PROCEDURAL EFFICIENCY VIS-À-VIS CONFLICTUAL JUSTICE

ZDENĚK NOVÝ

Právnická fakulta Masarykovy univerzity, Česká republika

Abstrakt v rodném jazyce
Příspěvek se zabývá vlivem praxe soudů na aplikaci cizího práva na základě kolizních norem. Příspěvek dále upozorňuje, že soudy některých států se snaží vyhnout aplikaci kolizních norem, tedy i cizího práva. Teoretické odůvodnění těchto snah pak představují tzv. teorie ekvivalence a tzv. anti-choice přístup. Teorie ekvivalence spočívá v tom, že soud nemusí aplikovat kolizní normu a jí určené cizí právo, pokud všechny potenciálně použitelná práva dávají na spornou otázku identickou odpověď. Anti-choice také vychází z identity potenciálně právních řádů, ale na rozdíl od teorie ekvivalence je založena na jejich paralelní aplikaci.

Klíčová slova v rodném jazyce
Anti-choice přístup, aplikace práva, Cour de cassation, Hoge Raad, kolizní právo, kolizní spravedlnost, mezinárodní právo soukromé, non-conflict, občanské právo procesní, procesní efektivita, procesní spravedlnost.

Abstract
The paper draws an attention to tension between procedural justice and application of foreign law via conflict-of-law rules. The paper further demonstrates that some national courts try to avoid application of foreign law. The attention is dedicated to two theories which provide justification for non-application of foreign law: theory of equivalence and so called anti-choice rule. These theories enable judges to disregard conflict rule when the substantive results of potentially applicable laws are identical. Whilst theory of equivalence leads to application of one of applicable laws, anti-choice means parallel application of all of them.

Key words
Anti-choice approach, application of foreign law, civil procedure, Cour de cassation, Hoge Raad, conflict rule, conflictual justice, non-conflict, private international law, procedural efficiency, procedural justice.

1. INTRODUCTION

The justice has had many faces. It is also submitted that the understanding of justice differs from one field of law to another. This paper deals with private international law. Therefore, the point of departure will be that of conflictual justice.[1] However, it should be born in mind that private international law does not function in vacuum. There has been a substantial impact of law of civil procedure and also substantive law on private international law. And these fields of law also have their understanding of justice. Furthermore, what is percieved to be just from the viewpoint of procedural or substantive law does not have to correspond with

[1] Cf T M De Boer, *Facultative Choice of Law* (1996) 257 Recueil des Cours de l'Académie de Droit International 223-428, 291 et seq; P Picone, *Les Méthodes de Coordination Entre Orders Juridiques En Droit International Privé* (1999) 276 Recueil De Cours de l'Académie de Droit International 9-296, 76 et seq.

the conflictual justice.[2] Thus, it is not exluded that there may be a tension between private international law, procedural justice and substantive law justice.

The point where one can find possible tension among the understandings of justice in metioned fields seems to be application of foreign law.[3] The foreign law is applied by judges on the basis of rules of civil procedure. Hence, the aspect of procedural justice is present. Moreover, the foreign law is applied via conflict-of-law rules. Thus, the conflictual justice comes into play. The foreign law designated on the basis of conflict-of-law rule is, let aside the problem of *renvoi*, substantive law. Then it is suggested that substantive law justice has also its place in the process of application of foreign law. In this connection, it should be emphasised that the majority of European legal orders provides for the *ex officio* application of foreign law, thus the parties are not expected to require application of foreign law.[4] Court has also a duty to ascertain the content of foreign law.[5]

2. THE CONFLICTUAL JUSTICE

I do not intend to deal with the problem of the relationship between procedural rules of national law and their effectivness and conflictual justice in its entirety, which would be sufficient for disertation thesis. I concentrate rather on the efforts of national courts in some European countries to avoid the application of conflict-of-laws rules thus foreign law. The reason behind this is the desire of the courts to maintain procedural effectivness.

