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ÉTUDE DE FAISABILITÉ SUR L'ADMINISTRATION DU DROIT ÉTRANGER TABLEAUX RÉSUMANT LE STATUT ET L'ACCÈS AU DROIT ÉTRANGER DANS UN ÉCHANTILLON DE RESSORTS

préparés par le Bureau Permanent avec l'assistance d'experts, dont certains ont participé à la réunion des 23 et 24 février 2007

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FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW SUMMARY TABLES ON THE STATUS OF AND ACCESS TO FOREIGN LAW IN A SAMPLE OF JURISDICTIONS

prepared by the Permanent Bureau with the assistance of experts, some of which attended the 23-24 February meeting of experts

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ARGENTINA	
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II. Ascertaining foreign law: (a) who and for which issues?	• Parties must prove foreign law. Courts may ascertain relevant foreign law when parties fail to.[3]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is a matter of fact[4] treated as a "notorious fact" in doctrinal sources.[5] • There are no limitations on the means of ascertaining foreign law:[6] testimony of law professors, foreign or Argentine attorneys; authenticated copies of legal dispositions; doctrine; jurisprudence; and, reports from diplomatic or consular representatives are all admissible forms of evidence.[7] • Proving foreign law usually implies considerable delays and/or high costs.
III. Effects of failure to establish foreign law (substitution law)	• Failure to establish foreign law results in dismissal of the case, application of the *lex fori*,[8] or application of a law closely connected to the dispute.

[1] See *Estudios Espindola* c. *Bollati*, (E.D., 33-26) *Ocerin* c. *TAIM,* (unpublished – April 13, 1976, Juzgado Nacional de Primera Instancia en lo Comercial Nº13, presided by Judge A. Boggiano,) and *Deutsches Reisebüro* c. *Speter,* (L.L. 1984-D-563). See also relevant legislation.

[2] R.R. Balestra, *Manual de Derecho Internacional Privado: Parte General* (Buenos Aires: Abeledo-Perrot, 1988) at 124-125. See also relevant legislation, particularly, Article 377 of the *Código Procesal Civil y Comercial de la Nación,* which allows for judicial discretion in decisions as to when to ascertain the relevant foreign law, based on relative costs and delays. See also Civil Code Articles 1205-1214, which provide for choice of law in contracts. See also M. Jänterä-Jareborg, "Foreign Law in National Courts" (2003) 304 *Recueil des cours* 181 at 81, citing A. Boggiano, *Curso de derecho international privado* 4ª ed. (Buenos Aires: Abeledo-Perrot, 2000) at 346-354. See also A. Boggiano, *Derecho Internacional Privado* 3rd ed. (Buenos Aires: Abeledo-Perrot, 1991) at 446: Whether parties can override the conflict of laws rules is a question to be decided on a case-by-case basis.

[3] G.T. Yates, "Foreign Law Before Domestic Tribunals" (1978) 18 *Va. J. Int'l L.* 725 at 732. See also relevant legislation, particularly Article 377 of the *Código Procesal Civil y Comercial de la Nación.*

[4] The result is that judges may investigate and apply foreign law even if the parties have not invoked it. This "notorious fact" is defined as: *"la sentencia de fondo que con el máximo grado de probabilidad dictaría el juez extranjero sobre el particular sometido a su derecho en la hipótesis de que le hubiere tocado resolverlo".*

[5] See Note to Civil Code Article 13. Professor W. Goldsmith's widespread theory is reflected in Article 2 of the *Inter-American Convention on General Rules on Private International Law*. See also R.R. Balestra, *supra,* note 2 at 123-124. There is currently a trend toward making foreign law a matter of law: see M.S. Rodríguez, *"Hacia el abandono de la consideración fáctice del Derecho Extranjero en el ordenamiento argentino"* (2005) *Centro Argentino de Estudios Internacionales Programa Derecho Internacional,* online: < http:www.cael.com.ar >.

[6] G.T. Yates, *supra,* note 3 at 732. Depending on the subject matter of the case, some judges might even use electronic means to obtain information on the content of foreign law.

[7] In general, an academic degree or bar admission in the foreign State is required.

[8] G.T. Yates, *supra,* note 3 at 732.

IV. (a) Review of application of conflict of laws rule	• Review of an incorrect application of the conflict of laws rules is possible through ordinary appeal procedures, and in extraordinary circumstances, where a conflict rule has been disregarded arbitrarily or has been unreasonably selected, recourse to the National Supreme Court is available.[9]
IV. (b) Review of application of foreign law	• Doctrine suggests that foreign law is not subject to review,[10] but if its content is a matter of "*droit commun*" and does not involve a federal question it is subject to review by way of ordinary recourse of appeal. In extraordinary circumstances, involving questions about the application or interpretation of the foreign law under the terms of a treaty or convention, a federal question is raised and may invoke the jurisdiction of the National Supreme Court.
Treaties / Arrangements in force	• Bilateral conventions with Uruguay,[11] Brazil, France, Italy;[12] *Inter-American Convention on Proof of and Information on Foreign Law* and *Inter-American Convention on General Rules on Private International Law*;[13] *Tratados de Montevideo Derecho Internacional Privado 1889 y 1940 Protocolos Adicionales;*[14] *Decreto-ley7771/56 , Protocolo de Cooperación y Asistencia Jurisdiccional en Materia Civil Comercial, Laboral y Administrativa de Las Leñas* (Articles 28 to 30);[15] *Convenio sobre Información en Materia Jurídica respecto al Derecho Vigente y su Aplicación*[16]
Relevant Legislation	***CÓDIGO CIVIL*** ***Artículo 13***. La aplicación de las leyes extranjeras, en los casos en que este código la autoriza, nunca tendrá lugar sino a solicitud de parte interesada, a cuyo cargo será la prueba de la existencia de dichas leyes. Exceptúanse las leyes extranjeras que se hicieren obligatorias en la República por convenciones diplomáticas, o en virtud de ley especial. ***CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN.*** ***Artículo 377***. - Incumbirá la carga de la prueba a la parte que afirme la existencia de un hecho controvertido o de un precepto jurídico que el juez o el tribunal no tenga el deber de conocer. Cada una de las partes deberá probar el presupuesto de hecho de la norma o normas que invocare como fundamento de su pretensión, defensa o excepción. Si la ley extranjera invocada por alguna de las partes no hubiere sido probada, el juez podrá investigar su existencia, y aplicarla a la relación jurídica materia del litigio.

[9] See Moka S.A. v. Graiver, David s/sucesión, Argentine Supreme Court 07/03/2000, published in: JA 2000-III-234. Fallos 323:287.
[10] R.R. Balestra, *supra,* note 2 at 122-124.
[11] See *ibid.,* at 149, citing full text of *Ley 22.411 Convenio entre la República Argentina y la República Oriental del Uruguay sobre aplicación e información del Derecho extranjero Aprobación.*
[12] Brazil: Brasilia 1990, Articles 24 to 26, *Ley 24.108*; France: París 1991, Article 9, *Ley 24.107*; Italy: Roma, 1987, Article 8, *Ley 23.720*.
[13] Argentina ratified the *Inter-American Convention on Proof of and Information on Foreign Law* on 4 September 1987, *Ley 23.506*; *Ley 22.921*.
[14] *Montevideo 1889*, in force between Argentina, Bolivia, Paraguay, Peru and Uruguay and *Montevideo 19-3-1940*, in force between Argentina, Paraguay and Uruguay.
[15] In force between Member States of MERCOSUR and associated States.
[16] Brasilia 1972, in force between Argentina, Spain and Paraguay, L*ey 21.447*. This Convention was adopted in the *Segunda conferencia de Ministros de Justicia de los países hispano-luso americanos y Filipinas*, in Brasilia on 22 September 1972.

CANADA (CIVIL LAW)	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• "Judicial notice shall be taken of the law in force in Québec": In principle, this latter provision extends to the conflict of laws rules in force in Québec.[17] The application of the conflict rules is mandatory, as are the rules in the rest of the Civil Code of Québec (Art. 2807 C.c.Q.). The judge must apply the choice of law rule *ex officio* whether or not a party invokes it. However, since the Court cannot take judicial notice of foreign law unless it has been alleged, the parties can prevent the judge from applying foreign law (English law uses "pleaded", which seems to be a somewhat higher requirement).
II. Ascertaining foreign law: (a) who and for which issues?	• Judicial notice may be taken of the law of a foreign State, provided it has been pleaded by the parties. The Court may also require that proof be made of such law. • Before 1994, the approach taken was linked to the factual nature of foreign law, the result of which was that the judge could not take notice of foreign law and it had to be pleaded by the party who wished to rely upon it. This approach led to the application of the awkward presumption of identity of laws. • The approach taken after 1994 in the C.c.Q. tends to treat foreign law as law, not as fact, which permits, but does not oblige the Court to take, on its own initiative, judicial notice of the laws of foreign jurisdictions as long as foreign law has been pleaded. Once judicial notice is triggered, the judge plays an active role in finding the relevant law. • The rule has led to a conspiracy of silence, which allows the parties to prevent the judge from taking judicial notice of foreign law by not pleading it, not only when it is a matter only involving the parties, but also where third parties may be involved, such as issues of status and succession. • Exceptionally, the judge is obliged to take notice of foreign law.[18] • Judicial notice is a method of ascertainment that is not subject to the admissibility rules of evidence.

[17] J. Talpis & J.-G. Castel, "*Le Code civil du Québec – Interprétation des règles du droit international privé*", *La réforme du Code civil, Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec*, Sainte-Foy, P.U.L., 1993.

[18] See, for example, Articles 574 and 3092 C.c.Q in relation to adoption. The judge has to verify that the conditions for adoption have been complied with in the State of origin. A similar rule exists in relation to the placement of a child whose residence is outside Québec (Art. 568 C.c.Q.) and with regard to international child abduction (Art. 28 of the *Loi sur les aspects civils de l'enlèvement international et interprovincial d'enfants*, L.R.Q., c. A-23.01).

