THE TREATMENT OF FOREIGN LAW
ADDITIONAL NOTE FOR THE GEDIP MEETING 2013 IN LAUSANNE

At our meeting in The Hague, we discussed the First Part only of the 2012 Report on The Treatment of Foreign Law (attached). According to the PV of the 2012 Hague meeting:

Quant à la première partie du rapport pour la réunion de La Haye, un consensus a semblé se dégager autour de la deuxième recommandation formulée par le sous-groupe, à savoir que le juge devrait dans les hypothèses où les règlements conditionnent ou limitent le choix de la loi applicable par les parties, informer les parties de ces conditions ou limitations à défaut d'invocation de celles-ci par les parties. Le sous-groupe a accepté de préparer pour la prochaine réunion une esquisse de règles illustrant cette idée. Comme le Groupe n'a a pas pu discuter de la deuxième partie du rapport, l'étude de celle-ci sera reprise lors de sa prochaine réunion.

In Lausanne, we will therefore, in addition to our examination of Part II (p.10 *et seq.),* continue our discussion on Part I. As requested, a sketch of Guidelines (a General Rule and specific Rules for each Regulation) is attached, in English and French, to illustrate the option nr 2 (p.10) of the 2012 Report. It will be recalled that option was suggested by Michael Bogdan,

…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).(…): *My idea (…) is to impose on the national courts the duty to bring, on their own initiative, the conflict-of-laws issues 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. (…) The suggestion is suitable for all those disputes where settlement is permitted, regardless of whether the EU conflict rule concerned allow 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 cots 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 disputes.*

(See Report for the 2011 Brussels GEDIP meeting *Reflections on the Application, Proof of, and Access to Foreign Law,* de 2011, p.9)

The attached texts clearly just represent a first effort. They are « *documents martyrs* ». This also applies to the following short explanations which attempt to clarify their background.

The *General Rule* corresponds with Michael Bogdan's basic idea. We presume that the parties in judicial proceedings, whether in a default procedure or in a defended action, have not brought to the attention of the court (whether in their documents or in their oral presentations) any (possible) international dimension (*element d'extranéité*) of their case. The parties may even have overlooked or forgotten (perhaps even on purpose) a choice of law made by them (and perhaps not reflected in the materials presented to the court). We assume, therefore, that the case was presented by the parties as if it were a purely domestic one, governed by the internal national law of the forum.

The effect of the General Rule would be that if the court, in spite of the parties' silence, discovers in the materials before it an *élément d'extranéité* that gives rise, or may give rise, to

the application of EU Regulations, then the court is obliged to inform the parties of this finding.

It is important to note, that, even at this stage of the proceedings, the procedural status of the foreign element that may lead to the application of the choice of law rule and the applicable law varies considerably from one EU Member to another. While in some EU countries the court is obliged to discover foreign elements in the case of its own motion, in other, even continental, EU Member States, the court is generally (or depending on the nature of the case, or on the nature of the rights at stake) *not bound* to discern foreign elements through independent investigation of the facts of the case (*cf.* 2012 Report, p. 7). Our General Rule may thus go further than current practice in some, *even continental*, EU Members.

When the court informs the parties of the foreign element, several things may happen. The parties may remember that they have made a choice of law, perhaps in a separate document or in general conditions that have not yet been brought to the attention of the court. If they, or one of them, rely on that choice, then the court should apply the foreign law designated by the parties, but only within the limits of the Regulations, and subject to any prohibited choices of law. Rules Rome I, (1) - (3), Rome II (1) and (2), Rome III (1), Maintenance Obligations Regulation (1) and (2), and Successions Regulation (1) and (2), attempt to reflect this idea. In other words, this will trigger the application of the Regulation *in toto*.

If none of the parties rely on a choice of law made, then it is not automatically up to them, having been informed by the court of the foreign element and the potential application of the Regulation, to choose between the application of the Regulation or the *lex fori*. That depends on national procedural rules. Only to the extent that the court is *not* obliged, under its domestic procedural law, to apply the conflict rule and the foreign law, may the parties opt for the application of the *lex fori* (*cf.* 2012 Report, p 7). Rules Rome I (4), Rome II (3), Rome III (2), Maintenance Obligations Regulation (3) and Successions Regulation (3) reflect this idea.

The *General Rule*, as formulated, shows a few alternatives for discussion: how far does the duty of the court go in discerning the *élément d'extranéité*? And should the Rule, if acceptable, apply only to EU Regulations or also when other (EU only?) applicable law rules apply?

Rome I

The three rules (1) to (3) are presented separately for the purpose of the discussion. They could ultimately be combined in one rule.

Rule (4) poses a question for our common law GEDIP members: assume that the court has informed that parties of the *élément d'extranéité*; Assume, moreover, that the case concerns a consumer or employment contract as covered by Article 6 (1) or Article 8; is it then, under present procedural rules applicable in the UK etc., left to the parties to raise the application of the objectively applicable law designated by these Articles? If the parties do not do so, but the objectively applicable law under these Articles is a foreign law, is the court then under a duty to apply these Articles?

Rome II

In respect of Rule (3) a similar question arises as the question under Rule (4) for Rome I. Is it, under present procedural rules applicable in the UK etc., left to the parties to raise the application of the objectively applicable law designated by Articles 6 and 8? If the parties do not do so, but the objectively applicable law under these Articles is a foreign law, is the court then under a duty to apply these Articles?

Rome III

In respect of Rule (2), the question is whether in the EU context as outlined in the 2012 Report, the question of the law applicable to divorce falls outside the parties' scope of decision (*cf.* also the introductory considerations 14 and 15 to Rome III, which put great emphasis on the parties' autonomy). If the answer is "no", then Rule (2) would apply: the procedural rules determine whether it is for the parties to raise the application of Rome III, or whether the court should apply Rome III of its own motion. If the answer is "yes", then the Alternative would apply.

Maintenance Regulation

The Maintenance Regulation refers for the applicable law provisions to the 2007 Hague Protocol. Paragraphs (1) and (2) of the proposed Rule follow the logic of the Rules for Rome III for the case where the parties rely on a choice of law. In respect of paragraph (3), the procedural rules of the forum will determine whether the parties should plead the application of the Protocol or whether the court should apply it of its own motion.

A question arises in respect of paragraph (3), somewhat similar to the questions asked above under Rome (I) and Rome II: in light of the provisions of Article 8 (3) of the Protocol which protect children and vulnerable adults, is it, under present procedural rules applicable in the UK etc., left to the parties to raise the application of the objectively applicable law designated by the Protocol to children and vulnerable adults? If the parties do not do so, but the objectively applicable law under these Articles is a foreign law, is the court then under a duty to apply these Articles? (We know, of course, that the Protocol does not apply in the UK, but the question asked here concerns the principle)

Successions Regulation

Paragraphs (1) and (2) follow the model for Rome I (1)-(3). Paragraph (3) raises questions similar to Rome III (3) and Maintenance Regulation (3)