First of all, I am to present traditional view on conflictual justice.[6] Assuming that conflictual justice has to do with the purpose of the conflict-of-laws rules, we can find its tenets. First, in order to employ conflict rules, there must be social relationship with connection to more than one potentially applicable legal orders. Difference between legal orders is a prerequisite for functioning of private international law. By the samet oken, there being the single and universal applicable law to all social relationships with foreign element (like *lex mercatoria*), there is no need for conflict rules.[7] Another premise is that there is equality between legal orders and any legal order cannot be discriminated in its application.[8] Therefore, the ideal conflict rule is bilateral. The desirable outcome is then the unformity of results.

Therefore, the conflictual justice, in its traditional form, has meant the allocation of multistate legal relationship via conflict rule into its center of gravity. Hence, the traditional conflictual justice means, in essence, correct technique of choice of law. Consequently, the application of

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[2] Cf T M De Boer, op. cit. sub 1, 290 et seq.

[3] Cf Hausmann, '*Pleading and Proof of Foreign Law – a Comparative Analysis'*(2008) The European Legal Forum, no. 1, I-1; De Boer, l.c.

[4] Cf R Hausmann, ibid., no. 1, I-1-I-60. In similar vein Naděžda Rozehnalová, Vladimír Týč, *Evropský justiční prostor v civilních otázkách* [The European Judicial Area in Civil Matters] (Masarykova univerzita Brno, 2003) 31.

[5] On this issue cf R Hausmann, op. cit. sub 3.

[6] The traditional view has its roots in Savigny's theory. Cf M Jänterä-Jareborg, *Foreign Law in National Courts A Comparative Perspective* (2003) 304 Recueil De Cours de l'Académie de Droit, 206 et seq.

[7] T M De Boer, op. cit. sub 1, 276.

[8] Cf M Pauknerová, *Evropské mezinárodní právo soukromé* [European Private International Law] (C.H. BECK, Prague 2008) 71, marg. number 96.

„correct“ foreign law should follow. Thus, the substantive law outcome of the allocation is of no or limited importance.

3. SUBSTANTIVE JUSTICE AND PROCEDURAL JUSTICE

The substantive justice focuses on just result of the application of law, whereas conflictual justice is perfectly satisfied with just allocation. Therefore, from the viewpoint of substantive justice the outcome, not method is important.[9]

Procedural law embodies different values than private international law. Procedural justice puts more emphasis on procedure itself and the just and reasonably quick decision.[10] What is more, the swiftness of the process must be particularly accentuated in the light of art. 6(1) of the European Convention on Human Rights.[11] So the procedural efficiency equals, to certain extent, to procedural justice. By the same token, if the procedure is not efficient, we can hardly speak about procedural justice. The decision should be also foreseeable for the parties thus assuring legal certainty. Last but not least, court ought not to increase the costs of the parties without a good reason.[12]

In sum, these were the essential characteristics of procedural justice. It is submitted that mentioned aspects of procedural justice may be diminished by the application of conflict-of-laws rule for various reasons which are summarize in the following chapter. This collision between procedural efficiency and conflict-of-laws justice is particularly visible in the application of foreign law. Therefore, let's have a look at the application of foreign law.

4. THE PROBLEM WITH APPLICATION OF FOREIGN LAW

The problem with application of foreign law is basically twofold.[13] First of all, the judges are not accustomed to apply foreign law, since its application forms only minor number of cases they deal with. Moreover, they have to cope with the application of conflict rules, which may seem to judges "*like skeet shooting with a bow and arrow: a direct hit is likely to be a rarity, if not pure luck.*"[14] And it is really possible to imagine fear in the judge's eyes when hearing magic words as secondary classification, prelimiary question or *renvoi* which are almost notorius among private international lawyers, but for the other people even lawyers who are not specialised in the field are hardly understandable.

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[9] T M De Boer, ibid., 293 et seq.

[10] Cf M Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, Oxford 1989) 243 et seq.

[11] M Capelletti, ibid, 244; Clare Ovey, Robin White, *The European Convention on Human Rights* (4th ed. OUP, Oxford 2006) 187-188; cf also art. 7.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure. Available at: http://www.unidroit.org/english/principles/civilprocedure/main.htm accessed 10 November 2008

[12] M Cappelletti, op. cit. sub 10, 240 et seq.

