Private International Law in Mainland China, Taiwan and Europe

Edited by
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The Application of Foreign Law – Comparative Remarks on the Practical Side of Private International Law

Jürgen BASEDOW

I. Introduction: Theoretical and Practical Questions Arising under Private International Law

Private international law is confronted with two fundamental questions, one of a more theoretical, the other of a more practical kind. The theoretical question is sometimes framed in terms of tolerance vis-à-vis the law of a foreign jurisdiction: To what extent should a court give effect to rules of law adopted by a foreign country? In reality, this is not a matter of tolerance vis-à-vis a foreign *state* since tolerance as a form of human interaction is a behaviour that has to be perceived by the other party in order to be acknowledged as such. Yet a state will usually not even take notice of, and will be indifferent to, the application of its own law by a foreign court in private matters. The first and theoretical question rather deals with the respect for the expectation of *private parties* that their relation is to be governed by the law of a specific foreign jurisdiction. Balancing the parties' expectations is the purpose of this discipline, as it is in other areas of private law. The willingness to honour those expectations by the application of foreign law may very well be praised as a progress of human civilization.

But how can that willingness to apply foreign law be implemented in legal practice? This is the second and more practical question of private international law. If we consider legal rules as a tool of social engineering intended to shape reality – in this case, the reality of cross-border relations and transactions – a satisfactory answer to this practical question is not

less important than the basic tolerance and willingness to apply foreign law. But such a satisfactory answer is much more difficult to find.

This is due to what may be called the infrastructure of justice in a given jurisdiction: legal education, the linguistic accessibility of the law, legal methodology, the court system, the legal professions, the procedures and the substantive law – they all constitute an integrated whole. Like the rolling stock on the tracks of a railroad, the application of the law of the forum is adjusted to that infrastructure of justice formed by those institutions. The application of foreign law is not only difficult because of a lack of information resources, inadequate language skills and insufficient education of the legal personnel, it is also time-consuming. The more frequently it is needed, the greater is the risk for the operability and proper functioning of the whole judiciary. The application of foreign law is feasible as long as it occurs in only one out of a thousand cases. But it may lead to the breakdown of the administration of justice where five per cent or ten per cent of all disputes have to be decided under foreign law.

The codification of private international law that is flourishing across the globe therefore raises the question how legislators intend the courts to cope with the burden created by the application of foreign law. This question splits into others, some of which are more familiar to legal doctrine: (1) Are courts under a legal duty to apply conflict rules and, consequently, foreign law *ex officio*, i.e. even in the absence of a corresponding request by a party? (2) Does private international law allow the court to return to the law of the forum by the recognition of *renvoi*? (3) What are the mechanisms available to the courts for ascertaining the content of foreign law? (4) What is the outcome where the foreign law cannot be ascertained?

These questions are of particular interest and significance where a legislator for the first time adopts a statute on private international law, thereby imposing on the courts a duty to apply foreign law which they did not know before. While Germany and Taiwan have dealt with these difficult questions for a considerable time, they are new for the courts of the People's Republic of China. The following comparative observations, instead of suggesting definite answers, are rather meant to shed some light on the practical difficulties.

II. Optional Conflict Rules and *Ex Officio* Application

Where the conflict rules of the forum designate the law of a foreign state, the courts will have to apply that law *ex officio* in most countries. While this rule receives almost general recognition from courts and legal writers in continental jurisdictions, it is not very often laid down in statutes. An example is, however, provided by Article 2 of Book 10 of the Dutch Civil

Code enacted in 2011: "The rules of private international law and the law designated by those rules are applied *ex officio*."[1] The traditional common law approach which is still applied in the United Kingdom is radically different. An English court will apply foreign law only if it is pleaded and proved by the parties; where no party pleads foreign law, "the conflict of laws dimension of a case may be lost."[2] Both abstaining from pleading foreign law and agreeing on its content "raise an important strategic issue for litigants."[3] Having in mind that English courts apply the law of the forum to most family matters anyway, the common law approach is essentially relevant for commercial disputes and some other claims sounding in money where party autonomy and private disposition is gaining more and more support in many legal systems. However, the basic approaches still differ considerably.[4] Academic efforts to establish the optional application of foreign law, in Germany for example, have not been successful.[5]

