Ius Comparatum – Global Studies in Comparative Law

Yuko Nishitani *Editor*

Treatment of Foreign Law - Dynamics towards Convergence?

Ius Comparatum – Global Studies in Comparative Law

Volume 26

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Treatment of Foreign Law - Dynamics towards Convergence?

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ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-319-56572-9 ISBN 978-3-319-56574-3 (eBook)
DOI 10.1007/978-3-319-56574-3

Library of Congress Control Number: 2017943337

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The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

The treatment of foreign law is a crucial issue for the functioning of private international law. If the relevant conflicts rule or the applicable foreign law is not applied in court proceedings, the designation of foreign law as the law governing the international legal relationship remains superfluous and purely theoretical. Thus, in cross-border cases, we primarily need to examine whether the application of conflicts rules of the forum state is mandatory or facultative and whether and how far judges are obliged to apply and ascertain foreign law ex officio or the extent to which parties are held to plead and prove foreign law. Further, we ought to consider and develop effective means of obtaining information on foreign law, subject to the limitations of the civil procedure rules of the forum state.

The methods of applying and ascertaining foreign law differ among jurisdictions. Conflicts lawyers used to separate two distinctive features: Civil law jurisdictions characterize foreign law as "law" and provide for the ex officio application and ascertainment of foreign law by the judge. Common law jurisdictions consider foreign law as "fact" and request that parties plead and prove foreign law. Nowadays, however, the "law-fact" dichotomy no longer seems to duly reflect reality.

A closer look reveals more differentiated features with their own nuances even among civil law jurisdictions. Some civil law countries restrict the mandatory application of conflicts rules to a certain category of rights or issues. Due to the judges' limited resources and expertise on foreign law, parties may be asked to provide assistance in ascertaining foreign law. Some civil law countries even place the onus of proving foreign law upon the party. Unlike domestic law, the judicial review of foreign law may be excluded or subject to particular restrictions. In common law jurisdictions, on the other hand, the judge may exceptionally be obliged or entitled to take judicial notice of foreign law in certain cases. Unlike usual facts, the absence of evidence on foreign law does not result in the dismissal of the claim, but generally leads to the application of the lex fori. The court's previous findings on the point of foreign law can also be referred to in subsequent cases as evidence of that foreign law, and the application of foreign law is appealable. Thus, foreign law may better be classified as a "question of fact of a peculiar kind" or "tertium genus" in common law jurisdictions. As a consequence, the difference between the conventional civil law approach and the common law approach is not as large as it appears at the outset.

The underlying volume examines different and multifaceted characteristics of applying and ascertaining foreign law and the methods of accessing foreign law in various jurisdictions. While extensive research already exists on these issues, this book is unique in comparatively scrutinizing the treatment of foreign law in different countries and regions worldwide, which extend from Europe over North and South America to the Asia-Pacific Area and Africa. Furthermore, this volume explores existing mechanisms and the possibility of establishing a new scheme for obtaining information on foreign law, in particular through administrative and judicial cooperation. It remains to be seen whether and how far legal systems around the world will integrate and converge in their treatment of foreign law.

This volume includes one general report and 29 national reports. The Hague Conference on Private International Law also provided a report on the state and progress of its envisaged project on the treatment of foreign law. The general report, as well as most of the individual reports, was prepared for the Vienna Conference of the International Academy of Comparative Law in the summer of 2014 and subsequently updated in the autumn of 2016. Spanish and Tunisian reports were submitted for publication. The questionnaire prepared for national reports is included at the end of this volume.

It is a great pleasure and honor that so many experts in private international law and civil procedure law from various jurisdictions have contributed to this volume. Special thanks go to Prof. Katharina Boele-Woelki, Prof. Diego P. Fernández Arroyo, Prof. George A. Bermann and Prof. Jürgen Basedow, the present and former President and Secretary General of the International Academy of Comparative Law, for their kind support and recommendations and also for including this volume in the honorable *Ius Comparatum* series. The editor would also like to sincerely thank Prof. Béligh Elbalti for his assistance in the editing work. Last but not least, the editor expresses her gratitude to Mr. Neil Olivier and Ms. Diana Nijnhuijzen at Springer for their patience and warm encouragement in completing this volume.

Kyoto, Japan
June 2017

Yuko Nishitani

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Part I
General Report

Treatment of Foreign Law: Dynamics Towards Convergence? — General Report

Yuko Nishitani

Abstract This general report conducts a comparative study mainly on the following three points. First, the report examines comparatively the question of whether the application of conflict of laws is mandatory or facultative. Second, the report analyses the nature of foreign law and distinctive features of its treatment, particularly in relation to the mandatory and the facultative application of foreign law, the ascertainment of foreign law and the review of foreign law by appeal courts. Although the starting point on how to treat foreign law differs in civil law and common law jurisdictions, the practical outcome is more similar than would appear at first, even though unification of the treatment of foreign law is still a long way off. Third, the report critically scrutinizes the existing methods for obtaining information on foreign law in the light of administrative and judicial cooperation and analyses possibilities for improving access to foreign law.

Abbreviations

CC	Civil Code
CJEU	Court of Justice of the European Union
CPC	Civil Procedure Code
EC	European Community
EU	European Union
HCCH	Hague Conference on Private International Law
PIL	Private International Law
TEC	Treaty establishing the European Community ([consolidated version 2006] *O.J.* 29.12.2006, C 321E/37)
TFEU	Treaty on the Functioning of the European Union ([consolidated version 2016] *O.J.* 7.6.2016, C 202/47)

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Y. Nishitani (ed.), *Treatment of Foreign Law - Dynamics towards Convergence?*,
Ius Comparatum – Global Studies in Comparative Law 26,
DOI 10.1007/978-3-319-56574-3_1

I. Introduction

Globalization is intensifying cross-border movements of people, goods, services and information. This results in more international legal relationships—not only for large enterprises in business transactions but also for individuals in everyday life such as through consumer contracts, family relations and succession planning. Private international law (conflict of laws or choice of law) assumes an important role in determining the applicable law and regulating international legal relationships. Once a cross-border case is governed by foreign law, it is crucial to know whether and to what extent conflicts rules are applied ex officio, and how foreign law is ascertained and applied.

