The Application of EU Private International Law and the Ascertainment of Foreign Law: A brief personal comment

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1. Introduction

Marta has provided us with a rich and in-depth paper which permits me the luxury of just giving a few personal thoughts on how EU private international law (PIL) should be applied by courts in the EU when it concerns applicable law rules.[1] My focus will be on the core of EU PIL that applies in all EU Member States apart from Denmark and not on enhanced cooperation or international provisions that bind only some EU Member States (eg the Hague Protocol on Maintenance). In enhanced co-operation and non-core areas of EU PIL if the States concerned regard the application of foreign law as being sufficiently important to be funded directly or indirectly by them then they can do so. This could be done by the States individually, or perhaps collectively by amendments to these instruments or by enhanced co-operation to an instrument on proof of foreign law applicable only to these non-core instruments so that the real State/EU interests in applying foreign law *ex officio*[2] can be teased out.

2. The importance of the universal application of EU PIL instruments on applicable law

One reason to be very cautious about insisting on *ex officio* application of foreign law by judges in courts in the EU is that they will be obliged to apply the laws of non-EU States when the EU law instruments on applicable law lead them to conclude that the law of a country not in the EU is the applicable law for that dispute or part of the dispute.[3] The result is that even if the EU legislature and the Member States were to significantly improve the European Judicial Network (EJN) so that it could give reliable, albeit basic, information on the laws of the EU Member States[4] this would not provide any help for judges when the applicable law is a non-EU law.

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[*] This paper should have been presented at a conference in Berlin from 2-3 March 2018 entitled "How European is European Private International Law?", but bad weather in Aberdeen prevented the writer from getting to Berlin, and the final version of the paper will appear as a chapter in a book with the same title to be published by Intersentia and edited by Jan von Hein, Eva-Maria Kieninger and Giesela Rühl. The author would like to thank Marta Requejo Isidro, Katarina Trimmings and Jayne Holliday for their helpful comments on an earlier version of this paper but any errors or omissions are his responsibility.

[1] See Centre Working Paper No.2018/2 available at https://www.abdn.ac.uk/law/research/working-papers-455.php.

[2] In this context "*ex officio*" is used to denote the idea that the judge or judges deciding the case must apply foreign law, where the relevant EU PIL rules indicate that a foreign law should be applied, even where none of the parties to the dispute have provided the judge with information as to the content of the foreign law in accordance with the procedural requirements in that court.

[3] See Art 3 of Rome II and Art 2 of Rome I. The applicable law rules in the Hague Children's Convention of 1996 which is a core part of the EU PIL *acquis* also makes no discrimination between the laws of Contracting States and non-Contracting States when it gives a discretion to judges to depart exceptionally from the law of the forum and apply or take into account a foreign law, see Art 15(2).

[4] Something that is very sadly lacking at the moment, see Marta's paper supra n 1 at 6.1.1 and J. VERHELLEN. "Access to foreign law in practice: easier said than done?", *JPrivIntL*, 2016, pp.281-300 pp.290-293.

3. The high costs of making and maintaining reliable public databases on the national laws of all EU Member States and making them available in all EU languages

It may be assumed that a large proportion of cases decided in the EU where a foreign law is applicable would concern the law of an EU Member State but data on this issue is lacking. Even if this could be proved to be the case it is doubtful whether the level of information on foreign law that could ever be provided by even an excellent EJN linking to all available public databases would be adequate to enable judges to *ex officio* accurately decide cases governed by a foreign law of an EU Member State. The public investment required in having the EJN and publically available databases on the laws of each of the EU Member States kept up to date to a very high standard and made available in enough languages that all judges in the EU could rely on it *ex officio* would be massive. Most taxpayers might regard such an investment as disproportionate to the potential benefits.