For the time being, the European Union has not tackled this issue. Although empowered under Article 81 of the Treaty on the Functioning of the European Union to take measures in civil matters having cross-border implications "promoting the compatibility of the rules on civil procedure applicable in the Member States", the Union has confined its legislative activities in this field to other issues of international civil procedure and to

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[1] Wet van 19 Mei 2011 tot vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (vaststellings- en invoeringswet boek 10, Burgerlijk Wetboek, Staatsblad van het Koninkrijk der Nederlanden 2011, no. 272; inofficial English translation in Yearbook of Private International Law, vol. 13 (2011), pp. 657 et seq. In other EU countries similar statutory rules can be found, for example in Article 14 of the Italian law of 31 May 1995, no. 218 on the Reform of the Italian system of private international law, Gazzetta Ufficiale 3 June 1995, no. 128, English translation in: Alberto MONTANARI and Vincent A. NARCISI (eds.), Conflicts of Laws in Italy, The Hague 1997, and Article 15 § 1 of the Belgian Code on private international law of 16 July 2004, English translation in Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 70 (2006), p. 358.

[2] See the National Report by Elizabeth CRAWFORD and Janeen CARRUTHERS, United Kingdom, in: Carlos ESPLUGUES, José Luis IGLESIAS and Guillermo PALAO (eds.), Application of Foreign Law, Munich 2011, pp. 391 et seq., 391 et seq.

[3] Richard FENTIMAN, Foreign Law in English Courts. Pleading, Proof and Choice of Law, Oxford 1998, p. 159.

[4] For a recent comparative assessement, see Carlos ESPLUGUES, José Luis IGLESIAS and Guillermo PALAO (supra note 2) and Clemens TRAUTMANN, Europäisches Kollisionsrecht und ausländisches Recht im nationalen Zivilverfahren, Tübingen 2011, pp. 17 et seq., 140 et seq.

[5] See the foundational article by Axel FLESSNER, Fakultatives Kollisionsrecht, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 37 (1973), pp. 547 et seq.; among the textbook authors his proposition has been accepted by Fritz STURM, see Leo RAAPE and Fritz STURM, Internationales Privatrecht, vol. 1, 6th ed., Munich 1977, pp. 306 et seq.

choice-of-law issues up to now. The practical effect of the various regulations dealing with choice of law therefore differs remarkably from Member State to Member State. The future development will have to show whether the diverse national approaches can be reconciled with the principle of effectiveness which Member States have to comply with when applying EU law, including private international law.[6]

Both Chinese jurisdictions represented in this symposium, just like the continental jurisdictions referred to above, have opted for the *ex officio* application of foreign law. According to Professor Rong-Chwan Chen, "it is well established in Taiwan's judicial practice that courts shall *ex officio* apply the AAL in cases with foreign elements."[7] This conclusion is drawn from what is now Article 1 of the Taiwanese PIL Act 2010[8] which prescribes that

> "[C]ivil matters involving foreign elements are governed, in the absence of any provisions in this Act, by the provisions of other statutes; in the absence of applicable provisions in other statutes, by the principles of law."

In the People's Republic of China, Article 10 of the Chinese PIL Act 2010[9] appears to be more explicit. While it does not expressly address the issue of *ex officio* application, it clearly allocates the task of ascertaining the content of the foreign law to "the people's courts, arbitration institutions or administrative organs," unless the parties have chosen the applicable law; in that case it is up to them to provide information about the law of the foreign country.[10] Needless to say, this is a heavy burden for institutions which have had little contact with the outside world in the past.[11] How can they cope with such a difficult task?

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[6] Certain doubts in this respect arise from the enquiry by Clemens TRAUTMANN (supra note 4), pp. 289 et seq.

