilateral treaties (Hague and other PIL Conventions, previously the 1980 Rome Convention) do. The fact that they have primacy status is not decisive (*cf.* B. *supra*). The Regulations *as a whole* are not matters of public policy (*cf.* C. *supra*).

Is this is any different for the *mandatory* provisions in Rome I and Rome II, such as the protection of consumers and employees (Arts 6-8 Rome I) and unfair competition,

[18] See Reflections, *supra* fn. 1, p.1. This study was published by the Commission in 2012, see http://ec.europa.eu/justice/civil/document/index_en.htm.
[19] See C. Esplugues, J.L.Iglesias, G.Palao (eds.), Application of Foreign Law, Munich, Sellier 2011.

restriction of competition and infringement of intellectual property rights (Arts 6 and 8 Rome II), restrictions on party autonomy (such as in Art 5 (2) Rome I), and aspects of Rome III and of the Successions Regulation?

Arguably, the fact that these specific rules are mandatory has an impact on their status and thereby on their application. Yet, it follows from the case law of the ECJ in consumer matters (*cf.* D. above), that action by the court *of its own motion* is required only in exceptional cases where the *public interest* requires its intervention. There is no doubt that if a consumer invokes Art 6 of Rome I, then the court *must* apply it. But does a (mere) conflict rule such as Article 6 serve a *public interest* that *requires* the court to apply it of its own motion? Given the importance which the ECJ attaches to the information of the consumer, which enables him/her to defend their substantive rights (see e.g. *Pannon*, supra D.), one might argue that the court should, when it has the duty or power to do so *under its domestic procedural rules*, under the principle of *equivalence*, inform the consumer of its own motion of the applicability of Article 6, e.g., when a consumer contract contains a choice of law for the law of the professional's country, and the consumer does not invoke the superior protection of the law of his/her habitual residence. But it would seem difficult to argue that such a duty follows directly from the choice of law rule of Article 6 itself and, in any event, this is not the same as applying Article 6 *ex officio*.

This conclusion also applies to the choice of law protection afforded by Articles 7 (insurance contracts) and 8 (individual employment contracts) of Rome I.[20]

What about the mandatory provisions in Rome II on unfair competition, restriction of competition and infringement of intellectual property rights? Competition law is a matter of declared public interest under European law. But does it follow that the *choice of law* rule of Article 6 Rome II – which also covers violations of domestic competition law – is also of public interest under European law, and must be applied by the court *of its own motion*? It would seem that, in light of *Van der Weerd,*[21] it would be sufficient, under the principle of *effectiveness*, that parties have a genuine opportunity to invoke the relevant choice of law rule, as they have in English or Scottish law.[22]

A special question may arise in the context of Rome III, Recital 18 of which provides:

"The informed choice of both spouses is a basic principle of this Regulation. Each spouse should know exactly what are the legal and social implications of the choice of applicable law. The possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal

[20] For a different view, see R. Hartmann, "Pleading and Proof of Foreign Law – a Comparative Analysis", [1 2008] The European Legal Forum, I-1-13, who, with reference to the 1980 Rome Convention takes the view that while this Convention generally does not require an *ex officio* application of foreign law whenever the parties are free to choose the applicable law, this is different for Articles 5 and 6. "*The mandatory character of these conflicts rules is ignored if the weaker party is required to plead and prove foreign law. (…). Therefore, the courts (…) are bound to apply [these Articles] ex officio in order to ensure the protection of consumers and employees irrespective of the procedural rules of the forum on the pleading of foreign law*" (at I-7). Similarly, with respect to Articles 6 and 8 of Rome I, Illmer, *supra* fn 2 (at 259).

[21] See *supra* text at fn 7.

[22] *Cf.* Dickinson, *supra* fn. 2, who after a comparative law overview, a review of the *travaux préparatoires* of Rome II, and an evaluation of the current practice of the English courts, concludes that "*[o]n balance the current English procedural rules appear justifiable, as being consistent with both the principle of equivalence and the principle of effectiveness (…)"* (at para 14.57).

opportunities for, the two spouses. Hence judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded."