II. Ascertaining foreign law: *(b) (i) fact or law;* *(ii) means; and* *(iii) costs*	• Foreign law in Québec has a hybrid status depending whether the judge takes judicial notice of it (there is no obligation), to the extent that it has been pleaded by the parties, or the parties prove it as a matter of fact. • Although there is nothing specific in the C.c.Q., nothing prohibits the judge on his own motion from ascertaining the contents of the foreign legislation in any number of ways. • Where the Court requires that proof be made of such law, this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult: - It is possible to cross-examine the jurisconsult who is the author of the certificate.[19] - The judge cannot, without the consent of the parties, support his / her opinion on a certificate drawn up by a jurisconsult who would have testified before another judge in relation to another case.[20] • The party who invokes the application of foreign law must advance funds for the payment of the expert. The costs, including the expert's fees, are usually paid by the losing party.
III. Effects of failure to establish foreign law (substitution law)	• Where foreign law has not been pleaded or its content cannot be established, the Court applies the law in force in Québec.
IV. (a) Review of application of conflict of laws rule	• If the characterisation was erroneous or the judge applied the wrong conflict rule or interpreted it wrongly, this can be reviewed on appeal.
IV. (b) Review of application of foreign law	• If the foreign law is proved by a party, the "fact approach" applies and its application is normally not subject to review. If the "law approach" applies, the application of foreign law is subject to review.
Treaties / Arrangements in force	• It seems that the British Law Ascertainment Act, 1859 is not being used in Québec, though it may be in force in Québec.

[19] *Desert Palace Inc. c. Ravary*, [1994] R.D.J. 277 (C.S.).
[20] *Droit de la famille* – 3403, [2000] R.J.Q. 2252 (C.A.). The certificate of jurisconsult on foreign law should be the same as that given in testimony – a statement of the content of law and not an opinion by the expert on how it should be applied to the case at hand.

Relevant Legislation	***CIVIL CODE OF QUÉBEC*** **2807.** Judicial notice shall be taken of the law in force in Québec. However, statutory instruments in force in Québec but not published in the *Gazette officielle du Québec* or in any other manner prescribed by law, international treaties and agreements applicable to Québec but not contained in a text of law, and customary international law, shall be pleaded. **2809.** Judicial notice may be taken of the law of other provinces or territories of Canada and of that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult. Where such law has not been pleaded or its content has not been established, the court applies the law in force in Québec.

CANADA (COMMON LAW)	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Foreign law must be specifically pleaded by the party relying on it.[21]
II. Ascertaining foreign law: (a) who and for which issues?	• Courts generally cannot take judicial notice of foreign law, and presume that it is the same as the *lex fori* unless the contrary is proved.[22] Federal and provincial legislation generally provide for judicial notice of the laws of other Canadian provinces and territories and of case law from other parts of Her Majesty's dominions. Judicial notice can sometimes extend to the laws of certain dominions of Her Majesty.
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Generally, foreign law is treated as a matter of fact. • The only means of ascertaining foreign law is through the testimony of a properly qualified witness.[23]
III. Effects of failure to establish foreign law (substitution law)	• If foreign law is not proved, it is assumed to be the same as the *lex fori.*[24]
IV. (a) Review of application of conflict of laws rule	• Review of the application of the conflict of laws rule is possible.
IV. (b) Review of application of foreign law	• The effect of foreign law upon the rights of the parties is a question of law.[25]
Treaties / Arrangements in force	• *British Law Ascertainment Act*[26]

[21] J.-G. Castel, *Canadian Conflict of Laws*, 3rd ed. (Toronto and Vancouver: Butterworths, 1994) at 147.
[22] *Ibid.*, at 148.
[23] *Ibid.*, at 147-149.
[24] *Ibid.*, at 153.
[25] *Ibid.*, at 153.
[26] British Law Ascertainment Act, 1859 (Imp.) 22 & 23 Vict., c. 63; R.S.O. 1897.

Relevant Legislation	***BRITISH LAW ASCERTAINMENT ACT*** ***Section 1.*** If in any action depending in any court within Her Majesty's dominions, it shall be the opinion of such court, that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the court is situated, it shall be competent to the court in which such action may depend to direct a case to be prepared setting forth the facts, as these may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such court or a judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another court, and shall pronounce an order remitting the same, together with the case, to the court in such other part of Her Majesty's dominions, being one of the superior courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the court whose opinion is to be obtained, praying such last-mentioned court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the court to which such petition shall be presented shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

CHINA	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• People's Courts must identify foreign law *ex officio* where foreign law applies by virtue of conflict rules.[27]
II. Ascertaining foreign law: (a) who and for which issues?	• People's Courts rely on parties to prove foreign law.[28] If the parties have serious difficulties in proving the foreign law, they may request the People's Courts to ascertain the foreign law *ex officio.*[29]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of fact. • Means of ascertaining relevant foreign law include referring to the Central authority of the foreign State (where a judicial assistance agreement is in place), the mission of the foreign State in China or the Chinese mission in the foreign State, Chinese or foreign legal experts, or the parties.[30] If the experts or parties agree on the content of foreign law, the People's Courts should confirm it. If the experts or parties disagree, the People's Courts must make up its own mind on the foreign law.[31] • There is no cost for ascertaining the foreign law through any of the means mentioned above. • Parties appoint, at their own expense, legal experts to ascertain the foreign law.
III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law results in the application of the *lex fori.*[32]

[27] Q. Kong & H. Minfei, "The Chinese Practice of Private International Law" (2002) 3 *Melbourne Journal of International Law* 415 at 425. See also R. Süβ, *Grundzüg des chinesischen Internationalen Privatrechts* (Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG, 1991) at 86. See also General Principles of the Civil Law, 1987, Article 142, available at < http://www.lawinfochina.com >. However, scholars and practitioners in China have different views on the nature of conflict of law rules: (a) mandatory, (b) optional and (c) combination, namely, the People's Courts must apply conflict of law rules *ex officio*, except in cases where doctrine of parties' autonomy applies.

[28] *Ibid.*, at 425. See also R. Süβ, *supra*, note 27 at 87.

[29] See the Supreme People's Court Conference Summary on "Adjudgement" Activities concerning Commercial and Maritime Matters with Foreign Elements, 2005, Article 51, Chinese edition available at < http://law1.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=78927 >.

[30] Q. Kong & H. Minfei, *supra* note 27 at 425. See also R. Süβ, *supra*, note 27 at 86. See also Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of Civil Law (for trial implementation), 1988, Article 193, available at < http://www.lawinfochina.com >. People's Courts more commonly require parties to ascertain the foreign law through legal experts.

[31] See the Supreme People's Court Conference Summary on "Adjudgement" Activities concerning Commercial and Maritime Matters with Foreign Elements, 2005, Article 52, Chinese edition available at < http://law1.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=78927 >. See also Article 193.

[32] *Ibid.*, at 426. See also R. Süβ, *supra*, note 27 at 88. See also relevant legislation. People's Courts are reluctant to apply foreign law over local law.

IV. (a) Review of application of conflict of laws rule	• Mistakes in the application of conflict of laws rules are subject to review.[33]
IV. (b) Review of application of foreign law	• Mistakes in the application of the foreign law are subject to review.[34]
Treaties / Arrangements in force	• Most bilateral judicial co-operation agreements between China and foreign States include provisions for the exchange of legal information.[35]
Relevant Legislation	***GENERAL PRINCIPLE OF THE CIVIL LAW, 1987***[36] ***Article 142.*** The application of law in civil relations with foreigners shall be determined by the provisions in this CHAPTER. ***CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, 1991*** ***Article 151.*** With respect to an appealed case, the people's court of second instance shall review the relevant facts and the application of the law ***Article 153.*** After hearing an appealed case, the people's court of second instance shall handle it respectively according to the conditions set forth below: (1) If the facts were clearly ascertained and the law was correctly applied in the original judgment, the appeal shall be rejected by judgment and the original judgment shall be sustained; (2) If the law was incorrectly applied in the original judgment, the judgment shall be amended according to law; (3) If in the original judgment the facts were incorrectly ascertained or were not clearly ascertained and the evidence was inconclusive, the judgment shall be rescinded and the case remanded by an order to the original people's court for retrial, or the people's court of second instance may amend the judgment after investigating and clarifying the facts; or (4) If in the original judgment a violation of the prescribed procedure may have affected the correctness of the judgment, the judgment shall be rescinded and the case remanded by an order to the original people's court for retrial. The parties may appeal against the judgment or order rendered in a retrial of their case. ***Article 262.*** In accordance with the international treaties concluded or acceded to by the People's Republic of China or on the principle of reciprocity, the people's courts of China and foreign courts may request each other's assistance in the service of legal documents, in investigation and collection of evidence or in other litigation actions. If any matter requested by a foreign court for assistance would impair the sovereignty, security or social and public interest of the People's Republic of China, the people's court shall refuse to carry it out.

[33] See relevant legislation.
[34] R. Süβ, *supra,* note 27 at 88. See also relevant legislation.
[35] *Ibid.*, at 87. See also relevant legislation. There are about forty bilateral agreements between China and other countries, including arrangements for judicial co-operation.
[36]All the translations in this part are taken from < http://www.lawinfochina.com >. Related legislation includes Article 178 (2): When hearing a foreign civil relationship, the People's Court shall apply the substantive law in accordance with the provisions of Chapter VIII of the General Principles of the Civil Law.