[7] Rong-Chwan CHEN, The Recent Development of Private International Law in Taiwan, in: Wen Yeu WANG (ed.), Codification in East Asia, Cham et al. 2014, pp. 233 et seq., 237.

[8] See the translation in this book, pp. 453 et seq.

[9] See the translation in this book, pp. 439 et seq.

[10] See Article 10 para. 1 of the Chinese PIL Act 2010; see also Weizuo CHEN, Chinese Private International Law Statute of 28 October 2010, in: Yearbook of Private International Law, vol. 12 (2010), pp. 27 et seq., 36.

[11] In an article published in 2005 the authors deal with a total of 36 cases having some international element, see Jin HUANG and Huan Fang DU, Chinese Judicial Practice in Private International Law 2002, Chinese Journal of International Law, vol. 4 (2005), pp. 647 et seq., 672 et seq.; more recently it has been reported that over a period of 10 years Chinese law was applied in 90.83% of all cases and foreign law only in 3.73%; in 3.05% of all cases international conventions were governing, see Renzo CAVALIERI, L'applicazione della legge straniera da parte dei tribunali della Repubblica Popolare Cinese, in: Renzo CAVALIERI and Pietro FRANZINA (eds.), Il nuovo diritto internazionale privato della Repubblica Popolare Cinese, Milano 2012, pp. 103 et seq., 108.

III. *Renvoi*

One of the means to reduce the foreign law burden generated by private international law and which a court system has to cope with is to allow *renvoi*. Where the conflict rules of the law designated by the private international law of the forum refer the case back to the *lex fori*, this will be accepted in the courts of many countries, cutting short the chain of reciprocal connections and references and allowing an application of their own law. The reason that is sometimes given for the acceptance of *renvoi* is rooted in the main objective of private international law, i.e. the uniformity of outcome irrespective of the court seized with the case. If the foreign law designated by private international law does not want to be applied, why should the domestic judge care about the foreign law? However, this theoretical reasoning is not conclusive where the foreign court would accept a *renvoi* under its own conflict rules as well. A theoretically less ambitious, but more practical reason for the acceptance of *renvoi* is that it allows reverting to the law of the forum. This is a safeguard for the greater competence of the judges and for more speedy proceedings, two advantages which have greater relative weight in situations where the uniformity of an outcome is difficult to achieve anyway.

The unclear theoretical and policy background explains that in a comparative perspective no general trend in legislation can be ascertained. The doctrinal debate has a long tradition and could fill many pages. For our purpose it is sufficient to note that some of the very recent codifications of private international law such as those of Italy[12], Romania[13] or Poland[14] explicitly recognize *renvoi* as a basic rule subject to some exceptions, in the case of the Italian Code of 1995 even in clear contrast to the previous statutory principle.[15] Exceptions from this basic rule are often laid down for cases of a contractual choice of the applicable law, for the law of obligations, for cases where the applicable law is determined by the closest relation under the conflict rules of the forum, or for cases where a substantive policy favouring a certain result is pursued by the use of alternative connecting factors.

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[12] See Article 13 para. 1 of the Law of 1995 (supra note 1).

[13] See Article 2559 of the new Romanian Civil Code, Law No. 287/2009 concerning the new Civil Code, French translation in Revue critique de droit international privé, vol. 101 (2012), pp. 459 et seq.

[14] Article 5 of the new Polish Act on private international law of 4 February 2011, English translation in Yearbook of Private International Law, vol. 13 (2011), pp. 641 et seq.

[15] See Article 30 of the Preliminary Provisions of the Civil Code of 1942 and the Comments by Franco MOSCONI and Cristina CAMPIGLIO, Diritto internazionale privato e processuale, vol. 1, 5th ed., Torino 2010, pp. 227 et seq.