Foreign law is obviously distinct from domestic law. This is because it emanates from a foreign sovereign with its own prescriptive and judicial jurisdiction. Judges do not have the power to modify the content of foreign law; they can only accept or refuse its application. Moreover, while judges are obliged to conduct court proceedings and render a judgment pursuant to domestic law, they do not necessarily afford the same status to foreign law.[1] In fact, although most civil law jurisdictions provide for the ex officio application of foreign law by judges, the ascertainment and review of foreign law may be subject to certain restrictions, which do not apply to domestic law. Common law jurisdictions even require the parties to plead or invoke and prove the content of foreign law. Furthermore, a crucial issue arises as to how to obtain information on foreign law, since access to foreign law is generally limited not only for courts but also for parties, lawyers, notaries, arbitrators and other stakeholders.

This general report conducts a comparative study mainly on the following three points. First, the report analyses the treatment of conflict of laws in court proceedings in various jurisdictions. This concerns the question of whether the application of conflict of laws is mandatory or facultative. Second, the report analyses the nature of foreign law and examines distinctive features of the treatment of foreign law in different jurisdictions, particularly in relation to the mandatory and the facultative application of foreign law, the ascertainment of foreign law and the review of foreign law by appeal courts. The report also pays special attention to the divergent treatment of foreign law among various jurisdictions when uniform conflicts rules in international treaties[2] or EU Regulations[3] ought to be applied. Third, the report

[1] Pierre Mayer/Vincent Heuzé, *Droit international privé*, 11th ed. (Paris 2014), p. 140.

[2] *See* the conventions adopted by the Hague Conference on Private International Law (http://www.hcch.net/) and the Organization of American States (http://www.oas.org/).

[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *O.J.* 2008, L 177/6; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *O.J.* 2007, L 199/40; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *O.J.* 2009, L 7/1 (*hereinafter* "Maintenance Regulation"); Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *O.J.* 2010, L 343/10 (*hereinafter* "Rome III Regulation"); Regulation (EU) No 650/2012 of the

critically scrutinizes the mechanism and functionality of existing methods for obtaining information on foreign law in light of administrative and judicial cooperation. The relevant international instruments are, in particular, the London Convention (1968),[4] the Montevideo Convention (1979)[5] and the Minsk Convention (1993).[6] The report then analyses the possibility of improving access to foreign law and scrutinizes several expedient methods to this end.

Extensive research already exists on these issues—consider, in particular, the work prepared by the Hague Conference on Private International Law (HCCH),[7] the European Judicial Network in Civil and Commercial Matters (EJN)[8] and the research projects subsidized by the European Union (EU)[9]. Although this general report considers these existing works, it takes an alternative approach by comparatively examining the treatment and application of foreign law in various jurisdictions worldwide. This study also considers the feasibility of establishing a common framework for collecting information on foreign law.

European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, *O.J.* 2012, L 201/107 (*hereinafter* "Succession Regulation"); Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, *O.J.* 2016, L 183/1 (*hereinafter* "Matrimonial Property Regimes Regulation"); Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, *O.J.* 2016, L 183/30 (*hereinafter* "Partnership Regulation").

[4] European Convention of 7 June 1968 on Information on Foreign Law; Additional Protocol of 15 March 1978 to the European Convention on Information on Foreign Law.

[5] Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law.

[6] Convention of 22 January 1993 on Legal Aid and Legal Relations in Civil, Family and Criminal Matters, amended on 28 March 1997.

[7] Various preliminary documents are available on the HCCH website (http://www.hcch.net/) under "Work in Progress" then "General Affairs; *also* Conclusions and Recommendations of the Joint Conference of the *European Commission and Hague Conference on Private International Law on* "Access to Foreign Law in Civil and Commercial Matters" (Brussels, 15–17 February 2012) (available at: http://www.hcch.net/index_en.php?act=events.details&year=2012&varevent=248).

[8] http://ec.europa.eu/civiljustice/index_en.htm; for an overview of conflicts rules and the treatment of foreign law in the EU Member States, *see* http://ec.europa.eu/civiljustice/applicable_law/applicable_law_gen_en.htm.

[9] Swiss Institute of Comparative Law, *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future* (*hereinafter* "SICL Report") (JLS/2009/JCIV/PR/0005/E4), Part I: Legal Analysis; Part II: Empirical Analysis; Synthesis Report with Recommendations (2011) (available at: http://ec.europa.eu/); Carlos Esplugues/José Luis Iglesias/Guillermo Paolo (eds.), *Application of Foreign Law* (Munich 2011) (it includes "Principles for a Future EU Regulation on the Application of Foreign Law" ["Madrid Principles"]); *see also* Carlos Esplugues Mota, "Harmonization of Private International Law in Europe and Application of Foreign Law: The 'Madrid Principles' of 2010", *Yearbook of Private International Law* 13 (2011), pp. 273 ff.

This general report has greatly benefitted from 32 national reports submitted for the 2014 Vienna Conference[10] and two national reports submitted subsequently[11] by experts in private international law and civil procedure law from various jurisdictions in Europe, North and South America, Asia-Pacific Area and Africa. The Hague Conference on Private International Law also provided a report on the state and progress of its envisaged project on the treatment of foreign law.[12] The aim of this general report is to provide fresh insights into the status quo in the treatment of and access to foreign law in different countries and possibly pave the way for further developments in the future.[13]

II. Conflict of Laws

A. General Remarks

The application of foreign law comes into consideration when the conflict of laws rules of the forum state designate foreign law as applicable to the cross-border legal relationship concerned. The content of the conflicts rules and the connecting factors that are employed determine the frequency of the application of foreign law.[14]

Notably, the applicable foreign law is not limited to the substantive law of the foreign state. Rather, foreign law may include foreign conflicts rules when the court solves conflicts of laws within the foreign legal system in a Multi-Unit state or exceptionally determines a renvoi. This is also the case when the court applies the conventional "vested rights theory" in the U.S.[15] or the "principle of recognition" in the EU.[16] Furthermore, foreign procedural law could also be considered when the court

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[10] Argentina, Australia, Belgium, Commonwealth African Countries, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Israel, Ireland, Italy, Japan, Macau/China, Malta, Poland, Portugal, Quebec/Canada, Romania, Sweden, Switzerland, Tunisia, U.K., Uruguay, Turkey, U.S. and Venezuela. The questionnaire prepared for the 2014 Vienna Conference is included at the end of this volume.

