

*The Application of European Private International Law and the Ascertainment  
of Foreign Law*

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## **1. Introduction**

The invitation to deliver a presentation on the application of European Private International Law and the ascertainment of foreign law, as part of the general topic ‘How European is European Private International Law?’ included the following specific questions:

1. Is European private international law mandatory or permissive in character?
2. Under what conditions may national courts decide to resort to the *lex fori*?
3. When and under what conditions do national courts apply foreign law?
4. Is there need for further (European) legislation to ensure uniform application of both European private international law and foreign law?

Let me state from the outset that I am not going to address these four questions - or at least, not directly. Three in-depth studies dealing with them have been published since 2010;<sup>1</sup> they were on the agenda

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<sup>1</sup> Below, n. 8, 9 and 10.

of The Hague Conference from 2007 until 2015;<sup>2</sup> the GEDIP addressed them at The Hague (2012) and Lausanne (2013) sessions.<sup>3</sup> The four co-organizers of this precise conference have written about them: Gisela Rühl in 2007;<sup>4</sup> E.M. Kieninger in 2016;<sup>5</sup> Jan von Hein and Jürgen Basedow, in 2017.<sup>6</sup>

Given these able contributions, while not exactly ignoring the four questions I have opted for a slightly different perspective. With a stress on the “Europeanness” of the application of European PIL and the ascertainment of foreign law, I will first look for whatever European traces in the field, be it instructions originating at the EU level (a top-down approach); or a spontaneous reaction by the Member States’ (MS) courts as a response to the European character of the conflict of laws rule, or to the fact that the designated law is one of a MS (a bottom-up approach).

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<sup>2</sup> <https://www.hcch.net/en/publications-and-studies/studies/access-to-foreign-law1> (accessed 05.02.2018).

<sup>3</sup> GEDIP, “La condition du droit étranger selon le droit de l’Union. Compte rendu des séances de travail, The Hague 14 - 16 September 2012”, at <https://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm#conditiondroitetranger>, accessed 20.02.2018; “Le traitement du droit étranger en droit international privé européen. Compte rendu des séances de travail, Lausanne, 20 - 22 September 2013”, at <https://www.gedip-egpil.eu/reunionstravail/gedip-reunions-23.htm#traitement>, accessed 20.02.2018.

<sup>4</sup> “Die Kosten der Rechtswahlfreiheit. Zur Anwendung ausländischen Rechts durch deutsche Gerichte”, *RabelsZ*, 2007, pp. 559-96.

<sup>5</sup> “Ascertaining and Applying Foreign Law”, in S. LEIBLE (ed.), *General Principles of European Private International Law*, Wolters Kluwer, 2016, pp. 357-73.

<sup>6</sup> J. VON HEIN, “The Determination and Application of Foreign Law. A Blind Spot of European Private International Law?”, in A. BRUNS, M. SUZUKI (eds), *Realization of Substantive Law through Legal Proceedings*, Mohr Siebeck 2017, pp. 35-60. J. BASEDOW, “The Application of Foreign Law- Comparative Remarks on the Practical Side of Private International Law”, published as Max Planck Private Law Research Paper nr. 14/17.

I will next summarize scholarly opinion on the issue, in particular vis-à-vis the question whether EU legislation is needed to ensure uniform application of both European private international law and foreign law. The contribution will end with my own assessment.

## **2. The top-down approach (1). The European lawmaker**

To present the state of affairs and highlight the evolution of the EU lawmaker, a separation into two time-periods may prove useful: before 2009-2011, and after. The choice of the, admittedly to some extent, artificial separation is dictated by several facts besides the logical need of some structure for the purposes of the presentation. 2009 corresponds to the entering into force of the Lisbon Treaty (1 December 2009),<sup>7</sup> and to the date of application of the first PIL Regulations, namely Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), applicable from 11 January 2009; and Regulation 593/2008 on the law applicable to contractual obligations (Rome I), applicable as of 17 December 2009. In 2009, Council Decision of 28 May 2001 creating the European Judicial Network (EJN) was amended to insert new provisions opening the Network to other legal professionals, and to expand obligations to inform about national law: see below, under 2.2.2. Two extensive studies funded by the European Commission on the topic were published in 2011: *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future*, by the Swiss Institute for Comparative Law (SICL);<sup>8</sup> and the Esplugues/Iglesias/Palao *Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe*<sup>9</sup> (in 2017, a third study on the application

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<sup>7</sup> On whether this entailed any substantial change in the domain under exam see below, under 2.2.

<sup>8</sup> JLS/2009/JCIV/PR/0005/E4, finished July 11, 2011, revised September 30, 2011. The study comprises a legal analysis of 27 MS, and an empirical one based on 576 responses received from a variety of legal professionals in the EU MS.

<sup>9</sup> <https://www.uv.es/joibu/questionnaires.html>, accessed 16.01.2018. Published as a book by Sellier, 2011. The Project was awarded to a research team in 2008; in addition to the legal analysis a questionnaire for law practitioners was prepared and circulated throughout Europe.

of foreign law in book form allows whatever changes may have taken place in the MS since the publication of the Swiss and Spanish studies alluded to above to be identified.)<sup>10</sup> The GEDIP engaged in the study of the application of European PIL and foreign law for its meetings of 2011 and 2012.

## 2.1. Up to 2009-2011. Unsuccessful legislative attempts

Before 2009-2011 national practice concerning EU PIL failed to be properly “European”; the same can be said of the ascertainment of foreign law. Unlike the European rules on jurisdiction, which (on many occasions) need to be checked *ex officio* by domestic courts,<sup>11</sup> no instructions had been given by the lawmaker as to whether national courts shall apply EU choice of law norms *ex officio*, establish *sua sponte* the contents of the designated foreign law, how to react in case of insufficient proof of foreign law, etc.

It is worth recalling that in 2005 the EU Parliament directly addressed the issue within the negotiations for a Regulation on the law applicable to non-contractual obligations.<sup>12</sup> Had Amendments 42 and 43 in the Position of the European Parliament of 6 July 2005 been accepted, the Rome II Regulation would have comprised the following proposed Article 12 and Article 13: Article 12, entitled ‘Contentions as to applicable law’, stating that ‘Any litigant making a claim or counterclaim before a national court or tribunal which falls within the scope of this Regulation shall notify the court or tribunal and any other parties by statement of claim or other equivalent originating document of the law or laws which that litigant maintains

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<sup>10</sup> *Treatment of Foreign Law - Dynamics towards Convergence?*, Y. NISHITANI (ed), Springer 2017, not limited to the EU.

<sup>11</sup> See the clear case of Article 4 Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast).

<sup>12</sup> Position of the European Parliament adopted at first reading on 6 July 2005 with a view to the adoption of Regulation (EC) No .../2005 of the European Parliament and of the Council on the law applicable to non-contractual obligations (“ROME II”), EP-PE\_TC1-COD(2003)0168, of 6 July 2005.

are applicable to all or any parts of his/her claim'. Article 13 would have dealt with the determination of the content of foreign law: '1. The court seised shall establish the content of the foreign law of its own motion. To this end, the parties' collaboration may be required. 2. If it is impossible to establish the content of the foreign law and the parties agree, the law of the court seised shall be applied'.

These proposed texts were rejected.<sup>13</sup> Amendment 42 was deemed too difficult to implement 'as parties are not all capable of stating what law is applicable to their situation, in particular when they are not legally represented'. As to Amendment 43, the Commission expressed the opinion that 'as matters stand, most Member States would not be able to apply the rule as they do not have proper structures in place to enable the courts to apply the foreign law in this way.' However, the Commission also agreed 'that this is an avenue well worth exploring and that special attention should be paid to it in the implementation report.' In the final text of the Regulation this is taken over by the Commission Statement on the treatment of foreign law, in Article 30: 'The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.'

Whereas both the SICL and the Iglesias/Esplugues/Palao Studies were financially supported by the Commission, they do not actually correspond to Article 30,<sup>14</sup> as we will see below, under 2.2., about 'appropriate measures'.

Other explicit (and unsuccessful) attempts by the EU institutions to address the problem of the application of foreign law should also be mentioned. In 2006, the European Parliament delivered a Report with recommendations to the Commission on succession and wills.<sup>15</sup>

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<sup>13</sup> COM(2006) 83 final, pp. 6 and 7.

<sup>14</sup> As pointed out by E.M. KIENINGER, above n. 5, p. 358.

<sup>15</sup> A6-0359/2006, 16.10.2006.

Recommendation 6, on general issues regarding the applicable law, expressly claimed that ‘the legislative act to be adopted should specify the ways and means by which the authorities required to apply a foreign law are to ascertain its content, as well as the remedies in the event of failure to ascertain that content’. Some years later, in 2009, the Communication from the Commission to the European Parliament and the Council - An area of freedom, security and justice serving the citizen, acknowledged that ‘the proper functioning of the European judicial area sometimes requires a national court to apply the law of another Member State. The Union must consider how to avoid the current disparity in practices in this area’.<sup>16</sup>

## 2.2. From 2009-2011 to date

In December 2009 the Lisbon Treaty entered into force. For the purpose of this analysis, the core content of former Article 65, on measures in the field of judicial cooperation in civil matters having cross-border implications, has remained the same, taken up by current Article 81. New letters e), g) and h), have been added; only h), ‘support for the training of the judiciary and judicial staff,’ seems to have a potential to impact on the field under examination. However, in spite of the lack of apparent change, some fresh trends can be discerned on the side of the EU lawmaker. The EU PIL Regulations adopted in or after 2009 show two approaches to the difficulties linked to the application of foreign law: 1) at the normative level, rules have been adopted which help in preventing the designation of a law other than the one of the court seized; 2) at the technical level, mechanisms have been set up to ease access to information on a foreign law.

### 2.2.1. The normative level

From the normative point of view, to a large extent the existing situation is kept as before, i.e., national solutions on the application of

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<sup>16</sup> COM (2009) 262 final, 10.06.2009, under 3. “Making people's lives easier: a Europe of law and justice” - 3.3, “Developing a core of common standards”.

PIL rules and foreign law remain intact. However, within the EU Regulations more examples can be identified of the parallelism *forum/ius*, which is either facilitated or explicitly endorsed.<sup>17</sup> As a consequence the usual practical problems linked to the application of a foreign law are avoided. The will to simplify is sometimes openly acknowledged.<sup>18</sup>

It should be noted that the association *forum/ius* is limited - for obvious reasons- to the MS. Besides, the regulatory approach is piecemeal. From the substantive point of view it is only enshrined as the main and objective solution in the Succession Regulation, Regulation 650/2012, whereas in the rest of the instruments it is just one possibility among others and depends on a choice by the parties. One may wonder what is so particular about succession in this regard: the intention to make things easier as an answer certainly does not suffice. A hint appears in recital 20 to the Succession Regulation, which refers to the need to respect the different systems for dealing with matters of succession applied in the MS. This could also explain the tolerance towards the application of some rules or solutions of the *lex fori* even when a different one has been designated, as foreseen by Article 29 for the appointment of administrators.

