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Section I

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

Pleading and Proof of Foreign Law – a Comparative Analysis*

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I. Introduction

In proceedings with a foreign element there are manifold interactions between the law of civil procedure on the one hand and private international law as well as (domestic or foreign) substantive law on the other hand. The procedure is governed by the principle "*forum regit processum*"; it is conducted under the law of the court seised with the action (*lex fori*), irrespective of the law applicable to the substance of the case. Private international law designates the applicable substantive law and thus provides the basis for a judgment on the merits (*lex causae*). Problems arise whenever the rules of private international law refer to foreign law, because its content normally is unknown to the court. In this situation it is again a matter of the *lex fori* to decide on the questions whether the judge has an obligation to apply such foreign law *ex officio* and by which means he may ascertain the content of the *lex causae*.

Therefore, procedural law has a key function in international civil proceedings: it governs not only the proceedings, but it may limit the scope of private international law by establishing specific procedural prerequisites for its application, as for instance a duty of the parties to plead the applicability of foreign law. Furthermore, it is the procedural law of the forum which determines the question to what extent and by which means a judge is allowed to examine the content of foreign law.

II. The Status of Foreign Law in Domestic Proceedings: Question of Fact or Question of Law?

1. Significance of the Distinction

Procedural law is essentially characterised by the distinction between questions of fact and questions of law. The effects of a classification as a question of fact or law, respectively, are

* Substantial parts on pages 1 – 7 of this article are based on the article "Ausländisches Recht vor deutschen und englischen Gerichten", by *Clemens Trautmann* in ZEuP 2006, pages 283 – 293.

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Adamczyk, Die Überprüfung der Anwendung ausländischen Rechts durch den Bundesgerichtshof und das schweizerische Bundesgericht im Zivilpozess (1999); *Artz*, Kollisionsrecht und ausländisches Recht in spanischen und deutschen Zivilverfahren (2004); *Bendref*, Gerichtliche Beweisbeschlüsse zum ausländischen und internationalen Privatrecht, MDR 1983, 892; *Calvo-Caravaca/Carrascosa González*, The Proof of Foreign Law in the new Spanish Civil Procedure Code 1/2000, IPRax 2005, 170; *de Vareilles-Sommières*, Glossaire de l'application judiciaire de la loi étrangère, Études à Normand (2003), 485; *Fastrich*, Revisibilität der Ermittlung ausländischen Rechts, ZZP 97 (1984), 423; *Fentiman*, Foreign Law in English Courts (1998); *Fentiman*, Foreign Law in English Courts, L.Q.Rev. 108 (1992), 142; *Ferrand*, Die Behandlung des ausländischen Rechts durch die französische Cour de Cassation, ZEuP 1994, 126; *Flessner*, Fakultatives Kollisionsrecht, RabelsZ 34 (1970), 57; *Fuchs*, Die Ermittlung ausländischen Rechts durch Sachverständige, RIW 1995, 807; *Geeroms*, Foreign Law in Civil Litigation (2003); *Geisler*, Zur Ermittlung ausländischen Rechts durch „Beweis" im Prozess, ZZP 91 (1978), 176; *Gottwald*, Zur Revisibilität ausländischen Rechts, IPRax 1988, 210; *Jessurun d'Oliveira*, Foreign law in summary proceedings, Essays in honour of Voskuil (1992), 119; *Hartley*, Pleading and Proof of Foreign Law: The Major European Systems Compared, I.C.L.Q. 45 (1996), 271; *Hau*, Gerichtssachverständige in Fällen mit Auslandsbezug, RIW 2003, 822; *Heldrich*, Probleme bei der Ermittlung ausländischen Rechts in der gerichtlichen Praxis, Essays in honour of Nakamura (1996) 243; *Hetger*, Die Ermittlung ausländischen Rechts, FamRZ 1995, 654; *Jansen/Michaels*, Die Auslegung und Fortbildung ausländischen Rechts, ZZP 116 (2003), 3; *Jäntera-Jareborg,* Foreign Law in National Courts, Rec. d. Cours 304 (2003) 228; *Jastrow*, Zur Ermittlung ausländischen Rechts: Was leistet das Londoner Auskunftsübereinkommen in der Praxis?, IPRax 2004, 402; *Kerameus*, Revisibilität ausländischen Rechts – ein rechtsvergleichender Überblick, ZZP 99 (1986), 166; *Kindl*, Ausländisches Recht vor deutschen Gerichten, ZZP 111 (1998), 203; *Krause*, Ausländisches Recht und deutscher Zivilprozess (1990); *Küster*, Zur richterlichen Ermessensausübung bei der Ermittlung ausländischen Rechts, RIW 1998, 275; *Küster,* Die Ermittlung ausländischen Rechts im deutschen Zivilprozess und ihre Kostenfolgen (1995); *Lindacher*, Zur Anwendung des ausländischen Rechts, Essays in honour of Beys (2003), 909; *Lindacher*,

threefold: [1]

Firstly, it depends on this classification who has to introduce a certain matter to the proceedings. Facts have to be pleaded by the parties, while questions of law have to be considered by the court *ex officio*. In principle, the workload is distributed between the parties and the court according to the Roman maxim "da mi facta, dabo tibi ius".

Secondly, the distinction between questions of fact and questions of law is relevant for the decision whether a certain matter is subject to evidence. Whereas questions of law are governed by the principle "*iuris novit curia*", questions of fact have to be proven by the parties. The obligation to prove certain facts lies normally with the party to which these facts are favourable. In case that the proof of certain facts can not be established ("*non liquet*"), the decision is made in disfavour of the party on which the burden of proof lies.

Thirdly, the distinction is important with regard to the judicial control of court decisions. The decision of a lower court may be overruled on appeal as far as questions of law are concerned, whereas the statements of fact made by the lower court normally are binding on the court of appeal.

Foreign law confronts the judge with the dilemma, that on the one hand its normative character is obvious, while on the other hand its content – and this is the parallel to facts – is unknown to the judge. With regard to the quality of the determination of foreign law in domestic proceedings, its pleading and proof, the approach of the main legal systems in Europe still is quite divided to date. Therefore a comparative study of the different approaches might be of some interest.[2]

Zur Mitwirkung der Parteien bei der Ermittlung ausländischen Rechts, Essays in honour of *Schumann* (2001), 283; *Mankowski/Kerfack*, Arrest, einstweilige Verfügung und die Anwendung ausländischen Rechts, IPRax 1990, 372; *Ost*, EVU und fact doctrine (1996); *Otto*, Der verunglückte § 293 ZPO und die Ermittlung ausländischen Rechts durch „Beweiserhebung", IPRax 1995, 299; *Picone*, Die "Anwendung" einer ausländischen "Rechtsordnung" in Forumstaat, Liber amicorum Siehr (2000), 569; *Picone*, La prova del diritto straniero nella legge italiana di riforma del diritto internazionale privato, Essays in honour of *Jayme*, vol. I (2004), 691; *Ponsard*, L'office du juge et l'application du droit étranger, Rev. crit. 79 (1990), 607; *Prütting*, Ermittlung und Anwendung von ausländischem Recht in Japan und Deutschland, Essays in honour of Ishikawa (2001), 397; *Reichert-Facilides*, Fakultatives und zwingendes Kollisionsrecht (1995); *Remien*, Jura novit curia und die Ermittlung fremden Rechts im europäischen Rechtsraum nach Art. 61 ff EGV, in: Aufbruch nach Europa, 75 Jahre MPI für Privatrecht (2001), 617; *Rodger/Van Doorn*, Proof of Foreign Law: The impact of the London Convention, I.C.L.Q. 46 (1997), 151; *Sass*, Foreign Law in Civil Litigation: A Comparative Survey, Am. J. Comp. L. 16 (1968), 335; *Sangiovanni,* Die neue italienische Rechtsprechung zur Ermittlung des ausländischen Rechts, IPRax 2006, 513; *Schellack*, Selbstermittlung oder ausländische Auskunft unter dem europäischen Rechtsauskunftsübereinkommen (1998); *Schilken*, Zur Rechtsnatur der Ermittlung des ausländischen Rechts nach § 293 ZPO, Essays in honour of Schumann (2001), 373; *Schütze*, Feststellung und Revisibilität europäischen Rechts im deutschen Zivilprozess, Essays in memory of Baur (1992), 93; *Sommerlad/Schrey*, Die Ermittlung ausländischen Rechts im Zivilprozess und die Folgen der Nichtermittlung, NJW 1991, 1377; *Spickhoff*, Fremdes Recht vor inländischen Gerichten: Rechts- oder Tatfrage, ZZP 112 (1999), 265; *Stürner*, Parteidisposition über das anwendbare Recht im europäischen Zivilprozess?, Essays in honour of U. Weber (2004), 589; *Theiss*, Feststellung ausländischen Rechts im italienischen Zivilprozess, IPRax 1987, 193; *Trautmann*, Ausländisches Recht vor deutschen und englischen Gerichten, ZEuP 2006, 283; *Volken*, Die internationale Rechtshilfe in Zivilsachen (1996); *Vrellis*, Überlegungen betreffend die Auslegung fremder Rechtsnormen, Liber amicorum Siehr (2000), 829; *Wagner*, Fakultatives Kollisionsrecht und prozessuale Parteiautonomie, ZEuP 1999, 6.

1 See *Trautmann,* ZEuP 2006, 284/285.

2 See already *Hartley*, I.C.L.Q 45 (1996) 271 – *Jäntera-Jareborg*, Rec. d. Cours 304 (2003) 272-306.

2. Comparative Survey

a) Germany

Under German procedural law it is a generally accepted rule that foreign law is treated as law, and not as fact.[3] The relevant provision on proof of foreign law in Article 293 of the German Civil Procedure Code (ZPO),[4] refers expressly to the "law" of another State. To a certain extent, this assessment is inspired by the universalistic ideal of the equality of domestic and foreign private law systems.[5] The qualification as " law" does not anticipate, however, how foreign law is treated procedurally.[6] This is also reflected by Article 293 ZPO; although questions of law principally are not open to proof, Article 293 ZPO provides that foreign law is subject to proof in case that it is unknown to the court.[7] Consequently, this rule is systematically included into the chapter of the German Civil Procedure Code on proof.

