



Small Group: Managing Cases Involving Proof of Foreign Law

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Discussion Questions

1. Procedural Steps Pre-Trial and at Trial. In light of the experience of the participating jurists, the recent report of the Association of the Bar of the City of New York and the cases discussed in the materials distributed, what specific procedural steps have the participants found to be helpful during the pre-trial proceedings or at trial in cases which raise an issue involving non-U.S. law?
2. Experience with Foreign-Law Experts. What has been recent experience with affidavits from foreign-law experts and when, if ever, is it helpful to have foreign-law experts appear as witnesses either in depositions or at trial in light of Judge Pollack's doubts about the wisdom of that course of action?
3. Structuring Pre-Trial Proceedings with Choice of Law Issue. Assume that a case presents a choice of law issue and, if non-U.S. law were held to be applicable, a non-U.S. law issue. Should the pre-trial proceedings be structured to resolve initially the choice-of-law issue and, if so, how would this be managed under the Federal Rules? If this approach were followed, the court's time would be conserved and the parties would undertake the expense of securing and presenting expert opinions only if non-U.S. law were held to be applicable to an issue in the case.

4. Possible Project of Hague Conference on Private International Law

Background: The Hague Conference on Private International is considering whether to undertake work on a project concerning cross-border cooperation in the treatment of foreign law. This is a subject that some believe to be worthy of the Conference's efforts in view of the role of the Conference's treaties concerning service, taking of evidence, child abduction and, most recently, recognition and enforcement of choice-of-court agreements and judgments resulting from such agreements. As discussed below, the Conference is using the term "treatment" rather than "proof" to raise a wider range of issues that generally is thought to be within the scope of the topic "proof of foreign law."

The precise focus of any Conference work and the form of its work product remains to be determined. The Conference would not be seeking to rewrite or reform by treaty domestic rules on how courts determine the content of foreign law. Instead, the Conference would be trying to develop mechanisms to facilitate the determination of foreign law through international cooperation and mutual assistance. The Conference might propose some rules on the treatment of foreign law such as the rather original approach of Articles 14 and 15 of the Child Abduction Convention¹. In its preparations the Conference is considering a range

¹ Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or (continued...)

of alternatives such as cooperation at the administrative level (as occurs under the Hague Service and Taking Evidence Conventions), the model of the Council of Europe Convention on Information of Foreign Law which now has 43 States parties, including the UK, Mexico and Costa Rica)², or a more direct form of mutual judicial assistance or a combination of these approaches. Any proposal would need to take account of the adversarial system that exists in the member states of the Hague Conference and the sensitivities about any attempt to revise domestic procedural rules through treaty. As with any such proposal to the Conference, there is some skepticism as to whether the Conference can do useful work in the field.

Question: The Hague Conference Permanent Bureau, which is the expert professional staff that prepares issues for the members states, would appreciate my reporting on whether the participants in our small group believe that U.S. judges and litigants would benefit from a treaty that facilitated the determination of foreign law. In particular, would such an agreement operate best in only a limited sphere (e.g., the legal effect of officials actions such as governmental rules and regulations, certain types of judicial interpretation or other court rulings, etc.) or possibly with a broader scope (e.g., identifying sources of foreign law or institutions offering interpretations)? What specific issues might such a treaty address productively? Should such a treaty facilitate direct communications by courts when there are parallel or related proceedings in the courts of two

retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

For the full text of the Child Abduction treaty see the Hague Conference web site: www.hcch.net.

² Copy attached and located at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/062.htm>

countries and the rulings in one potentially affect the action that the court of the other might take. What specific provisions of a treaty might encourage or help ensure the effectiveness of such communications?

While not central to our small group discussion, it is also important to consider in evaluating such a Conference project whether U.S. litigants would benefit from such a treaty in proving U.S. law, federal or state, in courts of other countries. The views of the group participants on this related issue would also be welcomed.

(In the interests of full disclosure, I have shared a draft of Item #4 above with the senior members of the Hague Conference Permanent Bureau and benefited from their suggestions for improving my summary of their potential work and identifying their questions on which our group's views would be welcomed.)

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³ Ms. Jian Zhou, currently a Lawyer from Abroad at Covington & Burling, has assisted with the preparation of these questions and will join me at the group's meeting to contribute to our discussion and keep a record of our exchange.