4. EU PIL rules on applicable law are for the benefit of parties and therefore in principle parties should decide whether or not they are relevant to a dispute between them and pay for any associated costs of proving the law

The general proposition here is that the applicable law rules in core areas of EU PIL where the application of foreign law is the expected outcome are designed to respect party autonomy and the legitimate expectations of the parties. If the parties choose not to plead foreign law then this can usually be subsumed within the party autonomy granted by the EU instruments as effectively a choice of the law of the forum to govern the dispute. In the rare cases where the party autonomy rules in the EU instruments do not permit such a post dispute choice of the law of the forum then the application of the law of the forum rather than the applicable law indicated by the rules of the EU instrument should be accepted when neither party is prepared to invest money in the pleading and proof of foreign law. The reason being that the applicable law rules which the parties are ignoring were primarily designed to meet the legitimate expectations of private parties. If these particular parties do not want to invest resources in using those applicable law rules, then why should the State compel them to do so or instead pay for it itself through legal aid or through the time of its judges. Surely, the State should only invest its resources – through legal aid for the parties to fund proof of foreign law or extra judicial time – if there is a strong public interest in requiring the application of foreign law.[5] In the core areas of EU PIL it is hard to see many, if any, areas where there is such a strong public interest as to justify such public investment in insisting on applying foreign law. The core areas are contractual obligations within the scope of Rome I, non-contractual obligations within the scope of Rome II and the applicable law provisions in chapter III of the Hague Children's Convention 1996. The last of these never requires the application of foreign law as it makes the law of the forum the default applicable law.[6]

[5] It is interesting to note that Dutch judges try to limit the costs to them of a requirement to apply foreign law *ex officio* by encouraging the parties to provide evidence of foreign law or to choose the law of the forum expressly or tacitly where the latter is possible, see A. VAN HOEK, I SUMNER and CATHALIJNE VAN DER PLAS, "The Netherlands" in P. BEAUMONT, M. DANOV, K. TRIMMINGS and B. YÜKSEL (eds), *Cross-Border Litigation in Europe*, Hart, 2017, pp.395-406, pp.400.

[6] See Art 15(1) of the 1996 Convention.

In the context of Rome I it is clear that in business to business cases (B2B) the parties can choose the law to govern their contract and ensure that it is applied by a court to which they give exclusive jurisdiction. In that situation the chosen court in the EU does not need to concern itself with foreign law at all apart from two situations. First, in a case that apart from the choice of court and choice of law agreements has all its connections only with one other country the court must respect the non-derogable provisions of the law of that other country.[7] This is a very unusual type of case that has been interpreted very narrowly to lead to its non-application at least in the UK courts.[8] Second, it may exercise a discretion to give effect to the law of the place of performance of the contract where the relevant performance under the contract is unlawful under that law even though it is not unlawful under the law of the forum.[9] It is also clear that the parties can agree to change the law applicable to their contract at any time.[10] Therefore in a situation where a court in the EU, that does not give *ex officio* application to foreign law, is confronted with a contract case where the parties do not plead foreign law or make any attempt to prove the meaning of the foreign law, it is perfectly reasonable in terms of EU PIL to interpret that as an implied choice of the law of the forum to govern the contract. The only cases where a judge might be uneasy about ignoring foreign law would be the very rare cases when the contract is a purely domestic contract linked to another State and there might be some non-derogable provision of that law which has been violated, or where performance of the contract is unlawful in the State of performance, or where the rights of a third party under the foreign law might be violated. Is an elaborate system compelling *ex officio* application of foreign law and State funded mechanisms for proof of foreign law needed just to cover these highly exceptional cases?

In relation to the special provisions in Rome I for certain types of insurance contract, consumer contracts and employment contracts where party autonomy is more limited both for choice of law[11] and, because of the provisions of the Brussels Ia Regulation, choice of forum,[12] the case for requiring a court to apply foreign law *ex officio* is stronger. However, the need to apply a foreign law *ex officio* for the benefit of the weaker party is relatively rare. The weaker party will often be able to sue and only be allowed to be sued in his or her own forum which will generally be applying its own law. Even in cases where a court has in principle to apply foreign law, usually because of the choice of a foreign law, this will often be for the benefit of the stronger party and therefore it is not unreasonable to expect that stronger party to plead the foreign law and pay for the costs of proving it.