This Recital could be read to imply that before resorting to the choice of law rules that apply in the absence of a designation of the law by the parties, the court – Recital 18 is addressed to judges – must ask the parties if they have made a valid and well-informed choice. This would be especially important in cases where the parties are not assisted by a lawyer. But, as in the case of consumer protection, one might argue, that any such *ex officio* information duty would, under the *equivalence* principle, only exist to the extent that it exists under the court's domestic procedural rules.

F. Discussion

Not all members of the Sub-group share the above analysis and conclusions. Some members point out, firstly, that at this point ECJ case law on the precise question before us (**"***Are the courts of EU Member States obliged to apply of their own motion the choice of law rules contained in and the foreign law designated by EU Regulations on the conflict of laws*") is not available. Secondly, they note that the ECJ case law referred to above, from *Van Schijndel* etc., to the ECJ case law on consumers (supra B.- D.), is concerned with internal domestic issues, and not with cross-border issues, which are the specificity of the EU Regulations. Thirdly, they are not convinced that the ECJ case law cited, even if applicable, justifies the conclusions drawn. Rather, they are of the view that, given the nature and purpose of choice of law rules in EU Regulations, these are "relevant Community rules" for which exception was made in *Rewe/Comet* (see B. supra). Much like Brussels I and II, these rules do not – or should not – depend on the national procedural order for their applicability. Instead – and perhaps in contrast with choice of law rules contained in EU directives (being not self-executing but depending on national implementation measures) – they are not procedural but substantive in nature ("*règles de fond*"). They are mandatory, and require, by their nature and purpose (see Recitals (4) and (6) if both Rome I and Rome II), to be applied ex *officio* by the courts. Uniform choice of law rules would make no sense if their application was left to the whims of domestic civil procedure. They serve the fundamental objective of creating a European Area of Civil Justice (see Articles 67 and 81, indeed even 3(2) TFEU). They serve not only the interest of the parties, but also the general interest of harmonizing conflict rules and of discouraging forum shopping. In a comment on an earlier draft of this Note to the subgroup of 12 July 2012, Hélène Gaudemet-Tallon has explained this position in more detail – see **Annex A**.

However, these members of the sub-group admit that it is far from certain that the ECJ would share their views, and, therefore, urge GEDIP to adopt a proposal on the issue.

G. Conclusion and Recommendations for possible proposals by the GEDIP

It would seem difficult to argue, in light of the current case law of the ECJ, that the conflict rules of the EU Regulations, Rome I, II, III and the Successions Regulation should, as a requirement of European law, be applied by domestic courts of their own motion.

Regarding possible proposals by the GEDIP, the views of the sub-group vary:

(1) Some members are of the view that an initiative to ensure uniform application of the choice of law rules in EU Regulations is neither necessary nor desirable. EU law in general is law that is mainly applied through national courts (and national non-judicial authorities). It is well known that this does not guarantee the uniform application of EU law, but this is an inherent feature of the present system. Imposing uniformity of application of EU Regulation choice of law rules would – independent of the characterisation of the choice of law rule as procedural or substantive – inevitably have a significant impact on the national procedural systems of the Member States, and would not be justified by the nature and purpose of choice of law rules which do not directly affect substantive rights of citizens. Finally, we should know more about the extent of the real problem of diversity of application before proposing action.[23]

(2) In contrast, some members are of the view that GEDIP should propose a binding EU rule that would oblige the national court to apply the choice of law provisions contained in EU Regulations. This rule would apply to all matters covered by the Regulations, so that one would not have to distinguish between e.g., matters of public interest and other matters. The necessary flexibility could be achieved through a provision, to be added to each Regulation, specifying whether the parties may or may not, at the moment of the proceedings, conclude a procedural agreement to set aside the choice of law rule/the law designated by the choice of law rule, in favour of the *lex fori* or perhaps the law of a third country.

(3) A third approach is that proposed by Michael Bogdan, according to which the court should of its own motion raise the conflict of laws issue with the parties, informing them of the issue, leaving it to the parties, in disputes where settlement is permitted, to either agree on the application of the *lex fori* or request the application of the designated foreign law.[24] This proposal goes less far than (2), in that it only puts an (*ex officio*) information duty on the court and not a duty (*ex officio*) to apply the foreign law designated by the choice of law rule, unless requested by at least one of the parties. But it goes further than (2) in so far as it would apply to *all* matters covered by the Regulations.[25]

II. Practical means of improving the determination, by the authorities of EU Member States, of the content of the applicable foreign law

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[23] As noted in Reflections (*supra* fn. 1, p. 7), the Lausanne study in its preliminary study of the application of Rome II in five EU countries (Bulgaria, Finland, Germany, the Netherlands and the United Kingdom) found no evictions of the applicable law in favour of the *lex fori*.

