

THE NATIONAL LAW JOURNAL

WWW.NLJ.COM

THE WEEKLY NEWSPAPER FOR THE LEGAL PROFESSION

MONDAY, SEPTEMBER 18, 2006

ALM

INTERNATIONAL LAW

Proving Foreign Law

IN MANY INTERNATIONAL contract negotiations, the question of which law will govern often arises in the final stages and receives less than the careful attention that it deserves. Further, a U.S. buyer or seller may fear losing a deal and, as a result, acquiesce to subjecting a contract to the law of a non-U.S. jurisdiction. What happens if a dispute arises under the contract and the U.S. party faces in a U.S. court the need to prove the selected foreign law? Or what if a U.S. company with branch or subsidiary operations abroad encounters a claim in this country based on the law of another jurisdiction? The decided cases provide some useful lessons and warnings for litigants and practitioners.

In 1966, Fed. R. Civ. P. 44 was amended to treat a court's determination of the content of foreign law as "a ruling on a question of law." Amended Rule 44.1 also provides that "[t]he 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 amended rule requires the party intending to raise an issue concerning foreign law to inform the court and parties by "pleadings or other reasonable written notice."

Notice requirement drafted to prevent unfair surprise

The notice requirement under Rule 44.1 and similar state statutes is designed to prevent

By Peter D. Trooboff



the unfair surprise to both the court and opposing counsel by raising foreign law late in a proceeding. How late is too late? The cases show that it is always advisable to raise the possible application of foreign law to a disputed issue as early as practical. This is often not burdensome when parties are aware of the potential pertinence of foreign law to key issues in a dispute well in advance of actual litigation.

Waiting for summary judgment proved unwise for the defendant in *Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216 (7th Cir. 1996), in which Whirlpool filed suit against the owner of a Venezuelan corporation for default on a promissory note. The 7th U.S. Circuit Court of Appeals applied forum law, rather than foreign law, when the defendant raised foreign law and introduced a supporting expert's affidavit only after summary judgment against him had been awarded. In *DP Aviation v. Smiths Industries Aerospace and Defense Sys. Ltd.*, 268 F.3d 829 (9th Cir. 2001), the 9th Circuit advocated that the issue be raised in the pretrial conference when clarifying its interpretation of "reasonable notice." The court recognized that occasionally issues of foreign law could emerge

at trial or even be raised for the first time on appeal; however, that was not standard practice. Further, the 9th Circuit rejected the view that the notice could be delayed because the issue, even though reasonably anticipated, involved prejudgment interest and would not arise until there was a decision on liability. It is noteworthy that the standard for appellate review of a trial court's ruling on whether notice is timely can be complex since legal issues are reviewed de novo, but a finding of reasonable notice is reviewed under an "abuse of discretion" standard. The 9th Circuit emphasized that it would have reached the same result under either standard. 268 F.3d at 845 n.15, 849 n.21.

Enactment of Rule 44.1 did not fully resolve the issues of how to determine the content of foreign law. In a characteristically blunt speech in 1978, Judge Milton Pollack reminded members of the American Foreign Law Association that Rule 44.1 did not "relieve the parties, or counsel, of the task of demonstrating what the law of a foreign country is." Milton Pollack, "Proof of Foreign Law," 26 Am. J. Comp. L. 470 (1978). Reminding his audience that "[w]e have quite a few things to do besides decoding the *Codigo Civil*," Pollack saw the rule as an opportunity and urged that "foreign law should be briefed and argued roughly in the same fashion as the domestic law." Pollack expressed skepticism about whether experts who support by written submission particular interpretations of foreign law should appear as witnesses and testify.

In a recently published report, the Committee on International Commercial Disputes of the Association of the Bar of the City of New York, under the chairmanship of

Peter D. Trooboff is a partner in the Washington office of Covington & Burling. Kathleen E. Reeder, a third-year student at Columbia Law School, provided substantial assistance with this article.

Lawrence Walker Newman, surveyed how the federal and New York reforms “are working today.” 61 *The Rec. of the Ass’n of the Bar of the City of N.Y.* 49 (2006). After not only reviewing the cases but also interviewing a number of judges who have confronted foreign-law issues in recent litigation, the committee concluded that “the reform procedures of the 60s have had to be modified in practice to allow for practical realities.” The committee discussed the experience of federal courts with determining foreign law in cases that used party-appointed expert witnesses, court-appointed experts and special masters on foreign law. The report recommended that judges be guided by the “freedom of the reformed rules, tempered with common sense.” In particular, it drew a key distinction between the role that a U.S. judge can play in finding applicable standards when the law at issue is likely to be accessible (e.g., English law) and that judge’s greater reliance on experts and other resources when there is a paucity of written material about the applicable law, language challenges in reading available cases and jurisprudence, or other difficulties (e.g., Chinese law).

