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Conquering Legal Xenophobia: Tips for Presenting and Proving the Laws of Foreign Countries in Federal Courts

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With the growth of international, transnational, and cross-border disputes in recent years, there has been a corresponding increase in the need for parties and their counsel to find efficient and effective ways to prove the substantive law of foreign countries. The determination of foreign law in federal courts is governed by Federal Rule of Civil Procedure 44.1. Although Rule 44.1 was adopted in 1966, the U.S. Court of Appeals for the Ninth Circuit did not address the rule in a published opinion until 1977. Nationwide, there were 15 published opinions addressing Rule 44.1 in the first five years after the rule went into effect, covering the laws of 12 different foreign countries. By contrast, there have been more than 125 published decisions addressing Rule 44.1 in the past five years, covering the laws of approximately 50 foreign countries. The increased number of cases implicating foreign law and the increased range and complexity of the foreign laws at issue—from Afghanistan to Zimbabwe—underscore the need for today's federal practitioners to be familiar with the procedures and potential pitfalls involved in presenting and proving foreign law.

The adoption of Rule 44.1 changed the determination of foreign law in federal courts from a question of fact (for a jury to decide) to a question of law (for the court to decide). The rule otherwise gives the parties and the court the freedom and flexibility to tailor their approach to particular foreign law issues on a case-by-case basis. As long as parties provide reasonable written notice of their intent to raise an issue of foreign law, they are virtually unrestrained with respect to the kind of evidence they can present to prove the substance of the law. Likewise, courts have broad discretion to determine the content of foreign law, including the freedom to conduct independent research. As detailed below, however, there are a number of practical considerations parties should keep in mind when faced with foreign law issues. This article focuses on the practice and case law from within the Ninth Circuit, although it also includes some decisions and recent developments from other circuits.

Notice: Avoid the Element of (Unfair) Surprise

The first sentence of Rule 44.1 states that "[a] party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing."[1] The primary purpose of the notice requirement is to avoid unfair surprise to opposing parties.[2] Although courts may consider an issue of foreign law at any time, a party intending to rely on foreign law should give notice as early in the case as practicable. The notice need not be in the pleadings, but it must be written. Because the differences between foreign and domestic law can be outcome-determinative, the parties should be mindful of potential foreign law issues and should raise them without delay. Parties that fail to timely raise a foreign law issue—or after raising it, neglect

to submit evidence to prove its content—run the risk of the court simply applying domestic law, most likely the law of the forum.[3]

Rule 44.1 does not identify a specific deadline, time limit, or cut-off date for giving notice. Although courts in the Ninth Circuit generally deem notice timely when given at or before the final pretrial conference, there is no bright-line test for determining whether notice is timely or reasonable.[4] Instead, timeliness is determined on a case-by-case basis by marshalling all available facts, typically with reference to the following Advisory Committee factors: (1) the stage of the case at the time of the notice, (2) the noticing party's reason for not giving notice earlier, and (3) the importance of the potential foreign law issue to the case as a whole.[5]

The Ninth Circuit analyzed these factors in two cases in which notice of an issue of foreign law was raised for the first time after entry of judgment.[6] Both cases involved disputes over contracts with choice of law provisions specifying foreign law.[7] In both cases, however, the foreign law issue would be implicated, if at all, only after a liability determination was reached. In *APL Co. v. UK Aerosols Ltd.,* the foreign law issue related to the availability of attorneys' fees after summary judgment was granted.[8] (Attorneys' fees were available under foreign law, but not under domestic law.) In *DP Aviation v. Smiths Industries Aerospace & Defense Systems*, the foreign law issue related to the determination of prejudgment interest.[9] (The foreign law provided for a lower prejudgment interest rate.) Addressing each of the factors in the Advisory Committee Notes, the Ninth Circuit held that the notice in *APL* was reasonable, but the notice in *DP Aviation* was not.[10]