FINLAND	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• The Court shall in principle always apply the foreign law designated by the applicable choice of law rules. However, if neither party pleads that a foreign law is applicable, the Court may conclude that the parties have agreed, at least tacitly, that Finnish law shall apply, though the choice of law rules designate a foreign law. The parties can agree on the applicable law. If the parties do not invoke a foreign law, but the Court decides that a foreign law would be applicable, the Court shall draw the parties' attention to the question of applicable law. In this context the Court may, where appropriate, also ask the parties whether they have agreed or agree that Finnish law shall apply. • Foreign law must be applied and its contents ascertained *ex officio* in matters relating to Bills of Exchange and Cheques.
II. Ascertaining foreign law: (a) who and for which issues?	• Courts or litigants may ascertain the relevant foreign law.[37] The task of ascertaining the foreign law's content is normally delegated to the parties invoking its application; however, the Courts have sometimes taken measures of research on their own.[38]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of law;[39] however, as far as proof of foreign law is concerned, it is treated as a matter of fact. • Means of ascertaining the relevant foreign law are unlimited and include seeking assistance from the Ministry of Foreign Affairs;[40] using experts; and referring to statutory texts of the concerned provisions, relevant case law, and extracts from legal literature.[41] • Costs for ascertaining the foreign law can be covered by legal aid if deemed necessary.
III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law results in an application of the *lex fori.*[42]

[37] G.T. Yates, *supra* note 3 at 738. See also M. Jänterä-Jareborg, "Foreign Law in National Courts" (2003) 304 *Recueil des cours* 181 at 278 at 278, citing K. Buure-Hägglund, *"Tuomioistuimen velvollisuudesta soveltaa vieraan valtion lakia"*, *Lakimies*, 1977, pp. 365ff. and M. Jänterä-Jareborg, *Partsautonomi och efterlevande makes rättsställning*, pp. 385-388.

[38] M. Jänterä-Jareborg, M., *supra*, note 37 at 298, citing A. Philip, *Dansk international privat – og procesret*, p. 60; P. Arnt Nielsen, *International privat- og procesret*, p. 52; R. Koulu, *"Huomaamaton kansainvälinen sopimus – ulkomaisesta lainsäädännöstä saatavia tietoja koskeva eurooppalainen yleissopimus"*, Juhlajulkaisu J. Peltonen, pp. 158-163; J. Lappalainen, *Siviiliprosessioikeus II*, pp. 136-138; *Gaarders innføring i internasjonal privatrett*, p. 166.

[39] G.T. Yates, *supra*, note 3 at 738. See also relevant legislation.

[40] *Ibid.*, at 739. See also M. Jänterä-Jareborg, *supra*, note 37 at 298.

[41] M. Jänterä-Jareborg, *supra*, note 37 at 298.

[42] See relevant legislation.

IV. (a) Review of application of conflict of laws rule	• "Choosing the wrong choice of law rule or applying erroneously the (correct) applicable rule is application of forum law, to be assessed in the same way as erroneous application of domestic law."[43]
IV. (b) Review of application of foreign law	• A regional Court of Appeal, which is the second instance, may review, in addition to the factual findings of the lower Courts, the application of both domestic and foreign law. There is no appeal by right from the regional Courts of Appeal to the Supreme Court, which will re-examine an erroneous application of foreign law only where a judgment by the Supreme Court is found necessary as guidance for future cases.[44]
Treaties / Arrangements in force	• The European Convention on Information on Foreign Law (the "*London Convention*")[45]
Relevant Legislation	***CODE OF JUDICIAL PROCEDURE*** ***Chapter 17, Section 3***[46] (1) A fact that is notorious or known to the court *ex officio* need not be proven. In addition, no evidence need be presented on the contents of the law. If the law of a foreign state is to apply and the court does not know the contents of this law, the court shall exhort the party to present evidence on the same. (2) If, in a given case, it is specifically provided that the court is to obtain information on the contents of the foreign law applicable in the case, the specific provisions apply. (3) If, in a given case, foreign law should apply, but no information is available on its contents, Finnish law applies instead.

[43] M. Jänterä-Jareborg, *supra*, note 37 at 270-271.
[44] *Ibid.*, at 270-271. It goes without saying that the Supreme Court is – to say the least – reluctant to make precedents on the correct application of a foreign law. The Supreme Court may, however, grant leave to appeal if it is quite obvious that the application of the foreign law in the Court of Appeal was erroneous. After leave has been granted, the Supreme Court will, when deciding the merits, also re-examine the application of the foreign law.
[45] The *London Convention* entered into force in Finland on 5 October 1990.
[46] This unofficial translation is taken from the Ministry of Justice, Finland, online: < http://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf >.

FRANCE	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Where parties do not have "*libre disposition de leurs droits*",[47] Courts must apply conflict of laws rules and the relevant designated foreign law *ex officio* (regardless of the origin of the conflict of laws rule).[48] Where parties have the "libre disposition de leurs droits", parties may request the Court to apply the conflict of laws rules. The judge may also decide to apply the conflict of laws rule *ex officio* unless the parties have reached an agreement ("*accord procedural*") to prevent him from applying the foreign law.[49]
II. Ascertaining foreign law: (a) who and for which issues?	• "*Il incombe au juge français qui reconnaît applicable un droit étranger d'en rechercher, soit d'office, soit à la demande d'une partie qui l'invoque, la teneur, avec le concours des parties et personnellement s'il y a lieu, et de donner à la question litigieuse une solution conforme au droit positif étranger*"[50].
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is considered as law.[51] However, since it is foreign law, it has to be proven. • Means of ascertaining the relevant foreign law include seeking assistance from the parties, who provide *certificats de coutume;* referring to a Court-appointed expert; referring to the *Bureau de l'entreaide civile commerciale et internationale* or to the *Centre d'information et de renseignements juridiques internationaux;* using (extremely rarely) the *London Convention*; and, consulting foreign legislation, case-law and academic writings directly.[52] • The cost of establishing the content of foreign law is borne by the parties. Where the Court ascertains the content of the applicable foreign law, either through the information services of the Ministry of Justice or under a legal assistance convention, the establishment of the foreign law is free of costs. • Parties have to bear the cost of providing *certificats de coutume*, by far the most common method of establishing the content of foreign law. Legal aid can be obtained.

[47] It seems that this expression may be translated in English by "indefeasible rights" or "inalieable rights", see in this sense B. Fauvarque-Cosson, "Foreign Law Before the French Courts: The Conflicts of Law Perspective" in G. Canivet *et al*, eds, *Comparative Law Before the Courts* (London: British Institute of International and Comparative Law, 2004) at 5-6.

[48] *Ibid.*, at 5. See also P. Mayer & V. Heuzé, *Droit International privé*, 7th ed. (*Montchrestien Domat droit privé*, 2001) at 123 and Y. Loussouarn & P. Bourel, *Droit international privé*, 8th ed. (*Précis Dalloz*, 2004) at 315-318. See also Cass. Civ. 1, 6 May 1997, Bull. Civ. I, n°140; Cass. Civ. 1., 26 May 1999 *Mutuelles du Mans*, Bull. Civ., I, n 172, 113; Cass. Civ. 1, 14 June 2005, Bull. Civ. No 243.

[49] See *Rapport annuel de la Cour de cassation 2005, Quatrième partie, La jurisprudence de la Cour, L'application du droit communautaire et du droit international, Conflit de lois.* See also B. Fauvarque-Cosson, *supra,* note 47 at 6-7. See also Cass. Civ. 1, 6 May 1997, Bull. Civ. I, No 140.

[50] Civ.1, 28 June 2005 and Com., 28 June 2005, *Rev. crit. DIP* 2005 at 645.

[51] Civ.1, 13 January 1993, *Rev. crit. DIP* 1994 at 78.

[52] P. Mayer. & V. Heuzé, *supra,* note 48 at 123. See also S. Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford: Oxford University Press, 2004) at 162-163.

III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law results in the application of the *lex fori* ("*vocation subsidiaire de la lex for").*
IV. (a) Review of application of conflict of laws rule	• The Cour de cassation will strike down a judgment that has failed to apply the conflict of laws rule in matters in which the parties do not have the "*libre disposition de leurs droits".* It will also strike down a judgment that has made an incorrect application of the rule.
IV. (b) Review of application of foreign law	• As a rule, the Cour de cassation has refused to review the interpretation of foreign law.[53] However, the Cour de cassation may review a decision where insufficient reasons (*motivation*) have been provided for the interpretation of foreign law or where foreign law, although "*claire et précise*", has been distorted by the lower Courts[54].
Treaties / Arrangements in force	• The *London Convention*[55]
Relevant Legislation	***CODE CIVIL*** ***Article 3.*** *Les lois de police et de sûreté obligent tous ceux qui habitent le territoire.* *Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française.* *Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger.* ***NOUVEAU CODE DE PROCÉDURE CIVILE*** ***Article 8.*** Le juge peut inviter les parties à fournir les explications de fait qu'il estime nécessaires à la solution du litige.

[53] Cass. Civ., 11 Dec. 1951, Ghattas, *Rev. crit. DIP* 1953.83, comments Starck; Cass. Civ., *20 mars 1978*, *Rev. crit. DIP* 1979.837, Cass. Civ., 20 Dec. 2000, Bull. Civ. I, n°336, p. 217; Cass. Civ., *21 mars 2000*, *JDI* 2002.173, note Raimon.
[54] See for example, Cass. Civ., 21 Nov. 1961, *Montefiore c. Colonie du Congo Belge*, *Rev. crit. DIP* 1962.329, note Lagarde; Cass. Civ. 1st July 1997, *Africatours*, *Rev. Crit. DIP* 1998.292, note Muir Watt.
[55] The *London Convention* entered into force in France on 11 June 1972.

GERMANY	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Courts must introduce foreign law if the parties fail to,[56] except where parties contractually agree regarding applicable law, which is not always possible,[57] or the same result can be reached through an application of the *lex fori*.[58]
II. Ascertaining foreign law: (a) who and for which issues?	• Courts must ascertain relevant foreign law rules as they are applied in the foreign jurisdiction.[59]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of law.[60] • Means of ascertaining foreign law include referring to a Court-appointed expert;[61] consulting foreign statutes, doctrine and case-law directly; and, relying on parties or German academics (*e.g.* the Max Planck Institute of Hamburg).[62] • Although there is no fee imposed by the Court for the ascertainment of foreign law, expenses for experts are charged.[63] Petitions for information to foreign countries are also charged and may include an examination fee,[64] translation costs and costs imposed by the foreign country.[65] Fees for expert opinions are charged pursuant to the Justizvergütungs-und Entschädigungsgesetz ("JVEG"), legislation regulating the remuneration of experts, interpreters, lay judges, and witnesses. Rates of approximately 80-95 Euros per hour are permissible.[66]

[56] Section 293 *Zivilprozessordnung* (ZPO). BGH 20.03.1980, III ZR 151/79, (official collection) BGHZ 77, 32-45; H. Schack, *Internationales Zivilverfahrensrecht*, 4th ed. (München: Beck, 2006) at § 14 I, p. 220; G. Kegel & K. Schurig, *Internationales Privatrecht* 9th ed. (München: Beck, 2004) at § 15 I, p. 498; H.-J. Musielak & M. Huber, *Kommentar zur Zivilprozessordnung* 5th ed. (München: Vahlen, 2007) at § 293 ZPO, No 8.