[13] There is a wealth of literature on this issue. Cf *inter alia* I Zajtay, *The Application of Foreign Law*. International Encyclopedia of Comparative Law. Volume III. Chapter 14 (J.C.B Mohr, Tübingen 1972) 3-45; S Geeroms, *Foreign Law in Civil Litigation* (OUP, Oxford 2004); R Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (OUP, Oxford 1998).

[14]T M De Boer, op. cit. sub 1, pp. 322-323 (citing words of American justice Butler).

- Thus, judges firstly have to correctly apply conflict rule and therafter find the applicable substantive law. Then second problem arises – how to apply foreign law? Moreover, judges are required in majority of legal systems to apply foreign law on their own motion.[15] Therefore, they cannot refuse to decide the case, because they are not able find or apply foreign law. This would amount to denial of justice.

- It should not to be lost from our sight that judges have usually studied and has been grown up in their country and were strongly influenced by their legal system. Notwithstanding the long lasting practice in his or her own legal system, "*judge is rather novice than veteran*" in the application of foreign law as was rightly pointed out by Axel Flessner.[16]

- There are many problems connected with application of foreign law. In essence, we can find following problems:

- Impossibility to find correct legal source of applicable law (e.g. Nepalese law),

- Language problems ("exotic languages" and so called false friends),

- The application of legal instutitions and concepts unknown to judge and his or her legal system,

- Errors in the interpretation of foreign law (e.g. the interpretation of foreign case law).[17]

This all problems may and often will result into two undesirable outcomes. First, there will be considerable delays in the proceedings. Second, the applicable law will be applied wrongly. Since aforementioned problems are willy-nilly present in the application of foreign law, one may then ask what has been the reaction of the courts? Generally speaking, the courts try to avoid application of foreign law via conflict rules as far as possible. In the following text, I deal with some of their efforts to do so.

5. THEORY OF EQUIVALENCE

Theory of equivalence has had its roots in the judicial practice of French courts.[18] There being a dispute with international element, French courts are under an obligation to apply conflict rules hence foreign law in case the matter is governed by international convention or EC Regulations.[19] French courts are also obliged to apply conflict rules in disputes concerning the

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[15] Cf comparative overview provided by R Hausmann, op. cit. sub 3, passim.

[16] Axel Flessner cited by T M De Boer, op. cit. sub 1, 318.

[17] T M De Boer, op. cit. sub 1, 304 et seq.

[18] However, this theory is not brand-new invention. Cf S Billarant, '*The French Diptych on Foreign Law: An Analysis Through Its Most Recent Retouching'* in P. Šarčevič and Paul Volken (eds), Yearbook of Private International Law, vol. 8 (Sellier. European Law Publishers, München 2007), 216 et seq.

[19] R Hausmann, op. cit. sub 3, I-5.

right the parties may not dispose with.[20] Contrary to this, French courts are under no obligation to apply conflict rules when the parties can dispose with their rights.[21]

The parties may usually dispose with their patrimonial rights (especially contracts and torts).[22] Thus, if the dispute concerns the right parties may dispone with, French courts do not have to apply conflict rule *ipso facto* foreign law. Therefore, theory of equivalence may be used only in disputes concerning rights parties may dispose with, since otherwise the French courts is obliged to apply French conflict rule.

Theory of equivalence, in a nutshell, means that the identity of results reached by the application of law applied and law which would conflict rule designated as applicable justifies the decision based on the application of the other law than that designated by conflict rule.[23] For instance, if the concrete solutions resulting from the application of French and German law are identical, the judge need not apply the law applicable on the basis of conflict rule (e.g. German law), but may apply in its place another law (e.g. French law).

At first blush, the theory of equivalence may seem to operate discriminately in favour of *lex fori*. Yet, on closer inspection we can find that this theory enables the court to apply either *lex fori* or *lex causae*.[24] Thus, it does not discriminate any of the legal orders. Albeit, one may expect that *lex fori* would often be applied.