Furthermore, Article 545 ZPO provides that an appeal on questions of law ("Revision") to the German Federal Court ("Bundesgerichtshof") can only be based on the violation of "federal law". This has been understood already by the German "Reichsgericht" in the sense that a "Revision" cannot be based on the violation of foreign law, even where it corresponds to German law.[8] The German Federal Court has followed this interpretation until today (principle of "irrevisibility of foreign law").[9]

b) England

By contrast, since the 18th century, English law is based on the principle that foreign law is to be treated as a question of fact.[10] Although it is admitted by English legal writers that this

3 *Prütting,* in: Münchener Kommentar zur ZPO, 2nd. (2000), § 293 No. 1; *Kropholler*, Internationales Privatrecht, 6th ed. 2007, § 31 I; *Geimer*, Internationales Zivilprozessrecht, 5th ed. 2005, No. 2577; *Fastrich*, ZZP 97 (1984), 427; *Kindl*, ZZP 111 (1998), 179; *Spickhoff*, ZZP 112 (1999), 276; *Lindacher*, Essays in honour of Schumann, p. 283.

4 Article 293 reads as follows: "Das in einem anderen Staat geltende Recht…[bedarf] des Beweises nur insofern, als [es] dem Gericht unbekannt [ist]. Bei Ermittlungen dieser Rechtsnormen ist das Gericht auf die von den Parteien beigebrachten Nachweise nicht beschränkt; es ist befugt, auch andere Erkenntnisquellen zu benutzen und zum Zwecke einer solchen Benutzung das Erforderliche anzuordnen".

5 See *Friedrich Carl von Savigny*, System des heutigen Römischen Rechts, Bd. 8 (1849) 23 ff.; *Kegel/Schurig*, Internationales Privatrecht, 9th ed. (2004), § 15 II; *Kropholler*, op. cit. § 3 I; *Schack*, Internationales Zivilprozessrecht, 4th ed. (2006), No. 622.

6 See *Spickhoff*, ZZP 112 (1999) 286.

7 See above Note 4.

8 RG 14.11.1929, RGZ 126, 202; RG 2.2.1936, RGZ 150, 314; RG 7.5.1936, RGZ 151, 227; RG 29.10.1938, RGZ 159, 33; RG 31.10.1941, RGZ 167, 373.

9 BGH 14.12.1958, ZZP 71 (1958) 363; BGH 14.4.1969, WM 1969, 858; BGH 27.4.1976, NJW 1976, 1588, 1589; BGH 30.4.1992, NJW 1992, 2026, 2029; BGH 23.6.2003, NJW 2003, 2685, 2686. This principle is strongly criticised in the German literature, see *Geimer*, op. cit. No. 2602-2604.

10 The fact doctrine is based on the old distinction between the courts of admiralty and the courts of common law. While the former had jurisdiction in matters with a foreign element, the latter decided on purely domestic issues. When the Common Law Courts extended their jurisdiction to matters with a foreign element in the 18th century they were bound to treat foreign law as fact because the only "law" they could apply was English common law, see *Fentiman*, L.Q.Rev. 108 (1992) 143-144; *Sass*, Am. J. Comp. L. 16 (1968) 335; *Hartley*, I.C.L.Q. 45

classification is a fiction which is in contradiction to intuition,[11] English courts stick to the fact doctrine, because its results are deemed appropriate and convincing. The ignorance of courts shall be compensated by submitting foreign law to the regime of proof: "The way of knowing foreign laws is by admitting them to be proved as facts".[12]

An exception to this rule is made, however, in appellate proceedings. Whereas an appellate court, principally, is bound by the factual statements of the lower court, this is not true as far as foreign law is concerned. Appellate courts are, therefore, allowed to overrule a judgment on the ground that foreign law had not been applied correctly.[13] In this regard foreign law is ranking *pari passu* with English law.

The distinction between systems that regard foreign law as fact and those that regard it as law is only of a limited importance today, however since the hybrid character of foreign law is recognized to a certain extent in all legal systems considered. Countries which regard foreign law as law, like Germany, don't treat it the same way as forum law, but as law of a different kind. Vice versa, countries which regard foreign law as a fact, like England, don't treat it as a normal fact, but as "fact of a peculiar kind". Therefore, in practice the attitudes with regard to particular issues of pleading and proving foreign law are not so different as it may appear on first sight.[14]

III. The Introduction of Foreign Law to the Proceedings

Thus, the treatment of foreign law as question of fact or question of law does not anticipate the decision on how foreign law should be introduced in the proceedings. The answer to this question depends on the procedural status of private international law within the respective legal system,[15] namely whether the judge has to apply private international law provisions in a case representing foreign elements *ex officio* or whether the application of foreign law has to be pleaded by the party being favoured by such law. The European countries still are deeply divided on this issue.

1. Germany

a) Principle

In German law it is quite settled by both, court decisions[16] and legal doctrine,[17] that the rules of private international law have to be applied as part of the German legal system by the judge *ex officio.* If a German conflict rule refers to foreign law, such law must be applied, therefore, whether or not it is pleaded by the parties. The German Reichsgericht[18] has put this obligation into the words: "A legal relation has to be judged according to the lex causae even against the selfish intention of the economically stronger party or of both parties". This solution is consistent with the German concept to treat foreign law as "law". The doctrine of a merely facultative character of private international law developed by some German academic writers[19] was rejected by the German legislator on the occasion of the fundamental reform of private international law in 1986.[20] The mandatory nature of private international law is also supported by Article 293 ZPO which provides that, as far as the content of the foreign law is concerned, the court is not bound by the common pleading of the parties.

b) Party Autonomy in the Proceedings

The duty of the court to apply private international law provisions *ex officio* does not mean, however, that there is no party autonomy with regard to the law governing the dispute. In all fields open to a choice of law the parties have the possibility to agree on the application of the *lex fori,* even in the course of the proceedings and although their dispute might have been governed before by foreign law as a result of an earlier choice or in the absence of such choice.[21] This follows, as far as contractual obligations are concerned, from Art. 3 (2) Rome Convention (= Article 27 (2) EGBGB). It is also accepted for disputes on non-contractual obligations (Article 42 EGBGB) and – with certain restrictions – for disputes on matrimonial property (Article 15 (2) EGBGB) or succession law (Article 25 (2) EGBGB). No difficulties arise where such choice of law is made expressly during the proceedings. By contrast, it is disputed whether an implied choice of law can be inferred from the fact that both parties plead their case under German substantive law although the case shows strong foreign elements which, according to German private international law, result in the applicability of foreign law. Whereas German courts tend to infer from such common pleading of the parties an implied choice of law[22] which is binding upon the parties even in appellate proceedings,[23] this attitude is

(1996) 282-283. In the beginning 20th century *Dicey* developed his "vested rights theory" as a new justification for the treatment of foreign law as fact, see *Dicey*, Conflict of Laws, 2nd ed. (1908), p. 23.

11 See *Fentiman* p. 66; *North*, in: Cheshire and North's Private International Law, 13th ed. (1999), p. 100.

12 *Mostyn v. Fabrigas* (1774), 1 Cowper's King's Bench Reports (Cowp.) 161, 174 (per *Lord Mansfield*).

13 *Parkasho v. Singh* (1968), P. 233, 250 (per *Cairns, J.*).

14 *Hartley*, I.C.L.Q. 45 (1996) 272.

15 See *Wagner*, ZEuP 1999, 17; *Geeroms* (2003), p. 42; *Trautmann*, ZEuP 2006, 286-287.

16 RG 24.5.1921, RGZ 102, 214; BGH 7.4.1993, NJW 1993, 2305, 2306; BGH 6.3.1995, NJW 1995, 2097; BGH 21.9.1995, NJW 1996, 54, note *Mäsch* 1453; BGH 2.10.1997, NJW 1998, 1395, 1396; BGH 18.4.2003, NJW 2003, 2605, 2606.

17 *Kropholler*, op. cit., § 7 II 2; *von Bar/Mankowski*, Internationales Privatrecht Vol. I, 2nd ed. (2003), § 5 No. 66; *Heldrich,* in: Palandt, 69th ed. 2008, Introduction to Article 3 EGBGB No. 1; *Geimer*, op. cit. No. 2570-2572; MünchKomm/*Sonnenberger*, 4th ed. 2006, Private International Law, Introduction No. 233-243.

18 RG 28.5.1936, JW 1936, 2059.

19 *Flessner*, RabelsZ 34 (1970), 547; *Reichert-Facilides* p. 57; see also *Wagner*, ZEuP 1999, 22, 45-46; *de Boer*, Facultative Choice of Law, Rec. d. Cours 257 (1996) 223.

20 BT-Drucksache 10/504, p. 25/26; *Wagner*, ZEuP 1999, 9.

21 See *Schack*, Rechtswahl im Prozeß?, NJW 1984, 2736, 2740.

22 BGH 28.11.1963, BGHZ 40, 320, 323; BGH 27.3.1968, BGHZ 50, 32, 33; BGH 23.10.1970, NJW 1971, 323, 324; BGH 12.12.1990, NJW 1991, 1292, 1293; BGH 28.1.1992, NJW 1992, 1380; BGH 21.10.1992, NJW 1993, 385, 386, BGH 12.5.1993, NJW 1993, 2753; BGH 20.9.1995, BGHZ 130, 371; BGH 9.12.1998, BGHZ 140, 167 = NJW 1999, 950; OLG Hamm 9.6.1995, NJW-RR 1996, 179; OLG Düsseldorf 19.12.1997, NJW-RR 1998, 1716.