[57] See *e.g.* Articles 14(2)-(4), 27(3), 29(1), 30(1), 40(1) *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (EGBGB).

[58] According to case law (*e.g.* BGH 25.01.1991, V ZR 258/89, NJW 1991, 2214), this rule only applies to courts exclusively reviewing points of law (*Revisionsgericht*) whereas appellate courts that also decide upon matters of fact (*Berufungsgericht*) have to decide upon the applicable law. See also S. Geeroms, *supra* note 52 at 43, 46-47; H. Schack, *supra,* note 56 at § 14 I, p. 220; G. Kegel & K. Schurig, *supra,* note 56 at § 15 I, p. 498.

[59] BGH 30.4.1992, IX ZR 233/90, BGHZ 118, 151-170. See also J. Kropholler, *Internationales Privatrecht* 6th ed. (Tübingen: Mohr Siebeck, 2006) at 215 (§ 31 III) and 644 (§ 59 I 1); H. Schack, *supra,* note 56 at § 14 I p. 221; G. Kegel & K. Schurig, *supra,* note 56 at § 15 II, pp. 498-503.

[60] H. Schack, *supra,* note 56 at § 14 I p. 221; G. Kegel & K. Schurig, *supra,* note 56 at § 15 II, pp. 498-503; J. Kropholler, *supra,* note 59 at § 59 I, p. 644.

[61] With respect to the qualification of the expert, the German Supreme Court has established in BGH 21.01.1991, II ZR 49/90, *IPRax* 1992, 324-326 that the court cannot exclusively rely on an expert without knowledge of the legal practice in the foreign State, who simply relies on available literature. Knowledge of the practice is also essential.

[62] H. Schack, *supra,* note 56 at § 14 II pp. 222-226. See also G. Kegel & K. Schurig, *supra,* note 56 at § 15 II, III, pp. 501-508; J. Kropholler, *supra,* note 59 at § 59 I, pp. 645-646, § 59 III, pp. 651-655.

[63] Nr.9013 table of fees of the GKG.

[64] Nr.200 table of fees of the JVKostO.

[65] Translation of H.-J. Musielak & M. Huber, *supra,* note 56 at No 14.

[66] Section 9 JVEG.

III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law results in an application of the *lex fori;* however, where the application of the *lex fori* yields an unsatisfactory result, the law designated by the next connecting factor of the conflict rule will be applied.[67]
IV. (a) Review of application of conflict of laws rule	• Since the conflict of laws rule is German law, its review is not restricted.[68]
IV. (b) Review of application of foreign law	• Review of the application of foreign law is generally prohibited by the Civil Procedure Code.[69] However, exceptions to the rule include cases where (i) German law applies by virtue of the *renvoi* principle (revisibility is limited to provision of the foreign law which orders *renvoi*); (ii) the foreign law in question has been retrospectively amended; (iii) the reasons for decision demonstrate that the lower Court applied its discretion incorrectly or not at all; or, (iv) a specific provision of the foreign law was not applied where it should have been.
Treaties / Arrangements in force	• Bilateral agreement with Morocco[70]; the *London Convention*[71]
Relevant Legislation	***GERMAN CIVIL PROCEDURE CODE*** **Section 293.** Das in einem anderen Staat geltende Recht, die Gewohnheitsrechte und Statuten bedürfen des Beweises nur insofern, als sie dem Gericht unbekannt sind. Bei Ermittlung 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. **Section 293.** The law which is in force in another state, customary law and by-laws require proof only to such extent as they are unknown to the Court. In the establishment of these legal norms, the Court is not limited to the evidence brought forward by the parties; it is empowered to make use of other sources of knowledge and to order whatever is necessary for the purpose of such utilization.[72]

[67] J. Kropholler, *supra,* note 59 at § 31 III 2, p. 217 –219; H. Schack, *supra,* note 56 at § 14 III, p. 227; G. Kegel & K. Schurig, *supra,* note 56 at § 15 V, pp. 512-513.
[68] BGH 02.10.1997, I ZR 88/95, BGHZ 136, 280 (286). See also H. Thomas & H. Putzo, *Zivilprozessordnung* 27th ed. (München: Beck, 2005) at § 545 ZPO, No 10.
[69] Section 545 ZPO. See also BGH 29.06.1987, II ZR 6/87, *IPRax* 1988, 228-229; G. Kegel & K. Schurig, *supra,* note 56 at § 15 IV, pp. 509-510.
[70] The bilateral agreement between Germany and Morocco, aiming to provide mutual legal aid and information, entered into force in 1994. See official German Federal Law Gazette, *Bundesgesetzblatt* (BGBl.) 1988 II 1054, 1994 II 1192.
[71] The *London Convention* entered into force in Germany on 19 March 1975.
[72] This translation is taken from G. Dannemann, *Establishing Foreign Law in a German Court,* online at < http://www.iuscomp.org/gla/literature/foreignlaw.htm >.

INDIA	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Parties must plead foreign law.[73]
II. Ascertaining foreign law: (a) who and for which issues?	• The party pleading foreign law must prove its relevant contents, though Courts may take judicial notice of relevant foreign law in certain circumstances.[74]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of fact. • Means of ascertaining relevant foreign law include expert testimony or judicial notice of foreign law published under the authority of government.[75]
Relevant Legislation	***EVIDENCE ACT, 1872*** ***Section 45. Opinions of experts.*** When the Court has to form and opinion upon a point of foreign law or of science or art, or as to identity of handwriting (Inserted by Act No. 5 of 1899) [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, (Inserted by Act No. 18 of 1872) [or in questions as to identity of handwriting] (Inserted by Act No. 5 of 1899) [or finger impressions] are relevant facts. Such persons are called experts. **Section 38. Relevancy of statements as to any law contained in law-books** When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant. **Section 84. Presumption as to collections of laws and reports of decisions** The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country and of every book purporting to contain reports of decisions of the courts of such country.

[73] P. Diwan & P. Dewarn, *Private International Law: Indian and English* 4th ed. (New Delhi, Deep & Deep Publications, 1998) at 122.
[74] *Ibid.*, at 122.
[75] *Ibid.*, at 122-125. See also relevant legislation.

ISRAEL	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Parties invoking foreign law must raise it.[76]
II. Ascertaining foreign law: (a) who and for which issues?	• Parties relying on foreign law must ascertain its relevant contents.[77]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of fact. • Means of ascertaining relevant foreign law include expert evidence only.[78] • The party that has to prove the foreign law covers the costs of its ascertainment. However, if the other party wishes to refute the opinion brought by the first (as would often be the case), it would have to submit an opposing expert opinion and incur the costs involved. If the Court appoints the expert, the expense will initially be paid by both parties. At the end of the trial, the Court will usually order the unsuccessful party, upon the application of the successful party, to pay the latter's costs.[79]
III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law results, in most cases, in an application of the *lex fori.*[80]
IV. (a) Review of application of conflict of laws rule	• The application of conflict of laws rules may be reviewed on appeal.
IV. (b) Review of application of foreign law	• The application of foreign law is not reviewed by the appellate Court. If the appellate Court has not been satisfied with the ascertainment of the foreign law, it may remand the case to the Court of first instance, instructing the latter to reconsider this matter on the basis of additional evidence.

[76] T. Einhorn, "Proof of Foreign Law in Israeli Courts – Getting the facts and fallacies straight" in T. Einhorn & K. Siehr, eds., *Intercontinental Cooperation Through Private International Law – Essays in Memory of Peter E. Nygh* (The Hague: T.M.C. Asser Press, 2004) at 109.
[77] *Ibid.*, at 113.
[78] *Ibid.*, at 110.
[79] Reg. 511ff., Civil Procedure Regulations.
[80] *Ibid.*, at 111.

JAPAN	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• The application of conflict of laws rules, which constitute a part of national law, is generally regarded as mandatory among academics and in court decisions.
II. Ascertaining foreign law: (a) who and for which issues?	• According to the majority of academics and court decisions, Courts must apply foreign law and ascertain its content *ex officio*. Assistance from the parties can, however, be requested. • A minor opinion maintains that parties should allege the application of foreign law and prove its content,[81] yet Courts have the discretion to apply the relevant foreign law *ex officio*.
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• The majority of authors and court decisions regard foreign law as "law" and assert that it is subject to *ex officio* examination (*cfr. supra* II (a)). • Means generally used to ascertain foreign law include, in domestic (family law) proceedings, referring to the foreign legislation[82] or documents submitted by the parties;[83] and, submitting inquiries to the General Secretariat of the Supreme Court.[84] Other means (calling expert witnesses,[85] submitting inquiries to Japanese or foreign authorities,[86] or to universities[87]) are seldom used in domestic proceedings. In principle, these means are also available in civil proceedings. • Where Courts examine foreign law *ex officio*, costs are allocated to the Courts. However, when parties call expert witnesses, the unsuccessful party usually incurs the expenses for the experts' fees.