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<sup>17</sup> The *Gleichlauf* was not the preferred solution in positive law. A clear disruption is found in Article 4 Rome I when read together with Article 7.1 Regulation 1215/2012, Brussels II bis. Another example is Article 15 of Regulation 2201/2003, Brussels II bis, providing for the transfer of a case on parental responsibility to a court better placed to hear the case, as interpreted by the CJEU: according to case C-428/15, *Child and Family Agency*, ECLI:EU:C:2016:819, para 57, a national court shall not have regard to the substantive law of the relevant MS for the purposes of the provision.

<sup>18</sup> A. BONOMI, *Explanatory Report to the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*, available at <https://www.hcch.net/es/publications-and-studies/details4/?pid=4898>, accessed 15.02.2018, at p. 115. In Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Rome III, the *forum/ius* solution is meant as well as an opportunity for the parties to get an easy divorce or separation, also from the point of view of the substantive conditions.

In the Succession Regulation the *Gleichlauf* is the outcome of the combination of Articles 4 and 21, which lead respectively to the courts and the law of the last habitual residence of the deceased. When the deceased has chosen the law of his nationality, thus breaking the parallelism, there is still a way back through a tool akin to a ‘forum convenience’ clause: Article 6a of the Regulation allows the court seized according to the “usual” rules (Articles 4 or 10) to decline jurisdiction if it considers that the courts in the MS of the deceased’s nationality are better placed to rule on the succession. The fact that the chosen law is that of another MS does not automatically endow its courts with a ‘better placed’ quality: it makes of them the alternative jurisdiction, but other factors must concur for them to be the more convenient. Similarly, the mandatory stay foreseen under Article 6.b requires the agreement of the parties concerned to confer jurisdiction on a court or the courts of the MS of the chosen law; the mere coincidence *forum/ius* is not enough.

The concurrence between *forum* and *ius* may be the consequence of a choice of the parties, either of the *lex fori* or of the courts of the MS of the applicable law. Article 5.1.d of the Rome III Regulation provides an example for the first situation, and so does (in the form of an *accord procédural*) Article 7 of the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Parties may choose the courts of the MS of the applicable law under Regulations 2016/1103 (recital 36, Article 7.1), dealing with matrimonial property regimes, and 2016/1104 (recital 37, Article 7.1), on property consequences of registered partnerships, under the specific circumstances therein explained.

### 2.2.2. The practical level

A much stronger (compared to the first prong) EU intervention focuses on the technical side of the application of foreign law, i.e. how to get information about it. Training of legal professionals on foreign law - of the MS- is also part of this trend.

Quite a lot of effort and investment has been made in recent years to facilitate access to the contents of MS laws, and to encourage communication via networks. The European Judicial Network, created



by Council Decision of 28 May 2001,<sup>19</sup> received a new impulse in 2009 with the amendment of the Decision,<sup>20</sup> where new provisions aim at opening the Network to other legal professionals, and to expand obligations to inform about national law.<sup>21</sup> In addition other networks have been set up co-funded by the EU, such as the European Notarial Network,<sup>22</sup> or the Network of the Presidents of the Supreme Judicial Courts of the Member States of the European Union.<sup>23</sup>

Regarding training, it suffices to recall that in 2011 the European Commission set the target that half (700,000) of all legal practitioners in the EU should have attended training on European law or on the law of another MS, and that this training should be supported with EU funds for at least 20,000 legal practitioners per year by 2020.<sup>24</sup> More than 143,000 legal practitioners received training on EU law or on the national law of another MS in 2016.<sup>25</sup> A new European Judicial Training Strategy 2019-2025 is in the making.<sup>26</sup>

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<sup>19</sup> OJ L 174, 27.6.2001

<sup>20</sup> By Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009, applying from January 2011, OJ L 168, 30.06.2009.

<sup>21</sup> Below, under 6.1.

<sup>22</sup> ENN, <https://www.enn-rne.eu/>: a tool for notaries facing practical questions with a cross-border element; it covers the 22 EU MS that have civil law notaries. A contact point is available to help notaries in each of these 22 countries.

<sup>23</sup> Which describes itself as ‘a forum through which European institutions are given an opportunity to request the opinions of Supreme Courts and to bring them closer by encouraging discussion and the exchange of ideas’: <http://network-presidents.eu/>.

<sup>24</sup> See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Building Trust in EU-Wide Justice. A New Dimension to European Judicial Training’, COM (2011) 0551 final.

<sup>25</sup> Sixth report on training for legal practitioners, published in December 2017 by the European Commission - Directorate-General for Justice and Consumers, <https://beta.e-justice.europa.eu/contentPresentation.do?clang=en&idTaxonomy=121>, accessed 14.02.2018.

<sup>26</sup> [http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247\\_en](http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5432247_en), accessed 14.02.2018. Direct reference is made to improving

It is worth mentioning at this point that the European Commission took an active part in the works of The Hague Conference related to accessing the content of foreign law; to all appearances it has endorsed its approach. The Conference's interest on the topic goes back to 2006, when the Permanent Bureau was invited to prepare a study on the elaboration of an instrument for cross-border cooperation concerning the administration of foreign law. In 2007 the experts concluded that it would be pointless to 'attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there [was] no need or likelihood of any success for such harmonization',<sup>27</sup> but also agreed on a clear need to facilitate access to foreign law. The scope of the research of the Permanent Bureau was narrowed in 2008 to the exploration of mechanisms to improve global access to information on the content of foreign law. The same year, experts commissioned by the Permanent Bureau developed some Principles focusing on facilitating on line access to legal information.<sup>28</sup> In 2012 a document on Conclusions and Recommendations was adopted, of which for the purposes of this presentation number 4 is worth recalling as matching the attitude of the EU lawmaker: 'The Conference confirms that any global instrument in this field should focus on the facilitation of access to foreign law and should not attempt to harmonise the status of foreign law in national procedures'. In 2015 the topic was removed from the agenda.

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knowledge of foreign legal language, but not to learning the law of another MS.

<sup>27</sup> Prel. Doc. No 11A of March 2009 - "Accessing the content of foreign law and the need for the development of a global instrument in this area – a possible way ahead", para. 2 (<https://www.hcch.net/en/publications-and-studies/studies/access-to-foreign-law1/>), accessed 20.02.2018).

<sup>28</sup> The cooperation foreseen by the Conference envisaged three prongs: access on line; administrative and judicial cooperation - on the organization and handling of requests for information on concrete questions relating to the application of foreign law in a specific subject that arise in the context of a proceeding; and a global network of institutions and experts for more complex issues. The Guiding Principles are annexed to the Prel. Doc. No 11A of March 2009, above n. 27.

### 2.2.2.1. Abstract duty of information (Information made available to the public)

Starting from Regulation 4/2009 - the Maintenance Regulation-<sup>29</sup> it has become common to include in EU instruments a clause imposing on the MS an obligation to provide information on national laws concerning the subject matter of the Regulation. The preferred way for doing so is the internet-based public information system set up by Council Decision 2001/470/EC - the European Judicial Network.

The instructions here are not always consistent. Usually there will be a first reference in a recital which one would expect is taken up later in the operative text. This is not the case, however, for the Rome III Regulation: the statement of recital 17 ‘before designating the applicable law, it is important for spouses to have access to up-to-date information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation’, has no follow up in the text. Article 17, on the information to be provided by participating MS, only alludes to the formal requirements applicable to agreements on the choice of applicable law, and to the possibility of designating the applicable law in accordance with Article 5(3). Article 70 of the Maintenance Regulation, on the contrary, is very explicit: ‘The Member States shall provide within the framework of the European Judicial Network ...the following information with a view to making it available to the public: (a) a description of the national laws and procedures concerning maintenance obligations; ... Member States shall keep this information permanently updated’. The Regulations are not consistent either as to the sharing of tasks between the MS and the Commission: Article 17 of the Rome III Regulation ends up by saying that ‘to guarantee such access to appropriate, good-quality information, the Commission regularly updates it in the Internet-based public information system set up by Council Decision 2001/470/EC’, whereas in the Maintenance Regulation the updating obligation lies with the MS.

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<sup>29</sup> Nothing similar exists in the Rome I and Rome II Regulations; it did to some extent in the procedural ones, see ad. ex. Article 10.2 or Article 19.1 Regulation 805/ 2004, on the European Enforcement Order.

More recent Regulations have adopted a more coherent and detailed approach: the formula used in Regulation 650/2012 is reproduced in Regulations 2016/1103 and 2016/1104. According to recital 75 of Regulation 650/2012, ‘...to facilitate the application of this Regulation, provision should be made for an obligation requiring the Member States to communicate certain information regarding their legislation and procedures relating to succession within the framework of the European Judicial Network ...’.<sup>30</sup> The recital corresponds to Articles 77 and 78:<sup>31</sup> the former, on the information to be made available to the public, requires the MS to provide the Commission with a short summary of their national legislation and procedures relating to succession, including information on the type of authority which has competence in matters of succession; they shall also provide fact sheets listing all the documents and information required for the purposes of registration of immovable property located on their territory; they shall keep all the information permanently updated. The latter deals with the details of authorities and procedures alluded to in other provisions of the Regulation; the Commission shall publish this information in the Official Journal, but also make it publicly available through any other appropriate means.

Finally, according to Article 86 of Regulation 2015/848 on insolvency proceedings the MS shall provide, within the framework of the EJN and with a view to making the information available to the public, a short description of their national legislation and procedures relating to insolvency, in particular relating to the matters listed in Article 7(2) - which corresponds to the substantive scope of the *lex concursus*. The MS shall update the data regularly. It is for the Commission to make the information concerning the Regulation available to the public.

#### 2.2.2.2. Information on specific aspects of the designated applicable law

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<sup>30</sup> See Regulation 2016/1103, recital 67; Regulation 2016/1104, recital 65.

<sup>31</sup> Article 77 matches 63 in Regulation 2016/1103 and Regulation 2016/1104, while Article 78 corresponds to Article 64.

The idea that the EJM could help with requests regarding the contents of the applicable law in pending cases - as opposed to a general, abstract obligation to provide information- was endorsed in the Decision No 568/2009/EC amending Decision 2001/470/EC. However, to date this approach remains underdeveloped in the EU. It has not been reflected in the PIL Regulations, with the exception of recital 14 of the Rome III Regulation: ‘...Where the law of another Member State is designated, the European Judicial Network ... could play a part in assisting the courts with regard to the content of foreign law.’ It has no counterpart in the operative text. A similar possibility had been proposed in the context of the amendment of Regulation 2201/2003, COM (2006) 399 final, Article 20 c 2<sup>nd</sup> paragraph, at a time when the Commission intended to introduce harmonised conflict-of-law rules in matters of divorce and legal separation: ‘Where the law of another Member State is designated, the European Judicial Network in civil and commercial matters can play a role in assisting the courts on the contents of foreign law’.

The Succession Regulation and Regulations 2016/1103 and 2016/1104 foresee in the recitals a quite limited duty to provide for specific information; no direct match is to be found in the operative text.<sup>32</sup>

### **3. The top-down approach (2). The case law of the CJEU**

It is not uncommon for the CJEU to go ahead of the legislator by coming up with solutions of procedural content on the occasion of a preliminary ruling; they often serve as a model or are simply taken

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<sup>32</sup> According to recital 26 Regulation 650/2012, on the context of the adaptation of an unknown right *in rem*, ‘... the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used...’. Equivalent provisions can be found in Recitals 25 of Regulations 2016/1103 and 2016/1104; in the operative text reference is made to the adaptation of rights *in rem* (see Article 29 in both Regulations), but not to the way to make it, or to cooperation.

up later in the legal instruments. This has not happened so far regarding the application of the European conflict of laws rules (rather: the questions listed in the Introduction). However, this does not mean that no lessons can be drawn from the jurisprudence of the CJEU. A thorough doctrinal analysis has been made on the case law delivered in other areas of law from which consequences may result for the topic under examination here. In addition, some recent decisions and Opinions by Advocates Generals addressing conflict of laws issues may shed some light as well.