23 BGH 17.1.1966, NJW 1966, 730.

largely criticized in German legal literature.[24] The main argument is that parties who plead their case under the German *lex fori* regularly have no intention to make a choice of law if they are not aware of the legal consequences of such pleading.[25] Therefore, in this situation it would be the duty of the judge, under Article 139 ZPO, to ask the parties whether they really intend to choose German law as *lex causae* and to draw their attention to the fact that in the absence of such implied choice of law he would have to apply foreign law.[26]

c) Non-Disclosure of Connecting Factors by the Parties

Even if private international law has to be applied by German courts *ex officio*, the parties keep control over the facts which they disclose to the court including the relevant connecting factors for the application of a conflict rule. If, for example, both parties do not reveal to the court that the tort forming the subject matter of the action had been committed abroad, the court has no reason to consider private international law or foreign law.[27] Thus, procedural law may extend the power of the parties to opt for the application of the *lex fori* beyond the limits set to party autonomy in private international law.[28] But this power is restricted, in any event, to proceedings governed by the principle that the parties have to present the facts and the evidence of their case ("Verhandlungsgrundsatz"); as far as the inquisitorial system ("Untersuchungsgrundsatz") applies, as for instance in matters of status and succession,[29] it is up to the court to investigate *ex officio* the facts which entail the applicability of foreign law, and it does not matter whether these facts are pleaded by the parties or not.

2. France

a) The Traditional Attitude

In France traditionally rules of conflict of laws were not considered a matter of public policy, but it was on the parties to request the application of foreign law. If they did not, the trial court could not be reproached for not deciding *ex officio* that foreign law was applicable. A famous example for this attitude is the "Bisbal" case of the French Cour de Cassation of 1959.[30] This case concerned a petition for divorce. Both parties were Spanish citizens and the Spanish law (as law of the common nationality), referred to by French conflict of law rules, at that time did not allow divorce. Although the trial court apparently knew that the parties were both Spanish, it applied French law and granted the divorce because neither party pleaded Spanish law. The Cour de Cassation dismissed the appeal based on the ground that the trial court should have applied Spanish law *ex officio*. Shortly after this decision the Cour de Cassation made clear, however, that even though a trial court is not obliged to apply foreign law *ex officio*, it is nevertheless permitted to do so, even if neither party requested its application.[31]

b) The Development since 1988

These remained the leading cases for more than 25 years. It was not until 1986 that the Cour de Cassation held for the first time that in special situations courts have an obligation to apply foreign law *ex officio*.[32] In 1988 the Cour de Cassation then changed its attitude dramatically and held in two cases[33] that courts generally must decide *ex officio* whether foreign law applies and a failure to do so could result in the decision being set aside on appeal. These two decisions have been considered as "the most important change of court rulings in the field of conflict of laws theory since about 30 years" in France.[34] As a consequence, the French judge has not only the possibility ("faculté"), but the obligation to apply the French rules of private international law. The Cour de Cassation refers to Article 12 (1) Nouveau Code de procédure civile (N.C.P.C.) which provides that "the court must decide the case according to the rules of law applicable to it."[35] This obligation does not only arise with regard to the rules of French substantive law, but also with regard to the rules of French private international law and international conventions.

However, subsequently, the Cour de Cassation mitigated its position. It held that the trial judge has no obligation to apply foreign law *ex officio* if the case concerns an area of law in which the parties have the "free disposition of their rights" ("une matière où les parties ont la libre disposition de leurs

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24 *Schack*, NJW 1984, 2737/2738; *Steinke*, Konkludente Rechtswahl und objektive Anknüpfung nach altem und neuem deutschen internationalen Vertragsrecht, ZVglRWiss 93 (1994) 312; *Steiner*, Die stillschweigende Rechtswahl im Prozess (1998).

25 *Schack*, NJW 1984, 2738; *Mansel*, Kollisions- und zuständigkeitsrechtlicher Gleichlauf der vertraglichen und deliktischen Haftung – zugleich ein Beitrag zur Rechtswahl durch Prozessverhalten, ZVglRWiss 86 (1987) 12.

26 *Wagner*, ZEuP 1999, 44.

27 See BGH 20.3.1980, BGHZ 77, 38; *Trautmann*, ZEuP 2006, 289.

28 This view is critizised by *Wagner*, ZEuP 1999, 44.

29 See § 2358 Civil Code; § 12 Law on Voluntary Jurisdiction; §§ 616 par. 1, 617, 622 par. 1 C.C.P..

30 Cass. civ. 12.5.1959, Clunet 1960, 810, note *Sialelli* = J.C.P. 1960. II. 11733, note *Motulsky* = Rev. crit. 1960, 62, note *Battifol*: "Les règles françaises de conflit de lois, en tant du moins qu'elles prescrivent l'application d'une loi étrangère, n'ont pas un caractère d'ordre public, en ce sens qu'il appartient aux parties d'en réclamer l'application …".

31 Cass. civ. 2.3.1960 (arrêt *Chemouny*), Clunet 1961, 408 = J.C.P 1960. II. 11734, note *Motulsky* = Rev. crit. 1960, 97, note *Batiffol*. See also Cass. civ. 22.4.1986, Rev. crit. 1988, 302, note *Bischoff*: "la cour d'appel n'est pas tenue de rechercher s'il convenait d'appliquer une loi étrangère dont le contenu n'était pas précisé"; *Ferrand*, ZEuP 1994, 126-128 with further references.

32 Cass. civ. 25.11.1986, Rev. crit. 1987, 383, note *Ancel* and *Lequette* = J.C.P. 1988. II. 20967, note *Courbe*; see in the same sense Cass. civ. 25.5.1987, Clunet 1987, 927, note *Gaudemet-Tallon* = Rev. crit. 1988, 60, note *Lequette* = J.C.P. 1988. II. 20976, note *Courbe*.

33 Cass. civ. 11. and 18.10.1988 (arrêts *Rebouh* and *Schule*), Clunet 1989, 349, note *Alexandre* = J.C.P. 1989. II. 21327, note *Courbe* = Rev. crit. 1789, 367; see *Y. Lequette*, L'abandon de la jurisprudence *Bisbal*, Rev. crit. 1989, 277. In the first case the Cour de Cassation set aside the decision of the court of appeal for violation of the law ("violation de loi") because it had applied French law without examining *ex officio* to which results the application of Algerian law – being the personal law of the mother – would lead ("sans rechercher d'office qu'elle suite devrait être donnée à l'action en application de la loi algérienne, loi personelle de la mère").

34 *Lequette*, Rev. crit. 1989, 277-278; see also *Ponsard*, Rev. crit. 1990, 607; *Bureau*, Clunet 1990, 317 ("révolution qui en marquera l'histoire").

35 Article 12 (1) N.C.P.C. provides: "Le juge doit trancher le litige conformément aux règles de droit qui lui sont applicables".

droits").[36] A judgment made by the trial court in such an area of law therefore cannot be attacked on the ground that the court applied the French *lex fori* if neither party had requested the application of foreign law. By contrast, the trial court has an obligation to apply foreign law *ex officio* whenever the matter is governed by an international convention[37] or where the parties are not free to dispose of the rights in dispute.[38]

This means that in areas such as contract, tort and real property (including matrimonial property) which under French law are traditionally regarded as areas in which the parties have the free disposition of their rights, the trial court is not obliged to apply foreign law *ex officio*.[39] Exceptions to this rule were made in areas concerning status and capacity[40] and for all matters governed by an international convention to which France is a Contracting State. In any case, the judge has to comply with Articles 7 and 16 N.C.P.C. According to Article 7 the court may only refer to facts introduced in the proceedings by the parties. And according to Article 16 the judge who intends to consider legal arguments *ex officio* has to communicate these arguments beforehand to the parties for their comment. Therefore, the French judge is not allowed to apply foreign law *ex officio* without having summoned the parties to comment thereon.[41] Finally, the parties may by express agreement exclude the application of the French rules of private international law and bind the judge to decide the case according to French substantive law, Article 12 (3) N.C.P.C.,[42] provided that they are free to dispose of the rights which form the subject matter of the dispute. The scope of Article 12 (3) N.C.P.C. may be restricted in cases which are governed by international conventions or EC-Regulations; but the parties may also in such cases agree to have the issue determined by the *lex fori* if the convention or EC-Regulation allows for party autonomy, as it is the case especially in contractual matters under the Rome Convention (Article 3) and in non-contractual matters under the new Rome II-Regulation No. 864/2007 (Article 14).[43]

Summarising the French position as of today we can conclude: (1) Foreign law will be applied by French courts if it is invoked (and proved) by one of the parties. (2) If the parties do not invoke foreign law the court nevertheless has to apply such law *ex officio* whenever the claim or action regards rights which the parties cannot freely dispose of ("droits indisponibles"). (3) By contrast, the French trial judge has no obligation to apply foreign law where only dispositive rights of the parties are the subject matter of the action; in such cases usually French law will be applied.[44] (4) In exception to this rule the French judge has to apply foreign law *ex officio* also in "dispositive cases" if so required by an international convention or EC-Regulation. But the parties are free to release the judge from this obligation by a procedural agreement that French law should be applied instead of foreign law referred to by such convention or regulation.[45]

3. England

a) Principle of Pleading Foreign Law

Under English law the reference made to a foreign substantive law by an English conflict rule is not sufficient in order that such foreign law be applied by the court. Instead, the principle is that if a party wishes to rely on foreign law, he or she must plead it in the same way as any other fact.[46] This means, that pleading[47] foreign law is entirely voluntary. However clear the foreign element in a case may be, the parties have a choice whether to introduce foreign law or not. The judge has neither the power nor the duty to do so *ex officio*.[48] In one prominent English case this meant that a dispute arising from a contract which contained an express governing law clause in favour of Dutch law was nonetheless decided entirely according to English domestic law because neither party invoked Dutch law.[49] By effectively allowing litigants to transform a conflicts case into a domestic one, it makes, as *Fentiman*[50] put it, the conflict of laws itself "a voluntary body of law".