[24] Reflections (*supra* fn 1), p. 9

[25] *Cf.* also the conclusions of the Lausanne study, Part III, Recommendations: "*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."(*at p. 16)

The second aspect of reflection on the treatment of foreign law consists in considering the ways of improving the ascertainment of the content of the foreign law which has been indicated by a conflict rule. As is well known, this question has been for a longer time a subject of interest in various forums, in particular at the Hague Conference on Private International Law and at the European Commission. The Group discussed at the 2010 and 2011 meetings the two studies that were prepared on the basis of contracts awarded by the European Commission: "Application of foreign law by judicial and non-judicial authorities in Europe", a study by the University of Valencia team (Valencia Report) which led to the book "Application of Foreign Law",[26] and also "Foreign Law and its Perspectives for the Future at the European Level", a study conducted by the Swiss Institute of Comparative Law in Lausanne.[27] The Hague Conference presented *inter alia* two important documents in recent years – "Accessing the content of foreign law and the need for the development of a global instrument if this area – a possible way ahead",[28] and "Guiding Principles to be Considered in Developing a Future Instrument".[29] These Guiding Principles were also annexed to another important document "Conclusions and Recommendations – Access to Foreign Law in Civil and Commercial Matters", adopted at a Brussels conference, organised jointly by the European Commission and the Hague Conference on Private International Law, held from 15 to 17 February 2012 (hereinafter "Conclusions and Recommendations").[30]

The 2012 Brussels conference emphasised in particular the increasing need in practice to facilitate access to foreign law, as a result of, among other things, globalisation and the cross-border movement of persons, goods, services and investments.[31] Even though the conference was devoted to the treatment of and, in particular, access to, foreign law on a global level, reaching far beyond the European Union, many conclusions adopted at this conference are relevant within the EU despite its particular legal and institutional structure, closer links between Member States and mutual connections in the sphere of administration and justice. Undoubtedly, from this perspective, the EU has wider possibilities to create a system interconnecting various levels of mutual cooperation which promote effective access to foreign law. On the other hand, we have to keep in mind that uniform EU conflict rules which lead to the need to ascertain and apply foreign law are universal and thus they may indicate as the applicable law the law of a third, non-EU Member State. Cooperation with States outside of the EU thus cannot be left aside, even if we intend to specifically consider possibilities of providing information on foreign law by the authorities and institutions of EU Members.

Three ways forward for future work / mechanisms in this area which had emerged from the preliminary work carried out by the Hague Conference may be outlined as basic starting points:

A. Information technology and its impact on ascertainment of foreign law

[26] See *supra* fn 19.
[27] See *supra* fn 18.
[28] Hague Conference on Private International Law, General Affairs and Policy, Prel. Doc. No 11 A, March 2009.
[29] Principles developed by the experts which met in 2008 at the invitation of the Permanent Bureau of the Hague Conference on Private International Law as part of its feasibility study on the access to foreign law.
[30] The English and French texts of the Conclusions, the Conference Report and other documents are available at http://www.hcch.net/upload/hidden/2012/xs2foreignlaw.html.
[31] "Conclusions and Recommendations", *op. cit.*, point 1.

B. Judicial and administrative cooperation
C. Networks of experts

A. Information technology and its impact on ascertainment of foreign law

Within possibilities of providing information on foreign law, the Internet is still a relatively new phenomenon. Despite its increasing influence on the availability of information on foreign law,[32] the Internet is not yet being fully used as compared to the opportunities that it offers.

We have to bear in mind that much information on foreign law currently offered by way of the Internet may be scattered over a great variety of sites, and may not be reliable, up-to-date and with transparency as to its provenance. Such information must often be verified and perhaps also authenticated by other sources.