### 3.1. Procedural autonomy, equivalence, effectiveness

Should the question ‘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’ be considered a procedural matter,<sup>33</sup> it would fall under the scope of the MS’ procedural autonomy, limited by the principles of equivalence and effectiveness. A dense corpus of case law has been rendered by the CJEU thereto in relation to different EU instruments, although none of them in the field of PIL. According to doctrinal views, though, if applied to it, it would allow for some inferences.<sup>34</sup> In what follows we summarize the most relevant:

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<sup>33</sup> See a different opinion by H. GAUDEMET-TALLON, ‘Annex A, Loi étrangère. Quelques réflexions’, <https://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm#quelquesreflexions>, accessed 13.02.2018. V. RUIZ ABOU-NIGM, ‘United Kingdom: The Traditional Approach to Foreign Law in Civil Litigation in the Legal Systems of the United Kingdom’, in Y. NISHITANI (above n. 10), pp. 360-74, p. 374, proposes a change *de lege ferenda* ‘to envisage the treatment of foreign law as pertaining to the substance of private international law in the United Kingdom legal system rather than an issue to be left to the rules on procedure and evidence’.

<sup>34</sup> See in particular C. TRAUTMANN, *Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren*, Mohr Siebeck 2011, Part 2. A similar analysis, shorter but with further case law illustrations, was undertaken by the GEDIP for the 2012 meeting at The Hague (<https://www.gedip-egpil.eu/reunionstravail/gedip-reunions->

i. EU PIL rules must be applied *ex officio* whenever national conflict of law rules are applied *ex officio* (equivalence principle), but also when the courts are authorized to do so (effectiveness principle).<sup>35</sup> The protection of consumers and employees should lead to the application by the courts on their own motion of Articles 6-8 Rome I Regulation when the interested parties themselves do not invoke them.<sup>36</sup> In addition, there is a kind of public-policy-like interest of the EU in the application *ex officio* of the rules protecting consumers - thus Article 6 Rome I Regulation-, which also exists for antitrust law - thus Article 6.3 Rome II Regulation.<sup>37</sup> A general interest in achieving harmony of solutions does not qualify as a 'hinreichendes öffentliches Unioninteresse'. Similarly, the *effet utile* does not impose an absolute, without exceptions *ex officio* application of the rules on EU PIL.<sup>38</sup>

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[22.htm#quelquesreflexions](#), accessed 20.02.2018), reaching comparable conclusions, nevertheless not shared by all the members of the Group.

<sup>35</sup> Pp. 295-303, on the basis of cases C- 430/93 and C- 431/93, *van Schijndel*, ECLI:EU:C:1995:441. A caveat from our side: what 'ex officio' actually means in the case of the CJEU is not easy to discern, as pointed out by B. HESS, P. TAELEMAN, 'Consumer Actions before National Courts', in *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law*, Strand 2, 2017, available at [http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=49503](http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503), accessed 12.02.2018. The expression is nevertheless common in the literature on the application of the EU PIL norms.

<sup>36</sup> Pp. 303-12, on the basis of C- 240/98 to C-244/98, *Oceano Grupo*, ECLI:EU:C:2000:346; C- 473/00, *Cofidis*, ECLI:EU:C:2002:705; C- 168/05, *Mostaza Claro*, ECLI:EU:C:2006:675; and C-429/05, *Rampion*, ECLI:EU:C:2007:575. The author excludes a similar conclusion for maintenance debtors, at least in general terms.

<sup>37</sup> Pp. 312-19, on the basis of C-126/97, *Eco Swiss*, ECLI:EU:C:1999:269, and C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675. The GEDIP, *loc. ult. cit.*, added the Rome II rule on intellectual property rights.

<sup>38</sup> Pp. 312-19; 319-21.

ii. Courts are not obliged to investigate or to bring to the debate on their own motion facts which would be of relevance to determine the applicable law.<sup>39</sup>

iii. Preclusion rules that would impede the introduction of foreign law for the first time in appeal proceedings are in accordance with the principles of equivalence and effectiveness provided they warrant the interested party a real possibility to submit whatever exception he/she may have in accordance with EU law.<sup>40</sup>

iv. The non-application of the designated foreign law (broader: leaving open the conflict-of-laws issue) runs against the effectiveness principle, but could be justified by counterbalancing values or objectives, such as the protection of rights of the defence by ensuring the proper conduct of proceedings - in particular, protecting them from the delays inherent in examination of new pleas.<sup>41</sup>

v. When the burden to prove the foreign law -designated by an EU conflict of laws rule- falls upon the party, and she is unsuccessful after exhausting all her resources, compliance with the effectiveness principle requires that the national court takes over on its own motion using all tools available under national law.<sup>42</sup>

vi. There are no clear rules on the evaluation of evidence which could be transposed to prove the existence and validity of the designated foreign law; it could nonetheless be accepted that the CJEU favours the principle of the free appraisal of evidence.<sup>43</sup>

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<sup>39</sup> Pp. 336-38, on the basis of cases C-430/93 and C-431/93, ECLI:EU:C:1995:441, *van Schijndel*.

<sup>40</sup> Pp. 348-56, referring to case C-312/93, *Peterbroeck*, ECLI:EU:C:1995:437; C- 327/00, *Sanex*, ECLI:EU:C:2003:109, C-430/93 and (although the CJ left the question open), C-431/93, *van Schijndel*, ECLI:EU:C:1995:441.

<sup>41</sup> Pp. 359-68, referring to case C-431/93, *van Schijndel*, ECLI:EU:C:1995:441.

<sup>42</sup> Pp. 374-79, referring to case C-526/04, *Laboratoires Boiron*, ECLI:EU:C:2006:528.

<sup>43</sup> P. 348, reading together case 199/82, *San Giorgio*, ECLI:EU:C:1983:318, case C-343/96, *Dilexport*,



At this point it should be noted that the outlined assumptions do not enjoy unrestricted support in academia. It has correctly been highlighted that the case law on which they are based concerns internal domestic cases, and not cross-border issues, which are the specificity of the EU Regulations.<sup>44</sup> Besides, as the author of the analysis himself is ready to admit, the CJEU case law is not always internally consistent: no closed system exists so far.<sup>45</sup> In our view, an additional difficulty to extend the jurisprudence delivered so far by the CJEU to the PIL domain lies with the fact that in general the PIL Regulations do not confer substantive rights (or contain rules watching for public interests), but “merely provide for certain choice of law rules”.<sup>46</sup> Where they do (like for certain consumers and employees) we could accept the likelihood of an obligation binding the judge to apply EU conflict of laws rules, and even to investigate the designated foreign law. Indeed, there is no direct legal basis for imposing it. However, it should be recalled that whereas most of the CJEU case law in the field corresponds to Directive 93/13/EEC, on unfair contract terms, where Article 6 imposes on the MS an obligation to provide for an effective remedy against violations of consumer law, the absence of a similar provision for other situations has not prevented the CJEU from identifying a power on the part of national courts to examine *ex officio* compliance with Union law.<sup>47</sup>

### 3.2. The CJEU on conflict of laws issues

i. The CJEU has not yet had the opportunity to address directly -i.e., on the occasion of a preliminary reference- any of the core questions

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ECLI:EU:C:1999:59, and case 109/88, *Danfoss*,  
ECLI:EU:C:1989:383.

<sup>44</sup> GEDIP, above n. 34, under F and Annex A.

<sup>45</sup> C. TRAUTMANN, above n. 34, p. 400. Not surprisingly, his final proposal is that the principles of equivalence and effectiveness do not guarantee the application of the EU conflict of laws rules, nor the harmony of solutions, and that a regulatory intervention by the lawmaker is needed: *ibid.* p. 401 and below under 5.1.

<sup>46</sup> GEDIP, above n. 34, under C.

<sup>47</sup> B. HESS, P. TAELEMAN, n. 35, para. 351 ff.

related to the application of the EU conflict of laws rules, or to the designated foreign law. Indeed, it is tempting to read some statements of the Court, or some AGs' Opinions, as pointing to a specific direction. For instance, AG N. Wahl's Opinion to case C-64/12, *Schlecker*, on the conflict of laws rule for labour contracts,<sup>48</sup> or para. 70 of the Court's decision in case C-191/15, *Verein für Konsumenteninformation*,<sup>49</sup> on Article 6 of the Rome I Regulation, suggest an active role of the domestic judge in the application of the European conflict of laws rule -and even, in the establishment of the contents of the designated foreign law. In the absence of a national procedural rule imposing such an intervention, this outcome could be explained for effectiveness reasons: either of the underlying substantive rules (provided they are also of a European character),<sup>50</sup> or of the conflict of laws rule itself (for it accords a right to the employee and the consumer). The fact remains that neither the AG Opinion nor the CJEU statements are the result of a discussion on how the PIL rule, or the designated foreign law, are to be applied.

ii. Two other decisions, dealing with the interpretation of Article 13 Regulation 1346/2000 (today's Article 16 Regulation 848/2015), ap-

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<sup>48</sup> ECLI:EU:C:2013:241, at para. 27: '...in the event that the parties have expressed a choice as to the law applicable to the employment contract, it will be for the court to ensure that that law does not deprive the employee of the legal protection which would be afforded him by the mandatory rules of the law with which the employment contract is most proximate...'. See also para. 51, to which the CJEU itself at para. 36 (ECLI:EU:C:2013:551).

<sup>49</sup>ECLI:EU:C:2016:612: 'Having regard to the mandatory nature of the requirement in Article 6(2) of the Rome I Regulation, the court faced with a choice-of-applicable-law term will, where a consumer with his principal residence in Austria is involved, have to apply those Austrian statutory provisions which, under Austrian law, cannot be derogated from by agreement. *It will be for the referring court to identify those provisions if need be*' (italics added).

<sup>50</sup> Finally, the choice of law rule acts as a 'vehicle' for the substantive provisions to be applied in cross-border cases.

pear at first sight to be of interest but remain finally of limited consequence: Case C-310/14, *Nike European Operations Netherlands BV*, followed by case C-54/16, *Vinyls Italia*.<sup>51</sup>

Article 13 provides for an exception to the general conflict of laws rule, the *lex fori concursus*, which shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that the act ‘is subject to the law of a Member State other than that of the State of the opening of proceedings’, and ‘that law does not allow any means of challenging that act in the relevant case’. The CJEU has been referred several questions relating to the provision, and therefore it has addressed issues touching upon the proof of foreign law and its contents. Of course - and unfortunately- the frame in which the questions arose is determinative: the CJEU elaborates within a specific setting; most of its conclusions are linked to the character of Article 13 as an exception to a rule, and not to the substance of the exception. The guidelines given by the CJEU to the national court would probably be the same even if the exception did not entail the application of a foreign law; as a consequence, extending the Court’s findings to all cases of designation of a foreign law would be too far-fetched. Para. 22 of the reasoning and number 1 of the operative text in Case C-310/14, for instance, are limited to the provision under examination. The person who benefited from an act detrimental to all the creditors must prove that the *lex causae* does not allow any means of challenging that act; for this purpose it is not enough to rely solely, in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the *lex causae*; rather, this must be taken as a whole, and the reason lies with the obligation to interpret strictly the exception laid down in Article 13. The same can be said as to the allocation of the burden of proof, which remains constrained to the specific purposes of the provision by its own wording.<sup>52</sup>

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<sup>51</sup> Case C-310/14, ECLI:EU:C:2015:690; case C-54/16, ECLI:EU:C:2017:433.