This doctrine is closely related to the traditional perception of the role of the English judge as an umpire who is restricted to adjudicating the dispute between the parties before him on the terms they have set forth themselves ("adversary principle"). Thus, the judge has to rely entirely on the parties for the material upon which he is to decide their dispute.[51] There are only

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36 Cass. civ. 4.12.1990 (arrêt *Coveco*), Clunet 1991, 371, note *Bureau* = Rev. crit. 1991, 558, note *Niboyet-Hoegy*; Cass. civ. 18.12.1990 (arêt *Sardis*), J.C.P. 1992. II. 21824, note *Ammar*; Cass. civ. 10.12.1991, Rev. crit. 1992, 316, note *Muir Watt*.

37 For restrictions of this obligation see below Note 43.

38 *Muir Watt*, Rev. crit. 1992, 332/333; *Ferrand,* ZEuP 1994, 129; *Hartley*, I.C.L.Q. 45 (1996), 279.

39 See *Lagarde*, Rev. crit. 1994, 337.

40 See for paternity proceedings Cass. civ. 18.11.1992, Clunet 1993, 309, note *Lequette* = Rev. crit. 1993, 276, note *Ancel*; Cass. civ. 26.5.1999, Rev. crit. 1999, 708.

41 *Ferrand*, ZEuP 1994, 130.

42 Article 12 (3) N.C.P.C. provides: "Toutefois, il [le juge] ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d'un accord exprès et pour les droits dont elles ont la libre disposition, l'ont lié par les qualifications et points de droit auxquelles elles entendent limiter le débat".

43 See Cass. civ. 26.5.1999, Rev. crit. 1999, 707, where French law was applied to a sales contract, because the parties had not invoked the 1955 Hague Convention on the Law Applicable to the International Sale of Goods.

44 See Cass. civ. 11.6.1996, Rev. crit. 1997, 65, note *Lagarde*: "S'agissant de droits disponibles et non régis par un traité international, il incombe à la partie qui prétend qu'un droit étranger est applicable d'établir la différence de son contenu par rapport au droit français, à défaut de quoi ce droit s'applique en raison de sa vocation subsidiaire".

45 Cass. 6.5.1997, Rev. crit. 1997, 514, note *Fauvarque-Cosson*: "Pour les droits dont elles ont la libre disposition, les parties peuvent s'accorder sur l'application de la loi française du for malgré l'existence d'une convention internationale ou d'une clause contractuelle désignant la loi compétente."

46 *Morse*, in: *Dicey* and *Morris* on the Conflict of Laws, 13th ed. 2000, No. 9-003.

47 The term "pleading" refers to the formal statements of claim, defence, reply, counterclaim etc. filed by the parties. In the Civil Procedure Rules 1998 (C.P.R.) the term "pleading" has been replaced by the term "statement of case".

48 *Fremoult v. Dedire* [1718], 1 P. Wms. 429; *Ascherberg v Casa Musicale Sonzogno* [1971], 1 W.L.R. 1128, C.A.

49 Aluminium Industrie Vaasen B.V. v. Romalpa Aluminium Ltd. [1976], 1 W.L.R. 676, C.A.

50 *Fentiman*, L.Q.Rev. 108 (1992), 150.

51 *Fentiman*, L.Q.Rev. 108 (1992), 144; *Lightman*, Civil Litigation in the 21th Century, (1988) 17 Civ.J.Q. 388.

few exceptions where the court may suggest a modification of the pleadings by the parties.[52] Moreover, the court will neither consider questions of law or precedents not pleaded by the parties. Therefore, the maxim "da mihi facta, dabo tibi ius" applies only in a very restricted sense to English court proceedings.[53]

The reasons why claimants sometimes decline to plead foreign law, are manifold.[54] A main reason may be that pleading the case under English law is more favourable for the claimant than to plead it under foreign law. For example, in a dispute concerning contractual claims, there would be no reason for a claimant to plead foreign law if the contract is valid under English law, but probably invalid under foreign law. Furthermore, a claimant will regularly decline to plead foreign law, if its position on the main issues of the dispute is the same as the English, thereby making it just as effective, but much easier and cheaper, to proceed under English domestic law. But even in cases where there would be some advantage in pleading foreign law the costs of retaining expert witnesses and the additional costs of lawyers for preparing the evidence and for examining and cross-examining the experts may outweigh this advantage. Furthermore, the content of the law which a judge eventually applies might differ substantially from what the party pleading it had in mind. There is not only a risk that the court might prefer the other side's presentation of foreign law, but that the court may arrive at a version of foreign law, which is a mix between the rival testimonies and thus satisfies neither party.[55] A final reason for avoiding foreign law are the difficulties inherent in the English conflict of laws itself. As many important choice of law problems remain unresolved, conflict cases are to a certain degree unpredictable in their outcome before English courts. The fact doctrine offers an opportunity to litigants to avoid this unpredictability arising from English choice of law rules, for example in tort cases, and the expense and practical inconvenience they cause.

b) Exceptions

Whether there are exceptions to the general rule that an English court will not apply foreign law unless it is pleaded by one of the parties (so called "*default rule*")[56], is not settled. An exception is discussed in English legal literature where the court is asked to give a declaration or decree on status that would bind third parties. Thus, where a party petitions for a decree of nullity of marriage, and where, under the English rules on the conflict of laws, the validity of the marriage is governed by foreign law, it is argued that the petitioner should not be able to rely on the default rule and simply establish his case on the basis of English law. As a consequence, the petitions should be dismissed, if the petitioner does not prove that the marriage is invalid under foreign laws.[57]

Whereas there is no direct authority for this exception, it is acknowledged that international conventions may enforce compliance with its provisions. This has been decided by the Court of Appeal[58] and by the House of Lords[59] with regard to the obligations arising from Article VIII (2) (b) of the Bretton Woods International Monetary Fund Agreement which provides that "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member". If proceedings are brought in England to enforce such a contract, the English court would consider the issue of its own motion, even if neither party pleads that the contract is illegal under the foreign exchange control regulation. In such cases the court would require the plaintiff to prove that the contract was not illegal and, if he fails to do so, it would refuse to enforce it.[60]

Moreover, comity may require that a contract should not be enforced where it is illegal under foreign law, even in the absence of an international convention. This rule is based on public policy and operates independently of the law governing the contract; therefore, it does not matter whether the applicable law is English law or foreign law.[61] As the enforcement of a contract that requires an illegal act to be committed in the foreign country could affect good relations between the foreign state and the United Kingdom, English courts consider this question of their own motion even if neither party pleads foreign law.[62]

Summarising the English attitude it can be said that there are only few exceptions to the default rule recognised by the courts. And even if an English court is held to apply foreign law *ex officio* it often will refer to the so called "presumption of similarity" and end up with the application of English law. According to this widely accepted presumption the law of a foreign country is the same as English law except where evidence is produced to show that it is different.[63]

4. "Default Rule" and the Rome Convention

It is discussed controversially whether and to what extent the Rome Convention affects the rules of the Contracting States on the pleading of foreign law. The language of the Convention appears to make it mandatory in contract cases for a court to consider what a contract's applicable law is by virtue of the Convention, regardless of whether the parties plead foreign law. According to the Convention its rules "shall

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52 *Andrews*, The passive court and legal argument, Civ. J.Q. 7 (1988) 115.

53 *Trautmann*, ZEuP 1999, 290.

54 See *Fentiman*, (1992), 108 L.Q.Rev.150-152.

55 *Fentiman*, op.loc.cit.

56 *Hartley*, I.C.L.Q. 45 (1996), 285.

57 *Hartley*, I.C.L.Q. 45 (1996), 286; *Briggs*, The conflict of laws (2002) p. 5; *Fentiman*, p. 113 *et seq*.

58 *Singh Butra v. Ebrahim* [1982] 2 Lloyd's Rep. 11, 13, C.A. (per *Lord Denning*).

59 *United City Merchants v. Royal Bank of Canada* [1983] A.C. 168, 189, H.L. (per *Lord Diplock*).

60 See *Hartley*, I.C.L.Q. 45 (1996) 288.

61 Substantially, this exception refers to internationally mandatory rules of a foreign State in the meaning of Article 7 (1) Rome Convention.

62 *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287, C.A; *Regazzoni v. Sethia* [1958] A.C. 301, H.L.; *Hartley*, I.C.L.Q. 45 (1996) 288/289.

63 See *Mac Millan Inc. v. Bishopsgate Investment Trust Plc.* (Nr. 4) [1999] C.L.C. 417, C.A.; *North*, op. cit. p. 99. This presemption is being criticized by *Morse*, op. cit. No. 9-025.

apply to contractual obligations in any situation involving a choice of law between the laws of different countries" and the Convention goes on to provide, for example, in Article 3 that "a contract be governed by the law chosen by the parties".

The answer of the English doctrine is that according to its Article 1 (2) (h) the Convention does not apply to "evidence and procedure". And since the rules on pleading and proof of foreign law are part of the law of evidence and procedure it follows that they cannot be affected by the Convention. Therefore, the Rome Convention would not impose any legal obligation on the Contracting States to alter their rules in this respect.[64]

Even if there is no legal obligation on Contracting States to apply foreign law ex *officio* the English requirement of pleading foreign law might undermine the objectives of the Convention which, according to its Article 18, aims at a uniform interpretation and application of its rules by the courts of all Contracting States. But, as can be inferred from Article 3 of the Convention, its main objective is to guaranty the freedom of the parties to choose the law governing their contract. And Article 3 (2) allows expressly for a subsequent alteration of the law applicable to the contract. An express or implied choice of the lex fori as governing law by the parties during the proceedings in accordance with Article 3 (2) of the Convention thus has the same effect as a decline to plead foreign law. Therefore, the spirit of the Rome Convention does not require an *ex officio* application of foreign law whenever the parties are free to choose the applicable law.[65]

A different approach has to be followed, however, as far as *mandatory* conflicts rules are concerned which exclude or restrict the autonomy of the parties. Within the Rome Convention this is the case in Articles 5 and 6 which guaranty to consumers and employees the protection by the mandatory provisions of the State in which they have their habitual residence or place of employment, respectively. The mandatory character of these conflicts rules is ignored if the weaker party is required to plead and prove foreign law. Therefore, a distinction should be made between the question by which means and methods foreign law has to be pleaded and proven – this has always to be answered in accordance with the procedural law of the forum – and the question whether the parties are obliged to plead foreign law – this only depends on the legal nature of the conflicts rule concerned, namely whether it is mandatory or not.[66]

Therefore, the courts of the Contracting States including English courts are held to apply the rules in Articles 5 and 6 of the Rome Convention *ex officio* in order to ensure the protection of consumers and employees irrespective of the procedural rules of the forum on the pleading of foreign law. The practical effect of this solution is limited, however, because under the Brussels I Regulation the jurisdiction in consumer and labour law cases normally lies with the courts in the State of the weaker party's residence which apply their own mandatory law, and not foreign law.

