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Proof of Foreign Law after Bodum
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At common law, a question of a foreign law was traditionally a question of fact. There was, however, some difference of opinion as to the extent to which it was a jury question. For example, Massachusets took a quite conservative approach, and held that questions of law were typically decided by the jury:

> If the law is found in a single statute or in a single decision, the construction of it, like that of any other writing, is a question of law for the court.... Where the law is to be determined by considering numerous decisions which may be more or less conflicting, or which bear upon the sujbect only collaterally, or by way of analogy, and where inference may be drawn from them, the question to be determined is one of fact, and not of law.

Electric Welding Co. v. Prince, 200 Mass. 386, 390, 86 N.E. 947, ___ (1909).

> Where the only proof of a foreign law is some statute which has been offered in evidence, a number of courts hold that its construction is for the court. But where . . . oral testimony is taken in which there is a sharp conflict and where the case must practically be decided upon this oral testimony, the authorities are well nigh harmonious to the effect that the disputed question of fact presents a jury question in a case triable by a jury, and not one that can be taken from the jury and be decided by the court.

Hite v. Keene, 149 Wis. 207, 215, 134 N.W. 383, ___ (1912).

This rule had been subject to criticism quite early:

> But how about court decisions? When these state the unwritten law of the foreign jurisdiction with reasonable certainty and clearness, their application should not be left to the speculation of twelve men. If instances should arise, which will be rare, where the decisions are so perplexing or doubtful that experts disagree on the law we shall have to determine whether the question of the foreign law must then be solved by the jury. How the jury can do this as well as the judge, experienced in the law, I cannot quite appreciate.

Fitzpatrick v. International Railway, 252 N.Y. 127, 169 N.E. 112 (1929).

It should be noted that while these old common-law precedents might seem quaint today, there probably was a good reason for them. It's unlikely that any judge had access to very many foreign legal materials, or that the issues came up very often. Therefore, it seems somewhat reasonable to at least impose a fairly high burden of production upon the parties seeking to assert foreign laws.

This question of whether foreign law is a "fact" or a question of law was largely resolved by Federal Rule of Civil Procedure 44.1, and corresponding state rules (including Minnesota and North Dakota):

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court 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 court's determination must be treated as a ruling on a question of law.**

(Emphasis added.) Rule 26.1 of the Federal Rules of Criminal Procedure is substantially similar.

Wisconsin has adopted the Uniform Judicial Notice of Foreign Law Act, Wis. Stat. § 902.02:

> (1) Courts take notice. Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.
>
> (2) Information of the court. The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.
>
> (3) Determined by court; ruling reviewable. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.
>
> (4) Evidence of foreign law. Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.
>
> (5) Foreign country. The law of a jurisdiction other than those referred to in sub. (1) shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.
>
> (6) Interpretation. This section shall be so interpreted as to make uniform the law of those states which enact it.
>
> (7) Short title. This section may be cited as the Uniform Judicial Notice of Foreign Law Act.

Cf. New York Civil Practice Rules 3016 and 4511).

While this rule clears up the confusion regarding whether the issue is one of fact or law, it still leaves open the question of how foreign law should be established.

At common law, the accepted method of proving foreign law was expert testimony, by attorneys from the country in question. See, for example, Fitzpatrick, supra, where two Ontario attorneys testified as to the meaning of a certain Ontario railroad regulation. Under Rule 44.1, it is still acceptable for the court to rely upon such testimony, since the "court may consider any relevant material or source, including testimony...."

These rules are, from the court's point of view, permissive, in that the allow the court to consider a wide variety of sources to prove foreign law. Indeed, they continue the common law practice of allowing expert testimony by foreign lawyers. But in general, the rules are not mandatory: They do not require the court to consider this information in any particular form.