[11] Spain and Tunisia (as revised).

[12] Report of the Hague Conference on Private International Law (hereinafter "HCCH report"); *see also* Philippe Lortie/Maja Groff, "The Missing Link between Determining the Law Applicable and the Application of Foreign Law: Building on the Results of the Joint Conference on Access to Foreign Law in Civil and Commercial Matters (Brussels, 15–17 February 2012)", in: *A Commitment to Private International Law. Essays in honour of Hans van Loon* (Cambridge *et al.* 2013), pp. 325 ff.

[13] The original, slightly shorter version of this general report will be published as "Proof of and Information about Foreign Law", in: Schauer/Verschraegen (eds.), *General Reports of the XIXth Congress of the International Academy of Comparative Law* (*forthcoming 2017*).

[14] *See* Maarit Jänterä-Jareborg, "Foreign Law in National Courts: A Comparative Perspective", *Recueil des cours* 304 (2003), pp. 202 ff.

[15] *See infra* note 32.

[16] Art. 18 and 21 TFEU (ex-Art. 12 and 18 TEC): *see, in particular,* CJEU, 2.10.2003, Case C-148/02 [*Garcia Avello*], Rep. 2003, I-11613; CJEU, 14.10.2008, Case C-353/06 [*Grunkin Paul*], Rep. 2008, I-7639; CJEU, 22.12.2010, Case C-208/09 [*Sayn-Wittgenstein*], Rep. 2010, I-13693;

determines the international jurisdiction to adjudicate,[17] the recognition of foreign judgments[18] or the opening of insolvency proceedings and its effects on the debtor's assets.[19] The relevant court proceedings are not limited to civil litigation, but include *exequatur*, insolvency and any other disputes before courts. Nevertheless, since the treatment of conflicts rules and foreign law in civil litigation principally applies to other types of court proceedings, this study concentrates on civil litigation.

B. Designation of Foreign Law

1. Conflict of Laws Rules

The majority of jurisdictions considered in this report[20] principally follow the conflict of laws method that goes back to Savigny in the mid-nineteenth century.[21] This method consists in designating the law that has the closest connection with the category of the legal relationship concerned, presupposing the equality and interchangeability of domestic law and foreign law. The conflicts rules are formulated in the form of bilateral conflicts rules that designate domestic law and foreign law under the same conditions ("internationalist approach").[22]

Depending on the content of conflicts rules, there are differences in how frequently there is reference to foreign law. In most jurisdictions in the world, party autonomy in contracts is an established principle, allowing the parties to designate

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CJEU, 12.5.2011, Case C-391/09 [*Runevič-Vardyn*], Rep. 2011, I-3787; CJEU, 2.6.2016, Case C-438/14 [*Bogendorff von Wolffersdorff*] (not yet reported); *see* Michael Grünberger, "Alles Obsolet? Anerkennungsprinzip vs. klassisches IPR", in: Leible/Unberath (ed.), *Brauchen wir eine Rom 0-Verordnung?* (Sipplingen 2013), pp. 81 ff.; Paul Lagarde (ed.), *La reconnaissance des situations en droit international privé* (Paris 2013); Matthias Lehmann, "Recognition as a Substitute for Conflict of Laws?", in: Leible (ed.), *General Principles of European Private International Law* (Aphen aan den Rijn 2016), pp. 11 ff.; Heinz-Peter Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums. Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?", *RabelsZ* 70 (2006), pp. 651 ff., 705 ff.

[17] For example, § 98 (1) No. 4 FamFG (divorce jurisdiction depends on the recognition of German judgments in the spouses' country of origin).

[18] For example, § 328 (1) No. 5 ZPO and § 109 (4) FamFG; Art. 118 No. 4 Japanese CPC (reciprocity requirement).

[19] *See* Art. 3 (4)(a) and Art. 5-14 of the EU Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *O.J.* 2000, L 160/1); Art. 3 (4)(a) and Art. 8-17 of the EU Insolvency Regulation Recast (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), *O.J.* 2015, L 141/19).

[20] Argentina; Australia; Croatia; France; Georgia; Greece; Israel; Italy; Japan; Poland; Portugal; Quebec; Turkey; Uruguay; Venezuela.

[21] Friedrich Karl von Savigny, *System des heutigen römischen Rechts,* Vol. 8 (Berlin 1849), pp. 2 ff.

[22] *Cf.* 1989 Santiago de Compostela Resolution of the Institute of International Law: "Equality of Treatment of the Law of the Forum and of Foreign Law" (http://www.idi-iil.org/idiE/resolutionsE/1989_comp_02_en.PDF).

the applicable law without restricting the range of eligible laws from which the choice can be made.[23] This renders the application of foreign law more likely, subject to the parties' choice of law.

In family and succession law, the principle of nationality that traditionally prevailed in civil law jurisdictions often led to the application of foreign law. This is arguably also the case with the "alternative connecting factors" method, which aims to achieve a certain substantive law policy at the level of private international law (e.g., "favor filiationis" or "favor testamenti"). Since the 1970s, with a view to achieving gender equality, civil law countries have abolished conflicts rules that solely refer to the law of nationality of the husband and have introduced in their place the "cascading connecting factors" method ("Anknüpfungsleiter") to seek common elements between the spouses. By restricting the designation of the law of nationality to the case where spouses share a common nationality, the applicability of foreign law has been considerably reduced. Moreover, the recent tendency of European countries to facilitate the acquisition of nationality and accept dual nationalities to enhance the integration of immigrants[24] will lead to greater application of the lex fori. Furthermore, the Hague Conventions,[25] as well as recent EU regulations[26] and various recent domestic legislation,[27] are gradually shifting from the principle of nationality to the principle of habitual residence when determining the applicable law. The conflicts rules that point to the law of habitual residence regularly result in the application of the lex fori due to coincidence with the jurisdiction rules.[28] Some specific conflicts rules, such as party autonomy under the EU regula-

[23] Only some Latin American and Arab states still exclude or limit party autonomy. In the U.S., the eligible laws that can be chosen by the parties are generally limited to those that have a close relationship with the contract. *See* Jürgen Basedow, "The Law of Open Societies: Private Ordering and Public Regulation of International Relations", *Recueil des cours* 360 (2013), pp. 164 ff.; Yuko Nishitani, "Party Autonomy in Contemporary Private International Law — The Hague Principles on Choice of Law and East Asia —", *Japanese Yearbook of International Law* 59 (2016), pp. 300 ff.