Just two years after his speech, Pollack confronted the issue in *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275 (S.D.N.Y. 1980), *aff’d*, 633 F.2d 203 (2d Cir. 1980), where the parties had stipulated that the open claims were governed by Colombian law. A kidnapping victim and his wife had sued the parent U.S. corporation of his Colombian employer and alleged that the parent was liable to them for damages under Colombia’s Labor Code and Civil Code. The plaintiffs introduced an affidavit from experts and argued that Colombian law allowed their claim. Citing his 1978 speech, Pollack explained that “[e]xpert testimony is no longer an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and reach their own decisions on the basis of independent examination of foreign legal authorities.” The court made clear that it had read carefully the analysis of the experts and even agreed with that of the defendant’s expert. However, Pollack confirmed that the court had “fully conducted its own examination of the authorities provided” to deny recovery to the plaintiffs under Colombian law.

If the parties invoke foreign law, they must be clear about the issues to which it is alleged to apply. In *Vishipco Line v. Chase Manhattan Bank N.A.*, 660 F.2d 854 (2d Cir. 1981), the plaintiff did not rely on foreign law for its claims and the defendant relied on foreign law only to support its affirmative defenses. The defendant did not expressly invoke foreign law as applicable to the plaintiff’s claims. After trial, the 2d Circuit would not permit the defendant to argue that foreign law should have governed the plaintiff’s claims and would have defeated them.

■ **The cases show that it is advisable to raise the possible application of foreign law to a disputed issue as early as practical.** ■

If a trial court fails to do the kind of homework that Pollack carried out in *Beatrice Foods*, then the likelihood of reversal increases greatly. In *Universe Sales Co. Ltd. v. Silver Castle Ltd.*, 182 F.3d 1036 (9th Cir. 1999), the defendant’s Japanese law expert, a Japanese attorney specializing in trademark and contract law, showed that Japanese contract, not trademark, law was controlling. The 9th Circuit reversed the district court’s grant of summary judgment because the trial judge had failed to credit the un rebutted presentation and interpretation by the expert and conducted no research of its own. Judge Melvin T. Brunetti explained that “[e]xpert testimony accompanied by extracts from foreign legal materials has been and will likely continue to be [under Rule 44.1] the basic mode of proving foreign law.” The 9th Circuit found that the district court, having been presented with an

argument as to the applicability and content of Japanese contract law, should have either conducted its own research or instructed the parties to present further evidence regarding the interpretation of the Japanese law.

One appellate court did the work of the trial court

In some instances, the appellate court will do the work of the trial court. In *Twohy v First National Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985), the 7th Circuit agreed with the trial court’s holding but added “we cannot fully endorse the court’s method of reaching its conclusion.” Chief Judge Walter J. Cummings Jr. noted the “conclusory nature” of the affidavits from the defendant’s foreign-law experts and the absence of references to controlling authority in the plaintiff’s experts. It concluded that the trial court should have demanded a more “complete presentation by counsel” as the Advisory Committee on Rule 44.1 had recommended. The court then proceeded to its own careful analysis of Spanish law that provided the missing support for the trial court’s conclusions.

In view of the cases to date, what is the optimal role of an expert, whether appointed by parties or the court? It would appear that an expert is best utilized to present reasoned support for a particular interpretation of the foreign law pertinent to the issue presented and to assist counsel with responding to submissions by any experts on the other side. Further, when the trial court intends to conduct its own research, the better practice would be to alert the parties and afford them an opportunity to comment on the preliminary conclusion, again often with experts helping to analyze the court’s research. Wright & Miller, *Federal Practice and Procedure* at § 2444. Most important, and as the cases surely show, well-advised parties will have first consulted their experts at the time of contract negotiation—and not solely when the dispute arises. **NLJ**

This article is reprinted with permission from the September 18, 2006 edition of THE NATIONAL LAW JOURNAL. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM Reprint Department at 800-888-8300 x6111 or visit almreprints.com. #005-09-06-0012