So while the court **may** take judicial notice, it is not necessarily bound to do so, as evidenced by the following exchange:

> Mr. Williams: I'm going to ask the Court to take judicial notice of the weather conditions on that day. And in that regard, I'm going to provide the court with a copy of the Lubbock Online article from January the 28th regarding the conditions on the 27th, and also a copy from the national Weather Service of the report for that particular day, and ask the court --and I think the court can take, under Rule 201, judicial notice of those facts. You guys want to look at this?
>
> Mr. Kingston: I don't want to look at them, Marvin.
>
> Mr. Williams: Can I have these marked, Your Honor, for the record?
>
> The Court: Mr. Williams, --
>
> Mr. Williams: Yes, sir. That suffice?
>
> The Court: -- the request for me to take judicial notice of Lubbock Online.com is denied. The newspaper is inherently unreliable.

Jerry Buchmeyer, et cetera, 67 TEXAS BAR JOURNAL 79 (January 2004).

So it is probably an unwise practice to assume that the court **will** take judicial notice of your particular proof of foreign law, even though the court **may** do so.

While the issue is clearly still subject to debate, some guidance as to how to prove foreign law (albeit conflicting guidance) was provided by the Seventh Circuit in Bodum USA, Inc., v. La Cafetiere, Inc., 621 F.3d 624 (7th Cir. Sept. 2, 2010). This case generated three opinions, so there's probably something for everyone. But by taking the advice of the three opinions, it's possible to be prepared to prove a question of foreign law to any court's satisfaction.

Bodum was a contract dispute involving the manufacture and sale of French-press coffee makers (which we learn from the opinion are known in French as cafetières à piston).

It was undisputed that the case was governed by French law, and one of the parties sought to rely upon Article 1156 of the French Civil Code, which provides:

> One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.

One of the parties testified by affidavit that he had a certain understanding of the terms of the contract, and therefore, under this provision, there must be a trial to determine the intent of the parties. Both parties offered affidavits of French law professors containing conflicting assertions as to French law.

The Court first noted that Rule 44.1 states that the court "may" consider such testimony, but pointed out that the rule does not say that the court "must" consider such testimony. It went on to say that "Judges should use the best of the available sources", and that the "court may have at its disposal better foreign law materials than counsel have presented". Id. at 628.

It is safe to say that the court's principal opinion, authored by Chief Judge Easterbrook, discourages the practice of proof of foreign law through expert testimony, even though the practice might be permitted by the rule.

The opinion points out that the practice of using experts' declarations is expensive, and also "adds an adversary's spin, which the court then must discount." Id. at 629. Instead, it noted that published treatises about French law (including those published in English) do not have this "slant", and because they are readily available, "we prefer them to the parties' declarations." Id.

The court went on to find that the above-quoted article of the French Civil Code means that the court must seek the parties' "common intention", and not merely the unilateral claimed intent of one party. The court cited a 2007 U.S. law review article for this proposition, along with a number of French judicial decisions and other statutes.

Having decided this issue, the court affirmed the lower court's grant of summary judgment without difficulty.

Judge Posner concurred and wrote a separate opinion "'to express emphatic support for, and modestly to amplify, the court's criticism of a common and authorized but unsound judicial practice." Id. at 631. Like Judge Easterbrook, Judge Posner first points out that Rule 44.1 does not **require** the court to consider such affidavits–it merely **allows** their use. According to Judge Posner:

> Thus the court doesn't *have* to rely on testimony; and in only a few cases, I believe, is it justified in doing so. This case is not one of them.

Id. at 632, emphasis in original. Indeed, it is clear from the rest of Judge Posner's opinion that he would prefer such affidavits in very few, if any cases. In his view, this would be especially true in a case involving the law of an English-speaking country. In that case, the primary materials would be preferable to any declaration by a supposed "expert" from that country.

But Judge Posner makes little distinction in cases involving the law of non-English speaking countries:

> Of course often the most authoritative literature will be in the language of the foreign country. But often too there will be official, or reputable unofficial, translations and when there are not the parties can have the relevant portions translated into English. Translations figure prominently in a variety of cases tried in American courts, such as drug-trafficking and immigration cases; why not in cases involving foreign law?

Id. at 634.