[24] Randall Hansen/Patrick Weil, "Citizenship, Immigration and Nationality: Towards a Convergence in Europe?", in: Hansen/Weil (eds.), *Towards a European Nationality. Citizenship, Immigration and Nationality Law in the EU* (Hampshire/New York 2001), pp. 5 ff.; Olivier W. Vonk, *Dual Nationality in the European Union* (Leiden 2012), pp. 47 ff.

[25] *See, inter alia,* Art. 3 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (*hereinafter* "Child Abduction Convention"); Art. 4-5 of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Art. 15-17 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Art. 13-16 of the Convention of 13 January 2000 on the International Protection of Adults; Art. 3-6 of the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (*hereinafter* "Hague Protocol") (available at: http://www.hcch.net/).

[26] *See* Art. 15 Maintenance Regulation (Art. 3-6 of the 2007 Hague Protocol); Art. 8 Rome III; Art. 21 Succession Regulation.

[27] Belgium (2004 PIL Act); Czech Republic (2012 PIL Act); Switzerland (1987 PIL Act); *also* Finland.

[28] Brigitta Lurger, "Die Verortung natürlicher Personen im europäischen IPR und IZVR: Wohnsitz, gewöhnlicher Aufenthalt, Staatsangehörigkeit", in: Hein/Rühl (eds.), *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union* (Tübingen 2016), pp. 217 f.; Heinz-Peter

tions that gives the parties an option to refer to the lex fori[29] or conflicts rules that protect weaker parties like maintenance creditors,[30] also favour the application of the lex fori.

On the other hand, the law governing family relations and succession in the U.K., Australia, the U.S. and other common law jurisdictions is generally the lex fori as a matter of course, or the law of habitual residence or domicile of the person which usually corresponds to the lex fori.[31] Foreign law is, therefore, rarely applied to family relations and succession in common law jurisdictions.

Furthermore, the modern approaches of conflict of laws in proprietary issues prevail over the traditional method of referring to fixed connecting factors grounded in the vested rights theory in most states of the U.S.[32] The modern approaches derive from the so-called U.S. "conflicts revolution" beginning in the 1960s.[33] They rely on, in particular, the "most significant relationship",[34] "governmental interests",[35] the "better law" approach[36] or the "lex fori" approach[37]. These "revolutionary" methods leave a wide leeway for U.S. courts in assessing the closest connection, governmental interests or other substantive interests to determine the applicable law. As a result, U.S. cases generally show a strong "homeward" trend of preferring the lex fori. Indeed, foreign law has seldom been applied before federal or state courts in the U.S., except for in specific commercial centres, such as New York. This tendency may intensify in light of recent developments surrounding bans on Shari'a law and foreign law.[38]

Mansel, "Die kulturelle Identität im Internationalen Privatrecht", *BerDGesVO* 43 (2008), p. 171; Marc-Philippe Weller/Bettina Rentsch, "'Habitual Residence': A Plea for 'Settled Intention'", in: Leible (ed.), *General Principles of European Private International Law* (Aphen aan den Rijn 2016), p. 175.

[29] Art. 3 Rome I; Art. 14 Rome II; Art. 5 Rome III; Art. 15 Maintenance Regulation (Art. 7 and 8 of the 2007 Hague Protocol); Art. 22 Succession Regulation; Art. 22 Matrimonial Property Regimes Regulation; Art. 22 Partnership Regulation (*supra* note 3).

[30] Art. 15 Maintenance Regulation (Art. 4 (2)(3) of the 2007 Hague Protocol).

[31] *See, e.g.,* Dicey, Morris & Collins, *The Conflict of Laws,* 15th ed., vol. 2 (London 2012), para. 17R-001 ff. (marriage: Rule 73–75), 18R-032 ff. (divorce and separation: Rule 85), 19R-001 ff. (parental responsibility: Rule 104–105), 20R-009 ff. (parentage: Rule 113–118), 27R-010 ff. (succession: Rule 149–164) and 28 R-001 ff. (the effect of marriage on property: Rule 165–167); Peter Hay/Patrick J. Borchers/Symeon C. Symeonides, *Conflict of Laws,* 5th ed. (St. Paul, MN 2010), pp. 614 ff., 1285 ff.

[32] Joseph Henry Beale, *A Treatise on the Conflict of Laws*, vol. 1 (New York 1935), pp. 53 ff.; also Restatement (First) Conflict of Laws (1934).

[33] Hay/Borchers/Symeonides, *supra* note 31, pp. 27 ff.; Symeon C. Symeonides, *The American choice-of-law revolution: past, present and future* (Leiden 2006), pp. 9 ff.

[34] Restatement (Second) Conflict of Laws (1971).

[35] Brainerd Currie, "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function", in: *Selected Essays on the Conflict of Laws* (Durham/NC 1963), pp. 188 ff.

[36] Robert Allen Leflar, *American Conflicts Law*, 3rd ed., (Indianapolis/NY *et al.* 1977), pp. 212 ff.

[37] Albert Armin Ehrenzweig, *Private International Law. A Comparative Treatise on American International Conflicts Law*, vol. 1: General Part (Leyden/NY 1967), pp. 91 ff.

