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Effectively Proving "Foreign" Law in U.S. Litigation

Questions of "foreign" law often arise in U.S. litigation, whether as a matter of choice of laws, disputes about whether companies acted in accordance with standards of care dictated by the relevant countries, or many other circumstances. It is well settled that Federal Rule of Civil Procedure 44.1 authorizes U.S. judges to determine and apply such foreign law.

The standard practice for U.S. lawyers seeking to persuade judges that a foreign law supports their client's position is to retain well-qualified experts – usually professors, retired judges, or practicing lawyers from the relevant country – who testify in detail to explain to the U.S. judge the meaning and significance of the foreign law. In some U.S. courts, however, that standard practice now may be ill-advised.

In *Bodum USA, Inc. v. La Cafetiere, Inc.,* 621 F.3d 624 (7th Cir. 2010), two respected appellate judges instructed that courts should rely upon their own interpretation of published source materials regarding foreign law rather than expert testimony presented by the parties. Chief Judge Frank Easterbrook, writing the decision of the Court, wrote that while judges "may" consider expert testimony, "we prefer" objective translations of the source law to the submissions of such experts. *Id.* at 628-29. Judge Richard Posner joined the Chief Judge's opinion, but also wrote a separate opinion in which he sought "to amplify … the court's criticism of [the] common and authorized but unsound judicial practice" of relying upon expert testimony regarding foreign law. *Id.* at 631. Judge Posner wrote that such reliance "is a bad practice, followed … out of habit rather than reflection." *Id.* at 633.

He explained that the use of expert testimony is unduly expensive, unreliable in part because the expert's views can be "spun" in favor of a party, and unnecessary because judges themselves are experts at finding and reviewing the laws of various jurisdictions and determining their meaning. Judge Posner cautioned, "[T]he court doesn't have to rely on [expert] testimony; and in only a few cases … is it justified in doing so." Id. at 632. Those few cases are when the law is from a country with such an "obscure or poorly developed legal system that there are no secondary materials to which the judge could turn." *Id.* at 633.

Several courts have relied upon *Bodum* to disregard or discount expert testimony regarding foreign law. For example, in *Estate of Botvin v. Iran,* 772 F.Supp.2d 218 (D.D.C. 2011), the court rejected expert testimony presented by the only party to address the issue and instead relied upon the court's own research regarding Israeli law.

There is no question but that Federal Rule of Civil Procedure 44.1 allows – but does not require – judges to disregard expert testimony and conduct their own research regarding non-U.S. law. Whether this is the best way for a court to obtain a correct

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understanding of any particular issue of foreign law is debatable, but for attorneys the critical fact is that there now is such a debate. Counsel and their clients seeking to persuade U.S. courts of the meaning and significance of foreign law should strongly consider doing so with minimal expert submissions, or in some cases without any expert testimony at all. Either way, it is essential to provide the judge the actual text (with certified translations if necessary) of all of the laws upon which counsel relies.

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