<sup>52</sup> Article 13 of the Regulation places on the defendant the burden of proof that the act is governed by the law of a MS other than that in which insolvency proceedings were opened, and that that law does not allow any means of challenging the act; according to the CJEU this entails

Still, some points in the reasoning can be accorded a broader reach. In particular, general guidance may be drawn from number 27 in the same ruling, according to which ‘Nevertheless, although Article 13 of the regulation expressly governs where the burden of proof lies, it does not contain any provisions on more specific procedural aspects. For instance, that article does not set out, inter alia, the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court’s assessment of the probative value of the evidence adduced before it’. Consequently the issue falls under the scope of the national legal order of each MS in accordance with the principle of procedural autonomy, subject to the usual restrictions, i.e., the principles of equivalence and effectiveness.

iii. Finally, some decisions are worth being referred to as they may have some bearing on the issue under examination: not directly on the questions reproduced in the Introduction, but rather on the relative importance of getting to harmonised substantive outcomes - an issue we will come back to later, under 6.2.3.

In case C-184/12, *Unamar*,<sup>53</sup> the ‘normal’ outcome of the conflict of laws rule, i.e. the application of the designated law, is set aside due to the intervention of mandatory rules. The referring court asked, essentially, whether Articles 3 and 7(2) of the Rome Convention must be interpreted as meaning that the law of a MS which meets the requirement for minimum protection laid down by a Directive, and which has been chosen by the parties, may be disregarded by the court seized, established in another MS, in favour of the law of the forum on the ground of its mandatory nature. The Court answered affirmatively, nonetheless conditioning the possibility to a thorough assessment allowing to conclude that the legislature of the *forum* State held it to be crucial to grant protection beyond that provided for by the Directive to specific subjects. In other words, according to

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that the applicant cannot be required to claim, or even prove, that the conditions for the application of a provision of the *lex causae* which, in principle, would enable the act at issue to be challenged are satisfied (para. 24-26 of the reasoning and number 2 of the operative text).

<sup>53</sup> ECLI:EU:C:2013:663.

the CJEU corrections to the outcome of a harmonized conflict of laws rule may occur even when the designated applicable law is one implementing a EU Directive; whether it will happen depends on particularities pertaining to each single MS.

Case C- 135/15, *Nikiforidis*,<sup>54</sup> provides for another example where special features existing at the national level come into play, even with the risk of modifying the substantive outcome of a uniform conflict of laws rule. The referring court asked whether Article 9(3) of the Rome I Regulation must be interpreted as precluding overriding mandatory provisions other than those alluded to in Article 9 (1) and 9 (3) from being taken into account by the court of the *forum* pursuant to the national law applicable to the contract. The CJEU answered in a negative way, but did not exclude ‘taking into account’ such mandatory rules as matters of fact, in so far as this is provided for by the national law applicable to the contract pursuant to the Regulation. As recalled by the AG, ‘the practical difference between the application of, and substantive regard to, an overriding mandatory provision is almost imperceptible’.<sup>55</sup> Hence, *de facto* the CJEU accepts another factor of divergence in the handling and outcome of cross-border cases by the MS, and this even when the point of departure is a harmonized (European) choice of law rule.

#### **4. Spontaneous incorporation of the European factor by the MS?**

An analysis of the application of the choice of law rules and of foreign law typically focuses on the following questions: the binding force of the conflict of laws rules; foreign law ascertainment; failure of determination of foreign law; and the control of the correct application of foreign law. An overall analysis covering the EU MS shows the many divergences among them - although more or less acute de-

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<sup>54</sup> ECLI:EU:C:2016:774.

<sup>55</sup> AG SPUZNAR, ECLI:EU:C:2016:281, para. 101 ff. The AG separates two stages in the process leading to the solution of a cross-border dispute: a) the determination of the applicable law, which falls under the scope of the EU regulations; b) the actual application of the designated law, which doesn’t.

pending on the issue at stake- and no specific sensibility to the European origin of the conflict of laws rules in the Regulations. In particular, the Swiss Institute for Comparative Law devoted some time to finding out whether the status of the conflict of laws rules changes *de facto* once it is established that it is contained in an EU Regulation or Directive. Under the heading ‘Procedural Status of the EC Conflict of Law Rules: *Rome II* Regulation’, and with the caveat ‘it is still too early to assess its application by the Member States’ courts, and the extent to which, if at all, it may have an impact on the rules concerning application of foreign law’, the Study refers to the cases so far adjudicated under the *Rome II* Regulation by MS courts.<sup>56</sup> It concludes: ‘The analyzed cases show that conflict-of-law rules contained in the Regulation are subject to the **same treatment** as national conflict-of-law rules would be. The communitarian origin of the conflict-of-law rules does not change, neither *de jure*, nor *de facto*, the status of such rules before the Member States courts’.<sup>57</sup>

Interestingly, though, the empirical analysis of the Study does reflect an element of ‘Europeanization’. When asked about the treatment of the law of other EU Member States, ‘(...) a considerable amount of respondents (almost a third) indicated to give special treatment to cases involving the law of other EU Member States’.<sup>58</sup> The Study provides the following summary of the reasons justifying the special treatment: ‘The duty of mutual recognition and cooperation resulting from the EU Treaty was the most frequently indicated reason (58 times), followed by the easier access to legal information via the European Judicial Network on civil and commercial matters (39 times), set up by Council Decision 2001/470/EC. Reasons of geographical

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<sup>56</sup> *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future*, Part III, pp. 20-9. Cases correspond to Bulgaria, Finland, Germany, the Netherlands, and the UK.

<sup>57</sup> *Ibid.*, p. 29. See P. WAUTELET, ‘Belgium. Foreign Law in Belgian Courts - From Theory to Practice’, in Y. NISHITANI (above n. 10), pp. 63-92, p. 69, reaffirming it for Belgium. According to A. ANTHIMOS, ‘Die Anwendung der Rom I-Verordnung in Griechenland’, *IPRax*, 2018 (2), pending publication, whether the instrument is a Convention or a Regulation has no relevance either.

<sup>58</sup> *Ibid.*, Part III, p. 51.

and/or linguistic proximity were also mentioned relatively frequently (33), though it seems that this applies only to some MS. Reasons of similarity of legal systems were specially indicated by respondents in Scandinavia as well as in Cyprus. In addition, some respondents indicated the importance of uniform law in a specific field as well as the risk of liability. Finally, it is noteworthy that a duty to report specifically on EU cases in Poland seems to encourage a special treatment of European cases. These reasons indicate that the special attention given to EU cases mainly (though by no means exclusively) occur in the judiciary.<sup>59</sup> Several reports add the ‘easier access to legal information due to long-standing bilateral cooperation.’<sup>60</sup>

To be honest, the analysis per country leads us to a less enthusiastic impression than the one conveyed by the SICL: the belief that the substantive law of a MS deserves a different attitude only exists clearly in Bulgaria. In Cyprus, Denmark, Malta, the Netherlands and Sweden only a minority of the interviewed legal professionals admit to giving preferential treatment to the law of other EU MS;<sup>61</sup> no special treatment is awarded in Finland; just one third of the respondents answered affirmatively in the case of Germany; MS law is rarely managed differently in Greece, Hungary, Ireland, Italy or Latvia (where only lawyers recognize according a special treatment); less than half of the interviewees admit to it in Lithuania (and again, almost all of them are lawyers).<sup>62</sup>

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<sup>59</sup> *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future*, Part II, p. 51. It should be noted that the Study formulated the question on the special treatment accompanied by standard answers listed in a grid, thus eliminating the possibility of nuances to a great extent. Further comments were nonetheless possible.

<sup>60</sup> *Ibid.*, Bulgaria, at p. 54; Czech Republic, at p. 85; Estonia, at p. 114; Hungary at 195.

<sup>61</sup> With, on some occasions, an express rejection of the possibility: ad. ex. in Malta, where judges expressly indicate that there is no rationale to discriminate against cases involving non-EU states.

<sup>62</sup> *The Application of Foreign Law in Civil Matters in the EU Member States and its Perspectives for the Future*, Part II, p. 70 (Cyprus); 99

A little frustration also springs from almost nothing being said about the “special treatment”. In Estonia, it corresponds to a handling of foreign law that does not follow the usual practice or attitude to foreign legal rules; in practice, the foreign law issue ‘would provoke **less reticence and thus have a greater chance to be actually applied** in the case.’<sup>63</sup> Some explanation can be found for Latvia: ‘... special treatment implies a particular attention to a case, for example by reserving for it extra time for both exploring the applicable law and doing analysis, as well as evaluating other issues, such as recognition, enforceability, litigation, etc that are generally linked to a case involving the law of other EU Member States.’<sup>64</sup>

Not much time has elapsed since the publication signed by the SICL. In spite of this, a number of MS have experienced some evolution regarding the application of foreign law.<sup>65</sup> In some cases the EU-link

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(Denmark); 182 (Finland); 160 (Germany); 179 (Greece); 195 (Hungary); 212 (Ireland); 230 (Italy); 246 (Latvia); 267 (Lithuania); 290 (Malta), 309 (The Netherlands); 409 (Sweden).

<sup>63</sup> *Ibid*, p. 114.

<sup>64</sup> *Ibid*. p. 246.

<sup>65</sup> In the Czech PIL Act 2012, Section 23 provides explicitly that, should foreign law not be ascertained within a reasonable period of time, the *lex fori* should apply; a similar provision exists in Estonia since 2002, Article 4 (4) PILA. In 2015 Spain adopted the *Ley de Cooperación Jurídica Internacional*, where the issue of the ascertainment of foreign law is addressed by the lawmaker incorporating the seminal case law of the Constitutional Court, STC 10/2000, 17.01.2000; in spite of it the occasion seems to be a lost opportunity for improvement, see A.L. CALVO CARAVACA, ‘Aplicación judicial del derecho extranjero en España. Consideraciones críticas’, *Revista Española de Derecho Internacional*, vol. 68, pp. 133-56. A new PIL Act has been adopted in Croatia in 2017; according to Article 8, devoted to foreign law ‘1. The court or other body of the Republic of Croatia shall determine the content of the law of a foreign country *ex officio*.’ See as well the quite telling words of S. COURNELOUP, ‘France- The Evolving Balance Between the Judge and the Parties in France’, in Y. NISHITANI (above n. 10), pp. 157-81, p. 158: ‘The regime has evolved in depth during the last decades and (...) it is not unlikely to change again in the near future’. In Italy a ground-breaking decision was delivered in 2014 by the



is explicitly stated. Recently the Spanish *Dirección General de los Registros y del Notariado* has reminded registrars and notaries of the convenience to advance in the knowledge of the legal systems of the other MS, in order to facilitate the application of foreign law in the extrajudicial area; and to resort, in addition to the possibilities given by Spanish law, to the means provided by the E-Justice portal.<sup>66</sup> In other cases it not easy to discern to what extent the changes have been triggered by the EU character of the conflict of laws rule. However, it does not seem unlikely that the increase in the number of EU Regulations and also in the flux of cross-border exchanges has some effect. At any rate, the phenomenon shows a capacity on the side of the EU MS to move on that must not be forgotten, should the need for a legislative action by the EU be assessed.