[38] U.S. District Court for the Western District of Oklahoma, 15 August 2013 [Awad v. Ziriax], 966

Some other factors are also likely to reduce the number of cases where foreign law is referred to as the applicable law. First, the application of foreign law can be excluded if it would contravene public policy, particularly when foreign law relies on values that are fundamentally different from the values of the forum state. Second, the so-called "blocking statutes" in the U.S.[39] or the overriding mandatory rules of the forum state in civil law countries may lead to the exclusion of the application of foreign law. Third, in cross-border business transactions, the frequent use of arbitration, instead of litigation, could mean courts more rarely apply foreign law. Fourth, allowing a simple renvoi, which consists of applying the domestic law pursuant to the foreign conflicts rules that refer back to the law of the forum, will result in excluding the application of the foreign substantive law.[40] Yet a simple renvoi does not fully exempt the court from applying foreign law, as the court needs to apply foreign conflicts rules to determine the renvoi. Finally, courts in the U.S., U.K. or Australia may dismiss the action or stay proceedings due to the court being a "forum non conveniens", on the ground that foreign law is applicable to the case at hand. A Japanese judge may also declare lack of international jurisdiction on account of special circumstances (Art. 3-9 CCP), owing to the fact that foreign law cannot be properly established or applied in Japan. Although foreign law will then no longer govern the subject matter of the dispute, a number of court proceedings invariably discuss the applicability of foreign law in precisely these circumstances (*infra* VII.A).[41]

2. Frequently Designated Sources of Foreign Law

Which foreign laws are applied vary considerably depending on the jurisdiction and area of law. First, due to geographic closeness and frequent movements of persons and goods, many jurisdictions regularly apply the foreign laws from neighbouring countries.[42] In the EU, the freedom of movement of persons, goods, services and capital—that is, the freedom of establishment within the internal market—increases the applicability of laws of other Member States. Further, the special connection

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F. Supp. 2d 1198; *see* Peter Hay, "Section II.B: Private International Law: The Use and Determination of Foreign Law in Civil Litigation", *Am. J. Comp. L.* 62 (2014), pp. 217 ff.

[39] Hay, *supra* note 38, pp. 233 ff.

[40] *See* Jürgen Basedow, "The Application of Foreign Law—Comparative Remarks on the Practical Side of Private International Law", in: Basedow/Pißler (eds.), *Private International Law in Mainland China, Taiwan and Europe* (Tübingen 2014), p. 91.

[41] U.K. (Richard Fentiman, *International Commercial Litigation,* 2nd ed. (Oxford 2015), para. 20.03 f.); *also* Australia; U.S. (Hay, *supra* note 38, p. 232); for Japan, *see* Tokyo District Court, 22 February 2013 (Westlaw Japan Case No. 2013WLJPCA02226001); for Japanese jurisdiction rules, *see* Yuko Nishitani, "International Jurisdiction of Japanese Courts in Comparative Perspective", *Netherlands International Law Review* 60 (2013), pp. 270 ff.

[42] Croatia (German, Austrian, Italian, Hungarian and Swiss laws; laws of former Yugoslavian countries); Czech Republic (Slovakian, German, Polish and Austrian law); Georgia (Russian, Turkish or Ukrainian laws); Germany (Dutch law and laws of other EU Member States); Hungary (Austrian, German and Romanian laws); Tunisia (laws of Arab countries and certain European countries).

between former colonial powers and their colonies,[43] among Commonwealth countries,[44] and among states who share a common language or cultural background[45] often leads to the reciprocal application of the laws. In Multi-Unit states such as the U.K., Australia, Canada, the U.S. and Nigeria, the law of other political units, such as states, regions or provinces is also considered to be foreign law and often applied in interregional or interstate conflict of laws cases.

Second, the presence of immigrants or ethnic minorities within a jurisdiction may often lead to the application of foreign law when the principle of nationality governs their family relations.[46] In Japan, with immigrants from North and South Korea, China and Taiwan, as well as from the Philippines, Vietnam and Brazil, courts often apply the laws of these jurisdictions, including those of North Korea and Taiwan which Japan does not recognize as statehood.[47]

Third, foreign law is frequently applied by way of the parties' choice of law in contracts, reflecting case-specific commercial considerations as well as the general need for efficiency in cross-border business transactions. The laws that are frequently chosen by the parties are, in particular, New York, English, French, German and Swiss.

C. Application of Conflict of Laws

1. General Remarks

A question that arises in the application of conflict of laws rules is whether and to what extent conflicts rules ought to be applied ex officio once the internationality or foreign elements of the case have been ascertained.[48] This question turns on what role the parties should play in civil procedure, so that conflicts rules are applied by the judge. This is a matter of task-sharing between the judge and the parties. In fact, various factors influence the practical implementation of conflicts rules, particularly the civil procedural rules of the relevant jurisdiction. A general distinction can be drawn between the civil law approach and common law approach, even though there are exceptions and considerable variations within these categories.[49]

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[43] Portugal and Brazil or Cape Verde.

[44] U.K., Australia.

[45] Nordic countries (Sweden, Norway, Finland); Latin American countries (Argentina, Uruguay, Venezuela).

[46] *See, e.g.,* Czech Republic (Vietnamese, Ukrainian and Russian law); Germany (Turkish and Iranian law); Italy (Moroccan, Egyptian and Tunisian law).

[47] Yayohi Satoh, "Law Applicable to Personal Status of Korean and Chinese Nationals before Japanese Courts", *Japanese Yearbook of International Law* 55 (2012), pp. 323 ff.

[48] For the ascertainment of the internationality or foreign elements of the case in civil procedure, *see infra* II.C.2.

[49] *See* Esplugues *et al.* (eds.), *supra* note 9, pp. 18 ff.; Sofie Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford 2004), para. In 11 ff.

In the following study, the term "mandatory" application of conflicts rules is used to indicate that the judge is obliged to apply conflicts rules ex officio. This is distinguishable from conflicts rules being "binding", which means that neither the court nor the parties may modify or deviate from the content of conflicts rules.

2. Mandatory Application of Conflicts Rules

a) Uniform Approach

The majority of the civil law jurisdictions considered in this report provide for the mandatory application of conflicts rules for all categories of legal relationships.[50] Under this system, the judge must apply conflicts rules suo moto without the parties' invocation. In these countries, the conflicts rules constitute a part of the domestic legal system, independently of whether their legal sources are domestic law, international treaties or EU regulations. Because the conflicts rules are legitimate sources of law in the forum state that are currently in force, they are regarded as binding upon the judge and the parties. Thus, the judge applies conflicts rules ex officio pursuant to the principle of "iura novit curia", in the same manner as the substantive domestic law, once the court confirms the internationality of the case.

