

Table of Contents

| | |
|-----------------------|------|
| List of Authors | xvii |
| Preface: The Project | xxv |
| List of Abbreviations | xxix |

Chapter I

| | |
|--|---|
| General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (Project JLS/CJ/2007-1/03) | 3 |
|--|---|

| | |
|------------------------|---|
| I. Introduction | 4 |
|------------------------|---|

| | |
|---|----|
| II. Application of Foreign law by Judicial Authorities in Europe | |
| 1. Introduction: the factual/legal condition of foreign law before national courts | 8 |
| a. Legal nature of foreign law | 10 |
| b. Factual nature of foreign law | 13 |
| c. Hybrid nature of foreign law | 16 |
| d. Conclusion: the lack of a valid and effective response | 17 |
| 2. The introduction of foreign law in the case at stake | 18 |
| a. The condition granted to choice-of-law rules and the application of foreign law | 18 |
| b. The pleading of foreign law before national courts | 22 |
| i) Countries endorsing the legal nature of foreign law | 22 |
| ii) Countries endorsing the factual nature of foreign law | 27 |
| iii) Countries endorsing the hybrid nature of foreign law | 28 |
| iv) Conclusion: inconsistencies exist between the theoretical approach upheld and its practical implementation | 29 |
| c. Application of foreign law by courts and the “ <i>iura novit curia</i> ” principle | 30 |
| i) EU Member States endorsing the factual condition of foreign law | 31 |
| ii) EU Member States endorsing the hybrid nature of foreign law | 31 |
| iii) EU Member States endorsing the legal condition of foreign law | 32 |

| | | |
|---|---|----|
| d. | The supplementary role played by the parties as regards the pleading of foreign law | 37 |
| 3. | The ascertainment of the content of foreign law | 38 |
| a. | The role played by the court and the parties as regards the ascertainment of the content of foreign law | 38 |
| i) | Countries Endorsing the legal nature of foreign law | 39 |
| ii) | Countries Endorsing the factual nature of foreign law | 45 |
| iii) | Countries Endorsing the hybrid nature of foreign law | 47 |
| b. | The means used to ascertain the content of foreign law | 48 |
| i) | EU Member States awarding legal condition to foreign law | 49 |
| ii) | EU Member States awarding factual condition to foreign law | 53 |
| iii) | EU Member States awarding hybrid condition to foreign law | 55 |
| iv) | Some conclusions | 56 |
| c. | Existence and application of bilateral/multilateral conventions as regards foreign law | 56 |
| d. | Proof of the content of foreign law and legal aid | 57 |
| i) | EU Member States awarding legal condition to foreign law | 58 |
| ii) | EU Member States awarding either factual or hybrid condition to foreign law | 59 |
| e. | When is the content of foreign law deemed sufficiently ascertained? | 59 |
| 4. | The application of foreign law | 64 |
| a. | How is foreign law applied by the judge? | 64 |
| b. | What happens in those cases the court considers that the content of foreign law has not been ascertained? | 67 |
| c. | Refusal of application of foreign law | 73 |
| 5. | May the application of foreign law be reviewed by the courts? | 75 |
| III. The Application of Foreign Law by Non-Judicial Authorities in Europe | | |
| 1. | Introduction | 79 |
| 2. | The meaning of “non-judicial authorities” regarding the application of foreign law | 81 |
| 3. | Non-judicial authorities and the application of foreign law | 83 |
| 4. | The role played by the parties and non-judicial authorities regarding the application of foreign law | 87 |
| 5. | Consequences of the lack of ascertainment of the content of foreign law | 89 |
| 6. | Some conclusions | 89 |
| IV. Final Remarks | | |
| | | 90 |
| “Principles for a Future EU Regulation on the Application of Foreign Law (“The Madrid Principles”) | | |
| | | 95 |

Chapter 2

Austria and Germany

| | |
|--|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. <i>Ex officio</i> ascertainment of foreign law | 101 |
| a. General rule | 101 |
| b. Legal reality | 102 |
| c. Gapfilling | 103 |
| 2. Modifications of the principle of <i>iura novit curia</i> | 104 |
| 3. Role of the parties | 105 |
| 4. Means of ascertainment used by the court | 105 |
| 5. Sufficient proof | 107 |
| 6. In case foreign law cannot be ascertained: application of the <i>lex fori</i> | 108 |
| 7. Review of judgments rendered on the basis of foreign law | 110 |
| 8. Costs | 112 |
| II. Application of Foreign Law by Non-Judicial Authorities | 113 |
| III. Evaluation of the Austrian/German rule | |
| 1. Broad acceptance of the <i>ex officio</i> approach | 113 |
| 2. Remaining questions | 114 |