## 5. The scholars' views

### 5.1 EU action is needed!

According to contemporary academic writings, the Europeanization of PIL is bound to produce broader or narrower consequences for the application of foreign law issue. In 2010 Profs. Bariatti and Pataut seemed totally convinced that 'L'origine désormais européenne du droit international privé a une importante influence sur la détermination de l'office du juge: la modification de source change ici la nature des obligations en cause. La mise en œuvre des règles de conflit, ensuite, conduit à l'application de règles nationales, dont l'impérativité est modifiée en profondeur par le droit de l'Union européenne'.<sup>67</sup> The survival of the French *accord procédural* was put

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Court of Cassation on the duty to search, investigate and apply *ex officio* the foreign law: Corte de cass., 26.05.2014, *Foro It.*, 2014, 6, I, 1738. Another feature increasingly common to the MS, that would certainly prove useful in the context under exam, is the growth of the managerial faculties accorded to the national judges (see B. HESS, P. TAE LMANN, above n. 35, para. 305 ff.)

<sup>66</sup> Res. DGRN, 17.04.2017, BOE 101, 28.04.2017, para. 15.

<sup>67</sup> 'Codification et théorie générale du droit international privé', in M. FAL-LON, S. POILLOT-PERUZZETTO (eds.), *Quelle architecture pour un*

into question by (among others) C. Nourrisat, arguing that the distinction between ‘droits disponibles’ and ‘indisponibles’ cannot trump the application of a European Regulation.<sup>68</sup> The idea that EU PIL rules cannot but be mandatory for the judges has gained supporters all around the EU.<sup>69</sup>

Against the background of an increasing number of cross-border relationships and a fragmented panorama of national legal answers and practices a large majority of authors<sup>70</sup> argue in favour of an EU intervention, preferably in a legislative form, and through regulation (which could be a separate, ‘mere procedural’ one, or integrate a future Rome 0 Regulation.)<sup>71</sup> The interplay between the CJEU and the national courts (or lawmakers) in the framework of the procedural autonomy and the equivalence and effectiveness principles is regarded as unsatisfactory: taken as such the majority of the national

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*code européen de droit international privé?*, Peter Lang 2011, pp. 337-61, p. 347.

<sup>68</sup>In J.S. BERGE, G. CANIVET (dirs.), *La pratique du droit de l’Union Européenne par le juge judiciaire. Réflexions autour de cas*, Dalloz 2016, p. 154.

<sup>69</sup>P. OREJUDO-PRIETO DE LOS MOZOS, ‘Imperatividad de la norma de conflicto y prueba del derecho extranjero en los reglamentos sobre ley aplicable a las situaciones privadas internacionales’, in J. LLUCH, J. PICO I JUNOY, M. RICHARD GONZALEZ, E. R. BARTLETT CASTELLA, J.L. ÁVILA ORIVE, C. MOLINA BLAZQUEZ (eds), *La prueba judicial. Desafíos en las jurisdicciones civil, penal, laboral y contencioso-administrativo*, La Ley 2011, pp. 477-98; S. COURNELOUP, above n. 65, p. 167. L. BURIÁN, S. SZABÓ, Hungary: Inconsistencies between Theory and Practice in the Treatment of Foreign Law in Hungary’, in Y. NISHITANI (above n. 10), pp. 240-53, p. 252: section 9 of the Hungary Code on PIL, foreseeing the non-application of the foreign law if requested by both parties, does not apply when an EU Regulation is at stake.

<sup>70</sup>This emerges from the abundant literature on the subject, as well as from the EU nationals reports in Y. NISHITANI (above n. 10). Dubitative, the Danish reporter, p. 144: the issue of access to foreign law has not seemed to attract much public attention; it is therefore difficult to assess the need for new international or regional instruments in the area.

<sup>71</sup>E.M. KIENINGER, above n. 5, p. 366; C. TRAUTMANN above n. 35, pp. 414-15.

rules are not incompatible with the EU PIL; the unifying potential of the effectiveness principle remains exceptional, limited to very specific situations - the protection of a weaker party or to ensure particular EU interests- and hence intervening only occasionally.<sup>72</sup>

## 5.2 Hard, soft and nuanced proposals

Disagreement starts one step further, when it comes to the extent of EU involvement.<sup>73</sup> To the questions: ‘1. The Binding Force of the Conflict of Laws Rules, 2. Foreign Law Ascertainment and 3. Failure of Determination of Foreign Law’, scholars answer supporting a more or less severe intervention by the EU.

i. C. Trautmann, with his exhaustive analysis of each of the referred questions, is representative of the ‘hard’ position,<sup>74</sup> which corresponds as well to the core suggestion of the *Iglesias/Esplugues/Palao* Study.<sup>75</sup> The questionnaire for the purposes of the Study specifically incorporated question number 24: ‘What is your opinion on the desirability and feasibility of a community law instrument regarding this issue? 24.1. Should the rules be the same for judicial and non-judicial authorities? 24.2. Which non-judicial authorities should be included?’ The answers are reflected in the so-called ‘Madrid Principles’, particularly I and IV: I, ‘A general European instrument on the ascertainment of content and manner of application of foreign law seems to be necessary. A Regulation seems to be the most suitable instrument to achieve this goal’; IV, ‘Application of

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<sup>72</sup> C. TRAUTMANN, above n. 35, p. 405.

<sup>73</sup> A brief summary can be found in Y. NISHITANI, General Report, in Y. NISHITANI (above n. 10), pp. 3-60, pp. 44-5.

<sup>74</sup> See Part 3, ‘Perspektiven der Harmonisierung’.

<sup>75</sup> Whereas the authors of the SCIL Study provide recommendations for a potential legal instrument governing the nature and implementation of conflict of laws rules in the European Union and of the foreign laws that those rules designate (Part III, pp. 62 ff), they also acknowledge that the outcome of the legal analysis does not support it (*ibid.*, pp. 5-6, reproduced below under 6.2.2).

foreign law should be made *ex officio* by the national authority (...).<sup>76</sup>

C. Trautmann advocates in favour of an *ex officio* application of the conflict of laws rules, and against the generalization of an *accord procedural* modelled on Article 7.1 of the 2007 Hague Protocol, which may prove problematic having in mind the need to protect third parties, or public interests; in consequence, where party autonomy is excluded on one of those bases the *accord procédural* should not be possible either. The author's opinion is more nuanced regarding whether a national court is bound to discern the relevant foreign elements: as a rule, no investigation of the facts of a case by the judge is required. By way of exception it should take place in family and succession matters.

Consequently with his proposal of an *ex officio* application of the conflict of law rule, C. Trautmann claims that the establishment of its contents corresponds as well to the judge, who may request or even mandatorily require the collaboration of the parties. The role of the judge remains in place even in case of a choice of law by the parties. Harmonization is also advised regarding the issue of the failure of determination of foreign law, which could be achieved by various means: it could be a rule with a positive content, or a negative rule setting the circumstances where the application of foreign law may be given up.

ii. At the other end of the spectrum the majority of the GEDIP members, meeting at The Hague in 2012, favoured the solution according to which 'Une applicabilité uniforme des règles de conflit de lois dans l'Union ne paraît ni nécessaire ni souhaitable ... la solution respecte l'orientation de la jurisprudence de la cour de justice et elle

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<sup>76</sup> Reproduced in IGLESIAS, ESPLUGUES, PALAO, above n. 9, pp. 95-97. The Principles match to a large extent C. Trautmann's conclusions, although due to their nature they are more nuanced and vague.

permet de préserver la diversité des cultures procédurales nationales...'.<sup>77</sup> At the 2013 meeting in Lausanne a proposal was approved for a rule which, while respecting the adversarial principle, would ensure a minimum of harmonization in the application of the EU Regulations: 'Where in light of the elements of the case before it, the court finds that it raises [may raise] an issue of applicable law [concerning on one or more European Regulations], it shall inform the parties thereof'.<sup>78</sup>

iii. In between, nuanced positions are also supported defending a balanced regulatory intervention, mainly focused on problem-avoidance. E.M. Kieninger<sup>79</sup> is representative of the opinion in favour of an enlarged freedom of choice of the *lex fori* after the proceedings have commenced: 'in all cases where the parties can request the *lex fori* through means of a retroactive choice of law (...), [they] should also have at their disposal the option to waive, expressly or implicitly, without formal requirements, the application of the foreign law in favour of the *lex fori*'. To compensate for the absence of formalities, an obligation should be imposed upon the judge to draw the parties' attention to the possibility of application of a foreign law. As for the boundaries of the *accord procédural* - in other words, which conflict of law rules should be labelled 'mandatory' and which 'non-binding' - the author proposes to resort to 'the limitations to party autonomy already contained in the Rome regulations.' Whenever a conflict of law rule is mandatory it is for the national judge to establish its contents, subject nevertheless to the proportionality principle: if time and costs of ascertainment of the contents of the foreign law are disproportionate in light of the object of the litigation, the judge should be allowed to replace it by the *lex fori*, provided the parties agree.

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<sup>77</sup> GEDIP, 'La condition du droit étranger selon le droit de l'Union', <https://www.gedip-egpil.eu/reunionstravail/gedip-reunions-22.htm#conditiondroitetranger> (accessed 20.02.2018). The opposed opinion was mainly sustained by H. GAUDEMET-TALLON, above n. 33.

<sup>78</sup> <https://www.gedip-egpil.eu/documents/gedip-documents-23-bis.htm>.

<sup>79</sup> Above n. 5, under para 17.04. On the *accord procédural* see as well, quite close, S. COURNELOUP, above n. 69, 169.

## 6. Assessment

### 6.1. Of the practical approach

In light of the lawmaker's clear decision not to rule on who should be in charge of introducing foreign law in the process, and/or establish its contents; neither on the solution in case of failure of the latter, nor regarding reviewability, it makes sense to evaluate in the first place the efforts tending to ease access to information. A caveat: in theory the EU system is neutral regarding the question 'who the main actor for the ascertainment of foreign law is'. In practice, to the extent that mainly judges have access to the most relevant facilitating tools, the EU is sustaining the *ex officio* model.<sup>80</sup>

To improve access to information on foreign law three main options are conceivable: judicial cooperation; information technology; networks of experts.<sup>81</sup> We will not address the latter: institutions such as the MPI Hamburg, the SICL, the Hellenic Institute of International and Foreign Law, come to mind as the proponents of this tool;<sup>82</sup> the EU is neither directly involved nor supports any of them.