5.1 CRITICAL VIEW ON THE THEORY OF EQUIVALENCE

As every theory, the theory of equivalence has had its weak points. Particularly important question is: what does it mean „the identical result"? Is it an „abstract identity" thus identity in principles applicable in the case (e.g. *favor contractus*) or rather „concrete" identity, i.e. identity of concrete legal rules (e.g. art. 1150 *Code Civil* and 1225 *Codice Civile*, both limiting damages by foreseeability criterion). One may also wonder whether the judge should compare the case law of legal orders or to what extent he or she should do so. Anyway, it is obvious, that the theory of equivalence requires judges to undertake comparative research in the legal orders they have had limited knowledge of. And this may really be a perilous excercise. It also entails uncertainty for the parties concerning too much room for manoeuvre given to a judges when choosing what and how compare.[25]

What is more, what should judge do if he or she is not able to find the solution for concrete situation? For example, assume that a French company claims damages from German company before French court. The German company raises and objection of prescription. French law provides for prescription in four years and German law lays down the period of prescription of three years. If French judge should use the theory of equivalence, how can he or she cope with the problem of whether the claim for damages is prescribed or not? Would not it be better to apply conflict rule and then e.g. only German law?

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[20] R Hausmann, ibid.; S Billarant, op. cit. sub 10, 215.

[21] R Hausmann, op.cit., I-4 et seq; S Billarant, op.cit. sub 10, 215.

[22] R Hausmann, op.cit. sub 3, I-5.

[23] S Billarant, op. cit. sub 18, 215.

[24] S Billarant, op. cit.sub 18, 219.

[25] H Gaudemet-Tallon (2005) 312 '*Le pluralisme en droit international privé: richesses et faiblesses (le funambule et l'arc-en-ciel)*' Recueil De Cours de l'Académie de Droit International 9-488, 76 et seq

It is also worth mentioning that *Cour de cassation* will uphold the decision of a lower court, even if it applied the wrong law when the concrete substantive law result is the same for the party applying for cassation.[26] However, *Cour de cassation* requires lower court to find concrete approach to equivalence.[27] Therefore, lower courts must look into foreign law very carefully and find not only principles, but concrete solution to the concrete facts of the case.

When considering the theory of equivalence, it should be born in mind that it is not a theory in strict sense, but rather a practical solution to problems arising in judicial process. One of the main aims of the judicial process is procedural efficiency or economy.[28]

It is also understandable that neither parties nor judge want the conflict rule hence foreign law to be applied if it is clear that there is common substantive solution in all potentially applicable laws. For instance, certain rules of French and Belgian civil law are identical. Thus, the result of a dispute, i.e. if one one party loses and the other wins is clear and does not depend on application of conflict rule therefore foreign law.

Theory of equivalence could even lead to settlement of a dispute and it also does not leave an opportunity to dishonest parties to prolong the judicial proceedings by claiming objections regarding conflict-of-law hence foreign law applicable on their basis.

However, in my view judge should inform the parties about his or her intention not to apply conflict rule *ipso facto* foreign law, because he or she has looked into all potentially applicable laws and find the single possible solution. The parties to a dispute ought to have an opportunity to express their statement on this question.

6. ANTI-CHOICE APPROACH

The question of anti-choice rule had arisen during the late 60's in the practice of Dutch courts.[29] Theoretical description and analysis of the phenomenon was then provided by Jessurun d'Oliveira.[30] In principle, anti-choice rule can be described as follows. There being a relationship with international element, the judge should research into all potentially applicable laws. If these laws arrive at the same result, there is no need to choose between them.[31] Thus, the decision of a court is not based on one legal order, but on more laws. For instance, *Hoge Raad* (Dutch Supreme Court) had to hear the case concerning law applicable to French-Dutch contract. Supreme court decided that it would not be useful to choose between French and Dutch law, since they arrived at the same results.[32]

To introduce simple example, assume wife asking the Dutch court for divorce. She is Dutch national and her husband is Belgian citizen. Therefore, there is an international element in a

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[26] S Billarant, op. cit. sub 18, 219-220.

[27] Ibid., 218.

[28] See chapter 2.

[29] H Gaudmett-Tallon, op. cit. sub 25, 339.

[30] Cf J D'Oliveira, *De Antikieregel. Een paar aspekten van de behandeling van buitenlands recht on het burgerlijk proces* (Kluwer-Deventer, Amsterdam 1971) 455-473; S Geerome, op. cit. sub 13, 59; S Billarant, op. cit. sub 18, 218.