Stage of the Case

The *APL* court noted that the issue of attorneys' fees arose only after summary judgment was granted and, therefore, the foreign law issue was not reasonably expected to be part of the proceedings earlier in the case.[11] The court further noted that "APL timely invoked foreign law as to attorneys' fees at the first opportunity when the issue became material: in the motion for attorneys' fees."[12] The *DP Aviation* court could have made a similar assessment (i.e. foreign law was invoked as to prejudgment interest at the first opportunity, namely, in opposition to a motion for prejudgment interest), but it was less tolerant. Instead, it found that the issue of prejudgment interest reasonably should have been expected earlier in the case because the issue was "not speculative" and "was almost certain to follow" in the event of an adverse judgment.[13]

Reason Proffered for Not Raising the Foreign Law Issue Earlier

The *APL* court found that there was no need for APL to give notice that it would specifically invoke foreign law as to attorneys' fees until it became an issue.[14] The parties and the court had notice that APL may invoke foreign law, and APL gave more specific notice when the post-judgment issue came before the court.[15] In *APL*, unlike in *DP Aviation*, there was at least some prior notice that foreign law may apply to at least some issues in the case.[16] The Ninth Circuit deemed the prior generalized notice sufficient even though the notice did not specify the particular issues of foreign law that may be raised.[17] In *DP Aviation*, however, the parties affirmatively relied on domestic law from the beginning of the case through trial and never previewed the possibility that foreign law may apply.[18]

Importance of the Foreign Law Issue to the Case as a Whole

The *APL* court found that the attorneys' fees issue was an "isolated aspect of the case," was "not particularly complicated," and "would not require extensive or time-consuming research or discovery" to defend.[19] Again, the *DP Aviation* court could have made a similar assessment, but it did not.[20]

In sum, the *APL* and *DP Aviation* courts came to opposite conclusions, not only on the ultimate issue of the reasonableness of notice, but also on each of the three Advisory Committee factors. The one factor that appears to have been the difference-maker, however, was the presence or absence of some prior indication by the party (no matter how general) that foreign law may apply. The importance of timely notice comes into stark focus through these two Ninth Circuit opinions.

When It Comes to Proof, Consider Your Sources

The second sentence of Rule 44.1 states 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."[21] Typical sources of foreign law include primary sources, such as copies of the applicable statutes, rules, code provisions, or judicial decisions. Parties may also submit secondary sources such as books, treatises, law review articles, or judicial opinions from other countries (including the United States) analyzing the foreign country's law.[22] These primary and secondary sources are often accompanied by expert testimony, usually in the form of declarations or affidavits, along with English translations of the relevant materials, if necessary. Not all evidence of foreign law is created equal, however, nor does all evidence merit equal weight.[23] The evidence parties present and the manner in which it is presented warrant careful consideration and planning.

No matter what evidence the parties submit, however, courts are free to do their own research and otherwise consider whatever materials they see fit to determine an issue of foreign law. This aspect of Rule 44.1 brings the process of ascertaining foreign law closer to the process of ascertaining domestic law. While the rule permits—but does not require—courts to conduct independent research, in *Universe Sales Co. v. Silver Castle Ltd*., the Ninth Circuit found that the district court committed reversible error by rejecting a party's unrebutted expert declaration without conducting independent research or encouraging the other party to submit rebuttal evidence.[24] Ironically, rather than remanding the case for the district court to do just that, the Ninth Circuit simply adopted the opinions in the unrebutted expert declaration and reversed without conducting its own research or soliciting additional evidence from the parties.[25] The *Universe Sales* decision drew a strong dissent, which not only disputed the majority's legal conclusion, but also challenged the majority's facts and noted that "the district court did everything the majority opinion now claims the court should have done," including conducting "a thorough inquiry" of the foreign law issue and requesting additional evidence and briefing from the parties.[26] Although *Universe Sales* is still good law, the hard edges of the majority opinion have been softened by subsequent Ninth Circuit decisions that are more in keeping with the letter and spirit of Rule 44.1.

