The Difficulties of Applying Maintenance foreign law in France

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Obstacles on the path leading to the effective application of a foreign law designated by the choice of law rule are numerous in French private international law, even when an international convention is involved. Despite the existence of unified rules, judges do not hesitate to exclude the conventionnal solution from the resolution of the case. Different converging elements make that the most applied law will ultimately be the French law, which is also not necessarily a French specificity. Without aspiring to be exhaustive, three key points of the conflict of laws reasoning deserve attention.
First of all, judges do not always enter in the conflict of laws logic itself. Choice of law rule is not systematically consulted and its application can depend on the invocation by the parties (I).
Then, even after this important step, the content of the foreign law must be established. The judge is responsible for this establishment but the obligation on him is not binding. It is quite easy for him to be dispensed and then to return to the application of French law (II).
Finally, more classicaly in comparative law, once the content is proved, foreign law may be ousted when its application is incompatible with the basic essentials of the French system. The public policy exception will then be used. This eviction mechanism is provided by the different international conventions on the topic but its implementation may vary from one state to another. We will focus on the French way of application (III).

I - The application of the choice of law rule

Two different situations exist before the court.

- In the first situation, parties or at least one of them invoke foreign law designated by the choice of law rule. The judge has to apply it and must enter into the private international law logic.
- In the second situation, the parties plead only on the basis of French law despite the existence of an international situation and even if the choice of law rule refers to one or more foreign laws.

The question is easy to understand : must the judge break the silence and apply the private international rules even if the parties have only pled on the basis of the French law or has he just the right to do it or can he remain silent on this particular point and apply French law and only French law, despite the existence of the choice of law rule ?

It is a controversial issue in France for nearly fifty years, for writers and judges. The current solution is as follows. The judge has the obligation to apply systematically the choice of law rules when the rights in question are not available. But when the rights are available, it is only an option for him[1]. The fact that the conflict rule is stated by an international convention has no influence[2],

1 The solution can be found in two decisions of the French Cour de cassation : Civ. 1ère 26 May 1999, Soc. Mutuelles

contrary to what the Court decided previously[3].

The next question is then the classification of the question of the maintenance obligations. Recently, the French Cour de cassation held that it was in the field of available rights. Such a classification can be clearly found in a decision of the First Civil Chamber of the Cour de cassation, delivered on 11 March 2009[4].

"*But whereas the appeal of Ms. Chakhchakh concerned only the amount of the compensatory benefit, that Article 9 of the Franco-Moroccan covers only personal effects of divorce and in contrast, in the case of available rights, spouses may agree that French law is applied*".

This means then that the French lower courts have no obligation to apply systematically the choice of law rules, if the parties are silent on this point and simply invoke the French law in their conclusions. It is not possible for the parties to use the argument of the violation of the conflict rule for the first time before the Cour de cassation.

To qualify this affirmation, we must say that if the issue of maintenance obligation is mixed with others that are unavailable, including, for example, the issue of divorce, it is not treated separately. The decision of the judge who has not applied the foreign law will be overturned in its entirety. Several convergent decisions may be quoted[5].

The justifications for this approach are neither legal nor ideological but pragmatic. The French judicial body is very unevenly familiar with the problems of private international law. That is why the Cour de cassation does not impose an obligation to uniformly apply the choice of law rules. In addition, the judges, however well trained and aware of the problems of private international law, often suffer from a lack of resources, which makes the access to foreign sources difficult and from a lack of time. It is therefore easier to enable them to remain under French law, at least for situations in which rights are available. Then it is not shocking that the parties, by their silence, influence the designation of the applicable law.

Of course, this solution harms the unification of the law applicable between the States parties to the same convention.

II - The application of foreign law

Once the foreign law designated, its content must be established and therefore we need to know know who bears the burden of the proof. In the French system, the solution lies on a subtle division. In two judgments delivered on the same day, the Cour de cassation decided that, "*it is up to the French judge who recognizes a foreign law applicable, to seek, either ex officio or at the request of*

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du Mans et Belaïd, Rev. crit. 1999, 707, note H. Muir-Watt.

2 Cass. Civ. 1ère 6 May 1997, Rev. crit. 1997, 514, n. B. Fauvarque-Cosson, JDI 1997, 804, n. D. Bureau.

3 For one of the last examples: Cass. Civ. 1ère 4 Dec. 1990, Coveco, Rev. crit. 1991, 558, n. M.-L. Niboyet ; JDI 1991, 371, n. D. Bureau.