On the other hand, both the Belgian Code of 2004[16] and the Dutch codification of 2011[17] expressly exclude the admission of *renvoi* as a general rule. EU legislation appears to have rejected *renvoi* until recently: It was excluded in Rome I[18] and Rome II[19] not only for contractual and non-contractual obligations, but in the Rome III Regulation also for divorce and personal separation.[20] In matters of succession, the new Rome IV Regulation takes a different approach: As suggested by the Max Planck Institute,[21] the new Regulation admits *renvoi* where the law of a third state (outside the EU) refers back to the law of a Member State which is not necessarily the forum state, or where it designates the law of a fourth state which would apply its own law.[22] Of course, *renvoi* becomes meaningless in the relations between the participating Member States, since all these countries apply the same conflict rules. But in their relations with third states, the Member States, by admitting the *renvoi* back to the law of the forum, can considerably facilitate the task of their courts.

In light of the divergent European developments it is not surprising that there is no uniform approach to *renvoi* in the private international law of the two Chinese jurisdictions either. In accordance with its previous Taiwanese PIL Act 1953, Taiwan accepts the *renvoi* enunciated by the national law of a person wherever Taiwanese conflict rules employ citizenship as a connecting factor.[23] Quite to the contrary, the new law of mainland China

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[16] See Article 16 of the Belgian Law of 16 July 2004 (supra note 1).

[17] See Article 5 of Book 10 of the Dutch Civil Code of 19 May 2011 (supra note 1).

[18] Article 20 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal of the European Union 2008 L 177/6.

[19] Article 24 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union 2007 L 199/40.

[20] See Article 11 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), Official Journal of the European Union 2010 L 343/10.

[21] Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's proposal for a regulation of the European Parliament and the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 74 (2010), pp. 522 et seq., 656 et seq.

[22] See Article 34 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Rome IV), Official Journal of the European Union 2012 L 201/107.

[23] See Article 29 of the Taiwanese PIL Act 1953 and Article 6 of the Taiwanese PIL Act 2010 as well as Rong-Chwan CHEN (supra note 7), p. 239.

contains an explicit and unrestricted anti-*renvoi* provision in Article 9 Chinese PIL Act 2010. This is allegedly justified by the fact that the law employs habitual residence instead of nationality as the principal connecting factor; moreover, the exclusion of *renvoi* is said to increase legal certainty.[24] Maybe the People's Republic of China has not gained much experience so far with Chinese citizens living abroad but litigating in Chinese courts. Where such Chinese citizens have their habitual residence in jurisdictions that espouse the nationality principle, the courts in mainland China will have to apply foreign law, while the courts in the foreign country of residence will apply Chinese law. In such situations, the Chinese rejection of *renvoi* will neither promote the uniformity of outcome nor will it assist the Chinese courts in speeding up proceedings by allowing the application of the *lex fori*.

The rejection of *renvoi* renders the application of foreign law more frequent. It would therefore appear that countries espousing that rejection, such as Belgium, mainland China, or the Netherlands, need a particularly effective system for the ascertainment of the content of foreign law.

IV. The Ascertainment of the Content of Foreign Law

Irrespective of whether foreign law is applied *ex officio* or only upon a party's application, finding that foreign law and ascertaining its content in the light of the facts submitted to the court is the most difficult part of the whole operation. Legislation is of little help in this context. Some statutes on private international law or on civil procedure may contain provisions requiring the courts to ascertain that content *ex officio*.[25] But such obligation is rather meaningless where counsel and court have neither the skills nor the information resources to comply. There is no duty to do the impossible: The Roman adage *"ultra posse nemo tenetur"* also applies to lawyers. What conflict lawyers need are institutional safeguards enabling them to actually apply foreign law.

At the international level, the European Convention on information on foreign law of 1968 has been a first step.[26] The Convention establishes a network of national liaison bodies among the contracting states. As receiv-

[24] Weizuo CHEN (supra note 8), p. 36, referring to a number of other jurisdictions that have excluded *renvoi* in their national legislation on private international law.

[25] See for example for the People's Republic of China Article 10 para. 1, 1st sentence of the Chinese PIL Act 2010; Article 14 para. 1, 1st sentence of the Italian Law of 1995 (supra note 10).