Baltic Countries

| | |
|--|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 119 |
| 2. Nature of foreign law | 120 |
| 3. The role of the court and parties regarding the pleading and proof of foreign law | 121 |
| 4. When and how foreign law is deemed proved | 123 |
| 5. Grounds for rejecting the application of foreign law | 124 |
| 6. Possibilities to review judgment rendered on the basis of foreign law | 125 |
| 7. Conventions regarding the application of foreign law | 127 |
| II. Application of Foreign Law by Non-Judicial Authorities | 127 |

Belgium

| | |
|---|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. Nature of foreign law in Belgium | 129 |
| 2. Pleading and proof of foreign law: role of the parties and the judge | 131 |
| 3. Means of ascertainment of foreign law | 133 |

Table of Contents

| | |
|---|------------|
| 4. When and how foreign law is deemed established in time? | 134 |
| 5. How does a court apply foreign law? | 135 |
| 6. How can gaps be filled and what happens in case of lack of ascertainment of foreign law? | 136 |
| 7. When and how may the application of foreign law be rejected by the court? | 137 |
| 8. Review of the judgment rendered on the basis of foreign law | 137 |
| II. Application of Foreign Law by Non-Judicial authorities | 139 |
| | |
| Bulgaria | |
| I. Introduction | 145 |
| II. Legal Rules on Application of Foreign Law | |
| 1. Code of Private International Law | 146 |
| 2. International Conventions on proof of foreign law | 147 |
| III. Application of Foreign Law by Judicial Authorities | |
| 1. Legal nature of foreign law | 147 |
| 2. The principle " <i>iura novit curia</i> " | 148 |
| 3. Pleading and proof of foreign law | 149 |
| 4. Lack of proof of foreign law | 151 |
| 5. Costs for ascertainment of the foreign law | 152 |
| 6. Appeal based on the insufficient or incorrect application/ interpretation of foreign law | 153 |
| 7. Rejection of application of foreign law | 154 |
| IV. Main Features of the Application of Foreign Law by Non-Judicial Authorities | |
| 1. Non-judicial authorities applying foreign law | 154 |
| 2. Application of foreign law by non-judicial authorities | 154 |
| 3. Pleading and proof of foreign law by non-judicial authorities | 159 |
| V. Conclusion | 159 |

Cyprus

| | |
|---------------------------------|------------|
| I. General Overview | 161 |
| II. Pleading Foreign Law | 162 |
| III. Proving Foreign Law | 164 |

| | |
|--------------------------------------|-----|
| IV. The Role of the Trial Judge | 166 |
| V. Failure to Prove Foreign Law | 168 |
| VI. The Right to Review Foreign Law | 170 |
| VII. Review of Foreign Law on Appeal | 170 |
| VIII. Concluding Remarks | 171 |

Czech Republic and Slovak Republic

| | |
|--|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. General introduction | 173 |
| 2. Brief history of legal regulation | 174 |
| 3. Fundamental principles of the current legal regulation regarding the application of foreign law | 175 |
| a. Duty to apply foreign law | 175 |
| b. Foreign law is treated as law | 175 |
| c. The principle “ <i>iura novit curia</i> ” and the duty to ascertain the content of foreign law | 176 |
| d. Application of foreign law | 176 |
| e. Exceptions | 176 |
| 4. Ascertaining of the content of foreign law | 177 |
| 5. Application of the <i>lex fori</i> instead of foreign law | 179 |
| 6. Review of the judgment rendered on the basis of foreign law | 181 |
| II. Application of Foreign Law by Non-Judicial Authorities | |
| 1. General introduction | 181 |
| 2. Review of the decision rendered on the basis of foreign law | 182 |

France

| | |
|---|-----|
| I. Introduction | 185 |
| II. The Application of Foreign Law by Judicial Authorities | |
| 1. The introduction of foreign law in the case | 186 |
| a. The ubiquitous distinction of available and unavailable rights | 187 |
| b. The mandatory character of the choice of law rule when unavailable rights are involved | 188 |
| c. The optional application of the choice of law rule when available rights are involved | 188 |
| 2. The ascertainment of foreign law | 189 |
| a. The burden of proof | 190 |