Some academics in these civil law countries have argued in favour of deviating from the ex officio application of conflict of laws. In particular, Flessner advocated the theory of the "facultative conflict of laws" in 1970 in Germany, according to which conflicts rules are applicable only when at least one party invokes them. This meant giving the parties control over whether conflicts rules are applied, on the ground that the quality of the administration of justice cannot be guaranteed when foreign law is always applied ex officio.[51] Yet the scholarly consensus was then against this position, because it could hamper legal certainty and thwart the integrity of the domestic legal system by allowing the parties to circumvent the application of domestic mandatory rules. In addition, there was a concern that the theory of the facultative conflict of laws would frustrate legal certainty and international harmony of decisions, which is the primary goal of conflict of laws.[52] Currently, however, the

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[50] Argentina; Austria; Macau; Croatia; Czech Republic; Denmark; Estonia; Georgia; Germany; Italy; Greece; Japan; Poland; Portugal; Quebec; Romania; Switzerland; Tunisia; Turkey; Uruguay; Venezuela. *See* Hague Conference on Private International Law, "Summary Tables on the Status of and Access to Foreign Law in a Sample of Jurisdictions", Information Document B of February 2007 (*hereinafter* "Summary Tables").

[51] Axel Flessner, "Fakultatives Kollisionsrecht", *RabelsZ* 34 (1970), pp. 547 ff.; *also* idem, "Das Parteiinteresse an der Lex Fori nach europäischem Kollisionsrecht", in: Verbeke *et al.* (eds.), *Liber Amicorum Walter Pintens* (Cambridge *et al.* 2012), pp. 593 ff.; idem, "Das ausländische Recht im Zivilprozess—die europäischen Anforderungen", in: Reichelt (ed.), *30 Jahre österreichisches IPR-Gesetz—Europäische Perspektiven*—(Wien 2009), pp. 35 ff.

[52] *See, inter alia,* Rudolf Hübner, *Ausländisches Recht vor deutschen Gerichten* (Tübingen 2014), pp. 190 ff.; Oliver Remien, "Proof of and Information about Foreign Law", in: Schmid-Kessel (ed.), *German National Reports on the 19th International Congress of Comparative Law* (Tübingen 2014), p. 224; Jänterä-Jareborg, *supra* note 14, pp. 197 ff.

facultative application of conflict of laws, at least in attenuated form, is gaining support in the process of seeking to harmonize the treatment of uniform conflicts rules in the EU (*infra* VII.B.2).

b) Distinctive Approach

Some other civil law jurisdictions take a distinctive approach to the treatment of conflicts rules, depending on the nature of the subject matter at stake. France in particular classifies the subject matter into two types, depending on whether the parties can dispose of the rights concerned: "non-disposable rights" (droits indisponibles) and "disposable rights" (droits disponibles).[53] This corresponds to the distinction between "indispositive" ("mandatory") issues and "dispositive" ("non-mandatory") issues in Sweden and Finland.[54]

Pursuant to French case law which has developed since the 1959 Bisbal decision[55] with several fluctuations,[56] the application of conflicts rules is mandatory in relation to "non-disposable rights". The non-disposable rights generally concern status issues, such as capacity, divorce, nullity of marriage and parentage. On the other hand, the application of conflicts rules is facultative for "disposable rights", which in particular relate to civil and commercial contracts, non-contractual obligations and succession. The application of conflicts rules for disposable rights becomes mandatory for the judge once a party invokes the applicable foreign law. Otherwise, the judge has discretion as to whether or not to apply conflicts rules and foreign law suo moto. However, once the parties enter a "procedural agreement" to preclude the application of conflicts rules, the judge is bound to refer to the lex fori.[57]

Arguably, the distinctive approach in France and other countries seeks to strike a fair balance between legal certainty and flexibility, that is, the "iura novit curia" principle and the adversarial principle of civil procedure. On the other hand, as the French reporter points out, it is difficult to draw a clear line between "non-disposable rights" and "disposable rights" or other comparable bifurcated categories of rights or issues pursuant to the lex fori. Today, rights arising out of contractual or non-contractual obligations are not necessarily regarded as disposable, since they are increasingly governed by mandatory rules to protect employees and consumers, regulate the market, or enhance competition. Nor do legal relationships grounded in non-disposable rights strictly exclude the parties' disposition in conflict of laws but allow party

[53] For France, *see, e.g.,* Sabine Corneloup, "Rechtsermittlung im Internationalen Privatrecht der EU: Überlegungen aus Frankreich", *RabelsZ* 78 (2014), pp. 845 ff.; idem, "L'application de la loi étrangère", *Rev. int. dr. comp.* 2014, pp. 363 ff.; Bénédicte Fauvarque-Cosson, "Foreign Law before the French Court: The Conflicts of Law Perspective", in: Cavinet *et al.* (eds.), *Comparative Law before the Courts* (London 2004), pp. 3 ff.

[54] For Scandinavian countries, *see* Jänterä-Jareborg, *supra* note 14, pp. 277 ff.

[55] Cour de cassation, 12.5.1959, *Rev. crit. dr. int. pr.* 1960, 62.

[56] Cour de cassation, 4.12.1990, *Rev. crit. dr. int. pr.* 1991, 558; Cour de cassation, 26.5.1999, *Rev. crit. dr. int. pr.* 1999, 707; Cour de cassation, 28.6.2005, *Rev. crit. dr. int. pr.* 2005, 645.