[26] European Convention on information on foreign law of 7 June 1968, United Nations Treaty Series, vol. 720, pp. 147 et seq.; see also the additional protocol signed at Strasbourg on 15 March 1978, United Nations Treaty Series, vol. 1160, pp. 529 et seq.

ing agencies they may be addressed by foreign judicial authorities which are in need of legal information; they will either reply to those requests themselves or will seek the assistance of a court in their country. Depending on the national implementation, they may also act as transmitting agencies for requests for information on foreign law originating in their own country; in that capacity they will adjust the request to the requirements laid down in the Convention, e.g. translating the request into the language of the requested state.

The Convention has taken effect for almost 50 countries including some non-European states such as Mexico and Costa Rica. Under Article 18, the Committee of Ministers may in fact invite any non-Member State of the Council of Europe to accede. The Convention has proved useful in simple cases, the solution of which directly flows from statutory law. However, in more complicated cases the requesting court, being unaware of the foreign law, is often unable to identify the facts of the case which are relevant for the foreign receiving agency. That agency does not receive the file of the case and has to draw up its reply on the basis of a potentially misleading statement of facts and abstract questions resulting from that statement of facts. Communication problems arise between the sender and the receiver, both trained in different legal systems and dependent on interpreters for understanding each other.

Apart from the London Convention, institutional safeguards for the ascertainment of foreign law depend on national measures. In high-value litigation, courts will usually ask the parties to provide the information needed, and the parties will purchase information and advice from lawyers of the foreign country, information that may however be tainted by the client's interest.

Additional sources of information are academic institutions like the Swiss Institute of Comparative Law, the Max Planck Institute in Hamburg or similar institutes attached to universities. In Germany, a court in need of information on foreign law will commission an expert opinion from such an institute, sending a rough statement of facts and the whole file of the case to the expert in question. The experts will sometimes receive a list of more or less specific questions but sometimes not more than the general request of the court to assess the merits of the case in light of the foreign applicable law. Some of the resulting opinions are published and permit outsiders to benefit in similar cases.[27] In Germany, these experts are often professors of comparative law who at the same time teach private international law; they

[27] See the volumes entitled Gutachten zum internationalen und ausländischen Privatrecht (IPG), eds. Jürgen BASEDOW, Dagmar COESTER-WALTJEN and Heinz-Peter MANSEL on behalf of the Deutscher Rat für Internationales Privatrecht, published since 1965; the last volume for the years 2007/2008 was published in Bielefeld in 2010.

are familiar with the interaction of conflict rules and the foreign substantive law. This is different in many other countries where comparative law as an academic discipline is completely separate from private international law.

A third instrument that has proved effective is the concentration of cases with an international dimension arising in a given region into a single court or even into a single section of that court. For example, cases with an international dimension are assigned to a certain few judges in the family courts of some major German cities.[28] These judges often collect legal materials relating to certain foreign jurisdictions. As a consequence, a judge of the Hamburg Family Court may acquire, over the years, great expertise in dealing with standard divorce situations under Turkish law.

The different ways to cope with the problem are rarely staked out by statutory law,[29] and they are not a focus of academic discussion either. It is rather left to the individual judges and courts to muddle through those problems. Taken as a whole, the mechanisms outlined above may be considered to operate tolerably well in Germany and some other West European states. Hearsay evidence from numerous other countries suggests, however, that most jurisdictions completely lack that institutional outfit; nevertheless, they enact ambitious statutes on private international law that may be conducive to the frequent application of foreign law. Such legislative idealism is detrimental to the administration of justice and to the reputation of the judiciary; it should be avoided. A responsible legislature will not enact a statute requiring the application of foreign law without ensuring the ability of the legal profession and of the courts to ascertain the content of foreign law.

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[28] At a time when family matters were still within the competence of district courts in Germany, the Hamburg District Court tested the practicability of such concentration, see Gerhard LUTHER, Kollisions- und Fremdrechtsanwendung in der Gerichtspraxis, in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, vol. 37 (1973), pp. 660 et seq., 668 et seq.