Table of Contents

| | | |
|-------------|--|-----|
| b. | The available modes of proof | 190 |
| c. | The interpretation of foreign sources | 192 |
| d. | Failure to establish foreign law | 192 |
| 3. | The exclusion of foreign law on the ground of public policy | 193 |
| a. | The French doctrine of “ <i>ordre public international</i> ” | 193 |
| b. | The activation of the public policy mechanism | 194 |
| 4. | Wrongful application of foreign law | 195 |
| a. | The theory of equivalence | 195 |
| b. | The grounds of the review of appellate decisions by the <i>Cour de cassation</i> | 195 |
| | | |
| III. | The Application of Foreign Law by Non-Judicial Authorities | |
| 1. | The introduction of foreign law in the case | 197 |
| 2. | The ascertainment of foreign law | 197 |
| 3. | The exclusion of foreign law | 198 |

Greece

| | | |
|--------------|--|-----|
| I. | Introduction | 201 |
| II. | Historical Background: The Treatment of Foreign Law Under the Code of Civil Procedure of 1834 | 201 |
| III. | Legal Nature of Foreign Law | 203 |
| IV. | The Judicial Treatment of Foreign Law | 203 |
| V. | Proof of Foreign Law | 205 |
| VI. | The Consequences of the Failure to Prove Foreign Law | 207 |
| VII. | Judicial Control | 209 |
| VIII. | Public Policy | 210 |

Hungary

| | | |
|-----------|---|-----|
| I. | Application of Foreign Law by Judicial Authorities | |
| 1. | General overview | 213 |
| 2. | Legal nature of foreign law in Hungary | 214 |
| 3. | The role played by the judge and by the parties as regards proof of foreign law and the ascertainment of the content of foreign law | 215 |
| 4. | When and how is foreign law deemed proved? | 217 |
| 5. | How is foreign law applied by the court and how are gaps filled? | 217 |

| | |
|---|-----|
| 6. When and how may the application of foreign law be rejected by the court? | 217 |
| 7. Possibilities of reviewing the judgment rendered on the basis of foreign law by upper courts | 220 |
| 8. Is there any bilateral/multilateral convention as regards the proof of foreign law applicable? How do they work in practice? | 221 |
| II. Application of Foreign Law by Non-Judicial Authorities | |
| 1. General overview | 223 |
| 2. Specific features (differences and identities compared with judicial authorities) | 225 |
| a. Application of foreign law in notarial proceedings | 225 |
| i) Probate proceedings | 225 |
| ii) Drafting of wills | 227 |
| b. Application of foreign law before court proceedings in family cases | 227 |
| i) Proceedings of the registrar for contracting marriage | 228 |
| ii) Registration of non-marital cohabitation | 228 |
| iii) International adoption | 229 |
| iv) Paternal recognition | 229 |

Ireland

| | |
|--|-----|
| I. Introduction | 231 |
| II. Legal or Factual Nature Granted to Foreign Law in Ireland | 231 |
| III. The Role Played by the Judge and by the Parties as Regards the Plea and/or proof of Foreign Law and the Means Referred to as Regards the Ascertainment of its Content | 232 |
| IV. The Specific Case of Canon Law Before Irish Courts | 234 |
| V. Final Remarks | 235 |

Italy

| | |
|--|-----|
| I. General Overview | 237 |
| II. The Nature of Foreign Law: Article 14 of the Italian Reform of PIL | 239 |
| III. The Role Played by the Judge and by the Parties | 242 |
| IV. The Ascertainment of the Content of Foreign Law | 244 |

| | |
|---|-----|
| V. The Proof of the Content of Foreign Law | 245 |
| VI. Problems on the Application of Foreign Law | 246 |
| VII. Reasons for Rejecting the Application of Foreign Law | 248 |
| VIII. The Review of Judgements Rendered in Application of Foreign Law | 249 |
| IX. International Conventions | 249 |

Luxembourg

| | |
|---|-----|
| I. Preliminary Remarks | 255 |
| II. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 255 |
| 2. Nature of foreign Law | 256 |
| 3. The role played by judges and parties concerning the pleading and proof of foreign law | 256 |
| 4. The proper moment to prove foreign law, the object and means of proof | 257 |
| 5. Applying and rejecting the application of foreign law | 260 |
| 6. Possibilities of review by Upper Courts | 260 |
| 7. International conventions on proof of foreign law | 260 |
| III. Application of Foreign Law by Non-judicial Authorities | |
| 1. General overview | 261 |
| 2. Divergences among judicial and non-judicial systems | 261 |
| IV. Some Final Comments | 261 |