If the EU legislature wants to insist on protecting weaker parties in rare cases where those parties need to prove foreign law, in order to do so it could insist on *ex officio* application of foreign law for this narrow band of cases (employment and consumer contracts not insurance contracts which is really about protecting businesses). However, to make this realistic and effective, it would need to invest time and money in training many judges across the EU and

[7] See Art 3(3) of Rome I and of its predecessor, the Rome Convention.
[8] See *Banco Santander Totta SA v Companha Cassis de Ferro de Lisboa SA* [2016] EWCA Civ 1267; *Dexia Crediop SpA v Comune Di Prato* [2017] EWCA Civ 428
[9] See Art 9(3) of Rome I; Case C-135/15 *Nikiforidis* EU:C:2016:774; and P. BEAUMONT and P. McELEAVY, *Anton's Private International Law*, W Green/SULI, 2011, 3rd edn, pp.514-519.
[10] See Art 3(2) but in doing so cannot adversely affect the rights of third parties.
[11] See Arts 6-8 of Rome I.
[12] See Arts 15-16, 19 and 23 of Brussels Ia.

providing specific databases with detailed information on laws that might be relevant to employment and consumer contracts.

In Rome II constraints on party autonomy are different but once again for all types of parties the freedom to agree the applicable law expressly or impliedly kicks in when the dispute has arisen.[13] As with Rome I, the freedom to choose the applicable law in a case where all the relevant elements of the case are situated in one other country is restricted. If all the relevant elements of the case apart from the choice of court and choice of law agreements are connected only with one other country the court must respect the non-derogable provisions of the law of that other country.[14] Also the choice of law cannot prejudice the rights of third parties.[15] However, there is no possibility to apply the overriding mandatory provisions of the law of a country other than the law of the forum.[16] The only other quirks in relation to party autonomy apply to certain types of torts where it is not permitted (ie unfair competition[17] and intellectual property[18] cases). Is an elaborate system compelling *ex officio* application of foreign law and State funded mechanisms for proof of foreign law needed just to cover these highly exceptional cases? Usually the party to an intellectual property or unfair competition tort dispute that wants to invoke a foreign law is not the weaker party and can afford to pay to prove foreign law to assert its rights.

5. Failed attempt to tackle the issue at the global level in the Hague Conference on Private International Law

Marta briefly summarises the work of the Hague Conference on Private International Law on accessing the content of foreign law.[19] At the Council of General Affairs and Policy of the Hague Conference on Private International Law from 24-26 March 2015 it was decided in the Conclusions and Recommendations as follows:

"11. The Council decided to remove from the Agenda of the Hague Conference the topic of accessing the content of foreign law, with the understanding that this issue may be revisited at a later stage."[20]

I attended the conference organised jointly by the European Commission and the Hague Conference on Private International law in Brussels from 15-17 February 2012 at which 35 States (including 22 EU Member States) and many organisations, including the EU

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[13] See Art 14(1)(a) and more generally on Art 14 see P. BEAUMONT and P. McELEAVY, *Anton's Private International Law*, W Green/SULI, 2011, 3rd edn, pp.624-634.
[14] See Art 14(2).
[15] See Art 14(1) last sentence.
[16] See Art 16 and P. BEAUMONT and P. McELEAVY, *Anton's Private International Law*, W Green/SULI, 2011, 3rd edn, pp.701-703.
[17] See Art 6(4) and P. BEAUMONT and P. McELEAVY, *Anton's Private International Law*, W Green/SULI, 2011, 3rd edn, pp669. However, as noted in Anton this restriction on party autonomy is hard to defend, see J. FITCHEN, "Choice of Law in International Claims Based on Restrictions of Competition: Article 6(3) of the Rome II Regulation" *JPrivIntL*, 2009, pp.337-370 pp.344-346.
[18] See Art 8(3) and P. BEAUMONT and P. McELEAVY, *Anton's Private International Law*, W Green/SULI, 2011, 3rd edn, pp.675-676.
[19] See Marta's paper supra n 1 at 2.2.2.
[20] See https://assets.hcch.net/upload/wop/gap2015concl_en.pdf

Commission and the European Parliament, were represented. The unanimous conclusions of that conference included not only a rejection of any "attempt to harmonise the status of foreign law in national procedures" (para 4) but also that "tailored foreign legal information… does not necessarily have to be provided without cost to users, and the provision of such services at a cost may enable better services." (para 14) This last point shows that in principle proof of foreign law should be paid for by the parties to a dispute in order that high quality legal information is provided to enable the court to accurately apply foreign law to the facts of the case before it.[21]