[29] The current trend in the international community to agree on treaties establishing cooperations between judicial authorities of different states may lead to a change in this respect; the treaties require the contracting states to establish central authorities as elements of a growing international network. Such authorities by necessity lead to a concentration of certain matters and thereby help to build up expertise in international and foreign law; for a German example see the Gesetz zur Aus- und Durchführung bestimmter Rechtsinstrumente auf dem Gebiet des internationalen Familienrechts (Internationales Familienrechtsverfahrensgesetz – IntFamRVG) of 26 January 2005, Bundesgesetzblatt 2005–I, p. 162. In the People's Republic of China, § 17 of the SPC PIL Interpretation 2012, refers to the following sources of information: the parties, international conventions, legal experts and "other appropriate methods" which appear to be compulsory for the judge; but this is not explicitly stated. See Peter LEIBKÜCHLER, Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China, in: Zeitschrift für chinesisches Recht, vol. 20 (2013), pp. 89 et seq., 94.

The national and international measures taken in the past have mainly departed from the demand side, i.e. from the request for certain information about foreign law. But is this still the appropriate approach? At a time of globalization, the demand for information on foreign law is no longer an isolated occurrence. Much of this demand focuses on standard situations such as – in litigation in Germany – the purchase of a holiday home in Spain, or the divorce of a Turkish couple. Of course, there will still be some need for tailor-made expert opinions in certain cases. But the standardization of the demand in so many areas suggests that a new attempt at international cooperation relating to information on foreign law should rather focus on the supply side. Since the costs of electronic storage of legal information have dropped dramatically in recent years and since the worldwide web makes that information available across the globe, such new attempts should rather focus on measures taken by each country to make its own law available to the world at large.

This appears to be the basic new idea of a project initiated by the European Union in 2001 and carried to the universal level by the Hague Conference on Private International Law some years later. The European Judicial Network established in the EU pursues two objectives: the internal promotion of the judicial cooperation between Member States, and the creation of an information system for the public which is meant to include, *inter alia,* data on the domestic law of the Member States.[30] The second objective is however far from being achieved. While the relevant website promises "info about national systems", displaying the flags of the Member States in pleasing colours, the content of that website is rather modest, differing from country to country: clicking on the Finnish flag one obtains access to hundreds of English translations of Finnish statutes; in respect of Germany there is not even a direct link to the less numerous English translations available on the official website of the Federal Ministry of Justice.[31] To date the focus of the European Judicial Network is much more on procedural law and the procedural cooperation between the Member States than on substantive law.

The Hague Conference tackled the issue in 2007. After some deliberations of experts, it proposed work on a new Hague convention that would consist of three parts: the first facilitating access to online legal information on foreign law published in accordance with some realistic quality

[30] Article 3 of Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (2001/470/EC), Official Journal of the European Union 2001 L 174/25; see Matteo FORNASIER, European Judicial Network in Civil and Commercial Matters, in: Jürgen BASEDOW, Klaus HOPT and Reinhard ZIMMERMANN (eds.), Max Planck Encyclopedia of European Private Law, vol. 1, Oxford 2012, pp. 607 et seq.

[31] See <http://ejn-crimjust.europa.eu/ejn/ejn_home.aspx>.

standards or best practices, and monitored by a permanent body of experts; the second dealing with the handling of requests for information; and the third founding a global network of institutions and experts for more complex questions.[32] It is rather unfortunate that the Council of the Hague Conference has ever since repeatedly decided that "the Permanent Bureau should continue monitoring developments but not take any further steps in this area at this point."[33] National governments would be well advised to grant support to this project. Making their laws accessible to the world would not only make private international law more effective, but also increase the attraction of their respective countries for foreign trade and foreign investment.

