

## FOCUS: BUSINESS LITIGATION

# Determination of Foreign Law Under Federal Rule 44.1

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The popularity of choice of law provisions in contracts and the increase in cross-border litigation require savvy business litigators to be prepared to prove the applicability and substance of foreign law in federal district courts.

The district court's determination of the substantive law of another country is governed by Federal Rule of Civil Procedure 44.1 and is frequently outcome-determinative.

Rule 44.1 only requires a party to give notice of its intent to raise an issue of foreign law and expressly provides that the court's determination of foreign law is a ruling on a question of law. The rule does not detail how a party must prove the substance of foreign law, but states that a court may consider "any relevant material or source," including testimony. It even provides that evidence need not be admissible to prove the substance of the foreign law.

While the rule itself is fairly straightforward, its application can be much more complicated.

## Foreign Law Experts

In most cases, and particularly in complex cases, parties use experts to prove the foreign law. The expert testimony does not have to be live, and can be made by declaration or affidavit. There is also no requirement that the submissions take place on the record; however, foreign law experts frequently give depositions and testify in court. But who may be an expert?

There is a split of authority on whether Rule 44.1 experts are held to the same standards as Federal Rule of Evidence 702 experts. This arises because their testimony is usually not submitted to the fact-finder as part of the evidentiary record. Some courts have held that their testimony is not governed by Rule 702, and have even held that the expert may apply the foreign law to the facts of the case.

Often, law professors and even practitioners are offered as experts. Courts in the Fifth Circuit have stated that an expert on foreign law need not meet any special qualifications, nor even be admitted to practice in the country whose law is at issue. This often gives rise to the classic "war of the experts." And because practitioners or attorneys offered as foreign law experts are often advocates themselves, and could cross the line between advocacy and expertise, courts often scrutinize their testimony. As one might expect, the determination of foreign law can become a mini-trial, wholly separate from the other issues in a case.

## District Court's Discretion

Rule 44.1 provides a court with broad discretion to accept or disregard evidence relating to, or to determine, the substance of foreign law. Although experts are the most common method of proving foreign law, expert testimony is not required. Rule 44.1, moreover, allows the court to reject even *uncontroverted* conclusions of a foreign law expert, and to determine the substance of foreign law on its indepen-

dent review of the law.

The court can thus conduct its own research to determine foreign law, and may wish to reexamine and amplify materials presented by the parties. However, the Circuit Courts of Appeals agree that the district court has no obligation to conduct its own research. Although it is rarely seen, a court can also appoint its own foreign law expert under Rule 44.1. As a result, although the parties may present expert testimony on foreign law, the district court may reach an independent and contrary conclusion.

## Unsettled or Unproven Foreign Law

Determining foreign law becomes even more complex when the foreign law is unsettled or cannot be ascertained, or when the parties' submissions are simply inadequate.

Most appellate courts have held — which is surprising to some practitioners — that when the foreign law is unsettled or inadequately proven, the

district court may look to its forum state's law in order to fill any "gaps." In addition, many courts in such situations have expanded their review to related jurisdictions. But, after all, the party seeking to rely on foreign law still bears the burden of proving that the foreign law, and not the forum state's law, applies. Thus, absent other guidance, courts may apply forum law as a default.

In sum, business litigators must be prepared to prove foreign law when foreign companies and choice of law provisions mandate its use. Failure to prove it adequately can cause the district court to default to forum law. Whether for good or bad for the party seeking to apply foreign law, the result can be case-determinative. **HN**

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