[64] In this sense *Dicey* and *Morris*, op. cit., p. 229, No. 9-011; *Hartley*, I.C.L.Q. 45 (1996), 290 R 91.

[65] *Hartley*, op. loc. cit.

[66] *Fentiman*, p. 93; *Trautmann*, ZEuP 2006, 294; a.A. *Hartley*, I.C.L.Q. 45 (1996), 291.

IV. Proof of Foreign Law

The question how the content of foreign law has to be brought to the knowledge of the court depends primarily on the quality of foreign law as fact or as law under the procedural law of the forum. In countries where foreign law is regarded as law, it has to be applied *ex officio* by the court and its proof is in principle also a matter for the court; in other countries where foreign law is regarded as fact, it is normally applied only if one of the parties so requests and the burden of proof rests on the party who pleads it; if it is not proven, the court will apply the lex fori.

1. Germany

a) The Role of the Court

aa) Duty to Ascertain the Content of Foreign Law *ex officio*

In Germany it is a generally accepted principle that the judge has to know the law, and if he has not a sufficient knowledge of the law, as is normally the case when he has to apply foreign law, he is under an obligation to investigate, interpret and apply such law on his own motion. With regard to foreign law[67] the maxim "*iura novit curia*" is to a certain degree restricted, however, by Article 293 ZPO which allows for a taking of evidence on the content of foreign law and provides for a duty of the parties to cooperate with the court.[68] But it is also stated in this Article that the court is not bound by the evidence offered by the parties; and it is generally concluded from Article 293 ZPO that the obligation of the judge to apply foreign law *ex officio* does necessarily include his duty to also ascertain its content *ex officio* ("Grundsatz der Amtsermittlung").[69] In order to comply with this duty it is not enough to find out the relevant foreign statutes and to interpret them according to their wording, but the German judge is obliged to apply foreign law the same way as it is being applied in the country of its origin. Therefore, he has to refer to the foreign judicial practice, in particular to relevant court rulings.[70] Extent and intensity of the court's obligation to investigate into foreign law cannot be determined in an abstract way, but depend on the circumstances of the individual

[67] In this regard international law and EC-law is treated as domestic law, not as foreign law, see *Schilken*, Essays in honour of *Schumann* p. 374; MünchKommZPO/*Pütting*, op.cit. § 293 No. 9-10.

[68] See Note 4; *Kindl*, ZZP 111 (1998) 180; MünchKommZPO/*Prütting*, op. cit., § 293 No. 3.

[69] See BGH 20.3.1980, BGHZ 77, 32, 38 = NJW 1980, 2022; BGH 29.6.1987, NJW 1988, 647; BGH 30.4.1992, BGHZ 118, 151, 162 = NJW 1992, 2026; BGH 21.9.1995, NJW 1996, 54, 55; BGH 22.10.1996, NJW 1997, 324, 325; BGH 25.9.1997, NJW 1998, 1321 = IPRax 1999, 45, note *Stoll* 29; BGH 2.10.1997, NJW 1998, 1395, 1396; OLG Saarbrücken 19.9.2001, NJW 2002, 1209; *Fastrich*, ZZP 97 (1984) 425; *Küster*, RIW 1998, 275-276; *Adamczyk*, p. 142-143; *Schack*, op.cit., No. 826; *Otto*, IPRax 1995, 301-303.

[70] BGH 27.4.1976, NJW 1976, 1588, 1589; BGH 24.3.1987, NJW 1988, 648; BGH 21.1.1991, NJW 1991, 1418, 1419; BGH 8.5.1992, NJW 1992, 3106; BGH 30.1.2001, WM 2001, 502, 503 = IPRax 2002, 302, note *Hüßtege* 292; BGH 23.6.2003, NJW 2003, 2685, 2686; OLG Saarbrücken 19.9.2001, NJW 2002, 1209; see also *Kindl* ZZP 111 (1998) 180-181; *Nagel/Gottwald*, IZPR, 6th ed. 2007, § 10 No. 15; *Kropholler*, op. cit. § 31 I 2; *Geimer*, op. cit. No. 2596; MünchKomm/*Sonnenberger*, op. cit., Introduction No. 638.

case.[71] Under no circumstances is the court allowed to dismiss the action because the legal situation under the applicable foreign law is unclear.[72]

bb) Methods of Investigation

According to Article 293 ZPO the trial judge is principally free to choose the method to obtain the knowledge on the foreign law referred to by German private international law. In particular, he has a certain discretion to decide whether a formal or an informal procedure of proof shall be initiated to this effect.[73] The exercise of this discretion is controlled, however, by the courts of appeal. A failure of the trial judge to comply with his duty to determine the content of the applicable foreign law correctly and sufficiently may be attacked by the party adversely affected by such failure in appeal proceedings to the German Federal Court (Article 555 (3) No. 3 (b) ZPO).[74] The Federal Court is restricted, however, to an examination whether the trial court has abused its discretion, and may not examine the correct application of foreign law by the trial court.[75]

(1) Knowledge of the Court

According to Article 293 ZPO evidence on foreign law is only required if it is unknown to the judge. Therefore, the trial judge may renounce on any procedure of taking evidence at all and rely on his own knowledge of foreign law or do the necessary research personally by studying literature on foreign law available to him in the court or in public libraries.[76] He also may resort to collections of expert opinions on foreign law published by German university institutes.[77] The judge is free to introduce his own knowledge on foreign law into the proceedings whenever he is convinced that it is sufficient to decide the case before him; but he has to inform the parties about his self-made opinion on foreign law and give them the opportunity to comment on it.[78] Even if the judge claims to have a good knowledge of the applicable foreign law, he is not allowed to reject expert opinions presented by the parties, but will have to consider them in his reasoning.[79]

(2) Informal Procedures

The judge may also choose informal procedures of proving foreign law outside the Civil Procedure Code ("Freibeweisverfahren"). For example, he may informally request information from private persons, domestic or foreign authorities, embassies, consulates, university institutes and the like.[80] Embassies and consulates are normally not qualified, however, to provide detailed legal advice. In any case the judge has an obligation to introduce such informal information on foreign law into the proceedings in order that the parties may express their opinion.

A further method to determine the content of foreign law in an informal procedure is the request for information under the London Convention on Information on Foreign Law of 1968.[81] Such request may emanate only from a judicial authority and only after proceedings having been instituted (Article 3(1)). The request must state the nature of the case and specify the questions information as to the law of the requested State is required (Article 4(1)); it must also furnish all the necessary facts to allow an exact and precise reply (Article 4(2)). The request , and any annexes, must be translated in the official language of the requested State (Article 14(1)).

The reply should inform in an objective and impartial manner and contain relevant legal texts, judicial decisions and additional documents and materials (Article 7). It must not generally entail payment of any costs or expenses by the requesting State (Article 15). The practical benefit of the Convention, unfortunately, is not very high, as is shown by the relatively small number of requests.[82] A main problem is that the Convention only allows for abstract legal questions, and not for an overall legal opinion on the particular case.[83] Moreover, the procedures under the Convention are rather time-consuming and costly, both in having to involve experts and with the formulation of questions/answers and translations.[84] Finally, the quality of the replies is considerably varying from country to country.[85]

(3) Formal Procedure

The most common method of ascertaining foreign law in Germany is the consultation of an expert directly by the court. To this effect the trial judge normally will call for an expert opinion ("Gutachten") by a comparative law institute of a German university or by the Max-Planck-Institute for Foreign Law and Private International Law in Hamburg. As a rule, the trial judge complies with his duty to ascertain the content of foreign law by calling for an expert opinion delivered by a scientific institute; but in certain cases this method may not be sufficient, in particular if the author of the opinion has no experience in the relevant foreign legal practice.[86]

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71 BGH 30.4.1992, BGHZ 118, 151, 163; BGH 28.11.1994, NJW 1995, 1032.

72 BGH 22.10.1996 RIW 1997, 152.

73 BGH 30.3.1976, NJW 1976, 1581, 1583; BGH 10.5.1984, NJW 1984, 2763, 2764; BGH 29.6.1987, NJW 1988, 647; BGH 21.1.1991, NJW 1991, 1418, 1419; BGH 30.1.2001, WM 2001, 502, 503; MünchKomZPO/*Prütting*, op.cit. § 293 No. 23; *Sommerlad/Schrey*, NJW 1991, 1379; *Kindl*, ZZP 111 (1998) 182.

74 BGH 21.1.1991, NJW 1991, 1418, 1419; BGH NJW 1992, 3106; *Geimer*, op. cit. No. 2580.

75 See above II. 2 a; further BGH 22.6.1987, NJW 1988, 648; BGH 30.4.1992, BGHZ 118, 151, 162 f.

76 See *Heldrichs*, Essays in honour of *Nakamura*, p. 244-246; *Kindl*, ZZP 111 (1998) 186-187; *Sommerlad/Schrey*, NJW 1991, 1379; *Schilken*, Essays in honour of *Schumann*, p. 377-378.