Unless there is a weaker party, it is hard to see why the State would invest in providing information on its law for foreign courts. Thus, if there is to be any traction in a new instrument in the EU (or in The Hague) it would have to be in areas where there is a general consensus that foreign law should be applied and that there is a weaker party whose interests need to be protected. But in reality do any of those areas exist? Even if they exist, would Member States be prepared to invest in a system where they pay for or subsidise the provision of detailed legal submissions on what the relevant law is in a particular case? If not, is there really any advantage in the primary sources of law appearing on national government websites (or even by a HCCH website linking national sites together) or in government bodies providing low cost information for foreign courts on their law which cannot be subject to cross-examination in those courts?[22]

Even if Member States want to help weaker parties to be able to prove foreign law, they do not necessarily need to harmonise the rules on proof of foreign law or provide a special instrument on assistance with proof of foreign law. States can simply insist on the provision of free legal aid in cross-border cases as was done in relation to child support cases under the Hague Maintenance Convention 2007 for all Contracting States and by EU Member States that are bound by the Hague Maintenance Protocol on Applicable Law for child support cases concerning that Protocol which are brought through the Central Authorities.[23]

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[21] See Access to Foreign Law in Civil and Commercial Matters Conclusions and Recommendations available at https://www.hcch.net/en/publications-and-studies/studies/access-to-foreign-law1

[22] The Hague Permanent Bureau tried to promote a new Hague Convention "facilitating access to online legal information on foreign law" and the "handling of requests for information in response to concrete questions on the application of foreign law in relation to a specific matter that arises in court proceedings" (see *Accessing the Content of Foreign Law and the Need for the Development of a Global Instrument in this Area – A Possible Way Ahead* Preliminary Document No. 11A, March 2009) available at https://www.hcch.net/en/publications-and-studies/studies/access-to-foreign-law1. However, the Hague Council on General Affairs and Policy in 2009 did not agree to move forward with working on a new Hague Convention in this field, instead opting for the possibility of work on a non-binding instrument, (see Conclusions and Recommendations of the Council April 2009 available at https://www.hcch.net/en/governance/council-on-general-affairs/archive) and, as noted supra n 20, in 2015 removed the topic from its agenda.

[23] See Art 15 of the Hague Maintenance Convention 2007 and Arts 15 and 46 of the EU Maintenance Regulation 4/2009, [2009] OJ L7/1. More generally on legal aid under the Hague Maintenance Convention and under the Protocol in the EU see L. WALKER, *Maintenance and Child Support in Private International Law* (Hart, 2015) and P. BEAUMONT, "International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity" 73 *RabelsZ*, 2009, pp.509-546 at pp.513-521, 530-532 and 546.

Could another way forward be States or the EU or HCCH regulating providers of information on law?[24] This seems too expensive as, in principle, lawyers in each Member State are already regulated to be able to provide legal advice on their own legal systems to clients in real cases. Any such lawyer could be asked to give a report on an aspect of their law for a foreign court (or party in a foreign court).

I would leave proof of foreign law as a procedural matter to be governed by the law of the forum and encourage the sensible common law presumption that the applicable foreign law is the same as the law of the forum unless one of the parties leads evidence to prove otherwise.[25]

6. Case study on the complexities of proving foreign law especially when quantum is an issue – see *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138

Simply put the *Wall* case shows that in England and Wales 8-10 different experts were required to determine how much money the victim of a severe road accident in France would need in order to be compensated the correct amount under French law whereas it would appear that a single expert could do the same thing under French procedural law. Supplying information on foreign law does not resolve this procedural problem. Furthermore, the correct quantum to be awarded is often not a matter of exact science, even in civilian systems like France, and therefore the information on foreign law has to convey sufficient nuances to show how a judge exercises his discretion in a case of this type (a tall order).[26] Another point carefully noted by the judges in the English Court of Appeal is that it would be "unrealistic and inefficient to expect courts to adopt the evidential practices of a different jurisdiction when determining questions of fact."[27] One reason for this is that the foreign evidential practices might be much more expensive than the domestic evidential practices and therefore not sit well with the costs regime in the court hearing the case.[28]

[24] This was one of three key ideas put forward by the Hague Permanent Bureau in Preliminary Document No 11A, March 2009, see supra n 22, but as noted earlier in the paper it was not supported in the Hague Council, see supra n 20.
[25] See P. BEAUMONT and P. McELEAVY, *Anton's Private International Law*, W Green/SULI, 2011, 3rd edn, pp.1228-1233.
[26] [2014] EWCA Civ 138 [35] and [53].
[27] Ibid [43].
[28] Ibid [44].