#### 6.1.1. Cooperation

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<sup>80</sup> The Council Decision of 2009 (above, n. 20) foresees that professional associations representing legal practitioners, in particular lawyers, solicitors, barristers, notaries and bailiffs directly involved in the application of Community and international instruments concerning civil justice may become members of the Network through their national organisations (recital 12 and Article 1). According to the *Evaluation of the activities of the European Judicial Network in civil and commercial matters* (Deloitte Study), 2014, available at <https://publications.europa.eu/en/publication-detail/-/publication/a877dc52-3f93-472b-a81f-9b7c5d810718/language-en>, accessed 16.02.2018, p. 55, representatives of legal professionals are not sufficiently involved in the activities of the EJM-civil.

<sup>81</sup> GEDIP, above n. 77; and The Hague Conference, above, n. 28.

<sup>82</sup> For comments on specialised institutes see S. LALANI, 'A proposed model to facilitate access to foreign law', *YPIL*, 2011, pp. 299-313, under n. 18.

Promoting the European Judicial Network (EJN) has become a goal at the EU institutional level. The Network has gained political visibility: in December 2016, for the first time, the Council adopted conclusions on the EJN.<sup>83</sup> On the importance the Commission attaches to the work of the EJN it suffices to refer to Věra Jourová's Keynote speech on February 1, 2017, 'Building a stronger European Judicial Network', at the 15th Annual Meeting of the European Judicial Network in Civil and Commercial Matters. The attitude matches scholars' views as well.<sup>84</sup>

One of the fundamental tasks of the Network is to facilitate direct contacts between authorities in charge of judicial cooperation in civil matters, allowing a case-by-case approach in implementing the relevant Union instruments. According to the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the activities of the European Judicial Network in civil and commercial matters of 2016, 'Data gathered through consultations of the Network has shown a mixed, albeit incomplete, picture that indicates great variation in the use of the Network for this purpose'.<sup>85</sup> This seems to be particularly true regarding support to establish the contents of a foreign law.

The intention to make of the EJN a tool to facilitate access to foreign law for specific cases is spelled out in the Decision of 2009 amending Decision 2001/470/EC.<sup>86</sup> The Commission Report of 2006 on the application of the latter reflected on the bridging role of the Network in this context: '(...) giving the ongoing harmonization of the

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<sup>83</sup> Under the Slovak Presidency, Doc. number 14411/16 JUSTCIV 297 EJUSTICE 183, [https://www.parlament.gv.at/PAKT/EU/XXV/EU/12/60/EU\\_126071/imfname\\_10678897.pdf](https://www.parlament.gv.at/PAKT/EU/XXV/EU/12/60/EU_126071/imfname_10678897.pdf), accessed 14.02.2018.

<sup>84</sup> See Madrid Principles, Number VI; C. TRAUTMANN above n. 35, p. 432 with further references; M. PAUKNEROVÁ, "Czech Republic- Treatment of Foreign Law in the Czech Republic", in Y. NISHITANI (above n. 10), pp. 113-29, p. 127; or S. COURNELOUP, above n. 69, p. 174.

<sup>85</sup> COM(2016) 129 final, at 6.

<sup>86</sup> Above, n. 20.

conflict-of-laws rules in the Union, the Network can be expected to play an essential role in helping the courts of the Member States when they apply the law of another Member State'.<sup>87</sup> The point was taken up in the Proposal for amendments: Article 3.2.b would be modified to provide that, where the law of another MS is applicable, the courts and authorities responsible for that case can apply to the Network for information on the content of that law. A new paragraph added to Article 5.2.a would compel the national contact points to provide the courts of their MS with information to facilitate the application of the law of another MS, drawing support from all the components of the Network in its MS.<sup>88</sup> The changes were incorporated in the 2009 Decision. However, no clear data was reported on this specific point by the Study commissioned in 2014 by the European Commission, on which the second Commission's report, delivered in 2016, is based.<sup>89</sup> The overall impression is that this aspect of the EJN has not been sufficiently explored, or exploited, yet; the scholar's scepticism as to whether the Network will be capable of providing a significant contribution, expressed before the amendments of 2009 and after, remains justified.<sup>90</sup> In this context several (already known) dangers are worth recalling: the lack of appropriate facilities in terms of staff, resources and modern means of communication; the factual subordination of the effectiveness of the EJN to

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<sup>87</sup> COM(2006) 203 final, at 5 (3.1).

<sup>88</sup> COM(2008) 280 final, at 6 (4.3). See also recital 7.

<sup>89</sup> The Deloitte Study (above n. 80) pp. 34-35, p. 55, reports good success on the facilitation of requests for judicial cooperation between MS in cross border cases, but includes no indication as to the contents of the requests. In p. 66 it acknowledges the need 'to discuss more often practical law cases'.

<sup>90</sup> P. FRANZINA, 'Il ruolo della rete giudiziaria europea nell'applicazione e nello sviluppo degli strumenti della cooperazione giudiziaria in materia civile', in N. BOSCHIERO, P. BERTOLI (eds.), *Verso un ordine comunitario del processo civile*, Editoriale Scientifica, 2007, pp. 185-200, p. 199. J. VERHELLEN, 'Access to foreign law in practice: easier said than done', *JPIL*, 2016, pp. 281-300, pp. 290-93, asks 'European Union Judicial Network: tool or promise?'



the existence of personal mutual relations within the EJM;<sup>91</sup> the absence of language and communication skills.<sup>92</sup>

### 6.1.2 Information technology and databases

The eur-lex site of the European Union hosts several tools to get information on national law and case law. To date, they are rather rudimentary both regarding design - the user interface - and contents.

i. Under <http://eur-lex.europa.eu/collection/n-law.html> the following instruments may be found:

- The N-Lex collection. Developed jointly by the EU's Publications Office and national governments, it is a single entry point to individual EU countries' national law databases. In other words, N-Lex itself contains no documents; it isn't a database, but a (self-declared) easy-to-use interface that lets you search national databases, on which it is entirely dependent. The search language will therefore be the official language of each MS, thus a user needs to know at least some words in order to start using the tool. She is offered three search possibilities: the first is a wide, somewhat random search, based on words in the title or in the text. The second and third allow for the search of a specific legal act, be it by document reference or publication): it is thus more targeted but requires previous knowledge of those elements. The research tool is not particularly refined, and the user will often have to navigate within many results barely related to his in-

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<sup>91</sup> As pointed out by the GEDIP, above n. 77 **Error! Bookmark not defined.**, Annex II, under II.B.

<sup>92</sup> Typical practical difficulties are the imprecise formulation of the question regarding foreign law, or its contradictory translation (or/and of the foreign rules too). A good example would be the situation underlying the Spanish Constitutional Court decision 10/2000, 17.01.2000, where the legal text in answer to the letter rogatory did not match at all the subject matter of the request.

terests, as they would have all been indiscriminately retrieved.<sup>93</sup> In light of this, one cannot but agree with the scholar's opinion on the need to be trained in on-line legal research, and on comparative law courses paying more attention to the sources of foreign law.<sup>94</sup>

As of January 2018, some countries' databases were not accessible: some of them apparently on temporary bases (France, UK, Denmark; Austria); some in general (Cyprus). Clicking on Lithuania the message was "the connection between the database of Finland and N-Lex is currently not working". In 2009, N-Lex was 'encore considéré comme expérimental car il repose sur la coopération avec les États et leurs diverses bases de données juridiques indépendantes' ;<sup>95</sup> it still seems to be so.

- JURE. A database created by the European Commission to contain relevant judgments delivered by courts in contracting states (EU MS and if applicable Iceland, Norway and Switzerland) and the EU Court of Justice under the Brussels and Lugano Conventions (both 1988 and 2007), the Brussels I Regulation and the Recast, as well as the Brussels II and Brussels II bis Regulations. The judgments are available in their original language only, although they should be accompanied by a summary in English, French and German, under 'JURE summary'.<sup>96</sup> JURE collects decisions from 1972 on;

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<sup>93</sup> For instance, the Spanish data base of the BOE does not only include legislation, but also other types of acts subject as well to compulsory publication: from the result of a challenge of a legislative measure before the Constitutional Court, to Universities' resolutions on the syllabi ('plan de estudios').

<sup>94</sup> P. WAUTELET, 'Belgium. Foreign Law in Belgian Courts - From Theory to Practice', in Y. NISHITANI (above n. 10), pp. 63-92, p. 74.

<sup>95</sup> Prel. Doc. No 11B of March 2009, 'Rapport de la réunion d'experts sur la coopération internationale relative à l'information juridique en ligne sur le droit interne', <https://assets.hcch.net/docs/77f3b4ca-edfb-423e-875c-b13ac31ded0e.pdf>, accessed 21.02.2018, para. 17.

<sup>96</sup> As of January 2018, many decisions were not translated, or only in English. Keywords in English may appear under the tab 'document information', but of course they do not make up for the lack of a summary.

as of January 2018 the total number of decisions by national courts in European Union law was said to be 7416 - of which only 4055 correspond to national courts; the most recent was of July 2017; the latest Spanish one dates from 2011.

- Finally, <http://eur-lex.europa.eu/collection/n-law.html> has some room reserved for national case-law, which is supposed to gather national case-law references concerning EU law, not only from MS but also from Canada, Liechtenstein, Norway, and Switzerland. In a search made with the following search criteria: *Domain: National law, Subdomain: National case law, Subject matter: Brussels Convention of 27 September 1968, Brussels Convention of 27 September 1968 - Enforcement, judicial cooperation in civil matters, Brussels Convention of 27 September 1968 - Jurisdiction, Lugano Convention, Subject matter: judicial cooperation in civil matters, Date: Date of document, From: 01/01/2017, To: 31/12/2017, National court: Germany, Search language: English*, the number of reported cases was of 3. A further re-search gave no results for Spain, France and the UK.

ii. The European e-justice portal provides information on national law and case law under <https://e-justice.europa.eu/home.do?plang=en&action=home>.

- The 2001 Decision setting up the EJN foresaw the establishment of an internet-based information scheme for the public. Accordingly, data concerning the national legal systems is (or should be) published in the form of “information sheets” in the E-justice portal.<sup>97</sup> The scope of the information is narrow, mainly covering the issues listed in Article 15.2<sup>98</sup> in spite of the clear indication therein about the non-exclusive nature of the enumeration. Other pieces of information of interest for the application of the conflict of law rules, or the

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<sup>97</sup> [https://e-justice.europa.eu/content\\_information\\_on\\_national\\_law\\_information\\_sheets-439-en.do](https://e-justice.europa.eu/content_information_on_national_law_information_sheets-439-en.do)

<sup>98</sup> Only a few other issues are addressed by the information sheets: for instance, those on procedural limits or on the calculation of statutory interests.

designated domestic law, are missing: national law on subject matters not yet addressed at the EU level (or falling under the exclusive competence of the MS) which may be the principal object of a private dispute, or more importantly for the issue under examination, arise as preliminary issues when applying a uniform EU conflict of laws rule, *ad ex.*, the rules on nationality.<sup>99</sup>

It is difficult to assess whether the data are updated - by the MS, as to the latest materials, and - by the European Commission, incorporating the new piece in the translation. An example: the Spanish information sheet for national law on succession was updated in Spanish in October 2, 2017. The current English version was last updated in October 2015; as of February 13<sup>th</sup>, 2018, the reader still gets a warning about it being prepared.