[31] H Gaudemet-Tallon, op. cit. sub 25, 339.

[32] Ibid.

dispute. Let's say that the wife claims as a reason for divorce infidelity of the husband. Then, the judge should find which law is applicable and provides for the reasons for divorce. If the judge used the conflict methodology, he would look for conflict rule and then apply e.g. Dutch law. However, if the judge based his or her decision on the anti-choice rule, he should find reasons for divorce in both Belgian and Dutch law. If infidelity was the reason for divorce in both laws, the judge should divorce the spouses due to the infidelity of one of spouses as reason for divorce under both laws without any need to apply conflict rule.

There is a certain resemblance with the theory of equivalence as far as the conflict rules are disregarded if the substantive result is the same. However, whilst the theory of the equivalence is based upon the application of only one of the potentially applicable laws, the anti–choice approach means parallel application of more laws (*rectius* legal rules).

However, it seems that in present days the Dutch law tends to abandon anti-choice theory and oblige the judge to apply foreign *law ex officio*.[33] Thus, the anti-choice rule could be, to certain extent, understood as predecessor of theory of equivalence.

Striking similarity could be also found between anti-choice approach and so called *tronc commun* doctrine in international commercial arbitration, since both approaches are based on parallel appllication of more legal orders or rules.[34]

7. GENERAL VIEW ON THEORY OF EQUIVALENCE AND NON-CHOICE APPROACH

It flows from previous text, that both the theory of equivalence and non-choice approach differ from the application of foreign law via conflict rule. The theory of equivalence and anti-choice rule aim to find substantive law solution. By the same token, they aim at cognisance of the content of applicable substantive law directly without any need to employ conflict rule. It seems that this stems from the simple fact – if the substantive solutions of potentially applicable laws are same, then there is no conflict. And if there is no conflict, there is also no room for application of conflict rules.

Therefore, we can see a striking similarity (albeit not identity) of mentioned approaches to American doctrine of private international law, e.g. with *Ehrenzweig*'s theory of "non-conflict."[35] Thus, we can say that American approaches to conflict of laws so much refused or at least suspiciously observed by European conflict scholars have had their reflection in the process of application of foreign law in Europe. It also bears noting that the practice of American courts begun the "revolution" in the American conflict-of-laws system. Aren't the theory of equivalence and the anti-choice rule similar ways the European judges aim to readjust the traditional approach to conflict-of-laws which are theoretically perfect, yet not very practical and also contrary to vision of procedural justice?

The theory of equivalence and the anti-choice approach could be also characterised as *ad hoc* approaches, since they put emphasis on a solution in concrete dispute, whereas the traditional

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[33] Cf S Geerome, op. cit. sub 13, 59.

[34] For the analogy between anti-choice rule and *tronc commun* doctrine cf B Ancel, 'The Tronc commun doctrine: Logics and Experience in International Arbitration' (1990) 7 Journal of International Arbitration no. 3, 65-72, 70.

[35] In the same vein S Billarant, op. cit. sub 18, 219; Also H Gaudmet-Tallon, op. cit. sub 25, 340.

conflictual approach tries to reach a decisional harmony. Hence, the former pay more attention to procedural justice and latter to conflictual vision of justice.

All in all, both theory of equivalence and anti-choice approach are not inventions by ignorant judges who will never respect the only one way in dealing with multistate problems – the application of conflict rule and then foreign law. These theories are rather a reflection of certain tension between everyday practice of the courts and perfectly elaborated theories of conflictual scholars.

8. THE APPLICATION OF FOREIGN LAW BY CZECH COURTS

In the light of previous considerations, it seems to be useful to analyse the position of Czech courts concerning application of foreign law. The principal question then would be if Czech judge may apply the theory of equivalence, anti-choice or similar approach. In other words, may Czech judge avoid application of conflict rule thus foreign law if it is clear that all potentially applicable laws lead to the identical result?