For example, in *Jinro America, Inc. v. Secure Investments, Inc.,*[27] the Ninth Circuit held that the district court's rejection of unrebutted expert testimony on foreign law was not reversible error for two independent reasons: (1) courts have "wide latitude" under Rule 44.1 to determine foreign law; and (2) the district court considered the unrebutted expert testimony, but when the parties failed to respond to the district court's request for evidence on a particular issue of foreign law, the court conducted its own research and reached its own conclusions.[28]

Moreover, in *Pazcoguin v. Radcliffe,*[29] the Ninth Circuit reiterated that the determination of foreign law is a question of law and "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."[30] Indeed, in *Pazcoguin,* unlike *Universe Sales*, the Ninth Circuit itself conducted independent research on the disputed foreign law issue.[31]

The subject of expert testimony warrants additional attention for at least two reasons. *First*, as the Ninth

Circuit has emphasized in a number of its opinions, "expert testimony accompanied by extracts from foreign legal materials has been and will likely continue to be the basic mode of proving foreign law."[32] *Second*, notwithstanding courts' emphasis and reliance on expert testimony, the use of paid experts has been the subject of increasing suspicion and skepticism. Indeed, there has been a movement afoot outside the Ninth Circuit for courts to conduct their own independent research and to rely on sources of foreign law other than the testimony of paid experts.

The U.S. Court of Appeals for the Seventh Circuit has been particularly vocal in recent years with respect to the practice of using paid experts to help courts determine foreign law. In *Sunstar, Inc. v. Alberto-Culver Co.*,[33] in an opinion by Judge Richard A. Posner, the Seventh Circuit criticized the practice and expressed a preference for "superior sources" of foreign law, "such as articles, treatises, and judicial opinions."[34] The *Sunstar* court elaborated on its bias against experts, explaining that experts "are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by the client."[35] In the court's view, "[r]elying on paid witnesses to spoon feed judges is justifiable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn."[36]

More recently, in *Bodum USA, Inc. v. La Cafetiere, Inc.*,[37] the Seventh Circuit issued a unanimous ruling based on an issue of French law, but split 2-1 with respect to the use of experts to prove the content of foreign law. Judge Easterbrook penned the majority opinion and noted that experts are expensive and add an "adversary's spin, which the court then must discount."[38] Judge Frank H. Easterbrook further stated that published sources like treatises were a neutral (and therefore better) alternative for determining foreign law.[39] Judge Posner wrote a concurring opinion expanding on his opinion in *Sunstar* and underscoring his view that the "common practice" of using experts to establish the meaning of foreign law is "bad" and "unsound."[40] Judge Diane P. Wood wrote separately to lodge her disagreement with Judge Easterbrook's and Judge Posner's views on the use of experts, noting that "Rule 44.1 itself establishes no hierarchy for sources of foreign law."[41] Judge Wood also noted that testimony from foreign law experts "has been used by responsible lawyers for years" and is "helpful or even necessary" in many cases to help provide not only the content, but also the context and nuances of the foreign law at issue.[42]

Notwithstanding the Seventh Circuit's criticism of expert testimony, the use of experts to prove foreign law is not only common practice, as Judge Posner acknowledges, but is expressly contemplated and authorized under Rule 44.1. Although Judge Posner was willing to roll up his sleeves and steep himself in various sources of French law, it is a safe bet that many judges still share Judge Milton Pollack's sentiment that judges "have quite a few things to do besides decoding the *Codigo Civil*"[43] and will appreciate expert guidance.

Given the conflicting opinions among judges regarding the use of foreign law experts, parties would be well-served to research their presiding judge's prior practice with respect to Rule 44.1 issues. Absent some indication of the judge's preference, parties should err on the side of caution and include expert testimony as *part* of their foreign law submissions. To use experts as effectively and cost-effectively as possible, however, parties should do so in a manner designed to maximize the benefits and minimize the drawbacks associated with foreign law experts. Specifically, parties should be mindful of the following considerations, which are not expressly required under Rule 44.1, but are suggestions for making expert testimony as helpful as possible while keeping costs and perceived bias to a minimum.