- Under [https://e-justice.europa.eu/content\\_member\\_state\\_case\\_law-13-en.do](https://e-justice.europa.eu/content_member_state_case_law-13-en.do) a search for MS case law can be performed at the e-justice portal itself by selecting the corresponding flags among those listed on the right hand side of the portal. Users will be redirected to a page with information translated into English by EU translators about the national case law<sup>100</sup> (and a link to a national search engine, if public): its value (or not) as a source of law; an explanation on how case law may be accessed in that MS, and how it is presented in the public data base (if any) of the corresponding MS with a link to it. Information is provided as well as to whether the data base includes details regarding the monitoring of ongoing proceedings (i.e., whether information is available on appeals, on whether the case has been resolved, on the outcome of appeals, on the irrevocability of the decision, or on other

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<sup>99</sup> See recital 22 Regulation Roma III; recital 41 Regulation 650/2012; recital 49 Regulation 2016/1104.

<sup>100</sup> With a disclaimer: ‘The national language version of this page is maintained by the respective Member State. The translations have been done by the European Commission service. Possible changes introduced in the original by the competent national authority may not be yet reflected in the translations’.

proceedings), and to whether there are mandatory rules concerning publication of court judgments.

In practice, the possibility of accessing judgements in a language different than the official one of the MS at hand is scarce.

- The European e-justice portal has a link to data bases compiling national case law in application of EU law, not managed by the EU services, such as the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union.<sup>101</sup>

### 6.1.3. Appraisal

Databases of national case law and legislation, as well as structures for cooperation, are on paper good devices to bridge the gaps between legal operators anchored in different national legal systems. In practice, the overall impression given by the existing EU platforms and initiatives is that they are not enough - not accurate enough, not trustworthy enough, not user-friendly enough -<sup>102</sup>, while at the same time they are too many both in number and origin. Economic resources at the EU level do not seem to be a problem;<sup>103</sup> one may wonder though about the return on investment. The example of <http://eur-lex.europa.eu/collection/n-law.html>, is quite telling, but

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<sup>101</sup> See on both data bases <http://www.aca-europe.eu/index.php/en/newsletter-en/205-newsletter-17>

<sup>102</sup> The schema of the e-justice portal is certainly not the best: it is difficult to understand, for example, the presence of a tab dedicated to succession (why not to matrimonial property, contracts or maintenance?), with contents slightly different to the ones retrieved when clicking on the tab “succession” under European Judicial Network on Civil and Commercial Matters-Information on national law.

<sup>103</sup> Regulation (EU) No 1382/2013 of the European Parliament and of the Council, of 17 December 2013, establishing a Justice Programme for the period 2014 to 2020, sets a budget of €377, 604,000 for actions aiming at: facilitating and supporting judicial cooperation in civil and criminal matters; supporting and promoting judicial training; and facilitating effective access to justice for all.

there are many others. We would like to mention in particular well-intended private initiatives to compile and systematize pieces of information regarding the legal systems of the MS (such as case law on a particular field of law), which are financed or co-financed by the EU, and after a while (a stipulated time: the duration of a research project, for instance) are abandoned somewhere on the internet. The final outcome is a fragmentation of the sources, which adds to the lack of certainty as to reliability of the provider and of the offer, and its updating. The value of the effort seems to lie essentially with the English summary usually provided: not bad, but certainly not enough.

It is worth recalling that while the EU does not support institutions similar to the Hellenic Institute of International and Foreign Law, there is a clear will to promote networking among professionals: there are training opportunities and *ad hoc* meetings, where they create personal bonds generating in turn reciprocal trust. This kind of action does not *per se* raise criticism, but once again, its added value regarding the application of EU Regulations and/or the ascertainment of foreign law is limited: it remains restricted to individual acquaintances; it is legitimate to wonder whether resources would not be better allocated in a different way.

In our view, the subject-matter is not politically neutral. Whatever the system chosen regarding the application of the conflict of laws rules and of foreign law, at the end of the day access to justice for individuals is at stake. If fostering cross-border transactions and movements is an institutional goal of the EU, it would seem appropriate that the public institutions are the ones in charge of facilitating access to the applicable law for all those who engage in such transactions, assuming thereby the risks and costs of internationality. A missing, vanishing or useless public involvement will simply boost private initiatives providing for the service upon payment, widening further the differences among a unique category of people (the litigants).<sup>104</sup>

## 6.2. Of the regulatory failure

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<sup>104</sup> Such as Getting the Deal Through: <https://gettingthedealthrough.com/>

As already explained under 2.2.1., so far the EU legislative initiative in the field under examination has been limited; ‘frustration’ may therefore aptly describe the feeling it elicits in the academic community, whose expectations we have described above. The extent of the normative action certainly leaves unsatisfied the *de lege ferenda* supporters of an EU Regulation imposing the initiative on the judge for applying the conflict of laws rule and in establishment of the contents of the foreign law. Even less daring submissions, such as the final one of the GEDIP,<sup>105</sup> have been left unheard; others, like the one on ‘a new European version of the doctrine of forum non conveniens’ have been incorporated only in some of the Regulations, to some degree, and subject to conditions.<sup>106</sup>

How can EU unwillingness to engage in further action be explained? The answer is surely a complex one.

### 6.2.1 Political hurdles

Any EU lawmaker effort to regulate the application of PIL and of foreign law is probably hampered by political hurdles. In our view they can be expected to worsen in the near future. The *White Paper on the Future of Europe - Reflections and scenarios for the EU27 by 2025*,<sup>107</sup> describes five possible scenarios for Europe by 2025. The *Declaration of the leaders of 27 Member States and of the European Council, the European Parliament and the European Commission* of March 25<sup>th</sup>, 2017, stating ‘We will act together, at different paces and intensity where necessary’, point to the third scenario, ‘Those Who Want More Do More’, as the most likely: not a promising avenue for those supporting a uniform European approach to the problems linked to the application of foreign law.

### 6.2.2 No ‘one-size-fits-all’ solution. Constitutional constraints

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<sup>105</sup> Above, under 5.2.

<sup>106</sup> M. JÄNTERÄ-JAREBORG, ‘Foreign Law in National Courts. A Comparative Perspective’, *Collected Courses of The Hague Academy of International Law*, vol. 304, Brill, Nijhoff 2003, pp. 1-386, pp. 313-24.

<sup>107</sup> COM(2017) 2025 final.

i. To be fair, the EU lawmaker cannot be blamed for not having found *the* way out - in normative terms - to the difficulties inherent to the application of foreign law. The parallelism *forum/ius* undoubtedly has great appeal. Its rationale is even coated with fundamental rights connotations: the ‘reasonable time’ requirement is a core notion of Article 6 ECHR. The prospect of a MS being found guilty of a violation due to the length of proceedings entailing the need to ascertain a given foreign law is no longer a threat, but a reality: in 2004, Hungary was found to have failed to comply in the case *Karalyos and Huber v. Hungary and Greece*.<sup>108</sup> At the same time, a general *Gleichlauf* would not fit: simplicity is not an absolute goal.

One would instinctively assume that the application of the conflict of laws rule by a judge independently of the parties contentions, coupled with an obligation to establish the contents of the foreign legal system, would guarantee or at least augment the probabilities of its application. However, one may wonder about such a radical proposal: a sledgehammer to crack a nut? Indeed, no solution works well or badly in the abstract but only against a given legal background. At the end of the day, the application of EU law is decentralized, and EU justice is justice as administered by the MS. Schemes currently in force at the national level reflect not only an understanding about the respective roles of judge and parties,<sup>109</sup> but

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<sup>108</sup> *Karalyos and Huber v. Hungary and Greece*, no. 75116/01; judgment was delivered on 6 April 2004. The Court held there had been a violation of Article 6 ECHR by Hungary, where the proceedings took place and where after 9 years the contents of Greek law had not yet been established. The ECtHR is willing to admit that the application of a foreign law may create legal difficulties and delay the resolution of a case, but found that explanation insufficient in the case at hand.

<sup>109</sup> The culture issue should not be underestimated either. An interesting example can be found by comparing the views of M. TORGA and O. REMIEN, the Estonian and German rapporteurs in Y. NISHITANI (ed.), above n. 10, on the methods to facilitate access to foreign law: for the latter (p. 219) information, mainly regarding interpretation, of foreign law among EU MS could be obtained via something akin to a preliminary reference procedure. For the former (p. 155), the national judge should himself have access to the whole system of foreign law, ‘and the judicial assistance and administrative cooperation should be used



more pedestrian, crude realities that have to do with the capacity of a system to engage in the exercise of administering justice according to foreign law, with bearable costs (for the parties and/or for the public coffers), within a reasonable time. Because each solution is to work in a particular -and highly complex- national frame, a technique involving the judge in the determination of foreign law from the beginning can be as (in-) effective as one that claims its intervention only as a last resort, once the primary tools have failed. It is therefore common sense to accept as a rule the coexistence of different options as to how to get to the application of foreign law<sup>110</sup> (and as a rule, it may be subject to exceptions).<sup>111</sup>

In addition, the existing divergence entails consequences for the practicability of the attempts to harmonize the field, as explained in the Swiss Study of 2011: the scenarios at the national level being so diverse, ‘... at the EU-level, [that] it would not be possible to achieve a uniform application of foreign law in all Member States by means of uniform Community measures. Any EU-wide rule or procedure would have different effects in each of the Member States into which it was introduced. In other words and somewhat counter-intuitively, **different measures specific to individual legal systems will need to be adopted** in order to move closer to Union-wide uniformity in this field.’ If refinements or amendments are to be system-tailored, then no doubt each national lawmaker is in a better position to act than the EU.

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only for getting the requesting judge on the right track or for double checking whether the understanding of foreign law ... has been correct’.

<sup>110</sup> It has been argued that divergence is a problem on its own, imposing an unjustifiable burden of the parties: IGLESIAS/ESPLUGES/PALAO, above n. 9, p. 5-6; or E.M. KIENINGER, above n. 5, p. 358. This would indeed be a reason to react at the EU level, but it remains to be proven that it is the case, and that the ‘additional burden’ is not justified.

<sup>111</sup> Below, our closing paragraph.

ii. Echoes of the principles of proportionality and subsidiarity resonate in the last paragraphs, opening the door to the issue of the constitutional constraints. It should be noted that the constitutional entitlement of the EU to legislate in this subject matter has not received much attention.<sup>112</sup> In 2003 it was asserted, without further ado, that (former) Article 65 c EC Treaty permits the adoption of measures with a view to harmonizing the law of procedure governing the applicability of the (then) Community rules on choice of law.<sup>113</sup> Other scholars seem less convinced, but again, they do not provide any explanation of their views.<sup>114</sup> In our view, a discussion about a competence of the EU to regulate on the application of EU conflict of law rules or the designated law is pointless at this stage; the real question is to what extent it should be exercised. Not only are the MS capable of introducing changes,<sup>115</sup> but as we have just seen, in view of the high degree of divergence and how much the issue is intertwined with national procedural solutions, they are better positioned to do it in a more appropriate and suitable way. This should not prevent the EU from making recommendations or suggesting good practices; or even, exceptionally, from imposing a mandatory way to handle the conflict of law/foreign law issue. Where, and how, depends on what is at stake: i.e., on the purposes of the uniformization of the choice of law rules.