[57] Corneloup, *supra* note 53, *RabelsZ* 2014, pp. 845 ff.

autonomy to some extent nowadays, as in the case of divorce under Art. 5 of the Rome III Regulation. The facultative approach in conflict of laws does not always correspond to the existence of the parties' freedom of disposition in substantive law. In light of this, some French academics advocate abolishing the conventional dichotomy between "non-disposable rights" and "disposable rights" de lege ferenda.[58]

c) Procedural Agreement

France, Sweden and several other countries allow the parties to enter into a procedural agreement ("accord procédural"),[59] with the effect of excluding the application of conflicts rules. The procedural agreement is characterized as an agreement to waive any cross-border elements of a case and render it a domestic case to be governed by definition by the lex fori. The judge is bound once the parties enter a procedural agreement explicitly or tacitly. While some of the countries considered accept procedural agreements only in relation to disposable rights or matters not related to public policy,[60] others extend its scope to all categories of legal relationships.[61] The procedural agreement is justified in light of procedural economy and flexibility to circumvent inappropriate conflicts rules or foreign law, with the argument that there is no need to apply foreign law when the parties are not interested in it. This argument particularly applies to cases where the parties are allowed to subject their legal relationship to the lex fori by means of choice of law and dispose of their substantive rights.

d) General Limitations

In addition to these methods of attenuating the mandatory application of conflict of laws, there are other relevant factual limitations. First, even among civil law jurisdictions, the mandatory application of conflicts rules may be restricted due to the adversarial principle in civil procedure law ("Verhandlungsmaxime" or "principe dispositive"). The majority of civil law countries,[62] except Austria and Italy, require the parties to invoke the facts constituting the cross-border elements of the case (e.g., nationality, habitual residence or place of performance). Exceptions are only granted in some countries for status and family matters, or matters concerning public policy, in which case foreign elements are ascertained ex officio[63] or on grounds

[58] Corneloup, *supra* note 53, *Rev. int. dr. comp.* 2014, pp. 365 ff.

[59] *Also* Belgium, Denmark, Hungary and Tunisia; for procedural agreement, *see, inter alia,* Bénédicte Fauvarque Cosson, *Libre disponibilité des droits et conflits de lois* (Paris 1996), pp. 241 ff.; *see infra* II.C.2.

[60] France; Sweden; Belgium; Tunisia.

[61] Denmark; Hungary.

[62] Germany; Italy; Japan; Sweden; Tunisia; for further detail, *see* SICL Report, *supra* note 9, pp. 10 ff.

[63] Belgium (*see* François Rigaux/Marc Fallon, *Droit international privé,* 3rd ed. (Bruxelles 2005), para. 6.52).

of inquisitional procedural rules.[64] Otherwise, the internationality of the case depends on the party's conduct in court proceedings. The court may be entitled[65] or obliged[66] to invite the parties to provide factual explanations on foreign elements of the case, but cannot examine them ex officio. This may, de facto, render the application of conflicts rules facultative or optional.

Second, in some jurisdictions like Spain and Tunisia, the judge takes a markedly passive position concerning the proof of foreign law. The parties need to provide the judge with sufficiently specific information on the content of foreign law to have it applied, otherwise the lex fori will come into play.[67] Again, the parties are given the opportunity to refrain from proving the content of foreign law in order to prevent the application of foreign law.

Third, some reporters have pointed out cases where the court has seemingly ignored the international aspects of a case or has provided a questionable interpretation of the relevant conflicts rules, with a view to circumventing the application of foreign law. These cases may result from insufficient legal education on conflict of laws. It is even reported from Italy that judges intentionally avoid applying foreign law as much as possible by discouraging the parties from requesting it, although the ex officio application of conflicts rules is taken for granted. This "homeward trend" in favour of the application of the lex fori can be observed throughout various jurisdictions.[68]

3. Facultative Application of Conflicts Rules

Mainly in jurisdictions grounded in or influenced by the common law,[69] the application of conflicts rules depends on the parties' pleading or invocation of foreign law. Due to the adversarial principle in civil procedure, the courts cannot intervene unless at least one party pleads the internationality of the case and the applicability of foreign law. In the absence of such pleadings, conflict of laws does not come into play and the matter is treated as a domestic case. Furthermore, in Australia, the parties can strategically circumvent the application of conflicts rules by accumulating actions and choosing a claim among them that is governed by the lex fori.

However, once a party pleads foreign law the judge has an obligation to apply conflicts rules, because conflicts rules constitute a part of the forum state's legal system. By pleading foreign law, a party can render the application of conflicts rules mandatory and binding, and it is the judge's task to find out the content of those conflicts rules. Once the court decides that foreign law is applicable, the content of that law needs to be proven by the party in principle. Yet some common law jurisdic-

[64] Germany (Art. 26 FamFG); Japan (Art. 20 Personal Matters Procedure Act and Art. 56 (1) Family Procedure Act).

[65] Quebec; Sweden.

[66] France.

[67] *See* Esplugues *et al.* (eds.), *supra* note 9, p. 20.

[68] Argentina; Croatia; Georgia; Germany; Tunisia.

[69] Australia; Commonwealth African countries; Israel; Ireland; U.K.; U.S.; *also* Malta; Quebec; Luxemburg.

tions are becoming more responsive to the idea of judges taking judicial notice of foreign law. In this respect, although the starting points of civil law jurisdictions and common law jurisdictions deviate from each other, the practical outcome will come closer than it appears at the outset (*infra* III).

4. Legal Sources of Conflicts Rules

The divergent approaches delineated so far raise the question of whether the source of conflicts rules necessarily determines how the conflicts rules are deployed. Domestic conflicts rules directly address the court in the forum state, so that it is a simple matter to define the operation of these domestic conflicts rules. On the other hand, conflicts rules deriving from international treaties or EU regulations are grounded in international law or EU law, which the forum state is obliged to abide by. For this reason, the majority of authors in Germany, Italy and Hungary assume specific obligations on the part of the forum state to apply conflicts rules grounded in international law or EU law ex officio.

Other countries do not seem to distinguish between the sources of conflicts rules. While this still results in the mandatory application of conflicts rules in the majority of civil law countries, it leads to a distinctive approach in France, although the previous case law had accepted a constant mandatory application of conflicts rules emanating from international treaties. Consequently, the application of the Rome I and the Rome II Regulations as conflicts rules relating to "disposable rights" are not mandatory in France, but subject to the parties' invocation and procedural agreements.[70] Further, the legal systems of the U.K. treat the application of foreign law as a matter of "evidence and procedure", which is outside the scope of Rome I (Art. 1 (3)) and Rome II (Art. 1 (3)). U.K. judges, therefore, are not obliged to apply foreign law, but the question depends on the parties' pleadings and proof of foreign law.[71]

This situation may well undermine the functioning of the uniform conflicts rules and hamper international harmony of decisions among Member States of the EU or Contracting States of international treaties. Particularly in the EU, this could eventually frustrate the purpose of adopting uniform conflicts rules to guarantee the free movement of persons, goods and capital, as well as the free circulation of judgments for the sake of an internal market (*infra* VII.B).