Moreover, the finding and ascertainment of foreign law by means of various Internet databases requires an experienced person with necessary orientation in the respective legal system. This may present particular challenges not only for judges, but also in particular for citizens, businesses, and nationally-oriented or smaller legal practices when they must ascertain the law of other States. Usually, only a plain text of the applicable legislation is accessible, which may be not sufficient in order to know the full import and context of the law. Besides, such information is mostly available only in the language of the respective State. Issues of language regimes are considered to be among the main contemporary challenges in the treatment of foreign law in general.

B. Judicial and administrative co-operation

The European Union makes it possible to create a more closely-connected framework of judicial and administrative cooperation. First, international treaties, in particular the *European Convention of 7 June 1968 on Information on Foreign Law* (the "London Convention") of the Council of Europe, and bilateral treaties permitting the obtaining of legal information between some Member States, are available.[33] Experiences with these tools have been evaluated differently. Sometimes the information provided on the basis of international treaties is too general and takes a long time to obtain. As for bilateral treaties, personal contacts are evidently important and they influence the assessment of this kind of cooperation – either positive or neutral – by various Member States.

Within the European Union the main relevant institution in this field is the European Judicial Network in Civil and Commercial Matters (EJN) which provides a wide range of information on EU law, as well as some information on national law of the Member States.[34] The efficiency of this type of activity substantially depends on the individual national contact points and their mutual relations. As is well known, administrative

[32] According to the empirical findings of the Lausanne study (*supra* fn 18), the "*overwhelming majority (77%) [of legal professionals in the 27 EU Member States] uses official sources of foreign law available on the internet regularly*" (..) Paid for legal databases are used on a much smaller basis (…), Part II, para 4.1.
[33] According to the empirical research of the Lausanne study (*supra* fn.18), their use is very limited (Part II, Overview, p 2).
[34] "*.. the European Judicial Network in Civil and Commercial Matters (…) is never used by slightly more than one third of respondents*"(*ibidem*).

cooperation is connected with increased costs, which is another of the main challenges in the ascertainment of foreign law in general.

The sub-group is rather reserved with respect to proposals of creating direct contacts between judges, as was mentioned several times at the 2012 Brussels conference. There are at stake such practical questions as language barriers, workload of judges, and the formalisation of posing questions / institutional requirements that would most probably be counterproductive as compared to the informal judicial cooperation currently within the EJN.

Another more general problem, mentioned above, is that of translations of legal texts and case law. In States with other than international languages the requirement to provide such accessible information of legal texts would mean the arrangement of good and reliable translations of their legislation which then should be regularly updated. The sub-group tends to be quite sceptical that States would be able to make all or most of their law more accessible in this respect, in particular for financial reasons. Today, respecting the dynamic development of legislations worldwide, such a binding requirement seems not to be very realistic: translations represent one of financial barriers in relation to facilitating access to foreign law.[35]

C. Network of experts

Information on the content of the foreign applicable law is often not sufficient and supplementary legal expertise or analysis is needed. Legal expertise is either provided by specialised institutions, such as the Max-Planck Institutes in Germany, the Hellenic Institute of International and Foreign Law, or the Swiss Institute of Comparative Law, or by individual experts.[36] The value of consulting experts for information corresponds to their much-specialised activity. The sub-group supports opinions that the access to foreign law cannot be entirely free.[37] Under point 14 of the Conclusions and Recommendations, "tailored" legal information (for example, the application of the information to specific facts, which may require the interpretation of the relevant law by judges, government officials, foreign law experts or expert institutes), does not necessarily have to be provided without cost to users, and the provision of such services at a cost may enable better services.[38]

D. A future instrument in this field?

[35] However, this situation could evolve further with the continuing improvement of (online) translation software. Additionally, there can be general economic benefits of a State making available at least its key legal texts (in particular in the commercial area) available in a widely used language, and thus translation efforts might be considered a worthwhile investment by some States.