4 D. 2009. 2084, note A. Devers ; *ibid*. 2010. 1585, obs. P. Courbe et F. Jault-Seseke ; AJ famille 2009. 220, obs. A. Boiché

5 Cass. Civ. 1ère 19 Nov. 2008, B. 2008, I, n°264 and 20 June 2006, B. 2006 I n°316 : divorce and compensatory benefit between two Moroccans living in France. According to the decisions of the Cour de cassation, the Moroccan law must be applied.
Cass. Civ. 1ère 4 June 2009, B. 2009, I, n°112 : divorce and compensatory benefit between a French husband and a German wife. According to the Cour de cassation, the Court of appeal could not apply the French law without checking if the German law was applicable to the case. Same solution for a divorce between two Portuguese citizens (Cass. Civ. 1ère 3 March 2010, B. 2010, I, n° 52) and for a divorce between an American husband and a British wife (Cass. Civ. 1ère 23 Nov. 2011, B. 2011, I, n° 203).

a party who invokes it, its content, with the assistance of the parties and personally when appropriate, and to give to the litigation a solution in accordance with the foreign law in force"[6]. The judge has the general responsibility but he may ask for the cooperation of the parties or of one party. The solution is a general one, without any distinction between available and unavailable rights.

The question that arises then is what is the scope of such an obligation. It remains to know if the obligation is binding for the lower courts. Does the judge needs to achieve the result, to prove the content of the foreign law, or has he just to use some means, to try to prove it ? What are the efforts that must be made to establish foreign law? The lower court act under the control of the Cour de cassation. Their activity will be checked by the supreme court. The Cour de cassation has settled the question in a important judgment in 2006[7]. In this case, the Belarusian law was designated by the choice of law rule. But the court of appeal had applied French law, despite the fact that the conflict of law rule had been applied. The judges considered that the content of the foreign law was impossible to establish.

The Cour de cassation has identified the main principles in this area in its decision. We must admit that it is not very demanding. The judge can easily be relieved of his responsibility. According to the judgment, "*if the French judge who recognizes a foreign law applicable to a case, faces an impossibility to establish its content, he may even for unavailable rights, apply French law as an alternative*". It is not an obligation of result. What is then an "impossibility"? What is the requirement ? It is a question of degree. The Court states that "*after having been correct in finding that the Belarusian law, personal law of the mother at the time of the birth of the child designated by Article 311-14 of the Civil Code was applicable, the Court of Appeal, which noted that, despite the representations made to the competent authorities, particularly in relation to the data supplied by the Department European and International Affairs of the Ministry of justice, and given the failure of the parties, the content of foreign law couldn't be established, nor the applicability of Articles 17 and 18 of the Russian Federal Law, was able to deduce that it was appropriate to apply French law to the alternative".*

The requirement is not very high in this area and it is easy for judges to avoid the application of the foreign law. They simply need to demonstrate that they have requested the parties and the services of the French Ministry of Justice. They do not have to go beyond. They can then return to the French law. The risk is therefore clear : the *lex fori* will very often be used.

French judges do not hesitate to do so : on the one hand their work is facilitated and procedural delays are shortened ; on the other hand, French law is considered adequately protective of the interests of the persons concerned, especially the maintenance obligation creditor. They consequently have little restraint to act like that.

III - The ouster of the applicable law: the exception of public policy

If the content of the foreign law has been established, it will be possible to apply it effectively in France. Of course, a classical mechanism can be an obstacle : the public policy of the forum. The application of the foreign law must not be manifestly incompatible with the basic essentials of the French system.
If its effects are contrary to the French fundamental conceptions, its application will be refused. The fear is evident : a systematic use of this exception mechanism could ruin the unification of the

6 Cass. Com. 28 Nov. 2005, Itraco, et Civ. 1ère 28 June 2005, Aubin, Rev. crit. 2005, 645, n. B. Ancel et H. Muir-Watt.
7 Cass. Civ. 1ère 21 Nov. 2006, Rev. crit. DIP 2007. 575, note H. Muir Watt.

choice of law rules. This is why it is essential to identify the degree of tolerance for the foreign laws in this field. Experience seems to demonstrate that French judges show moderation in the use of the exception. It appears that the incentive to temperance in the various conventions adopted by the requirement of "manifest incompatibility" is taken into account.

The question arises frequently in France about the Moroccan law that is not favourable for the maintenance creditor. Many decisions are about the law of this country and the result of its application in France, due to the important presence of Moroccans on the French territory.

The first good example is a decision of 1992[8]. The Cour de cassation, applying Article 11 of the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations, refuses the application of Moroccan law because it "*does not provide compensatory benefit or maintenance to the wife, or damages for her in case of divorce*". As a consequence, such a law is "*manifestly incompatible with French public policy and should be rejected in favor of the French law*". Moroccan law is ousted because it deprives the wife of any resource in this situation. The explanation was given by a later decision[9], which is even clearer. Moroccan law is "*manifestly incompatible with the French international public policy because it deprives women of any pecuniary assistance while divorce is not pronounced to her faults*". The approach is this time detailed. There is a clear explanation, considering the particular circumstances of the case.