Malta

| | |
|---|-----|
| I. Introduction | 265 |
| II. Legal or Factual Nature Granted to Foreign Law | 266 |
| III. Pleading Foreign Law and Ascertaining its Content | 266 |
| IV. The Means Referred to by the Court and/or by the Parties as Regards the Ascertainment of the Content of Foreign Law | 269 |
| V. Failure to Proof Foreign Law | 270 |

| | |
|---|-----|
| VI. Rejection of the Application of Foreign Law by the Court | 271 |
| VII. Possibilities of Review of the Judgment rendered on the basis of Foreign Law by Courts of Second Instance Superior Courts | 272 |
| VIII. Bilateral/Multilateral Conventions Regarding the Proof of Foreign Law | 273 |
| IX. Final Remarks | 273 |

Poland

| | |
|---|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 275 |
| 2. Legal nature attributed to foreign law | 276 |
| 3. The role played by the judge and by the parties as regards the plea and proof of foreign law | 279 |
| 4. The means by which the content of foreign law may be ascertained. Cooperation between the court and the parties | 283 |
| 5. The sufficient determination of the content of foreign law in a reasonable time | 286 |
| 6. Rejecting the application of foreign law | 287 |
| 7. Possibilities of review of the judgment rendered on the basis of foreign law | 289 |
| 8. Multilateral and bilateral conventions as regards the proof of foreign law | 290 |
| II. Application of Foreign Law by Non-Judicial Authorities | |
| 1. General overview | 291 |
| 2. Similarities and differences between the system of application of foreign law by judicial and non-judicial authorities | 292 |
| III. Final Comments and Conclusions | 294 |

Portugal

| | |
|---|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 301 |
| 2. Legal or factual nature granted to foreign law in the specific country dealt with | 302 |
| 3. The role played by the judge and by the parties as regards the plea and/or proof of foreign law and the possibility/obligation of cooperation between them as regards these two issues | 303 |
| 4. The means referred to by the court and/or by the parties as regards the ascertainment of the content of foreign law | 303 |

| | |
|--|-----|
| 5. When and how is foreign law deemed proved? Meaning of proof in a reasonable time | 304 |
| 6. How is foreign law applied by the court? How are gaps filled? | 306 |
| 7. When and how may the application of foreign law be rejected by the court? | 307 |
| a. Public policy (<i>ordre public</i>) | 307 |
| b. Mandatory rules | 309 |
| c. Unconstitutionality | 310 |
| 8. Possibilities of review of the judgment rendered on the basis of foreign law by Upper Courts | 311 |
| 9. Is there any Bilateral/Multilateral convention as regards the proof of foreign law applicable? How do they work in practice? | 311 |
| II. Application of Foreign Law by Non-Judicial Authorities | |
| 1. General overview | 312 |
| 2. In case any specific system exists as regards this issue, which are the main similarities/differences in relation with the system of application of foreign law by judicial authorities | 313 |
| Romania | |
| I. Short Introduction | 317 |
| II. Application of Foreign Law by Judicial Authorities | |
| 1. Legal nature granted to foreign law in Romania | 318 |
| 2. The role played by the judge and the parties as regards the pleading and/or proof of foreign law and the possibility/obligation of cooperation between them as regards these two issues | 319 |
| a. Application | 319 |
| b. Ascertainment of the content of foreign law | 319 |
| 3. The means referred to by the court and/or the parties as regards the ascertainment of the content of foreign law | 320 |
| 4. When and how foreign law is deemed proved in a reasonable time? | 321 |
| 5. How is foreign law applied by the court? How are gaps filled? | 321 |
| 6. When and how may the application of foreign law be rejected by the court? | 322 |
| 7. Possibilities of review of the judgment rendered on the basis of foreign law by Upper Courts | 322 |
| 8. Existing bilateral/multilateral conventions as regards the proof of foreign law and the way they work | 323 |
| III. Application of Foreign Law by Non-Judicial Authorities | |
| 1. General overview | 324 |
| 2. Which are the main similarities/differences regarding the system of application of foreign law by judicial authorities? | 324 |