[36] It should be noted that networks of legal professionals have been added to the structure of the European Judicial Network in civil and commercial matters (see Council Decision of 28 May 2001 (2001/470/EC), as amended 2009): Art. 2**:** "*1. e) Professional associations representing, at a national level in the Member States, legal practitioners directly involved in the application of Community and international instruments concerning judicial cooperation and commercial matters [shall be part of the European Judicial Network in Civil and Commercial Matters]"[…] "4.a) Member States shall determine the professional associations referred to in paragraph 1(e). To that end, they shall obtain the agreement of the professional associations concerned on their participation in the Network. Where there is more than one association representing the legal profession in a Member State, it shall be the responsibility of that Member State to provide for appropriate representation of the profession on the Network."*

[37] See the contribution of Andrea Bonomi at the Brussels conference on 17.2.2012.

[38] Conclusions and Recommendations, op. cit., point 14.

Undoubtedly, a global instrument on improving access to foreign law is considered to be useful. This point is also one of the results of the 2012 Brussels Conference, which stressed that such an instrument should focus on the effective *facilitation* of access to foreign law and should not attempt to harmonise the status of foreign law in national procedures.[39] It appears that, for the time being, with respect to the various existing concepts of the treatment of foreign law, such a solution on a global level is the only realistic approach.

The Sub-group agrees that such an instrument should have a universal nature because problems of facilitation of access to foreign law are in fact global and not specifically European, despite the above-mentioned specific features of the European Union, consisting in close judicial cooperation in cross-border civil matters. We may refer back to the Conclusion integrated in the 2010 Report "Reflexions on the Application and Proof of, and Access to, Foreign Law", which suggested a pragmatic approach: 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 the Hague Conference on Private International Law.[40] This main global trend or direction does not exclude particular mechanisms that may facilitate access and treatment of foreign law within the European Union.

[39] Conclusions and Recommendations, *op. cit.*, point 4.

[40] At its meeting of 17-20 April 2012, the Council on General Affairs and Policy of the Hague Conference "*took note of the Conclusions and Recommendations of the [Brussels Joint Conference, and] decided that the Permanent Bureau should continue monitoring developments but not take any further steps in this area at this point*." Subsequently, the Council of Europe at the meeting of the CDCJ of 18-20 June 2012 discussed the possibility of revising the 1968 London Convention. The CDCJ instructed the Secretariat "*to make contact with the European Commission and the Hague Convention on Private International Law on the reasons and interest for a possible revision of the European Convention on Information on Foreign Law and report to the Bureau*".

Loi étrangère. 26 juillet 2012

Gedip 2012

Quelques réflexions.
Hélène Gaudemet-Tallon.

Après avoir lu les documents envoyés et repris les travaux précédents du Gedip, d'abord un grand merci à Hans et Monika pour leur important travail.
Ensuite j'essaie de résumer la problématique et ce qu'on pourrait proposer comme solution. J'ai également relu, entre autres, l'article de Harry aux Mélanges Siehr, et celui de Tristan Azzi dans mes Mélanges.

La question : le juge national doit-il appliquer d'office la loi étrangère désignée par une règle de conflit de lois contenue dans un règlement communautaire ? (problématique différente pour les directives puisqu'elles font l'objet de mesures nationales de transposition)

Les idées qui se dégagent :

1) L'objectif des règlements communautaires portant règles de conflits de lois est à l'évidence **l'unification** des solutions aux conflits de lois dans les domaines visés par les règlements, objectif qui n'est pas atteint si on laisse chaque droit national décider de l'applicabilité d'office ou non de la règle de conflit communautaire.

2) En revanche, le principe de l'**autonomie procédurale** du droit des Etats membres, semble plaider pour laisser les droits nationaux s'appliquer ;

3) Toutefois :
   - Il n'est pas certain que la question de l'applicabilité d'office ou non de la règle de conflit de lois soit une question de procédure ; personnellement, j'y vois plutôt une règle de fond, et particulièrement importante puisqu'elle détermine le droit qui sera appliqué au litige. Il me semble qu'on pourrait tirer argument de ce qui se passe pour les conflits de juridictions : les textes communautaires (convention de Bruxelles de 1968 puis règlement Bruxelles I doivent être appliqués d'office par le juge, le rapport Schlosser était déjà en ce sens, et la jurisprudence a confirmé : v. par ex. CJCE *Shearson Lehman Hutton* du 19 janv. 1993, aff. C-89/91 et déjà CJCE *Hoffmann c. Krieg* 4 fév. 1988, aff. 145/86, pt.31 ; la jurisprudence de la cour de cassation française est aussi en ce sens, v. les arrêts cités dans mon ouvrage « compétence et exécution des jugements en Europe » 4ème éd. 2010 , n° 77, notes 17 et 18)
   - la CJUE a déjà admis des exceptions au principe d'autonomie procédurale : v. la jurisprudence citée par Hans et Monika