77 See *Basedow/Kegel/Mansel*, Gutachten zum internationalen und ausländischen Privatrecht, since 1965.

78 See Article 278 ZPO; MünchKomm ZPO/*Prütting*, op.cit. § 293 No. 24.

79 See BGH 5.11.1980, BGHZ 78, 318, 335; BGH 10.5.1984, NJW 1984, 2763, 2764.

80 BGH 15.6.1994, NJW 1994, 2959, 2960 = IPRax 1995, 322, note *Otto* 299; BGH 16.7.1975, NJW 1975, 2142, 2143; *Kindl*, ZZP 111 (1998), 187.

81 See for the 43 member states of the Convention *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht, 13th ed. 2006, p. 560.

82 See *Rodger/van Doon*, I.C.L.R., 46 (1997), 151 with statistics concerning the operation of the convention; *Otto*, IPRax 1995, 299, 302.

83 See *Hüßtege*, IPRax 2002, 293; *Schack,* op. cit. No. 632.

84 *Rodger/van Doorn*, I.C.L.Q., 46 (1997), 165.

85 See BGH 30.1.2001, IPRax 2002, 302, note *Hüßtege* 293, where the decision of the court of appeal was set aside for misuse of discretion although the court had made two requests to the Spanish Ministry of Justice.

86 BGH 21.1.1991, NJW 1991, 1418, 1419.

It is the great advantage of this "Gutachten" system that the expert consulted, as a rule, has knowledge not only of the relevant foreign legal system but also of German private international law and of German substantive law. As the expert is given full access to the files and records of the case, he will not only answer abstract questions asked by the court with regard to foreign law but will deliver a detailed proposal how the concrete case should be decided according to German private international law and foreign substantive law.

Not seldom, with a view to the foreign legal system, the expert will end up with the statement that the questions are not correctly formulated by the court or even that – in contrast to the court's opinion – not foreign law, but German law is applicable to the case or that the German court has no jurisdiction to decide the case.[87] Even though the expert opinion is not binding on the court, it normally will be followed. By this practice, judicial functions are transferred to a certain extent, from the court to the expert.[88]

If the trial judge calls for an expert opinion on foreign law by a formal order for taking evidence ("Beweisbeschluss"), he has to respect the provisions of the Civil Procedure Code on expert evidence (Articles 402-415 ZPO), although foreign law is not a fact, but law. As a consequence of opting for a formal procedure of taking evidence ("Strengbeweisverfahren") he is bound to invite the expert to explain and defend his opinion in the hearing, if one of the parties applies for such an interrogation of the expert.[89]

b) The Role of the Parties

Although the parties are entitled under German law to participate in the investigation and ascertainment of foreign law, their role is rather restricted. Expert opinions presented by them have only the quality of submissions by the parties. As foreign law is not a fact, but law, an expert on foreign law may never be a witness. And as the court has to ascertain foreign law *ex officio*, there is no burden on either party to prove the content of foreign law.[90] Even if the parties voluntarily cooperate and offer evidence on foreign law, or if the defendant party admits the content of foreign law as pleaded by the claimant the court is not bound by such evidence or admission[91] but has a duty to examine this question *ex officio*, if it has some suspicion or doubt whether the common pleading of the parties is correct.[92]

On the other hand, the parties are obliged to support the judge in fulfilling his duty to ascertain the content of foreign law, if such cooperation is requested by the court because the parties or their lawyers have easy access to the foreign sources of law. If the parties fail or deny to participate, the court may draw consequences from such behaviour and renounce on further efforts.[93]

2. Austria and Switzerland

The German Approach to apply foreign law as law, and not as fact, and to impose on the judge the obligation to ascertain its content *ex officio* is being followed, in principle, also in Austria and Switzerland.

a) Austria

The Austrian Private International Law Act of 15 June 1978 has a clear position with regard to the treatment of foreign law in domestic proceedings: Foreign law shall not only be applied *ex officio* the same way as it is being applied in the country of its origin (Article 3), but the court has rather the duty to determine its content of its own motion (Article 4(1)). The Austrian Act even goes one step further in providing that the factual and legal prerequisites of a conflict rule, too, have to be determined by the court *ex officio*, except for such areas of law where a choice of law by the parties is allowed (Article 2).

Permitted methods to ascertain the content of foreign law are, among others, the participation of the parties, information given by the Federal Ministry of Justice and expert opinions (Article 4(1)). In practice, the Austrian Ministry of Justice plays a central role, even though its function is restricted to the transmission of materials (such as statutes, judgments or textbooks) to the court without any interpretation. By contrast, calling for an expert opinion seems to be rather unusual in Austria.

b) Switzerland

In Switzerland the pleading and proof of foreign law originally were considered as a matter of procedure and as such regulation was reserved to canton law. But with the adoption of the Federal Private International Law Act of 18 December 1987 it became a matter of federal law. According to Article 16 (1) of the Act the court must determine the content of foreign law *ex officio*. This principle is subject, however, to two exceptions. First, in patrimonial matters ("vermögensrechtliche Ansprüche") the court may place the burden of proving foreign law on the parties; if they fail to discharge this burden, the *lex fori* will apply by virtue of Article 16(2).[94] The second exception is that where the Swiss rules of private international law give the right to the parties to choose the governing law, the parties may also enter into an agreement that not foreign law but the Swiss *lex fori* will apply.

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87 *Spickhoff*, ZZP 112 (1999), 269-271.

88 *Jänterä-Jareborg*, Rec. d. Cours 304 (2003) 290 characterizes the German system with good reason as a "comfortable method of ascertaining the content of foreign law from the court's point of view".

89 BGH 11.7.1975, NJW 1975, 2142; BGH 15.6.1994, 2959, 2960. This view is being criticized in part of the German doctrine, see *Geisler*, ZZP 91 (1978), 176; *Schack*, op. cit. No. 635.

90 BGH 26.10.1977, BGHZ 69, 357, 393; BGH 23.12.1981, NJW 1982, 1215, 1216; *Lindacher*, Essays in honour of Schumann, p. 284-285; *Otto*, IPRax 1995, 302; *Kindl*, ZZP 111 (1998) 180; *Nagel/Gottwald*, op. cit. § 10 No. 29; *Geimer*, op. cit. No. 2589.

91 *Spickhoff*, ZZP 112 (1999), 273; *Sommerlad/Schrey*, NJW 1991, 1381.

92 *Schilken*, Essays in honour of Schumann, p. 380; *Geimer*, op. cit. No. 2586; MünchKommZPO/*Prütting*, op.cit. § 293 No. 50.

93 BGH 30.3.1976, NJW 1976, 1581, 1583; *Spickhoff*, ZZP 112 (1999), 272-273.

94 This rule does not apply to cases in which foreign law is applicable by virtue of an international convention; see *A. Bucher*, Droit international privé (1995), vol. I/2 p. 381.

3. France

a) Burden of Proof

Different from German law, the French Cour de cassation traditionally held that the trial judge had no obligation to ascertain foreign law *ex officio*, but the content of foreign law had to be proved as fact by the parties. Under what was known as the "Lautour-Thinet rule",[95] the burden of proving foreign law rested on the party whose claim was governed by it, rather than on the party who pleaded it.[96] This meant, for example, that if the plaintiff was suing for a tort committed in a foreign country, he had to prove the foreign law, even if he had preferred to have the case decided according to French law, and it was the defendant who pleaded the foreign law. If the foreign law was not proven, the position was as follows: if this was due to the default or lack of diligence of the party on whom the burden of proof lay, the claim would be rejected; if, on the other hand, it was genuinely impossible to ascertain the foreign law, the court would apply the lex fori.[97]

It was quite doubtful whether the Cour de cassation would uphold these traditional rules on proof of foreign law[98] after the dramatic change of law with regard to pleading foreign law or whether it would opt for the German system and establish a duty of the trial judge to determine the content of the foreign law *ex officio*. The answer was given in a further decision of the Cour de cassation in 1991[99] where the respective roles of the court and of the parties with regard to the proof of foreign law were newly defined as follows: Whenever the trial judge is not obliged to apply foreign law *ex officio*, he also has no duty to ascertain the content of the foreign law, applicable according to French private international law, on its own motion, but the burden of proof rests on the parties. As far as the distribution of this burden between the parties is concerned, the Cour de cassation abandoned the "*Lautour-Thinet*" rule and adapted the rules on the proof of foreign law to the new principles on pleading foreign law. The new rule is that, where the parties have the "free disposition of their rights", the party claiming that the application of foreign law would lead to a different result from that which would be obtained if French law were applied must establish this difference by proving the content of the foreign law he invokes; otherwise French law will be applied as the lex fori.[100]

The new rule was confirmed two years later in the *Amerford* case,[101] where an insurer of goods damaged in transit had brought an action for breach of contract against the carrier. The defendant claimed that the law of Illinois was applicable and this was not contested by the plaintiff. Under the "*Lautour-Thinet*" rule, the burden of proving Illinois law would have fallen on the plaintiff, since his claim was governed by it. Under the new system, however, it was the defendant – the party who had invoked foreign law – who was required to prove that it was different from French law as the lex fori. The new system has the advantage, that it is no longer necessary to distinguish between those cases in which the failure to prove the foreign law is the fault of the party on whom the burden of proof lies and those cases in which it is genuinely impossible to prove it. In both cases now simply the lex fori applies.[102]

The new rule on the burden of proof fits in well with the rules on the application of foreign law, since the concept of areas of law in which the parties have the "free disposition of their rights",[103] applies in both. In such cases the court is not obliged as explained before, to apply foreign law *ex officio*, and, if the foreign law to which French private international law refers is not invoked and proven by one of the parties, the lex fori will apply instead. Difficulties arise in cases concerning areas of the law in which the parties do not have the "free disposition of their rights" or in which an international convention applies. As it would be contradictory for a court to declare foreign law applicable even if it is not pleaded, but then to apply the lex fori if the foreign law is not proved by the parties it seems that the court is obliged to establish the content of the foreign law *ex officio* with all means.[104] The same rule applies where the court is not obliged to apply foreign law *ex officio* because the parties have the "free disposition of their rights" but nevertheless chooses to do so.[105] Moreover, there is a tendency in new rulings of the Cour de cassation that the trial judge has an obligation to establish the content of foreign law whenever it is invoked in the proceedings, and it does not matter whether it is introduced by the judge himself or by the parties, and it is also irrelevant whether the litigation concerns disposable or indisposable rights.[106]

b) Methods of Proof

As far as the French judge has no obligation to ascertain the content of foreign law *ex officio*, the procedural rules on proof

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95 Named after the two leading cases: Cass. civ. 25 5.1948, Rev. crit. 1949, 89, note *Batiffol* = D. 1948, 357 = S. 1949 I, 21, note *Niboyet* J.C.P. 1948.II.4532, note *Vasseur* (arrêt *Lautour*); Cass. civ. 24.1.1984; Clunet 1984, 874, note *Bischoff* = Rev. crit. 1985.89, note *Lagarde* (arrêt *Thinet*).