[81] Some early court decisions took this position. See for example Fukuoka District Court (Kokura Branch Office), 22 January 1962; Osaka High Court, 6 April 1962.
[82] Generally, Family Court judges refer to translations of foreign legislation in examining the relevant foreign law *ex officio.* Family Court judges also rely on documents published by the General Secretariat of the Supreme Court, the Ministry of Justice and the Parliamentary Library, as well as on foreign literature and documents published in various journals. As far as South Korean, Chinese and Philippine laws are concerned, which are often applied by Family Courts, there are translations of legislation published in accessible media forms so that Family Courts generally have sufficient material to ascertain the relevant foreign law.
[83] Documents submitted by the parties (especially translations of foreign legislation) can also serve as the basis for a court decision once the judge effectuates a supplementary examination *ex officio* and verifies them as reliable. This method is often used in practice.
[84] Family Courts can make inquiries of the General Secretariat of the Supreme Court for information on the relevant foreign law. It is a common practice and the General Secretariat of the Supreme Court answers the inquiries based on documents available.
[85] Expert witnesses can be called by application of the interested party and approval by the Court. These means are, however, said to be rarely used in Family Court practice. Most authors write that Courts cannot summon expert witnesses on their own motion.
[86] When asked by Family Court, the General Secretariat of the Supreme Court can in turn make inquiries to the Ministry of Justice about documents on the relevant foreign law. Family Court can also inquire, through the General Secretariat of the Supreme Court, the Ministry of Foreign Affairs or foreign embassies in Tokyo. The Ministry of Foreign Affairs can also make further inquiries via diplomatic channels through Japanese embassies abroad. This method, however, is rarely used in practice since it is time-consuming and the result has often been unsatisfactory.
[87] Inquiries to the universities and other research institutions are generally not effectuated in practice.

III. Effects of failure to establish foreign law (substitution law)	• Five different solutions have been suggested in Japan where the relevant foreign law cannot be ascertained: (i) dismiss the claim; (ii) apply the *lex fori*; (iii) deduce rules which should be in force in the State concerned based on a "reasonableness" test;[88] (iv) refer to the legal systems which are most similar to the applicable foreign law;[89] and, (v) point to another law by way of subsidiary connecting factors.[90] • While the majority of court decisions have relied on (iii), other court decisions had recourse to (ii) or (iv). Academic opinions generally support (iv). Though (iii) and (iv) do not contradict with each other, but (iv) is held to be complementary to (iii) in seeking objective criteria for the "reasonableness" test.
IV. (a) Review of application of conflict of laws rule	• Errors in the application of the conflict of laws rules, like national law, can be reviewed by the Supreme Court.[91]
IV. (b) Review of application of foreign law	• Errors in the application of foreign law can be reviewed by the Supreme Court.[92]
Treaties / Arrangements in force	• None[93]

[88] In applying the "reasonableness" test, Courts consider the major principles of its legal system and / or the appropriateness of the solution.
[89] See, for example, Tokyo Family Court, 13 June 1963.
[90] For example, in family proceedings, failure to ascertain the national law of the party may result in the application of the law of his / her habitual residence.
[91] Under Article 394 of the Civil Procedure Code (Law No 29 of 21 April 1890), prior to the 1996 reform of the Civil Procedure Code, violation of laws and regulations, which obviously affected the decision, constituted grounds for appeal to the Supreme Court. Under the current Article 318, paragraph 1 of the Civil Procedure Code (Law No 109 of 26 June 1996), violation of laws and regulations constitutes a ground for certiorari, when the court decision in question concerns "important matters" on interpretation of laws and regulations, such as contradiction with the previous case-law. Failure to apply conflict of laws rules as a part of national law has generally constituted a ground for appeal or certiorari by the Supreme Court.
[92] Under the previous Article 394 of the Civil Procedure Code (*cfr.* note 11), failure to apply foreign law has been reviewed by the Supreme Court decision of 2 July 1981 and the Supreme Court decision of 25 February 1997. There has been no Supreme Court decision after the 1996 amendment of the Civil Procedure Code, but the majority of academics maintain that a violation of a foreign law may well be a ground for certiorari.
[93] According to Article 219 of the Civil Procedure Code of 1890 (prior to the reform of 1926), foreign law had to be proven by the parties, same as regional customary law, commercial customs and articles, but the judge was also allowed to examine the relevant foreign law *ex officio*, independently of whether the parties proved it or not. Since this provision was abrogated in 1926, questions concerning the application of foreign law are left to the interpretation and implementation by courts and academics. As an exception, Article 3 of the Regulation on the Recognition of and Assistance to Foreign Insolvency Proceedings provides that the Japanese Court, in ruling whether to recognise or assist foreign insolvency proceedings, may require the foreign trustee to provide information on the foreign law concerning the foreign proceedings.

MEXICO	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Courts must raise foreign law, though parties must invoke foreign law in commercial matters.[94]
II. Ascertaining foreign law: (a) who and for which issues?	• Courts must ascertain relevant foreign law except in commercial matters.[95]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of law except in commercial matters. • Means of ascertaining foreign law include judicial knowledge, use of expert witnesses, international co-operation, and reports from diplomatic or consular representatives.[96]
III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law probably results in the application of the *lex fori*.[97]
IV. (b) Review of application of foreign law	• Review of errors in law is possible.
Treaties / Arrangements in force	• *Inter-American Convention on Proof of and Information on Foreign Law*, the *London Convention*, bilateral treaty with Spain.[98]

[94] L.P. Castro & J.A. Silva Silva, *Derecho internacional privado: Parte especial* (Oxford University Press: México, 2006) at 553. See also L.P. Castro, *Derecho Internacional Privado, cuarta edición* (Harla: México, 1980) at 290. See also relevant legislation.
[95] *Ibid.*, at 553-554. See also L.P. Castro, *supra,* note 94 at 290.
[96] *Ibid.*, at 553-554. See also L.P. Castro, *supra,* note 94 at 290. See also relevant legislation.
[97] See relevant legislation. See also L.P. Castro, *supra* note 94 at 290.
[98] L.P. Castro & J.A. Silva Silva, *supra,* note 94 at 555. For reference to bilateral treaty with Spain of 1 December 1984, see A.-L. Calvo Caravaca & J. Carrascosa González, "Proof of Law in the new Spanish Civil Procedure Code 1/2000" (2005) 2 *IPRax* 170 at 172. Mexico ratified the *Inter-American Convention on Proof of and Information on Foreign Law* on 9 March 1983. The *London Convention* entered into force in Mexico in 22 May 2003.

Relevant Legislation	***CÓDIGO CIVIL FEDERAL*** ***Artículo 14.*** En la aplicación del derecho extranjero se observará lo siguiente: I. Se aplicará como lo haría el juez extranjero correspondiente, para lo cual el juez podrá allegarse la información necesaria acerca del texto, vigencia, sentido y alcance legal de dicho derecho; II. Se aplicará el derecho sustantivo extranjero, salvo cuando dadas las especiales circunstancias del caso, deban tomarse en cuenta, con carácter excepcional, las normas conflictuales de ese derecho, que hagan aplicables las normas sustantivas mexicanas o de un tercer estado; III. No será impedimento para la aplicación del derecho extranjero, que el derecho mexicano no prevea instituciones o procedimientos esenciales a la institución extranjera aplicable, si existen instituciones o procedimientos análogos; IV. Las cuestiones previas, preliminares o incidentales que puedan surgir con motivo de una cuestión principal, no deberán resolverse necesariamente de acuerdo con el derecho que regule a esta última; y V. Cuando diversos aspectos de una misma relación jurídica estén regulados por diversos derechos, éstos serán aplicados armónicamente, procurando realizar las finalidades perseguidas por cada uno de tales derechos. Las dificultades causadas por la aplicación simultánea de tales derechos se resolverán tomando en cuenta las exigencias de la equidad en el caso concreto. Lo dispuesto en el presente artículo se observará cuando resultare aplicable el derecho de otra entidad de la Federación. ***Artículo 15.*** No se aplicará el derecho extranjero: I. Cuando artificiosamente se hayan evadido principios fundamentales del derecho mexicano, debiendo el juez determinar la intención fraudulenta de tal evasión; y II. Cuando las disposiciones del derecho extranjero o el resultado de su aplicación sean contrarios a principios o instituciones fundamentales del orden público mexicano. ***CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES*** ***ARTICULO 86.*** Sólo los hechos estarán sujetos a prueba, así como los usos o costumbres en que se funde el derecho. ***ARTICULO 86 Bis.*** El tribunal aplicará el derecho extranjero tal como lo harían los jueces o tribunales del Estado cuyo derecho resultare aplicable, sin perjuicio de que las partes puedan alegar la existencia y contenido del derecho extranjero. Para informarse del texto, vigencia, sentido y alcance del derecho extranjero, el tribunal podrá valerse de informes oficiales al respecto, los que podrá solicitar al Servicio Exterior Mexicano, así como disponer y admitir las diligencias probatorias que considere necesarias o que ofrezcan las partes. ***Código de Comercio*** ***Artículo 1197.*** Solo los hechos están sujetos a prueba: el derecho lo estará únicamente cuando se funde en leyes extranjeras: el que las invoca debe probar la existencia de ellos y que son aplicables al caso.