4) Au regard du droit français, on est en présence de deux concepts tous deux assez flous :
   - celui de l'autonomie procédurale, mal définie par le droit communautaire. En particulier, il ressort de la jurisprudence de la CJUE (très bien détaillée par Hans) que le principe de l'autonomie procédurale s'efface lorsque la protection des consommateurs est en jeu (mais alors pourquoi pas aussi celle des salariés), et lorsque il y a « d'importants intérêts publics en

cause » …formule vague. Le droit de la concurrence relèverait de ces importants intérêts publics, mais en revanche, qu'en serait-il pour l'état des personnes ? on pourrait soutenir que, par exemple, le divorce ne concerne pas d'importants intérêts publics, mais qu'en revanche lorsqu'est en cause « l'intérêt supérieur de l'enfant » alors, on serait en présence d'un « intérêt public important » justifiant la mise à l'écart du principe d'autonomie procédurale.

- celui de « droits indisponibles » : selon la jurisprudence la plus récente de la Cour de cassation (26 mai 1999, deux arrêts *Belaïd*, et *Assurance du Mans*), la solution française est de distinguer entre droits disponibles et droits indisponibles.

  Si le droit est disponible (contrats en général), le juge n'est pas obligé d'appliquer d'office la loi étrangère désignée par la règle de conflit ; si le droit est indisponible (matières d'état des personnes par exemple), le juge est obligé d'appliquer d'office la loi étrangère désignée par la règle de conflit. Le droit français ne distingue pas selon l'origine de la norme (règle nationale de DIP, ou règle émanant d'un traité international, ou règle d'origine communautaire), mais selon le droit en cause. L'ennui est que la frontière entre droit disponible et droit indisponible est très difficile à tracer. Et dans la mesure où l'autonomie de la volonté pénètre maintenant le droit des personnes et de la famille, on ne sait plus très bien ce qui est disponible ou non : par exemple, on pourrait soutenir que le droit du divorce est un droit disponible en présence d'un divorce par consentement mutuel, et indisponible si le divorce est contentieux. La question est déjà soulevée en doctrine à propos de Rome III : le divorce reste-t-il un droit indisponible dès lors que les époux peuvent choisir la loi applicable à leur divorce ? Pour moi (et je crois aussi P. Lagarde), cela reste indisponible, mais d'autres auteurs sont plus dubitatifs.

  Donc cette distinction française, aux contours incertains, ne me paraît pas utile en droit communautaire.

Et on voit que ces deux concepts flous se combinent mal : par exemple, s'agissant d'un contrat portant atteinte au droit de la concurrence, c'est un « droit disponible », mais en revanche il échappe au principe d'autonomie procédurale.

5) On constate que la Cour de justice de Luxembourg se montre un peu hésitante sur cette question de l'applicabilité d'office du droit communautaire en général, sauf pour les contrats de consommateurs (v. l'étude de Hans et Monika). Ceci est assez logique lorsque sont en en cause des dispositions de droit substantiel ; et on comprend par ex. la position de la CJCE dans l'affaire *Heemskerk* (25 nov. 2008, aff. C-455/06 et v. l'art. S.Cazet sur cet arrêt, Revue Europe, juillet 2009, Etude n°7). Mais, lorsqu'est en cause la détermination du droit applicable, il me semble que la Cour devrait être plus exigeante : comme le disait l'avocat général Bot dans l'affaire *Heemskerk*, « l'enjeu de l'application d'office du droit communautaire…consiste, plus fondamentalement dans la sauvegarde d'exigences d'intérêt général au plan communautaire » (pt127) et l'avocat général (qui n'a pas été suivi par la Cour) regrettait que la Cour ait une conception trop extensive de l'autonomie procédurale des Etats membres. Or, si l'on adopte des règlements communautaires portant sur les conflit de lois, c'est pour que la même règle de conflit soit appliquée par tous les tribunaux des Etats