### 6.2.3 What is (EU) harmonisation of PIL for?

Conflict-of-laws rules are definitively gaining momentum in the EU legislative panorama. The fact has not gone unnoticed; it has triggered scholars' reactions in the form of questions such as how should this newly developed European conflict of laws be characterized, or

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<sup>112</sup> For instance, just two pages (410-11) in the otherwise extensive research by C. TRAUTMANN.

<sup>113</sup> M. JÄNTERÄ-JAREBORG, p. 370.

<sup>114</sup> GEDIP, above n. 77 **Error! Bookmark not defined.**: 'Indépendamment de la question, débattue, de l'habilitation du législateur européen pour adopter des règles uniformes sur la condition du droit étranger au regard des termes de l'article 81 TFEU (...)'.  
<sup>115</sup> Above under 4.

warnings about the importance of a full understanding of ‘the elements building the identity of European conflict of laws’.<sup>116</sup> We cannot but agree to that. A specific identity of EU conflict of laws - for the sake of the argument let’s assume there is one - is likely to have a bearing on the question we are addressing here; it should be transposable in indications as to the perimeter for an EU legislative intervention aiming at ensuring the application of the conflict of laws rule and of the designated applicable law. As to what the components of a ‘European identity’ of the rules are, leaving aside the origin, we would expect them to be function-related: in other words, to lie with the role and goal of the rules vis-à-vis the European project of integration. Several possibilities emerge from the PIL Regulations - unfortunately none completely convincing:

i. Harmony of solutions. Could the ‘new life’ of conflict-of-laws rule in the EU be explained in terms of harmony of (substantive) solutions?<sup>117</sup> Indeed, this is the justification that intuitively comes to mind, and the one scholars resort to in the first place to plead for an EU intervention.<sup>118</sup> Moreover, one would expect the EU rules to be characterized for improving the chances to get to this outcome, thus being different to ‘simple’ international uniform PIL solutions; this difference capable of boosting international transactions and the movement of persons within the EU, instead of only reacting to them.

No conclusive answer is to be found in the Regulations, though. Recital 6 to the Rome I and II Regulations refers to the need for conflict of laws rules in the MS to designate the same national law irrespective of the country of the court in which an action is brought, as an instrument ‘to improve the predictability of the outcome of litigation,

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<sup>116</sup> J. MEEUSEN, F. VAN OVERBEEKE, L. VERHAERT, ‘The Link between Access to Justice and European Conflict of Laws after Lisbon. Much Ado about Nothing?’, *RabelsZ*, 2017, pp. 853-83, p. 861, with further references.

<sup>117</sup> A caveat: an explanation based on the search for harmony of solutions as such would never be sufficient -except for aesthetic reasons; it is not an objective in itself, but a means to an end, usually understood to be legal certainty.

<sup>118</sup> Above, n. 110.

certainty as to the law applicable and the free movement of judgments’ - all three ingredients for ‘the proper functioning of the internal market’. In the Rome III Regulation, recital 9, the core concern is forum shopping: ‘This Regulation should ... prevent a situation from arising where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests’.

In our view there are two possible readings of the recitals. First, the idea of achieving one and the same substantive outcome, while certainly not spelled out therein, is nevertheless implicit. According to the second reading, the EU lawmaker’s commitment to the harmony of solutions is much more limited: he is content with laying down the first brick. Harmonization of the conflict of law rules and *designation* (which is not yet *application*) of the same national law are per se able to reach the desired objectives, which, under a second look to the wording of the recitals, are not far reaching. This is particularly clear in the Rome III Regulation: uniform contacting points are as such capable of ‘prevent(ing) a situation from arising’, i.e., producing a deterrent effect. Also the predictability of the result of a dispute and the free movement of judgments are improved by the simple fact that PIL rules are common - especially the latter, as no control exists in one MS as to the law applied at the MS of origin.

The situation does not become clearer in the most recent Regulations: the Succession Regulation, and Regulations 2016/1103 and 2016/1104. To start with, the relevant recitals incorporate a rather cryptic formula, the wording of which is in addition slightly different in the Succession Regulations. Recital 42 to Regulation 2016/1104 states ‘In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable partners to know in advance which law will apply to the property consequences of their registered partnership. Harmonised conflict-of-law rules should therefore be introduced in order to avoid contradictory results’. According to recital 37 to Regulation 650/2012 ‘Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results’; the word ‘therefore’ is missing; the instrumental link between the conflict of laws rules and foreseeability is undermined... or lost, if one is to follow the Spanish

version ‘*Además, deben introducirse normas armonizadas en materia de conflicto de leyes para evitar resultados contradictorios*’ (italics added).

Secondly, harmonization of the conflict of laws solutions is literally associated with the avoidance of ‘contradictory results’. The formulation comes close to the ‘irreconcilable judgments’ phrase in recital 21 of Regulation 1215/2012, in its Article 8.1, or in its Article 45.1, c and d). The notion has a context-specific meaning;<sup>119</sup> therefore it might be different in the context at stake. Still, it evokes a plurality of instances (procedures) on the same subject, and mutual recognition comes immediately to mind. In this regard it is worth recalling that the relationship between harmonised choice of law rules and the free movement of judgments appeared already in recital 6 to the Rome I and Rome II Regulations.

iii. Mutual recognition? Almost all PIL Regulations include recitals referring to one or other of the following Programmes: the Programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters of 30 November 2000, The Hague Programme of 2004, and/or the Stockholm Programme of 2009,<sup>120</sup> where choice of law rules are described as instrumental to mutual recognition (Introduction to the Programme of measures 2000; The Hague programme, under 3.4.2), and as a safeguard to accompany the abolition of the exequatur (the Stockholm Programme, under 3.1.2). In the Maintenance Regulation the link is made explicit to its furthest expression in recital 24: ‘The guarantees provided by the application of rules on conflict of laws should provide the justification for having decisions relating to maintenance obligations given in a Member State bound by the 2007 Hague Protocol recognised and regarded as enforceable in all the other Member States without any procedure being necessary and without any form of control on the substance in the Member State of enforcement.’ The exequatur procedure, together with all controls by

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<sup>119</sup> See case 145/86, *Hoffmann*, ECLI:EU:C:1988:61, and case C-406/92, *The Tatry*, ECLI:EU:C:1994:400.

<sup>120</sup> OJ C 12, 15.1.2001, OJ C 53, 3.3.2005, OJ C 115, 4.5.2010, respectively.

the authorities at the requested MS, is given up thanks to the harmonization of the conflict of laws solutions - although, funnily, their origin is to be found in an international instrument; they are not 'uniquely' European.

As a matter of fact, the enhanced association PIL solutions-mutual recognition is a) not only unfamiliar to EU PIL, but b) it is not sure to what extent the EU lawmaker actually believes in it. Until the Maintenance Regulation, the applicable law issue was never deemed relevant for the purposes of free circulation of decisions. One would mechanically assume that the recognition of a judgment from another MS becomes easier when it has been adopted in conformity to a law designated by a common choice of law rule; but, in fact, what law has been actually applied, or how, does not really matter at that stage. According to Article 27.4 Brussels Convention 1968, a MS's judgment could be refused recognition if the court of the State of origin had decided on a preliminary question 'in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State', but only when the subject matter touched upon the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession, i.e., topics not falling under the scope of application of the Convention. The rule was given up later, and does not exist since Regulation 44/2001. The only remaining device against the recognition of a foreign decision on substantive grounds is the very much narrower public policy clause; where it disappears, the discussion on the interpretation of the material scope of the Regulations comes to the forefront.<sup>121</sup>

There are other examples raising doubt about the reality of the purported connection between harmonisation of conflict of law rules and mutual recognition. The Brussels II bis Regulation does not harmonize the conflict of law rules but imposes recognition and enforcement without any control at the requested State for some decisions (access rights, certain return orders) under Article 40 and ff.

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<sup>121</sup> As happened with Regulation 805/2004 on the European Enforcement Order: see F.J. GARCIMARTÍN ALFÉREZ, *El título ejecutivo europeo*, Civitas 2006, pp. 50-51, npp. núm. 9.

The abolition of the *exequatur* procedure has been proposed for all decisions covered by the Regulation on the occasion of its recast, without any simultaneous harmonization of the conflict of laws rules. The Succession and Matrimonial or Registered Couples' Property Regulations harmonize the choice of law rules but do not do away with the *exequatur* procedure - and the controls in the requested MS.

Judging from the most recent PIL Regulations - from the need to resort to enhanced cooperation in most family matters, and with the UK and Ireland not being bound by the Succession Regulation- it is not too daring to say that the mutual trust battle is still played out at the level of the scope of application of the instruments. At the end of the day, mutual trust seems to tolerate and even to promote blindness regarding substantive law: actually, according to the CJEU, taking into account the substantive law of another MS when assessing whether to transfer a case to its courts would be in breach of the principles of mutual trust between MS and mutual recognition.<sup>122</sup>

Still, for the purposes of this paper the association between harmonized choice of law rules and mutual recognition may prove productive. In a recent academic paper, the relation has been tentatively explained by adding to the equation mutual trust *in particular domains*.<sup>123</sup> According to the authors the commonality of the conflict of laws solution is particularly needed in fields where "a procedural approach solely resting upon mutual recognition, inspired by mutual trust, would indeed be too blunt to take proper care of the different policy perspectives at issue".<sup>124</sup> European PIL should, for some topics, be the vehicle of substantive EU (or national) policies, supporting mutual recognition in fields where the latter, on its own, would be too straightforward, to the point that it would 'threaten its own success'.<sup>125</sup> As announced, the approach is not uninteresting for the topic under examination here. In the area of procedural law, fragmentation and divergence of the national systems have not hindered

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<sup>122</sup> Above, n. 17.

<sup>123</sup> J. MEEUSEN, F. VAN OVERBEEKE, L. VERHAERT, above n. 116, p. 879.

<sup>124</sup> *Ibid.*, p. 879, 880.

<sup>125</sup> *Ibid.*, p. 881.

the recognition in a MS of the outcome of judicial proceedings conducted in another MS: for it to be so, however, the EU had set up (and is still setting up) a bunch of common rules to guarantee the respect of a fundamental right all MS are strictly committed to - the right to a due process-, and coupled them with indications as to how they should be applied.<sup>126</sup> Following the same pattern, in the field of conflict of laws the next task would be to identify the cornerstones for European or national substantive policies and rules.<sup>127</sup> Once this point is clear (knowing nevertheless the issue is a dynamic one), the EU lawmaker should look for a way to underpin the application of the corresponding conflict of laws rule and of the designated national system, in order to buttress mutual trust among the MS through PIL.<sup>128</sup>

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<sup>126</sup> See for instance Article 28 of the Brussels I bis Regulation; or Articles 11, 19, of the Maintenance Regulation.

<sup>127</sup> J. MEEUSEN, F. VAN OVERBEEKE, L. VERHAERT, above n. 116, pp. 881-82, talk in particular about labour and international family law.

<sup>128</sup> A rule on the application of the conflict-of-law rules/foreign law would work as “a positive tool”, preventively caring for mutual trust, as opposed to devices which, like the public policy clause, work after a decision has been rendered blocking its free circulation.