V. The Fallback Solution

However sophisticated the institutional methods will be for the ascertainment of foreign law, there will inevitably be cases where its content cannot be assessed notwithstanding the conflict rule mandating its application. In such situations one might think of the application of another law that would be linked to the fact situation of the case by another connecting factor[34] or the application of the law of a related legal system, e.g. English law instead of Australian law, or one might simply apply the *lex fori*. This is the solution explicitly prescribed by a number of conflict statutes including the law of the People's Republic of China of 2010.[35]

The ultimate application of the law of the forum may appear as the only reasonable fallback solution. However, its statutory recognition creates a certain disincentive to use all possible means for the ascertainment of foreign law. Moreover, the unascertainability of the foreign law is a vague notion. Does it relate to the legal principles governing a certain area of the law as such, or to all kinds of specifications which the court might expect

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[32] Hague Conference on Private International Law, Accessing the content of foreign law and the need for the development of a global instrument in this area – A possible way ahead. Note drawn up by the Permanent Bureau. General Affairs and Policy, Prel. Doc. No. 11A of March 2009, available on the website of the Hague Conference: <http://www.hcch.net/index_en.php> → Work in Progress → General Affairs.

[33] See Hague Conference on Private International Law, Work Programme of the Permanent Bureau for the next financial year (1 July 2013–30 June 2014), drawn up by the Permanent Bureau. General Affairs and Policy, Prel. Doc. No. 2 of February 2013, available on the website of the Hague Conference, see the previous fn.

[34] See Article 14 para. 2 of the Italian Law of 1995 (supra note 1).

[35] See Article 10 para. 2 of the Chinese PIL Act 2010, Article 10 para. 2 of the Polish Act of 2011 (supra note 14) and Article 2562 para. 3 of the Romanian Law of 2009 (supra note 13).

in view of its own law? Assuming, for example, a dispute about the third party liability of a public accountant, would a foreign law be considered as unascertainable if the general principles of liability sounding in tort can be found, but no specification with regard to the third party liability of accountants? Article 10 para. 2 of the Chinese PIL Act 2010 appears to give an affirmative answer. It instructs the judge to have recourse to the law of the forum not only where the law of a foreign country cannot be ascertained, but also where the law of that country contains no relevant provisions. What are relevant provisions? The term opens the door to a narrow interpretation tainted by the perspective of the court, which enables the judge to make use of the fallback provision of the *lex fori* as a kind of general rule. Where that happens, the very purpose of private international law is reduced to absurdity. It is a not infrequent occurrence that the issue under dispute has never been decided in the foreign jurisdiction; in such cases the court seized of the matter is rather called upon to take a decision departing from the best possible knowledge of the pertinent principles of the foreign law.

A final objection to this type of homeward trend relates to jurisdictions which have equipped their own law with legal transplants from other countries. Suppose, for example, that a Chinese court has to decide a dispute subject to the laws of New Zealand, which the judge, however, does not succeed in ascertaining. Instead of applying Chinese law, would it not be more appropriate to have recourse to available information about the laws of England as the parent legal system of New Zealand law? It is difficult to say *a priori* that one solution or the other is better. Having said this, the categorical preference given to the *lex fori* is difficult to defend. The silence of the law would be a greater incentive for the judge to do some more research on the matter.

VI. Conclusion

The application of foreign law by domestic courts is a sign of tolerance of the legal order; it indicates a progress of human civilization. But unless it is done in moderation, it will imperil the operability of the judiciary. At a time of increasing numbers of cross-border disputes and conflicts, legislatures have to understand the basic tension between tolerance and an effective administration of justice. In light of comparative law, and particularly with regards to the more recent legislation in China and Europe, this paper has shed some light on issues related to that tension. It should be borne in mind that there are other relevant issues; in particular the choice of the connecting factors for the various areas of the law plays a certain role in this context. The more pertinent issues discussed above relate to the *ex of-*

ficio application of conflict rules, to *renvoi* and to the fallback solution of the *lex fori* where the foreign law is not ascertainable. The key problem, however, relates to the institutional safeguards for the ascertainment of the content of foreign law. Legislatures, whether in Europe, in China or elsewhere, do not appear to be particularly interested in this side of private international law, yet they should tackle this problem which, in the era of the internet, is far more capable of being resolved or at least reduced than it was in former times.