THE NETHERLANDS	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Courts must determine and apply foreign law *ex officio*.[99]
II. Ascertaining foreign law: (a) who and for which issues?	• Courts must ascertain relevant foreign law, but are allowed to seek advice from the parties. Courts are not bound by the opinion / interpretation of parties regarding the content of foreign law; parties need not prove the content of the relevant foreign law in the event of a defended action ("*bij tegenspraak*").[100]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of law according to Mostermans,[101] and is between fact and law according to Strikwerda.[102] • Means of ascertaining foreign law include using a Court-appointed expert or party-appointed experts; judicial knowledge; seeking assistance from the International Legal Institute in The Hague, the T.M.C. Asser Institute for International Law; and consulting foreign legislation, case-law and academic writings directly.[103] • Where judicial knowledge is used or parties are ordered to provide information regarding the content of the foreign law, the Court incurs the costs of ascertaining the foreign law. However, where an expert is used, costs will be borne by the unsuccessful party. Where the *London Convention* is used, costs for ascertaining the relevant foreign law will be borne by the replying Member State.
III. Effects of failure to establish foreign law (substitution law)	• There is no uniform Court practice; failure to establish foreign law may lead to: (i) refusal of claim or request; (ii) application of law that seems similar (in sense of time and place); (iii) application of other foreign law that is also related to the claim, the request or the legal relations between the parties; (iv) application of principles of law that are accepted internationally; or (v) application of the *lex fori.*[104]

[99] P.M.M. Mostermans, "Optional Facultative Choice of Law? Reflections From a Dutch Perspective" (2000) *NILR* 393 at 398. See also Article 25 Dutch Code of Civil Procedure ("DCCP"); HR 4 June 1915 W1915, 9871, HR 8 April 1927 NJ 1927, 1110, HR 22 February 2002 NJ 2003, 483, *Hof Den Bosch* 30 March 2004 NIPR 2004, 221.
[100] L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* 8th ed. (Deventer: Kluwer, 2005) at 35-38, citing Rb Rotterdam 10 October 1996, NIPR 1997, nr 108; Rb Rotterdam 13 February 1997 NIPR 1997, nr 227 and Rb Den Haag 7 April 2000 NIPR 2000, 182.
[101] P.M.M. Mostermans, *supra,* note 99 at 398.
[102] L. Strikwerda, *supra,* note 100 at 35-38.
[103] S. Geeroms, *supra,* note 52 at 156.
[104] L. Strikwerda, *supra*, note 100 at 35-38.

IV. (a) Review of application of conflict of laws rule	• Dutch Supreme Court ("*Hoge Raad*") may review the application of the Dutch conflict of laws rule.[105]
IV. (b) Review of application of foreign law	• Clear legislation prohibits direct review of application of foreign law, though *Hoge Raad* may review decisions where an inadequate motivation for the application of foreign law is provided.[106]
Treaties / Arrangements in force	• The *London Convention*[107]
Relevant Legislation	***EERSTE BOEK. DE WIJZE VAN PROCEDEREN VOOR DE RECHTBANKEN, DE HOVEN EN DE HOGE RAAD*** ***Artikel 25.*** De rechter vult ambtshalve de rechtsgronden aan. ***WET OP DE RECHTERLIJKE ORGANISATIE (Wet RO)*** ***Artikel 79*** **1.** De Hoge Raad vernietigt handelingen, arresten, vonnissen en beschikkingen: a. wegens verzuim van vormen voorzover de niet-inachtneming daarvan uitdrukkelijk met nietigheid is bedreigd of zodanige nietigheid voortvloeit uit de aard van de niet in acht genomen vorm; b. wegens schending van het recht met uitzondering van het recht van vreemde staten. **2.** Feiten waaruit het gelden of niet gelden van een regel van gewoonterecht wordt afgeleid, worden voorzover zij bewijs behoeven, alleen op grond van de bestreden beslissing als vaststaande aangenomen.

[105] See also HR 19 January 1968 NJ 1968, 112, HR 4 April 1986 NJ 1987, 678 and HR 28 January 2005 RvdW 2005, 20.
[106] P.M.M. Mostermans, *supra,* note 99 at 399. See also Article 79 Code on Judicial Organisation ("*Wet op de Rechterlijke Organisatie*"). See also HR 31 May 1985 NJ 1985, 717, HR 3 March 1989 NJ 1990, 688 and HR 13 July 2001 NJ 2002, 215 and HR 17 June 2005, LJN: AS9035.
[107] The *London Convention* entered into force in the Netherlands on 2 March 1977. If the court uses the *London Convention*, the Court has to formulate the request for information in consultation with the parties (Art. 67 DCCP) and, upon receipt of the answers, allow them to give their opinion (Art. 68 DCCP).

PANAMA	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Courts must raise foreign law *ex officio*.[108] However, the parties may also invoke foreign law (particularly in the complaint), which they must prove during the proceedings.
II. Ascertaining foreign law: (a) who and for which issues?	• Courts may ascertain relevant foreign law.[109] Nonetheless, when the parties invoke foreign law they must prove it.
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of law. • Means of ascertaining foreign law include referring to copies of relevant legislation, judicial decisions, doctrinal sources, and reports from experts or experienced lawyers.[110] • Costs for ascertaining content of relevant foreign law can range, in practice, from approximately 1,500 to 3,000 USD.
III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law probably results in the application of *lex fori*.[111]
IV. (b) Review of application of foreign law	• The application of foreign law is subject to review if applied by virtue of conflict rules ("*recurso de casación*").[112]
Treaties / Arrangements in force	• *Inter-American Convention on Proof of and Information on Foreign Law*, Código Bustamante [113] law 15 of 1928

[108] G. Boutin I., *Derecho Internacional Privado, Segunda Edición* (Panamá: *Edition Maître Boutin*, 2006) at 403-406.
[109] *Ibid.*, at 403-406 and 906-907. See also relevant legislation.
[110] *Ibid.*, at 403-406 and 906-911. See also relevant legislation.
[111] *Ibid.*, at 906.
[112] *Ibid.*, at 801-812. See also relevant legislation.
[113] Panama signed the Convention on 8 May 1979, but it has not entered into force in Panama. See also *Código Bustamante*, online: < http://www.oas.org/juridico/spanish/firmas/a-31.html >. Panama deposited the instrument of ratification for the *Código Bustamante* on 26 October 1928.

Relevant Legislation	***CÓDIGO JUDICIAL*** ***Artículo 800.*** El derecho extranjero se podrá probar mediante copia de las normas pertinentes, decisiones de los tribunales, estudios doctrinales o dictámenes rendidos por abogados idóneos. No obstante lo anterior, el juez podrá investigar directamente el derecho extranjero, acudiendo a cualquier fuente o medio idóneo. ***Artículo 1127.*** Todos los recursos concedidos en este Código serán admitidos para los casos en que se decida aplicar las leyes extranjeras, por remisión de la ley nacional.

SPAIN	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• The conflict of laws rules have to be applied *ex officio* by the judge.[114] In principle, this is the same regardless of whether the conflict of laws rule is contained in an internal instrument, Community text or international convention.
II. Ascertaining foreign law: (a) who and for which issues?	• The party relying on the foreign law must prove its contents,[115] and that the relevant foreign rule is in force, though Courts may intervene to clarify some aspects or its application to the case.[116] Courts do not replace the parties but only intervene to complement or to clarify the proof submitted by the parties when necessary.
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of fact of a particular kind.[117] • Parties may use any means admitted by the Spanish law[118] to ascertain the relevant foreign law, including public / private documents and experts' reports or evidence. Courts may use any other means considered necessary.[119] • The cost of proving foreign law is, in principle, assumed by the party who invokes the foreign law, without prejudice to a ruling on costs at the end of the proceedings. When the interested party meets the legal standards, the costs can be covered by legal aid.
III. Effects of failure to establish foreign law (substitution law)	• Legal scholars propose different solutions. The jurisprudence of the Supreme Court in most cases has opted for the application of Spanish law. It is noteworthy that in a couple of cases, the Supreme Court has directly rejected claims where there was a failure to ascertain the relevant foreign law.
IV. (b) Review of application of foreign law	• The traditional opinion of the Spanish Supreme Court ("*Tribunal Supremo*") is that it is not possible to review decisions on foreign law;[120] however, this jurisprudence seems to have changed: the Supreme Court has recently affirmed that both, the interpretation and the application of foreign law, are subject to review.[121]
Treaties / Arrangements in force	• Bilateral treaties with Mexico, Brazil, Czech Republic and Slovakia, China, Bulgaria, Morocco, the former Soviet Union, Uruguay;[122] the *Inter-American Convention on Proof of and Information on Foreign Law*, the *London Convention*[123]

[114] A.-L. Calvo Caravaca & J. Carrascosa González, "Proof of Law in the new Spanish Civil Procedure Code 1/2000" (2005) 2 *IPRax* 170 at 172. See also Article 12.6 Spanish Civil Code 1881.
[115] See relevant legislation.
[116] See relevant legislation.
[117] *Ibid.*, at 171.
[118] See Article 299 *Ley de Enjuiciamiento Civil* 1/2000.
[119] See Article 12.6 Spanish Civil Code.
[120] G.T. Yates, *supra*, note 3, at 748.
[121] Judgment of 4 July 2006.
[122] Mexico: 1 December 1984, Brazil: 13 April 1989, Czech Republic and Slovakia: 4 May 1987, China: 2 May 1992, Bulgaria: 23 May 1993, Morocco: 30 May 1997, former Soviet Union: 26 October 1990, Uruguay: 4 November 1987.
[123] A.-L. Calvo Caravaca & J. Carrascosa González, *supra*, note 98 at 172. The *Inter-American Convention on Proof of and Information on Foreign Law* was signed in Montevideo on 8 May 1979. The *London Convention* entered into force in Spain on 20 February 1974.

Relevant Legislation	***CÓDIGO CIVIL 1881*** ***Artículo 12*** 1.La calificación para determinar la norma de conflicto aplicable se hará siempre con arreglo a la ley española. 2. La remisión al derecho extranjero se entenderá hecha a su ley material, sin tener en cuenta el reenvío que sus normas de conflicto puedan hacer a otra ley que no sea la española. 3. En ningún caso tendrá aplicación la ley extranjera cuando resulte contraria al orden público. 4. Se considerará como fraude de ley la utilización de una norma de conflicto con el fin de eludir una ley imperativa española. 5. Cuando una norma de conflicto remita a la legislación de un Estado en el que coexistan diferentes sistemas legislativos, la determinación del que sea aplicable entre ellos se hará conforme a la legislación de dicho Estado. 6. Los Tribunales y autoridades aplicarán de oficio las normas de conflicto del derecho español. ***LEY DE ENJUICIAMIENTO CIVIL, CAPÍTULO V, DE LA PRUEBA: DISPOSICIONES GENERALES SECCIÓN 1.ª DEL OBJETO, NECESIDAD E INICIATIVA DE LA PRUEBA*** ***Artículo 281. Objeto y necesidad de la prueba.*** 1. La prueba tendrá como objeto los hechos que guarden relación con la tutela judicial que se pretenda obtener en el proceso. 2. También serán objeto de prueba la costumbre y el derecho extranjero. La prueba de la costumbre no será necesaria si las partes estuviesen conformes en su existencia y contenido y sus normas no afectasen al orden público. El derecho extranjero deberá ser probado en lo que respecta a su contenido y vigencia, pudiendo valerse el tribunal de cuantos medios de averiguación estime necesarios para su aplicación. 3. Están exentos de prueba los hechos sobre los que exista plena conformidad de las partes, salvo en los casos en que la materia objeto del proceso esté fuera del poder de disposición de los litigantes. 4. No será necesario probar los hechos que gocen de notoriedad absoluta y general. **Artículo 282*. Iniciativa de la actividad probatoria.*** Las pruebas se practicarán a instancia de parte. Sin embargo, el tribunal podrá acordar, de oficio, que se practiquen determinadas pruebas o que se aporten documentos, dictámenes u otros medios e instrumentos probatorios, cuando así lo establezca la ley.