membres, et c'est bien là une « exigence d'intérêt général » (Hans a parfaitement raison dans son mail en réponse à Monika de dire que la situation est particulière s'agissant de situations transfrontières, donc mettant en cause des règles de conflits de lois et je crois que les arrêts *Van Schijndel* et *Peterbroeck* du 14 décembre 1995 s'expliquent précisément parce qu'il s'agissait de situtions internes à un Etat membre). Si on ne satisfait pas cette exigence, on voit mal l'utilité des règlements sur les conflits de lois. Cette conclusion m'amènerait à modifier l'opinion que j'avais émise au Jurisclasseur Europe fasc.3200 n° 65 à 67 ainsi que dans mon article sur Rome I au Journal de droit européen en 2010 où j'écrivais que le règlement Rome I n'était pas applicable d'office car concernant des droits disponibles (opinion défendue aussi par T.Azzi, art.préc.) : au contraire, en l'état actuel de ma réflexion, je pense que le règlement Rome I devrait être applicable d'office mais que les parties devraient être autorisées expressément par le règlement à passer un accord procédural pour changer la loi applicable en vertu du règlement (qu'il y ait eu ou non auparavant choix de la loi), c'est d'ailleurs ce qui résulte déjà de l'art. 3 §2 de Rome I. En France, cet accord procédural est possible (au motif qu'il s'agit de droits disponibles), mais il serait préférable que la solution soit donnée au niveau communautaire et en écartant ou en entourant de garanties supplémentaires l'accord procédural lorsqu'il y a une partie faible à protéger

6) Proposition *de solution* : il me semble qu'il faudrait avoir une règle de droit communautaire obligeant le juge national à appliquer d'office une règle de conflit de lois contenue dans un règlement communautaire, peu important la matière en cause (et je ne partage pas les réticences de Johan car , comme je l'ai écrit *supra*, à mon avis la question de l'applicabilité d'office de la règle de conflit ou non n'est pas une règle de procédure). Il n'y aurait pas à s'interroger pour savoir si « l'autonomie procédurale », « des intérêts publics », « l'ordre public » ou encore des « droits indisponibles » sont ou non en cause : la règle de conflit est une règle de droit dont l'application s'impose au juge comme toute règle de droit (cela a d'ailleurs été la solution un temps retenue par la Cour de cassation française : v. les arrêts Rebouh et Schüle des 11 et 18 octobre 1988, solution adoptée sur la proposition du conseiller A. Ponsard, solution approuvée par la doctrine, v. Grands arrêts de la jurisprudence française de DIP par B. Ancel et Y. Lequette, 5ème éd. 2006, n° 74-75, mais qui a malheureusement été abandonnée par la suite)

Ainsi seulement serait assurée l'unification voulue par l'adoption de ces règlements.
La souplesse nécessaire serait atteinte si chaque règlement communutaire disait s'il admet ou non un « accord procédural », c'est à dire la possibilité pour les parties, au moment du litige, de se mettre d'accord pour écarter la loi désignée par la règle de conflit communautaire et choisir la loi du for (ou éventuellement une autre loi ? à discuter). C'est un peu, me semble-t-il l'idée de Michael dans le document Gedip de la précédente session. On trouve un exemple de ce type d'article dans le règlement Rome III (v.art.5 §3)**.**

Il serait bon qu'il figure dans Rome I et Rome II de façon précise, dans la mesure où ces textes laissent déjà pas mal de place à volonté des parties, mais en écartant sans doute l'accord procédural pour les contrats où il y a une partie faible à protéger (consommateurs, salariés, assurés) et pour Rome II, il faut veiller à ce que l'accord

procédural soit vraiment voulu par la victime du dommage. Pour le règlement successions (et le règlement régimes matrimoniaux à venir)…il faudrait réfléchir.

Évidemment ceci aboutirait à l'application de lois diverses pas forcément prévues au départ, car différentes de celles désignées par le règlement. Mais si les parties sont d'accord, pourquoi pas ?

La solution serait quand même une solution de conflit unique dans tous les pays de l'UE (sous réserve des cas de coopération renforcée) : normalement loi désignée par le règlement, appliquée d'office par le juge, mais possibilité d'accord procédural dans les conditions et limites fixées par le règlement.