First, parties should not use experts as the exclusive source of foreign law. Instead, experts should be used to supplement and elucidate the available

primary and secondary sources on foreign law. For example, experts should identify the key sources of foreign law, submit copies of those sources (including translations, if necessary) with their testimony, provide background and context, and explain any issues or nuances regarding the relevant foreign law that the available sources do not fully or adequately address.

Second, when selecting experts, parties should look for legitimate experts in the specific area of foreign law at issue, typically professors, retired judges, or attorneys with relevant knowledge of and experience with the foreign law at issue.[44] Ideally, parties should seek out experts who are helpful and effective communicators, preferably in English. Where translation into English is needed, parties should not underestimate the importance and convenience of an expert who is fluent and effective in both languages. Having a single expert who understands the nuances of the law and the language of the translation can streamline the process by eliminating unnecessary confusion and minimizing disputes, while avoiding the expense of a separate translator. Indeed, translators who are unfamiliar with certain legal terms (or the subtleties or specialized meaning of certain terms in the legal context) may actually create disputes through their translations that would not arise in the native language.

Third, to avoid concerns about adversarial spin, experts should provide their testimony in as neutral a manner as possible. Whether or not the expert is a professor, the expert should present the foreign law as a teacher, not as an advocate. Along those lines, the expert's testimony should be limited to an explanation of the relevant legal principles, rather than a legal analysis applying the relevant law to the facts in the case. The legal analysis and advocacy should be reserved to the parties' attorneys based on the legal principles presented through the experts. Limiting experts' work in this way should also help reduce costs.

Fourth, to further reduce costs and eliminate the risk of perceived bias, the parties may consider jointly retaining an expert. The parties could agree on a selection process and then work together to identify and retain an expert to provide testimony on the foreign law at issue. This approach may not be workable in every case, but is at least worth pursuing to reduce expenses and to avoid having the court discount (if not disregard) an expert's testimony as partisan.

Questions of (Foreign) Law Are Questions of Law

Rule 44.1 makes clear that the court's determination of foreign law "must be treated as a ruling on a question of law."[45] This aspect of the rule marked a significant change from prior federal practice. Unlike the practice before Rule 44.1 was adopted, questions of foreign law are decided by the court, not the jury. As a result, summary judgment procedures are available even if the parties dispute "the content, applicability, or interpretation of the foreign provision" at issue.[46] Such disputes do not create a "genuine issue as to any material fact" precluding summary judgment.[47] Moreover, on appeal, district courts' determinations of foreign law under Rule 44.1 are reviewed *de novo*.[48] The appellate courts are free to consider evidence of foreign law outside the record or evidence presented for the first time on appeal.[49]

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In sum, Rule 44.1 provides the parties and the courts with ample freedom and flexibility to tackle and resolve issues of foreign law. But the process of determining foreign law is anything but a free-for-all. The parties and the court need to be vigilant and thorough, particularly with respect to giving notice of intent to rely on foreign law, the sources of foreign law that are presented and consulted to prove foreign law, and the use of expert testimony.

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1 Fed. R. Civ. P. 44.1.

2 *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 846 (9th Cir. 2001).

3 *See Commercial Ins. Co. of Newark, N.J. v. Pacific-Peru Construction Corp.,* 558 F.2d 948, 952 (9th Cir. 1977).

4 *DP Aviation*, 268 F.3d at 847.

5 Fed. R. Civ. P. 44.1, Advisory Committee Notes.

6 *APL Co. v. UK Aerosols Ltd.*, 582 F.3d 947, 951 (9th Cir. 2009); *DP Aviation*, 268 F.3d at 845.

7 *APL*, 582 F.3d at 950; *DP Aviation*, 268 F.3d at 845.

8 *APL*, 582 F.3d at 951.

9 *DP Aviation,* 268 F.3d at 845.

10 *APL*, 582 F.3d at 956; *DP Aviation,* 268 F.3d at 849.

11 *APL*, 582 F.3d at 956.

12 *Id.*

13 *DP Aviation,* 268 F.3d at 848-49.

14 *APL*, 582 F.3d at 956.

15 *Id.*

16 *Id.*; *DP Aviation,* 268 F.3d at 846.