SWEDEN	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Courts must apply foreign law *ex officio* when adjudicating indispositive disputes[124]. In such disputes, the Court must also examine, on its own initiative, all relevant facts, including those that may lead to the application of foreign law. With respect to dispositive disputes, the Court must not base its decision on facts not invoked by any of the parties in support of its pleadings.[125] However, if relevant circumstances have been invoked but the parties ignore the conflict of law issue, the prevailing opinion seems to be that the Court should *ex officio* bring it to their attention in order to give each of them the opportunity either to demand that the applicable foreign law be applied or to agree with the other party on the application of Swedish law.[126]
II. Ascertaining foreign law: (a) who and for which issues?	• The Code of Judicial Procedure contains a provision enabling the Court to call upon "a party" to investigate and present proof of foreign law.[127] The Court is allowed to use its own efforts instead (or as well), and it is not bound by the submissions of the parties.[128] The Code does not stipulate which of the parties should be called upon to prove the foreign law and what happens if that party does not comply with the Court's request. It seems that normally the request should be addressed to the party relying on the foreign law. The Court may, however, prefer to call upon the party having better resources, for example in a consumer dispute. The parties have the right to submit evidence about foreign law even without being called upon to do so by the Court.

[124] M. Jänterä-Jareborg, *supra* note 37 at 278-279: "In indispositive issues, *i.e.*, the areas of law not permitting settlements between the parties, the presence of a public interest is explained to demand *ex officio* application of all the applicable rules. This includes the rules on choice of law and any foreign law rules. […] In Scandinavian law, indispositive cases where the choice of law rules of the forum would refer to foreign law are very few. In divorce and adoption cases, *i.e.*, the most frequently arising indispositive cases with foreign elements, the choice of law rules in all of the Scandinavian States refer directly to forum law! This unilateral model excludes the application of foreign law already at the outset. An exception is the Swedish Act on International Issues of Paternity (1985), based on bilateral rules on choice of law."

[125] This means that in dispositive disputes, disputes that are within the control of the parties, who are allowed to settle them out of court, the court is not supposed to investigate upon its own initiative whether there are any circumstances not referred to by any of the parties that lead to the application of foreign law. See also Code of Judicial Procedure, Chapter 17, section 3.

[126] Such agreements, which may be tacit, on the application of Swedish law will normally be respected by the court in dispositive disputes, as the parties should be able to avoid the potential expenses and delays entailed by the application of foreign law, especially in disputes of limited value. This kind of procedural consensus of the parties during the actual litigation must be distinguished from choice of law agreements reached in advance, which are binding in certain areas only, *e.g.*, regarding contracts.

[127] See relevant legislation. See also M. Jänterä-Jareborg, *supra,* note 37 at 297.

[128] This is likely true even where the parties agree on the contents of the applicable foreign law.

II. Ascertaining foreign law: *(b) (i) fact or law;* *(ii) means; and* *(iii) costs*	• There is no general statutory or judicial statement classifying foreign law as "law" or "fact". Foreign law can be said to be either "law of a peculiar kind" or "fact of a peculiar kind". For example, the right of the Court to call upon a party to prove foreign law might indicate it is a fact, while the right of the Court to investigate itself the content of foreign law indicates that foreign law is law. • The free submission and evaluation of evidence is a fundamental principle of Swedish procedural law. Means of ascertaining foreign law may, in particular, include the presentation of foreign statutes, judicial decisions and legal writing, as well as expert opinions of foreign judges, scholars and practicing lawyers. The Court and / or the parties may seek assistance from the legal division of the Ministry of Foreign Affairs.[129] • The costs incurred by the Court when ascertaining foreign law are covered by the State. The costs of the parties are in principle covered by the parties themselves, but the prevailing party is normally entitled to recover those costs from the unsuccessful party. Subject to the same conditions as other legitimate costs, costs of ascertaining foreign law are covered by legal aid.
III. Effects of failure to establish foreign law (substitution law)	• There is a tendency to apply Swedish law where there is a failure to establish the foreign law. However, there is some support among legal writers for the view that the effect of failure to establish foreign law should depend on the circumstances of the individual case.[130]
IV. (a) Review of application of conflict of laws rule	• Applying the wrong Swedish choice of law rule or applying a Swedish conflict rule in an incorrect manner is a violation of Swedish law, subject to the same possibilities of review as a wrong application of any other rule of Swedish law.
IV. (b) Review of application of foreign law	• In theory, the Supreme Court may re-examine an erroneous application of applicable foreign law. However, leave to appeal to the Supreme Court is normally granted only where a judgment by the Supreme Court is needed as guidance for future cases.[131]
Treaties / Arrangements in force	• The *London Convention*[132]

[129] It should be noted that a party is entitled to examine and comment on evidence presented by the other party.
[130] For example, if the court called upon the plaintiff to prove foreign law and the plaintiff failed to do so without good reason, it might sometimes be appropriate to dismiss the case.
[131] Chapter 54, section 10 of the Code of Judicial Procedure. This condition is rarely fulfilled in the case of an erroneous interpretation and application of foreign law.
[132] The *London Convention* entered into force in Sweden on 1 February 1970.

Relevant Legislation	***RÄTTEGÅNGSBALKEN (CODE OF JUDICIAL PROCEDURE)*** ***Chapter 35, section 2.*** Proof of a circumstance that is generally known is not required. Nor is proof required as to legal rules. If foreign law is to be applied and the court does not know its content, it may request a party to prove it.[133]

[133] Part of this translation is taken from M. Jänterä-Jareborg, *supra,* note 37 at 296.

SWITZERLAND	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• The predominant view is that conflict of laws rules are mandatory, though there is no explicit provision in the Private International Law Act (PIL) (1987).[134]
II. Ascertaining foreign law: (a) who and for which issues?	• The Court has to establish the content of the foreign law *ex officio*. However, the cooperation of the parties *may* be requested. In matters involving an "economic interest" [in German: *vermögensrechtliche Ansprüche*; in French: *matière patrimoniale*],[135] the task [in German: *Nachweis*, not *Beweis*;[136] in French: preuve] of establishing the content of the foreign law *may* be assigned to the parties.[137] However, even if this task has been assigned to the parties, the principle of *iura novit curia* applies and the judge has to make reasonable efforts to establish the content of the foreign law on its own.[138] The ascertainment of foreign law includes foreign conflict of laws rules if Swiss law allows for *renvoi*.[139] The above principles also apply if foreign law is applied as mandatory foreign law ("*loi d'application immediate*").[140]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is considered a matter of law.[141] • Means of proving foreign law include official gazettes, commentaries, textbooks, and expert opinions, including from the Swiss Institute of Comparative Law in Lausanne. • Expert opinions can be fairly expensive; legal opinions from the Swiss Institute of Comparative Law are less costly. The cost of ascertaining foreign law is either part of the court costs (if the court mandates an expert or the Institute in Lausanne) or part of the parties' costs (if the judge has put the burden of proof of foreign law onto the parties in accordance with Art. 16 PIL Act). These costs may be covered by legal aid like any other court cost.

[134] See M. Keller & D. Girsberger, *"IPRG Kommentar"* in *Zürcher Kommentar zum IPRG : Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987* 2nd ed. (Zürich : Schulthess, 2004) - Article 17 at note 10; B. Dutoit, *Droit international privé suisse : Commentaire de la loi fédérale du 18 décembre 1987* (Bâle : Helbing & Lichtenhahn, 2005), Article 16 at note 3; Judgment of the Federal Supreme Court 118 II 83.

[135] Essentially, the claim has to be measurable in money and the subject matter not precluded from the parties' choice of law (because of considerations relating to a parties' protection), see M. Keller & D. Girsberger, *supra,* note 134 at notes 26-31. Examples: Corporate and contractual claims.

[136] In other words, it is not proof in the technical, procedural sense and thus the consequences of failing to "prove" foreign law are not to be determined under the ordinary, technical rules of evidence.

[137] See relevant legislation, Article 16(1) of the PIL Act. See also M. Keller & D. Girsberger, *supra,* note 134 at notes 15-46. See also B. Dutoit, *supra,* note 134 at notes 4-10.

[138] See Judgment of the Federal Supreme Court 128 III 346, 351 at para. 3.2.1.

[139] See Article 14 of the PIL Act.

[140] See Article 19 of the PIL Act. However, the wrong application of the applicable foreign law can be the object of an appeal to the Supreme Court only in non-pecuniary matters, as opposed to any wrong application of Swiss (substantive or private international) law.

[141] See B. Dutoit, *supra,* note 134 at note 7; M. Keller & D. Girsberger, *supra,* note 134 at note 32.