Another level is reached concerning the French demands in a decision of 2006[10]. According to Moroccan law, maintenance was only provided, in case of divorce, during the period of widowhood. The Cour de cassation considered that this law "*does not allow to allocate sufficient maintenance to the wife after divorce*" and that its application should then be refused. Even when the Moroccan law provides for maintenance, it must still be sufficient. However, on this point, the concrete analysis often justifies the refusal of application. In fact, the social standards can be very different between the two countries. This means that the allocation under Moroccan law, while substantial, can be considered insufficient to live in France. It seems that this decision hardens the requirements of the French public policy, in these particular matters compared to previous judgments. It should however be noted that the Cour de cassation does not declare, in this case, that Moroccan legislation is manifestly incompatible with public policy, which is quite surprising because it is a requirement of Article 11 of the Hague Convention.

Despite this gap, the trend is still significant. Indeed, in the early cases, judges were less tolerant. French law was often regarded as a minimum. A decision of 1971 is famous and always quoted for this reason[11]. According to the most remarkable sentence, "*Tunisian law, law of the family relationship, can be applied in France, subject to the French public policy, which can intervene to ensure the minimum assistance of the French law*".

According to the Explanatory Report on the 1973 Hague Maintenance Conventions, which is very often quoted by French authors, "*it would seem to be a more delicate question to find out whether, by invoking the concept of public policy, application of the foreign law which is less "generous" than the lex fori could be refused to the benefit of the latter. In the private international law practice*

8 Cass. Civ. 1ère 16 July 1992, Rev. crit. 1993, 269, n. P. Courbe, JCP 1993, II, 22138, n. J. Déprez, D. 1993, 358, n. K. Saïdi.

9 Cass. Civ. 1ère 7 Nov. 1995, D. 1996. Somm. 170, obs. B. Audit.

10 Cass. Civ. 1ère 28 Nov. 2006, D. 2007, 280, n. A. Devers, Rev. crit. 2007, 584, n. N. Joubert, AJ famille 2007, 86, obs. A. Boiché. See also before : CA Aix-en-Provence 10 May 1998, JDI 1999, 136, note A. Bencheneb : public policy is used to oust the foreign law « which accorded maintenance to the wife only during 100 days and contained no equivalent to the compensatory benefit ».

11 Cass. Civ. 1ère 19 Oct. 1971, B. 1971, I, n°261 ; *D.* 1972.633, n. P. Malaurie, Rev. crit. 1973. 70, n. M. Simon-Depitre.

of a number of countries, the law of the forum is regarded as the minimum which is due to any creditor. Accepted as such, this system would run counter to the spirit of the Convention, the majority of its clauses would becoming dead letters"[12].

The French solution was therefore somewhat ambiguous and this is probably why it has evolved, although in some cases the French law continues to be treated as a minimum[13]. It is also possible to say that judges have other means than public policy to apply finally the French law.

Three clarifications are needed about public policy :

- When judges make use of the exception of public policy, the rejection cannot be abstract and must be based on the specific circumstances of the case. They must always establish the content of the foreign law and study the result of its application. An *in abstracto* reasoning will not be admitted and the refusal cannot be based on the fact that it is the law of a particular country. Thus, the Cour de cassation did not hesitate to overturn judgments which do not analyze in detail the foreign law[14].
- The institution of polygamy cannot be recognised as such in France, as inconsistent with fundamental principles of the French law, but the provision of maintenance by the husband to the various wives is not regarded as being improper[15].
- Different modalities of attribution under a foreign law are not considered incompatible with French public policy. The principle was stated long ago about maintenance obligation between spouses during mariage[16] and still remains in force. Similarly, prescription or limitation periods prescribed by the French Civil Code are not considered as public policy requirements[17].

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The impression is mixed when we look at these various solutions. But the progress is notable. With the development of new technologies, the fate of foreign law may be even better in the next years than today. In addition, young judges are now much more concerned by private international law and know the international conventions relating to maintenance obligations. The future is promising.

12 *Explanatory Report on the 1973 Hague Maintenance Conventions*, *Acts and Documents of the Twelfth Session (1972)*, tome IV, *Maintenance obligations*, p. 457, n° 175.

13 Cass. civ. 1ère 20 Nov. 1990, Bull. 1990, I, n° 249, Defrénois, 1991. 293, note J. Massip : about the enforcement of a Danish judgment, the lower courts have decided that the application of the French law would have produced an equivalent material result. The Cour de cassation decides that the judges have rightly compared the patrimonial consequences of divorce in both French and Danish law and after this comparison that the maintenance obligation decided by the Danish judge after the divorce was not contrary to the French public policy.

14 Cass. Civ. 1ère 4 Nov. 2009, Bull. 2009, I, n° 218 about the new Moroccan Family Code.

15 See the famous Chemouni case : Cass. Civ. 28 Jan. 1958, Rev. crit. 1958, 110, note Jambu-Merlin, D. 1958, 265, note Lenoan, JDI 1958, 776, note Ponsard and 19 Feb. 1963, Rev. crit. 1963, 559, note G. H., JDI 1963, 986, n. Ponsard.

16 Cass. Civ., 17 Dec. 1958, Rev. crit. DIP 1959. 691, note J. Déprez, JDI 1959. 824, obs. J.-B. Sialleli.

17 CA Paris, 1er April 1977, Rev. crit. DIP 1980. 814, JCP 1979. IV. 14.