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[70] Corneloup, *supra* note 53, *Rev. int. dr. comp.* 2014, pp. 372 f. This point is disputed in Hungary.

[71] Dicey, Morris & Collins, *supra* note 31, vol. 1, para. 9-011; Trevor C. Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared", *Int'l & Comp.L.Q.* 45 (1996), pp. 282 ff. However, a deviating opinion emphasizes the mandatory character of the conflicts rules of the EU regulations and conventions, and the resulting application of foreign law. Richard Fentiman, *Foreign Law in English Courts. Pleading, Proof and Choice of Law* (Oxford 1998), pp. 92 ff.; *also* idem, *supra* note 41, para. 5.07.

III. Nature of Foreign Law

A. General Remarks

The nature of foreign law concerns the question of whether to characterize foreign law as "law" or "fact". The characterization of foreign law as "law" would equate foreign law with domestic law and presuppose the mandatory application of foreign law by the judge. The characterization of foreign law as "fact" would result in the facultative application of foreign law based on the parties' pleadings and proof, like other facts. Although the characterization of foreign law may directly influence the way foreign law is introduced, ascertained and applied in the court proceedings, this classification does not apply in its genuine form. A comparative study on the treatment of foreign law reveals multi-faceted features as to the division of tasks between the parties and the court in civil procedure.

B. Classification

1. Foreign Law as "Law"

Foreign law is considered "law" in almost all civil law jurisdictions.[72] France, Sweden and other civil law countries which take a distinctive approach as to the mandatory or facultative application of conflicts rules, depending on the rights or issues at hand, regard foreign law as "law".[73] Germany and Greece do too, even in the area of public law. Equating foreign law with domestic law generally results in the mandatory judicial ascertainment and application of foreign law ("iura novit curia"). Once designated by conflicts rules, foreign law ought to be applied to achieve international harmony of decisions; this is the primary goal of conflict of laws. Therefore, in the majority of civil law jurisdictions, an erroneous application of foreign law is appealable to higher courts—including the Supreme Court—under the same conditions as domestic law (*infra* V.B).

However, the treatment of foreign law is in fact differentiated from that of domestic law in several aspects. First, it is commonly assumed that the judge cannot always know the content of foreign law. With a view to alleviating the duty of courts to ascertain and apply foreign law, the parties may be required to provide information on foreign law in all the civil law jurisdictions considered. In Germany and Switzerland, the parties incur the obligation ("Mitwirkungspflicht"; "Obliegenheit") to cooperate with the court.[74] In Tunisia, it is even incumbent upon the parties to

[72] Argentina; Croatia; Czech Republic; Estonia; Finland; Georgia; Germany; Greece; Hungary; Italy; Japan; Poland; Portugal; Romania; Tunisia; Turkey; Uruguay; Venezuela.

[73] *Also* Denmark.

[74] For further detail, Hübner, *supra* note 52, pp. 274 ff.; *also* Max Keller/Daniel Girsberger, "Art. 16 IPRG", in: *Zürcher Kommentar zum IPRG,* 2nd ed. (Zürich 2004), para. 20 ff.; Monica Mächler-

prove the content of foreign law, whereas the judge is permitted, not obliged, to ascertain foreign law suo moto in principle. Thus the "iura novit curia" principle does not apply as a matter of course, and the task division between the court and the parties is effected in a manner different from domestic law (*infra* IV.B).

Second, even when foreign law is classified as "law", some countries deny or restrict appeals regarding its interpretation and application to the highest court, unlike in the case of domestic law. This is so in France, Germany and the Netherlands (*infra* V.B). For this reason, some Dutch authors characterize foreign law as neither law nor fact, but as a kind of "tertium genus".[75] In Belgium and Tunisia, foreign law has been confirmed as legal since the Supreme Court sanctioned the review of lower courts' errors in applying foreign law.

2. Foreign Law as "Fact"

The jurisdictions grounded in or influenced by common law consider foreign law to be "fact".[76] They deny the legal nature of law originating from a foreign state. Foreign law needs to be pleaded and proven with sufficient specificity by the parties so that the judge can apply it. The judge is assumed not to have any knowledge of foreign law and, in principle, is not allowed to take judicial notice of foreign law (*infra* IV.B.3).

In reality, the classification of foreign law as "fact" is not implemented consistently. While the existence, the nature and the scope of foreign law is a matter of fact, the application of foreign law is a matter of law. Thus there are some distinctive features of the treatment of foreign law that do not fit squarely within the "fact" doctrine.

First, questions of foreign law are no longer submitted to the jury, but are determined by judges in the U.K., Australia and the U.S.[77] Second, judges are obliged or entitled to take judicial notice of foreign law in certain cases. U.K. criminal courts hearing bigamy charges determine the validity of the first marriage celebrated abroad ex officio, referring to the applicable foreign law. English judges may also apply foreign law sua sponte for a declaration of status, summary judgment or the application of foreign law under international obligations (e.g., Art. 8 (2)(b) of the IMF Agreement).[78] Third, in the case of usual facts, the absence of evidence results in the dismissal of the claim of the party who bears the onus of proof, whereas in the case of foreign law, a default rule may be provided to refer to the lex fori. Fourth, the interpretation and application of foreign law is appealable. Appellate courts may reconsider foreign law in an analogous manner as an issue of law, accept new evidence, and reverse the findings of the trial judge on the foreign law. In the U.K., Australia and Malta, foreign law can even be reviewed by the highest judiciary in

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Erne/Susanne Wolf-Mettier, in: Honsell *et al.* (eds.), Basler Kommentar: Internationales Privatrecht, 3rd ed. (Basel 2013), Art. 16 IPRG, para. 9 ff.

[75] Esplugues *et al.* (eds.), *supra* note 9, p. 17.

[76] U.K.; Australia; Commonwealth African countries; Ireland; Israel; *also* Malta; Quebec.

[77] *See* Dicey, Morris & Collins, *supra* note 31, vol. 1, para. 9-012.

[78] Hartley, *supra* note 71, pp. 285 ff.