III. Effects of failure to establish foreign law (substitution law)	• Failure to establish foreign law results in an application of Swiss law (see Art. 16(2) PIL Act), though Swiss law only applies as a substitution law if (i) the parties failed to establish the content of the relevant foreign law and (ii) the Court, despite reasonable efforts, could not establish the content on its own.
IV. (a) Review of application of conflict of laws rule	• Review is possible - mandatory character of conflict of laws rules applies in all instances (*i.e.* including in appellate procedures).
IV. (b) Review of application of foreign law	• Review of the application of foreign law is possible under Article 16(1), *i.e.* non-pecuniary matters.[142]
Treaties / Arrangements in force	• The *London Convention*[143]
Relevant Legislation	***PRIVATE INTERNATIONAL LAW ACT (1987)*** ***Article 16*** 1. The contents of the foreign law shall be established by the authority on its own motion. For this purpose, the cooperation of the parties may be requested. In matters involving an economic interest, the task of establishing foreign law may be assigned to the parties.[144] 2. Swiss Law shall apply if the contents of the foreign law cannot be established.

[142] See M. Keller & D. Girsberger, *supra*, note 134 at note 15. See also the Judgment of the Federal Supreme Court 124 I 49: A cantonal Appellate Court had asked for a legal opinion on its own motion – that opinion differed substantially from the opinions submitted by the parties at trial level – appellate court issued judgment based on new legal opinion without giving parties opportunity to respond – losing party filed constitutional complaint because of violation of right to be heard – Supreme Court accepted complaint. See also Article 96 of the new law (of 17 June 2005) on the Federal Supreme Court, which entered into force on 1.1.2007 (*Loi fédérale du 17 juin 2005 sur le Tribunal fédéral (LTF): Droit étranger "Le recours peut être formé pour: a) inapplication du droit étranger désigné par le droit international privé suisse; b) application erronée du droit étranger désigné par le droit international privé suisse, pour autant qu'il s'agisse d'une affaire non pécuniaire."* Article 96: *Ausländisches Recht – "Mit der Beschwerde kann gerügt werden: a) ausländisches Recht sei nicht angewendet worden, wie es das schweizerische internationale Privatrecht vorschreibt; b) das nach dem schweizerischen internationalen Privatrecht massgebende ausländische Recht sei nicht richtig angewendet worden, sofern der Entscheid keine vermögensrechtliche Sache betrifft."*

[143] The *London Convention* entered into force in Switzerland on 20 November 1970.

[144] This translation is taken from B. Dutoit, *supra*, note 134.

UNITED KINGDOM	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Court will not introduce foreign law *ex proprio motu;* party wishing to rely on foreign law must plead it like any other fact.[145]
II. Ascertaining foreign law: (a) who and for which issues?	• Parties wishing to rely on foreign law have the burden to prove the contents of the relevant foreign law, though Courts may take judicial notice of laws of England, Scotland and Northern Ireland.[146]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Foreign law is treated as a matter of fact. • Means of ascertaining foreign law include expert evidence from a suitably qualified witness "on account of his knowledge or experience".[147]
III. Effects of failure to establish foreign law (substitution law)	• Application of *lex fori.*[148]
IV. (b) Review of application of foreign law	• It is possible to examine evidence of foreign law and decide whether the evidence justifies the conclusion of the lower Courts.[149]
Treaties / Arrangements in force	• *British Law Ascertainment Act,* which is largely unused and is entirely concerned with law within the Commonwealth*;* the *London Convention*[150]

[145] A. Briggs, "Proof of Foreign Law" in L. Collins *et al*., eds. *The Conflict of Laws* 14th ed. (Sweet & Maxwell: London, 2006) at 256.
[146] *Ibid.*, at 256.
[147] *Ibid.*, at 255. See also P.M. North, J.J. Fawcett & G.C. Cheshire, *Cheshire and North's Private International Law* 13th ed. (Butterworths: London, 1999) at 101.
[148] R. Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Clarendon Press: Oxford, 1998) at 4.
[149] P.M. North, J.J. Fawcett & G.C. Cheshire, *supra*, note 147 at 105.
[150] The *London Convention* entered into force in London on 17 December 1969.

Relevant Legislation	***CIVIL EVIDENCE ACT 1972*** ***Section 4* - Evidence of foreign law. 4.**- (1) it is hereby declared that in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, irrespective of whether he has acted or is entitled to act as a legal practitioner there. (2) Where any question as to the law of any country or territory outside the United Kingdom, or of any part of the United Kingdom other than England and Wales, with respect to any matter has been determined (whether before or after the passing of this Act) in any such proceedings as are mentioned in subsection (4) below, then in any civil proceedings (not being proceedings before a court which can take judicial notice of the law of that country, territory or part with respect to that matter) – (*a*) any finding made or decision given on that question in the first-mentioned proceedings shall, if reported or recorded in citable form, be admissible in evidence for the purpose of proving the law of that country, territory or part with respect to that matter; and (*b*) it that finding or decision, as so reported or recorded, is adduced for that purpose, the law of that country, territory or part with respect to that matter shall be taken to be in accordance with that finding or decision unless the contrary is proved: Provided that paragraph (*b*) above shall not apply in the case of a finding or decision which conflicts with another finding or decision on the same question adduced by virtue of this subsection in the same proceedings.

UNITED STATES	
I. Nature of Conflict of Laws Rules: Mandatory or Optional ('fakultatives Kollisionsrecht')	• Parties should raise and explain an issue concerning foreign law; the Court determines the issue; parties are responsible for informing Courts and other parties by "pleadings or other reasonable written notice".[151]
II. Ascertaining foreign law: (a) who and for which issues?	• Under U.S. federal law and the law of most states, the Court determines the issue; parties may present their own experts or an agreed expert; the Court may also appoint an expert and may independently research the issue.[152]
II. Ascertaining foreign law: (b) (i) fact or law; (ii) means; and (iii) costs	• Under U.S. Federal Law and the law of most states, a Court's determination of the content of foreign law is treated as "a ruling on a question of law".[153] • Courts are authorised to dispense with technicalities of exclusionary rules of evidence and to conduct research on foreign law; consider testimony of expert witnesses called by parties or appointed by the Court; or consider reports of a special master familiar with the relevant law.[154] There is a dispute over how much time and effort judges should invest in researching foreign law. Some are of the view that Courts will not admit documents or apply foreign law without expert input.[155] Others take the view that expert testimony is not always necessary in establishing foreign law and Courts may reach decisions on the basis of independent examination of foreign legal authority.[156] • In the United States, costs in civil litigation, including for any proceedings on foreign law, are generally paid by the party incurring the cost, although Courts may assess Court costs against the losing party. Parties are responsible for payment of legal experts who assist with proving any non-U.S. legal issue. In only a very limited class of civil cases may Courts require a losing party to pay the fees of counsel and experts.

[151] J.R. Brown, "44.1 Ways to Prove Foreign Law" (1984) 9 *Mar. Law.* 179 at 185. See also P.D. Trooboff, "Proving Foreign Law" (9/18/2006) 29 *N.L.J.* 13.
[152] *Ibid.*, at 185. See also Association of the Bar of the City of New York, Committee on International Commercial Dispute Resolution – "Proof of Foreign Law after Four Decades with Rule 44.1 FRCP and CPLR 4511" (2006) 60:1 *The Record* 49 (online: New York City Bar < http://www.nycbar.org/Publications/record/vol_61_no_1.pdf >) at 52.
[153] See relevant legislation.
[154] Association of the Bar of the City of New York, Committee on International Commercial Dispute Resolution, *supra,* note 152 at 50.
[155] S.L. Sass, "Foreign Law in Federal Courts" (1981) 29 *AJCL* 97 at 109-110.
[156] P.D. Trooboff, *supra,* note 151, citing *Curtis* v. *Beatrice Foods Co.*, 481 F. Supp. 1275 (S.D.N.Y. 1980), aff'd, 633 F. 2d 203 (2d Cir. 1980): According to P.D. Trooboff, citing *Universe Sales Co. Ltd.* v. *Silver Castle Ltd.*, 182 F. 3d 1036 (9th Cir. 1999), if a trial court fails to do its homework, the likelihood of reversal increases greatly.

	• Only limited legal aid (including costs of counsel) is available for U.S. civil litigation, state or federal, and non-U.S. persons would generally not be eligible. There is no system of legal aid for payment of Court costs, counsel or experts in cases involving proof or determination of non-U.S. law.
III. Effects of failure to establish foreign law (substitution law)	• Failure to ascertain the relevant foreign law will result in an application of the *lex fori* where principles are not rudimentary.[157]
IV. (a) Review of application of conflict of laws rule	• A lower Court's decision can be disturbed where the lower Court decided a case based on the *lex fori* rather than applying foreign law where it was required to.[158]
IV. (b) Review of application of foreign law	• It is possible to reverse findings, deal afresh with foreign law and hear new evidence.[159]
Treaties / Arrangements in force	• There are no treaties in force; however, the *Uniform Certification of Questions of Law Act/Rule (1995)*,[160] as adopted in 4 of 8 states enacting the statute (Maryland, New Mexico, West Virginia and Montana), provides for Canadian or Mexican Court inquiries to the state's highest Court.
Relevant Legislation	***FEDERAL RULES OF CIVIL PROCEDURE*** ***Rule 44.1.*** A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law. (effective July 1, 1966)

[157] K.J. Hood, "Drawing Inspiration? Reconsidering the Procedural Treatment of Foreign Law" (2006) 2:1 *Journal of Private International Law* 181 at 188-189, citing A.R. Miller, "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for a Die-hard Doctrine" (1967) 65 *Mich. L. Rev.* 613 at 644. See also Association of the Bar of the City of New York, Committee on International Commercial Dispute Resolution, *supra*, note 152 at 59.
[158] *Ibid.*, citing *Curley* v. *AMR Corporation*, 153 F. 3d 5 (2d Cir. 1998).
[159] J.R. Brown, *supra*, note 151 at 192. See also *Twohy* v. *First National Bank of Chicago*, 758 F 2d 1185 (7th Cir. 1985), cited in P.D. Trooboff, *supra*, note 151.
[160] National Conference of Commissioners on Uniform State Laws, *Uniform Certification of Questions of Law [Act] [Rule](1995)* (Chicago: National Conference of Commissioners on Uniform State Laws, 1995).