96 Cass. civ. 24.1.1984, loc. cit.: "La charge de la preuve de la loi étrangère pèse sur la partie dont la prétention est soumise à cette loi et non sur celle qui l'invoque, fût-ce à l'appui d'un moyen de défence."

97 Cass. civ. 24.1.1984, loc. cit.; see also *Ferrand*, ZEuP 1994, 131-132; *Hartley*, I.C.L.Q. 45 (1996), 280.

98 The traditional rules had been confirmed by the Cour de Cassation still a few months before the famous decisions *Rebouh* and *Schule* dated 11. and 18.10.1988 (above note 33); see Cass. civ. 2.2. and 21.6.1988, Rev. crit. 1989, 66, note *Ancel*.

99 Cass. civ. 5.11.1991, Rev. crit. 1992, 314, note *Muir Watt*.

100 *Muir Watt*, Rev. crit. 1992, 327; *Ferrand*, ZEuP 1994, 132-133; *Hartley*, I.C.L.Q. 45 (1996), 280-281.

101 Cass. com. 16.11.1993, Rev. crit. 1994, 322, note *Lagarde* = Clunet 1994, 98, note *Donnier*.

102 *Hartley*, I.C.L.Q. 45 (1996), 281.

103 These areas of law are determined by the *lex fori*, see *Lagarde*, Rev. crit. 1994, 338-339.

104 In this sense Cass. civ. 18.12. 1990, J.C.P. 1992. II. 218 24, note *Ammar*.

105 Cass. civ. 27.1.1998, J.C.P. 1998. II.10098, note *Muir Watt*; Cass. civ.13.11.2003, Rev. crit. 2004, 95, note *Ancel*: "Il incombe au juge français qui déclare une loi étrangère applicable de rechercher par tous moyens, au besoin par lui-même, la solution donnée à la question par le droit de l'Etat concerné".

106 See Cass. civ. 21.3.2000, Clunet 2001, 505, note *Revillard* = Rev. crit. 2000, 359, note *Ancel;* Cass. civ. 6.3.2001, Rev. crit. 2001, 335 note *Muir Watt* = Clunet 2002, 171, note *Raimon*; Cass civ. 18.9.2002. Bull civ. I. No. 2, note Mégnin, IPRax 2005, 459: "il appartient au juge saisi de l'application d'un droit étranger de procéder à sa mise en œuvre et, spécialement d'en rechercher la teneur de trancher le litige selon ce droit".

of facts apply. In principle, all methods of proof may be used but the normal method is the production of written opinions by experts on the foreign system, often foreign lawyers ("certificats de coutume"). These may be accompanied by the relevant documentation – for example, the text of foreign legislation or judicial decisions, translated into French. If both parties present conflicting certificates, it is up to the court to decide which is correct.

If it is the duty of the judge to ascertain the content of foreign law, he has to take into consideration all the relevant sources of law in the State of its origin.[107] He is rather free to choose the method of how to comply with his duty. He may ask the parties for assistance or use diplomatic and consular channels; he may also resort to the possibilities offered by the London Convention or consult the French Ministry of Justice.

4. Italy and Spain

Whereas the French law in the field of pleading and proof of foreign law has been developed, as described before, step by step by the Cour de Cassation, in other jurisdictions, traditionally influenced by French legal thinking like Italy and Spain, the fact doctrine has been abolished by legislative action.

a) Italy

Although the nature of foreign law as "law" has been recognized in the Italian legal literature almost unanimously already under the system of the "Disposizioni Preliminari" to the Italian Civil Code of 1942,[108] the Corte di Cassazione proceeded still in recent times from a presumption of conformity between foreign law and Italian law and imposed the burden of proof that the foreign law was different to the party who pleaded the applicability of foreign law.[109] The Italian legislator put an end to this long lasting conflict between legal doctrine and court practice by adopting in Article 14(1) of the new Private International Law Act No. 218 of 31 May 1995 the unambiguous formula that "the judge has to ascertain the applicable foreign law of his own motion". This provision is generally understood in the sense that foreign law needs not to be pleaded by the party favoured by such law, and that not only foreign law, but also the rules of Italian private international law are mandatory for the Italian judge, not optional.[110]

As the fact doctrine is definitely abandoned by Article 14(1), the parties are not any longer obliged to prove the content of foreign law, but this is the duty of the court and has to be discharged *ex officio*.[111] The predominant opinion in Italy concludes from this provision that foreign law has the same quality as Italian law, and that the judge, therefore, has to know its content ("iura aliena novit curia").[112]

As far as the methods of proof are concerned, Article 14(1) provides that the judge may use, in addition to the instruments referred to in international conventions, information obtained through the Ministry of Justice, and he may further hear experts or specialised institutions. An Italian judge normally will not do research of foreign law himself,[113] but will either ask the parties for their support or apply to the Italian Ministry of Justice for legal advice. Different from German courts,[114] Italian courts discharge their duty to determine the content of foreign law in procuring the relevant foreign statutes and their translation into Italian, if this material allows for a decision of the case; the judge is not obliged to make further reference to the foreign legal practice or doctrine.[115] Moreover, the judge may use devices offered by international conventions, especially the London Convention on Information on Foreign Law of 1968. But the convention has only little importance in the Italian practice; there is not a single judgment reported in which the channels of the Convention were used by an Italian court.[116] Finally, the court may call for an expert opinion to be delivered by a lawyer or university professor; but quite different from German law the court is not obliged, as a rule, to do so and thus charge the parties with the costs of such an expert opinion.[117]

If the content of the foreign law cannot be ascertained, the Italian judge has to proceed according to Article 14(2) in two steps. In a first step he has to apply the law which is declared applicable by alternative connecting factors being determined by the Italian conflict rule,[118] and only in the second step he is allowed to resort to the *lex fori*.

b) Spain

According to the "basic rules" about pleading and proof of foreign law as developed by the Tribunal Supremo (TS) already in the 19th century foreign law could not be treated as "law" because this was considered as an "attempt" on the

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[107] *Fauvarque-Casson*, D. 2000, 129.

[108] See *Carbone*, Commento all'art. 14, Riv. dir. int. priv. proc. 1995, 961-962; *Frigo/Fumagalli*, L'assistenza giudiziaria internazionale in materia civile (2003) p. 183 et seq.; *Picone*, Essays in honour of *Jayme*, vol. I., p. 691-692.

[109] Cass. 19.1.1985, No. 149, Riv. dir. int. priv. proc. 1986, 344; Cass. 19.2.1986, No. 995, Riv. dir. int. prov. proc. 1987, 823; *Picone*, op. cit. with further references.

[110] *Picone*, op. cit. p. 692-693. See also Cass. 11.11.2002, Riv. dir. int. priv. proc. 2003, 978, where a decision of the Tribunale Roma has been set aside on the ground that the trial court had failed to characterize the relation between the parties as a contractual one, and consequently had not applied the law of New York as agreed between the parties.

[111] See Cass. 26.2.2002, No. 2791, Riv. dir. int. 2002, 463 = NGCC 2003, 22, note *Zamboni*, Sugli strumenti di conoscenza della legge straniera da parte del giudice civile italiano; Cass. 11.11.2002, No. 15822, Riv. dir. int. priv. proc. 2003, 978; *Sangiovanni*, IPRax 2006, 513-514; but see also Cass. 11.11.1999, Riv. dir. int. priv. proc. 2001, 173 where the appeal was dismissed because the plaintiff had not pleaded the relevant provisions of German law.

[112] *Sangiovanni*, IPRax 2006, 513; *Picone*, op. cit. p. 693.

[113] *Sangiovanni*, op. cit. p. 515.

[114] See *supra* 1 a aa.

[115] Cass. 26.2.2002, No. 2791, Riv. dir. int. priv. proc. 2002, 726; *Sangiovanni*, op. cit. p. 516.

[116] *Sangiovanni*, op. cit. p. 517.

[117] Cass. 9.1.2004, No. 115, Riv. dir. int. priv. proc. 2004, 1377; *Sangiovanni*, op. cit. p. 517.

[118] For the construction of this rule, especially ist application to conflict rules providing for a „cascade" of connecting factors, see *Picone*, op. cit. p. 697-700.

