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CONTRACTS

When Foreign Law Applies to The Agreement...Now What?

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The expansion of technology and globalization has brought many challenges for individuals and companies entering into agreements, as well as the New York courts and judges who are ultimately interpreting those agreements. One of the challenges for contracting parties is agreeing what law governs the agreement. Sometimes, parties agree to have the law of a foreign country govern their agreement. In those cases, New York courts are tasked with the challenge of interpreting laws of countries all across the globe—laws that are completely "foreign" to New York judges and attorneys.

This article outlines how New York federal and state judges handle cases where foreign laws have been selected to govern an agreement, and what should be considered before agreeing to such a choice of law provision.

Do New York Courts Enforce Choice of Law Provisions?

Generally, yes. New York courts will honor the terms of a parties' agreement, including the use of foreign law to govern the agreement, so long as the chosen law "bears a reasonable relation to the agreement" (i.e., some apparent nexus or connection to the transaction) and applying foreign law does not "violate a fundamental public policy of New York." *USA-India Export-Import, Inc. v. Coca-Cola Refreshments USA, Inc.*, 2015 N.Y. Misc. LEXIS 255 (Sup. Ct. Westchester Cty. Jan. 30, 2015); *see also Gambar Enterprises, Inc. v. Kelly Services, Inc.*, 69 A.D.2d 297, 303 (4th Dep't 1979). It's important to note that "a choice of law provision only operates to import the substantive law of the chosen jurisdiction; any matters of procedure remain governed by New York law." *USA-India*, 2015 N.Y. Misc. LEXIS 255 at *18. Courts will not apply a foreign jurisdiction's law if the law is "anachronistic or offensive," or "if to do so would violate its public policy." *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 885 (E.D.N.Y. 1991).

As with any provision, the parties should carefully consider the ramifications of agreeing that foreign law governs their agreement, including the substantive elements of the foreign law and the procedural obstacles the use of foreign law might create in a potential future litigation. The analysis of foreign law that should be performed before the parties agree that it will govern might increase upfront legal costs, but might also help the parties avoid future uncertainty in their agreement and ultimately save legal costs.

How Do Courts Interpret Foreign Laws?

Federal Courts. As a practical matter, courts must take steps to understand foreign law when the litigants' contract calls for the application of foreign law. In federal court, the starting point in the analysis is Fed. R. Civ. P. 44.1, which allows a court to consider "any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. Rule 44.1; *see also Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998). The purpose of Rule 44.1 is "(1) to make a court's determination of foreign law a matter of law rather than fact, and (2) to relax the evidentiary standard and to create a uniform procedure for interpreting foreign law." *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 316 (S.D.N.Y. 2018). Critically, these experts are not required to meet any specific qualifications. *See Jonas v. Estate of Leven*, 116 F. Supp. 3d 314, 330 (S.D.N.Y. 2015).

When interpreting foreign laws, courts often consider a variety of sources, including expert testimony, declarations, or affidavits (which do not need to be sworn) from lawyers familiar with the foreign law and/or who practice in the foreign country. Courts also consider treatises, foreign court opinions, and other legal authorities. The court may even conduct its own independent investigation. *See Nguyen Thang Loi v. Dow Chem. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 18 (E.D.N.Y. 2005).

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The court may also compel a party to provide an expert report or testimony. For example, in *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51-52 (2d Cir. 2004), the U.S. Court of Appeals for the Second Circuit requested the parties submit supplemental briefing, expert statements, and other supporting authority on Swiss law as late as after oral argument. Simply stated, almost anything goes.

When live expert testimony is presented, the expert's demeanor and credibility is not a basis for the court to defer to the expert on the content of the foreign law. *See Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998). Instead, the court may only consider the "persuasive force of the opinions" that the expert expressed. In addition, if a party hires a foreign law expert, the adverse party is entitled to discovery regarding that foreign law expert, just like any other expert. *See Silberman v. Innovation Luggage, Inc.*, 2002 U.S. Dist. LEXIS 18456, at *4-5 (S.D.N.Y. Sept. 30, 2002).

New York State Courts. New York state courts have similar procedures and requirements. Pursuant to CPLR 4511(d), the court may consider "any testimony, document, information or argument," whether "offered by a party or discovered through its own research." CPLR § 4511 gives the trial court "broad discretion in considering what evidence to take into account and at what stage of the case to resolve these questions of law." *Stichting Pensioenfonds ABP v. Credit Suisse Group*, 2012 N.Y. Misc. LEXIS 5996, at *9 (Sup. Ct. N.Y. Cty. Nov. 30, 2012).

Thus, New York law authorizes courts to interpret foreign law based on any evidence that provides sufficient information for it to make a decision. *See id.* at *10 (holding affidavits, translated Dutch statutes, and cases were sufficient); *Stone Column Trading House Ltd. v. Beogradska Banka A.D. in Bankruptcy*, 2017 N.Y. Misc. LEXIS 3757, at *12 (Sup. Ct. N.Y. Cty. Oct. 2, 2017).

Like federal courts, if the state court judge is unfamiliar with the legal system or relevant laws of a foreign country, the court may require experts to testify and be cross-examined. *Matter of Elmezzi*, 2013 N.Y. Misc. LEXIS 4906 (Sur. Ct. Nassau Cty. Sept. 26, 2013); *Jann v. Cassidy*, 265 AD2d 873 (4th Dep't 1999). State courts may also consider translated foreign law statutes and judicial decisions. *Harris S.A. De C.V. v. Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V.*, 279 A.D.2d 263, 264 (1st Dept. 2001); *Sea Trade Mar. Corp. v. Coutsodontis*, 111 A.D.3d 483, 484-85 (1st Dept. 2013).

What Does This All Mean?

Before executing their contract, parties to an agreement with a New York dispute resolution forum should carefully consider what law will govern the agreement. Choosing a foreign law that has no relation to the transaction, or that conflicts with New York policy, whether because of its relationship with one of the parties, as a compromise, or for some other reason, could be challenged by one of the parties, and ultimately struck down.

> Sometimes, parties agree to have the law of a foreign country govern their agreement. In those cases, New York courts are tasked with the challenge of interpreting laws of countries all across the globe—laws that are completely "foreign" to New York judges and attorneys.

Even if the foreign law applies, the parties might still face roadblocks and increased litigation costs. As explained above, both state and federal judges will likely require that the parties hire an expert to interpret the foreign law, and hiring an expert is not inexpensive. Expert discovery can also be extremely time consuming, and will likely add to the length of the parties' discovery schedule, and litigation costs.

In addition, judges might take additional time to learn and understand the laws before they can apply them to the dispute, again, adding more time before the case is resolved. Of course, not all foreign laws will involve the same degree of complexity or potential lack of familiarity. For example, applying United Kingdom law to a breach of contract action will likely be far less onerous than applying the law of countries whose jurisprudence is not based on the common law of the United Kingdom, or to other kinds of substantive disputes.

In addition, more likely than not, the New York attorneys hired to handle the case will need to research the foreign law before they can commence the action. The reality is that the parties and their New York counsel will probably not fully understand the foreign law and how it applies to their case until *after* an expert is hired.

All of these challenges will not only increase litigation costs, but might also substantially delay a final resolution. It is unlikely that parties will be willing to resolve a case before they have a complete understanding of the foreign law at issue, which means that cases involving foreign law might be less likely to settle until after an expert is retained. This means that the parties may be forced to incur a substantial amount of legal fees before they will be prepared to settle.

Ultimately, it is for the parties to decide whether to incorporate a foreign choice of law provision into their agreement. However, it is important that the parties weigh the potential costs and challenges of incorporating the foreign law before finalizing their agreement.