Interestingly, though, when Judge Posner then moves on to the substantive issue in the case, he cites almost exclusively American law review articles (and cases) **about** French law, rather than citing many primary sources himself.

I think it's safe to say that the underlying issues in this case were easily resolved, whether the case involved French law, or common law principles. Essentially, one party was arguing that there should be

a trial regarding his secret intent while making the contract, without regard to the actual terms of the contract, or without regard to the **mutual** intent of the parties. It seems unlikely that the commercial law of any country would allow that result.

Probably because it was such an easy case, the Court's holding was unanimous, and the trial court's grant of summary judgment was affirmed. But the concurring opinion of Judge Wood argues for caution before totally abandoning the idea of using expert affidavits.

Probably because the case was so easily decided, Judge Wood "endorse[d] without reservation the majority's reading of the 1991 contract that is at the heart of this case." Id. at 638. But he is reluctant to join the majority's enthusiasm for abandoning expert affidavits:

> Rule 44.1 itself establishes no hierarchy for sources of foreign law, and I am unpersuaded by my colleagues' assertion that expert testimony is categorically inferior to published, English-language materials. Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not.

Id. at 638-39.

Judge Wood makes clear that he has no objection to written materials. But he cautions that in many cases, the testimony of an expert, subject to the same safeguards as all expert testimony, might prove helpful in many cases to keep from leading the court astray.

Practice Pointer: Bodum might be perceived by some as adding to the confusion, this isn't necessarily the case. All three judges concede that Rule 44.1 **allows** expert testimony, and they all concede that it **allows** presentation of primary and secondary materials even without expert testimony. Since the type of proof that the judge will accept is largely up to his or her discretion, the best approach is probably to be prepared to satisfy the judge whatever his or her leanings happen to be.

It is probably most unwise to rely upon conclusory affidavits of experts. This is especially true if the expert's conclusion might strain credulity (e.g., if he claims that the secret intention of one party to a contract might be relevant). There might be cases where the foreign law is, indeed, quite foreign to a common-law judge or lawyer. But it's dangerous to conclude that the judge will reach this conclusion without further persuasion.

Judges are used to considering legal arguments presented by advocates for one side, so if the foreign expert is going to testify, then it seems prudent to have him sound like an advocate, and be prepared to answer the court's questions, just like any other advocate.

One easy way to accomplish this is to make clear that the foreign lawyer is, first and foremost a lawyer, and move to have him or her admitted pro hac vice. For example, Rule 5 of the Minnesota General Rules of Practice provides:

> Lawyers duly admitted to practice in the trial courts **of any other jurisdiction** may appear in any of the courts of this state provided (a) the pleadings are also signed by a lawyer duly admitted to

> practice in the State of Minnesota, and (b) such lawyer admitted in Minnesota is also present before the court, in chambers or in the courtroom or participates by telephone in any hearing conducted by telephone. In a subsequent appearance in the same action the out-of-state lawyer may, in the discretion of the court, conduct the proceedings without the presence of Minnesota counsel. Any lawyer appearing pursuant to this rule shall be subject to the disciplinary rules and regulations governing Minnesota lawyers and by applying to appear or appearing in any action shall be subject to the jurisdiction of the Minnesota courts.

(Emphasis added.)

Since the Court is allowed to decide the foreign law issue as a matter of law, it seems preferable to treat it like a matter of law. If the expense of flying in the foreign lawyer is too great, then there's no reason why he or she, if admitted pursuant to this rule, cannot serve as one of the authors of, and place his or her signature on, the brief.

If the Judge turns out to be more old-fashioned, and actually prefers affidavits, then there's no reason why such a brief or memorandum could not be accompanied by a sworn affidavit.

It seems that if this practice were followed, it would satisfy most judges, including the three schools of thought set forth in Bodum. In addition, if the foreign lawyer is available for questions by the court (as he would be if it were an issue of U.S. law), then the argument is going to be much more compelling (assuming that the law says what he or she claims it says, and that he or she is able to intelligently answer the questions).