Spanish sovereignty. Consequently it had to be proved as fact exclusively by the parties. The courts were allowed to intervene in the proof of foreign law, but they were not obliged to do so. If the foreign law was not proved by the party concerned, the Spanish court had to decide the case according to the Spanish *lex fori*.[119] The new Preliminary Title of the Spanish Civil Code which introduced in 1974 explicit provisions on the proof of foreign law in its Article 12 (6) did not alter, according to the opinion of the Spanish TS, these "basic rules".[120]

The situation only changed by enactment of the New Spanish Code of civil procedure (Ley de Enjunciamento civil, LEC) of 1 January 2000 which came into force on 8 January 2001. The LEC contains several rules on the proof of foreign law; the most important rule is Article 281.2 LEC which provides: "The custom and foreign law will also be proved ... The content and validity of the foreign law must be proved [and] the court may use any instrument that it considers necessary for its application". As has been stated correctly, [121] the Spanish legislature has given in the new LEC only some "guidelines" on the proof of foreign law and has left their elaboration in detail to the courts. The main consequences derived from the new LEC are as follows:

(1) As proof of foreign law is something totally different under the LEC than proof of facts, pleading of foreign law is not necessary anymore but the court will consider and apply it *ex officio*.[122]

(2) As the principle "iura novit curia" referred to in Article 6.1 Civil Code applies only with regard to Spanish law, foreign law must be proved (Article 281.2 LEC). This proof is required even if the parties are in full agreement on the content of the foreign law,[123] and it is admitted not only in the first instance, but also in appeal proceedings and before the TS.[124]

(3) As to the means and methods of proof Spanish law distinguishes between the proof of foreign law by the parties on the one hand and by the court on the other hand. The parties may prove the foreign law, exclusively, by public documents (Article 317 LEC);[125] therefore, simple photocopies of foreign statutes or judgments are not sufficient to prove the content of foreign law correctly.[126] The parties are also allowed to prove the foreign law, exclusively, by an expert's report (Article 335 LEC), and it is not required that the expert be a lawyer of the respective foreign country.

By contrast, the court is allowed to use whatever means or method to ascertain the content of foreign law (Article 281.2 LEC). It may, therefore, profit from the private knowledge of the judges or utilize the specific legal devices of international conventions, especially of the London Convention on Information on Foreign Law of 1968.

(4) The burden of proving foreign law is shared under Spanish law between the parties and the court. The general rule is, that the parties have to prove foreign law, and the burden of such proof lies with the party who is favoured by foreign law and therefore pleads its application.[127] Different from French law it does not make any difference whether the conflict rule referring to foreign law is contained in the Preliminary Title of the Spanish Civil Code or in an international convention; even in the latter case the court is not obliged to ascertain the foreign law *ex officio*.[128]

Exceptionally, the court has to intervene and to assume the burden of proving foreign law *ex officio* if there is a specific interest of the State or of the public in the application of the foreign law referred to by the Spanish conflict rule. This is presumed if foreign law is applicable as internationally mandatory (as for instance under Article 7(1) Rome Convention), or if the Spanish conflict rules aims at the protection of the weaker party (minors, consumers, employees).[129] Furthermore, the court's intervention is necessary if the parties do not succeed to prove the foreign law although they did their very best to comply with their respective obligation.[130]

5. England

In England the starting point for the procedure of proof is the principle that judges are deemed to have no knowledge of foreign law, because foreign laws are merely facts. It follows that the general rules on proof of facts apply.

a) The Role of the Parties

Therefore, foreign law must not only expressly be pleaded, but also proved by the parties. It is for the party who relies upon foreign law to establish its content and the onus of proof is upon the party who so alleges, unless the other party admits it. If foreign law is not proved to the conviction of the judge, the *lex fori* will be applied.[131]

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[119] See *Calva Caravaca/Carrascosa González*, IPRax 2005, 170 with references in note 6.

[120] See still TS 25.1.1999, Repertorio Aranzadi de Jurisprudencìa 321; TS 5.6.2000, Reperatorio Arunzadi di Jurisprudencìa No. 5094; *Calva Caravaca / Carrascosa Gonzálvez*, op. cit. with further references.

[121] *Calva Caravaca/Carrascosa González*, op. cit. p. 171; see also *Garau Sobrino*, Der Beweis des ausländischen Rechts in der neuen spanischen Zivilprozessordnung vom 7. Januar 2000: Chronik einer Entwicklung, in: *Basedow*, Aufbruch nach Europa – 75 Jahre Max-Planck-Institut für Privatrecht (2001) p. 685; *Marín Lopez*, La prueba de la ley estranjera en la nueva LEC., An. Esp. Der. int. priv. 2001, 305.

[122] *Calva Caravaca/Carrascosa González*, op. cit. p. 171.

[123] See TS 5.11.1971, Rep. Aranzadi de Jurisprudencìa No. 4524.

[124] *Calva Caravaca/Carrascosa González*, op. loc. cit.

[125] See TS 12.1.1989, Rep. Aranzadi de Jurisprudencìa No. 100; TS 15.11.1996, Rep. Aranzadi de Jurisprudencìa No. 8212.

[126] *Calva Caravaca/Carrascosa González*, op. cit. p. 172 with references.

[127] TS 15.11.1996, Rep. Aranzadi die Jurisprudencìa No. 8212; *Calva Caravaca/Carrascosa González*, op. cit. p. 172, with further references.

[128] AP Alicante 18.11.2003, referred to by *Calva Caravaca/Carrascosa González*, op. cit. p. 172-173.

[129] See for this distinction between "blind conflict rules" and "content-orientated" conflict rules and the consequences of this characterization on the burden of proving foreign law *Calva Caravaca/Carrascosa González*, op. cit. p. 172-173.

[130] ST 17.1.2000 and AP Girona 7.6.2004, referred to by *Calva Caravaca/Carrascosa González*, op. cit. p. 173.

[131] *Hartley*, I.C.L.Q. 45 (1996), 283.

b) Expert Opinions

Under English law a party cannot prove foreign law by merely putting in evidence foreign statute law, court decisions, treatises or other such sources. The testimony of competent experts is always required to explain and interpret such material,[132] although an expert may refer to such material to support his own evidence.

The other party is not obliged to call an expert, but if the content of the foreign law is strongly contested, he almost certainly will do so. Usually the two experts will disagree and it will be then for the court to give a ruling, either by preferring the evidence of one expert to the other or by accepting parts of the evidence of each.[133]

Where so much depends on the testimony of expert witnesses, the parties' selection of experts is of great importance; much can depend on their persuasiveness. Equally it is important for the courts to have clear guidelines in order to decide which experts are competent to testify on foreign law. The matter of competence is in the court's discretion. The expert need not be a foreign lawyer; practical experience is the only qualification.[134]

The procedure of proof of foreign law has to some extent been simplified by the Civil Evidence Act 1972. Article 4 (2) of this Act provides that, where an English court has previously determined a question of foreign law, and where the previous decision appears in citable form, such a decision shall be admissible as evidence in proving foreign law. Such a previous decision will be regarded as conclusive unless the contrary is proved.[135]

c) The Role of the Court

As judges are deemed ignorant of facts until they are proven, judges are technically ignorant of unproven foreign law. The principle of ignorance prevents a judge – quite different from German law[136] – from conducting personal research of foreign law[137] and commits the parties to proving foreign law just as they would other facts. And, if a foreign expert refers only to part of a foreign legal text the judge may not refer to other parts which have not been put in evidence. Moreover, if such an expert's evidence is undisputed the court is – again different from German law – usually bound to accept it because it has no information with which to contest it.

V. Conclusion

Coming to a conclusion of this comparative survey it can be said that the actual state of law in the Member States of the European Union with regard to pleading and proof of foreign law is far from being satisfactory. The European Union is at present considering the adoption of common rules on choice of law in many different areas, reaching from contractual[138] and non-contractual obligations[139] to dissolution of marriage,[140] maintenance[141] matrimonial property[142] and succession.[143]

The main objective of this harmonisation of private international law by the Rome Regulations is to avoid forum shopping by guaranteeing that a certain case will be decided by the courts of any Member State according to the same substantive law. This intended uniformity of result through unified choice of law rules can only be achieved, however, if the courts of the Member States are under an obligation to apply these rules and the law they refer to *ex officio*. Furthermore, in all Member States, the same standard must be applied when evaluating the sufficiency of proof of foreign law. Perhaps also the same methods should be used when ascertaining the content of foreign law. The "official involvement" of the courts would, in any case, need to be increased. The courts should in all the Member States not only be "allowed" to ascertain the content of the applicable foreign law but have the duty to strive at establishing its content, even in cases where the parties deliver information. The final responsibility for getting sufficient information should lie with the courts, as is today the case in the majority of the Member State.[144]

Where the content of the foreign law cannot be established, the same solutions should be applied. At present, in this situation the courts of almost all Member States apply the law of the forum. This may be a practical solution, but it does not promote unity of result.[145] The mode of pleading and ascertaining the content of foreign law is a procedural issue. It is not exaggerated to claim that the divergences in the national procedures of the Member States in respect of application of foreign law create an obstacle to the good functioning of civil proceedings within the European Union. If this is accepted, then the necessary legal basis for taking action is already provided by the EC Treaty. Article 65 lit. c) permits measures promoting compatibility of the rules on civil procedure applicable in the Member States. The measures to be taken should strive at harmonisation of the procedural law governing the applicability of the Community rules on choice of law.

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132 *Hartley*, op. loc. cit. Note 59.

133 *Hartley*, I.C.L.Q. 45 (1996), 284.

134 *Hartley*, I.C.L.Q. 45 (1996), 283.

135 See *Hartley*, op. loc. cit. Note 59 („quasi-precedent").

136 See above IV. 1.

137 See Bumper Corp. v. Comr. Of Police of Metropolis, [1991] 1 W.L.R. 1362, C.A.

138 See Proposal for a Regulation (EC) on the law applicable to contractual obligations (Rome I), Com (2005) 650 final.

139 See Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations.

140 See Proposal for a Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM (2006) 399 final.

141 See Proposal for a Regulation (EC) on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, COM (2005) 649 final.

142 See Green Paper on conflicts of laws in matters concerning matrimonial property, including the question of jurisdiction and mutual recognition, SEC (2006) 952.

143 See Green Paper succession and wills, SEC (2005) 270.

144 See above IV.

145 *Jänterä-Jareborg*, Rec. d. Cours 304 (2003) 370.