According to prevaling view in the Czech theory of private international law the aswer would be in negative.[36] Judge must apply Czech conflict rule.[37] Obligatory character of conflict rule allegedly flows from its own text.[38] Therefore, Czech judge cannot avoid application of conflict rule. What is more, the non-application of foreign law which should have been applied amounts to incorrect application of law as one of the reasons for appeal to the Czech Supreme Court.[39]

Moreover, Czech judge is under an obligation to apply foreign law *ex officio* and also by his or her own motion ascertain the content of foreign law. Thus, the old maxim *jura novit curia* has held its position not only concerning domestic law, but the foreign legal order too. Furthermore, Czech judge must apply foreign law as the court in respective country would apply it. Hence, not only the text of foreign statute should be taken into account, but also foreign case law.[40]

8.1 CRITICAL VIEW ON APPLICATION OF FOREIGN LAW IN THE CZECH REPUBLIC AND LEX FERENDA

Only recently a proposal of new Private International Law Act (hereinafter "PILA") has been published.[41] Concerning the question of application of foreign law, the only change in comparison to previous Private International Law Statute lies in *verbatim* expression of a court's duty to apply foreign law of its own motion.[42] Furthermore, the court is under obligation to apply foreign law in the same way as it has been applied in the territory of state in which the law operates. What is more, the content of foreign law has to be ascertained *ex*

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[36] Z Kučera, Mezinárodní právo soukromé [Private International Law] (Doplněk, Brno 2004) 187.

[37] Z Kučera, l.c.

[38] Z Kučera, op. cit. sub 36, s. 187

[39] Para 241 Sec 2 letter b) of the Czech Code of Civil Procedure. Cf Z Kučera, op. cit. sub 36, 188.

[40] Ibid.

[41] Available at: http://obcanskyzakonik.justice.cz/cz/zakon-o-mezinarodnim-pravu-soukromem/text-navrhu-zakona.html Accessed 10 November 2008.

[42] Ibid.

officio. In case that the judge does not manage to ascertain the content of foreign law in reasonable time, he or she shall apply Czech law.

First of all, as mentioned above the maxim *jura novit curia* has played pivotal role in the application of foreign law. One may, however, wonder whether this old maxim still should retain its status. There has been expressed some doubts as to its validity even in the Czech law.[43] How can then judges still know foreign law?

It also seems to be nothing but a fallacy to think that Czech courts are able to apply foreign law as the court of the state where that law operates. Consequently, wouldn't it be reasonable to impose duty on a courts to find the text of foreign legal statute without looking into foreign case law and practice if this is sufficient to resolve the dispute?[44]

What is, on the contrary, laudable is that the PILA in its para 25(4) sets forth that if foreign law cannot be ascertained in reasonable time, the Czech law (lex fori) is to be applied. Thus, Czech court may apply Czech law for the sake of procedural efficiency, i.e. not to lenghten the proceeding by futile attempts to find and apply foreign law.

On the other hand, one may miss in the PILA more integration thus responsibility for the parties in the process of ascertaining of foreign law. The omniscient Czech court is expected to provide the parties with all legal service, even if the parties may often have better access to foreign law than judge himself. Hence, it is suggested to lay down explicitly a rule enabling judge to make parties to cooperate in ascertaining foreign law.

9. CONCLUSION

Many issues concerning the mutual influence and interaction between procedural law and private international law have remained untouched in this text. For instance, the interesting question would be whether the Czech courts as well as the courts of other EU member states may disregard conflict rule contained in the EU Regulations Rome I and Rome II. I would like to devote my attention to these issues at another place.

The application of foreign law is the topic of particular importance, which really should be considered very thoroughly. The old dogmas concerning application of foreign law should be abandoned. This would entail also analysis and rethink of the impact of civil procedure on private international law. I hope that this paper has revealed some interesting points regarding the relationship between procedura efficiency and conflictual justice.

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[43] M Bobek, '*A New Legal Order or Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe'*(2006) Croatian Yearbook of European Law and Policy, Vol. 2, 265-298, 282, chapter II.3. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=973616&download=yes

[44] For instance Italian courts are not obliged to study foreign case law or legal theory if the text of a foreign statute enables to decide the case. Cf G Novelli, *Compendio di diritto internazionale privato e processuale* (IX Edizione Esselibri, Napoli 2007) 43. One may think that this has something to do with the well-known sluggishness of Italian courts.

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Kontaktní údaje na autora – email:
Zd.novy@seznam.cz