17 *APL*, 582 F.3d at 956.

18 *DP Aviation,* 268 F.3d at 849.

19 *APL*, 582 F.3d at 956.

20 *DP Aviation,* 268 F.3d at 849.

21 Fed. R. Civ. P. 44.1

22 *See General Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat,* 289 F.3d 434, 439 (6th Cir. 2002) (considering two judicial decisions from the United Kingdom applying Romanian law).

23 The court must decide how much weight, if any, to give to the evidence submitted by the parties or otherwise considered by the court to determine foreign law. *Zeevi Holdings Ltd. v. Republic of Bulgaria,* (S.D.N.Y April 5, 2011) (citing *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 700 (S.D.N.Y. 2003)).

24 182 F.3d 1036, 1038-39 (9th Cir. 1999).

25 *Id.* By contrast, in *Tobar v. United States*, the Ninth Circuit remanded because "the district court apparently did not recognize that, in its discretion, it could inquire further into the content of Ecuadorian law." 2011 BL 106712, at **5287-88 (9th Cir. April 21, 2011) The Ninth Circuit noted that "[o]n remand, the court may instruct the parties to provide additional evidence, through testimony or other means; the court may conduct its own research; and the court may undertake any other inquiry consistent with Rule 44.1." *Id.* at *5288.

26 *Universe Sales*, 182 F.3d at 1039-40 (dissenting opinion).

27 266 F.3d 993 (9th Cir. 2001).

28 *Id.* at 1000.

29 *Pazcoguin v. Radcliffe,* 292 F.3d 1209 (9th Cir. 2002).

30 *Id.* at 1216. The dissent in *Universe Sales* cited out-of-circuit authority for this same proposition. *See Universe Sales,* 182 F.3d at 1040 (dissenting opinion).

31 *Pazcoguin,* 292 F.3d at 1216 ("We have reviewed the Philippine statute at issue and have conducted our own research into Philippine law.").

32 *Jinro America Inc.,* 266 F.3d at 1000 (citing *Universe Sales,* 182 F.3d at 1038).

33 586 F.3d 487 (7th Cir. 2009).

34 *Id.* at 495.

35 *Id.* at 495-96.

36 *Id.* at 496.

37 621 F.3d 624 (7th Cir. 2010).

38 *Id.* at 629.

39 *Id.*

40 *Id.* at 631-38 (concurring opinion).

41 *Id.* at 638-39 (concurring opinion).

42 *Id.* at 639 (concurring opinion).

43 *See* Pollack, *Proof of Foreign Law*, 26 Am. J. Comp. Law 470, 471 (1978).

44 The Ninth Circuit has made clear that foreign law experts are "not required to meet any special qualifications" and "need not even be admitted to practice in the country whose law is in issue." *In re Grand Jury Proceedings (Marsoner)*, 40 F.3d 959, 964 (9th Cir. 1994) (quoting 9 C. Wright & A. Miller, Federal Practice & Procedure § 2444 at 406 (1971)). Nevertheless, the expert's qualifications will impact the weight of his or her testimony. *See, e.g., Fahmy v. Jay-Z,* 2011 BL 126123, at *6 (C.D. Cal. May 2, 2011) (denying motion to exclude foreign law expert's testimony and noting that the expert's "limitations . . . go to the weight, rather than admissibility of the testimony").

45 *See* Fed. R. Civ. P. 44.1; *see also Pazcoguin*, 292 F.3d at 1216.

46 *See Universal Trading & Investment Co. v. Kiritchenko*, No. 99-cv-03073 (N.D. Cal. September 7, 2007) (citing *Banco de Credito Industrial, S.A. v. Tesoreria General de la Seguridad Social de Espana*, 990 F.2d 827, 838 (5th Cir. 1993)).

47 *Id.*

48 *DP Aviation,* 268 F.3d at 846. However, the district court's determination of the reasonableness of notice under Rule 44.1 is discretionary and, therefore, subject to an abuse of discretion standard on appeal. *Id.*

49 *See Pazcoguin,* 292 F.3d at 1216.