Scandinavian Countries

| | |
|--|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 327 |
| 2. Legal and factual nature of foreign law | 329 |
| 3. The role played by the judge or the parties | 330 |
| 4. The means referred to by the court and/or by the parties as regards the ascertainment of the content of foreign law | 331 |
| 5. When and how is foreign law deemed proved? Meaning of proof in a reasonable time | 332 |
| 6. How is foreign law applied by the court? How are gaps filled? | 334 |
| 7. When and how may the application of foreign law be rejected by the court? | 335 |
| 8. Possibilities of review of the judgment rendered on the basis of foreign law by Upper Courts | 337 |
| 9. Bilateral and multilateral agreements | 337 |
| II. Application of Foreign Law by Non-Judicial Authorities | |
| 1. General overview | 337 |
| 2. Special characteristics | 341 |
| a. Ombudsman institution | 341 |
| b. Appeal procedure | 342 |

Slovenia

| | |
|---|-----|
| I. Introduction | 345 |
| II. Foreign Law – Legal Nature and Main Features | 345 |
| III. Pleading, Proving and Applying Foreign Law | |
| 1. Pleading and proving foreign law before judicial and non-judicial authorities | 347 |
| 2. The nature of the conflict of laws rules | 349 |
| 3. The role of the parties | 349 |
| 4. Costs concerning the application of the foreign law | 350 |
| 5. Assistance on the application of foreign law by the Ministry of Justice | 350 |
| 6. Legal remedies in case of non-application or misapplication of the foreign law | 351 |
| 7. The foreign law and provisions which effects are contrary to the domestic public order | 352 |
| IV. International Commitments on the Basis of International Conventions | 353 |
| V. Conclusion | 353 |

Spain

| | |
|---|-----|
| I. Introduction | 355 |
| II. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 356 |
| 2. The “hybrid” character granted to foreign law | 357 |
| 3. The role played by judges and parties concerning the pleading and proof of foreign law | 358 |
| 4. The proper moment to prove foreign law, means and object of proof | 360 |
| a. The proper moment to prove foreign law | 361 |
| b. Means of proof of foreign law | 361 |
| c. The object of proof | 362 |
| 5. Assessing the final application or rejection of foreign law | 363 |
| 6. Possibilities of review by upper courts | 364 |
| 7. International conventions on proof of foreign law | 366 |
| III. Application of Foreign Law by Non-judicial Authorities | |
| 1. General overview | 368 |
| 2. Divergences between judicial and non-judicial authorities regarding the application of foreign law | 369 |
| 3. The consequences of the lack of proof of foreign law | 371 |
| IV. Some Final Remarks | 372 |

The Netherlands

| | |
|--|-----|
| I. Introduction | 377 |
| II. The Dutch Approach towards the Application of Foreign Law | |
| 1. General overview – the legal nature of foreign law | 377 |
| 2. The role played by the judge and the parties and the means as regards the ascertainment of the content of foreign law | 380 |
| 3. The application of foreign law and the consequences of the lack of proof of foreign law | 383 |
| 4. Conventions | 384 |
| 5. Application controls | 386 |
| III. The Future – the Process of Codification of Dutch Private International Law | 388 |

United Kingdom

| | |
|--|-----|
| I. Application of Foreign Law by Judicial Authorities | |
| 1. General overview | 391 |
| 2. Legal or factual nature granted to foreign law in the specific country dealt with | 392 |
| 3. The role played by the judge and by the parties as regards the plea and/or proof of foreign law and the possibility/obligation of co-operation between them as regards these two issues | 393 |
| a. Role of the parties | 393 |
| b. Role of the judge | 395 |
| 4. The means referred to by the court and/or by the parties as regards the ascertainment of the content of foreign law | 397 |
| 5. When and how foreign law is deemed proved? Meaning of proof in a reasonable time | 398 |
| 6. How is foreign law applied by the court? How are gaps filled? | 400 |
| a. England and Wales | 400 |
| b. Scotland | 401 |
| c. Northern Ireland | 402 |
| 7. Failure to prove foreign law | 402 |
| 8. When and how may the application of foreign law be rejected by the court? | 404 |
| 9. Possibilities of review of the judgment rendered on the basis of foreign law by Upper Courts | 404 |
| 10. Is there any bilateral/multilateral convention as regards the proof of foreign law applicable? How do they work in practice? | 405 |
| II. Application of Foreign Law by Non-Judicial Authorities | |
| 1. The notary public | 406 |
| 2. General Register Office | 407 |
| III. Summary | 407 |