DEVELOPMENTS IN THE ENGLISH COURTS' APPROACH TO FOREIGN LAW

HOW DO THE COURTS APPROACH FOREIGN LAW?

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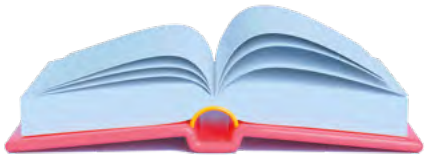
As the latest version of the Commercial Court Guide notes, "Expert evidence of foreign law features in a significant proportion of Commercial Court trials"[1]. Foreign law (i.e. the law of any jurisdiction other than England and Wales) is a matter of a "special finding of fact"[2] to be proved at trial[3], but the Court has flexibility in determining exactly how that should happen[4]. In this article, we consider guidance from the Courts over the last year or so on the different methods of evidencing the content of foreign law.

There are four key ways to prove the content of foreign law: i) judicial notice; ii) admission; iii) evidence and iv) presumption.

Generally, the English Courts (subject to certain specific exceptions) do not take judicial notice of foreign law, and admissions are rare in litigation. The doctrine of presumption is complex and beyond the scope of this article. We therefore focus on developments in proving foreign law through evidence.



Decisions of foreign courts

Where the disputed point of foreign law has already been resolved by a senior foreign court, the English Court will treat that decision as persuasive but not conclusive. In Dexia Crediop SPA v Comune Di Prato [2017] EWCA Civ 428 the Court determined that, for "disputed questions of foreign law, the task for the trial judge is to determine what the highest relevant court in the foreign legal system would decide if the point had come before it." However, in Deutsche Bank v Comune di Busto Arsizio [2021] EWHC 2706 (Comm), the Court said that it is able to "diverge from even the highest authority, particularly in the context of a civilian law system" if, for example, it "can be satisfied that an authority, however eminent, does not represent the law ". More recently, however, the Commercial Court has somewhat retreated from that position. In Banca Intesa Sanpaulo SpA and another v Comune di Venezia [2022] EWHC 2586 (Comm), the Court held that the more senior the foreign court, or the greater number of foreign court decisions, the more difficult it will be for the English Court to conclude that the decisions do not reflect the law. Further, it held this remains the case even if the decisions are "unworkable in commercial practice or their reasoning illogical or inconsistent". Ultimately, the English Court's job is not to apply the previous foreign court's finding, but to decide whether the highest foreign court would follow its own decision or not. Conducting that analysis is, of course, not easy and the role of the foreign law expert is a crucial one, as to which, see below.

Decisions of the English Courts

Because findings of foreign law are findings of fact, they have no precedential value. In theory, the foreign law must be proved each time it is raised.

1 At H3.1
2 King v Brandywine Reinsurance Co (UK) Ltd [2005] EWCA Civ 235
3 Bumper Development Corp v Metropolitan Police Commission [1991] 1 WLR 1362
4 CPR 32.1(b)/(c), 35.1, 35.4(1) and 35.5(1) and FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45 at [148]

However, s4(2) of the Civil Evidence Act 1972 provides a mechanism through which findings on foreign law can be admitted in evidence, following compliance with the relevant provisions and service of a notice.

Once admitted as evidence, the foreign law finding is presumed to be correct, unless proved otherwise or there are conflicting decisions on the point.

The importance of Civil Evidence Act notices has been thrown into sharp relief recently in the ongoing Italian swaps litigation. Giving judgment in the most recent decision of Banca Intesa v Venezia, the Commercial Court observed that the judgment given a year earlier in Deutsche Bank v Busto Arsizio was not "strictly binding". However, the findings of fact made in Busto on Italian law could have been admissible as evidence had the claimant banks served a notice under the Civil Evidence Act. Significant reliance was placed on the analysis of Italian law in Busto but without the benefit of a Civil Evidence Act Notice, it had no evidential status and the Commercial Court was free to depart from it, which it did.

By contrast, in Dexia Crediop SPA v Provincia Di Pesaro E Urbino [2022] EWHC 2410 (Comm), (a judgment given just a month earlier than Venezia on an identical issue) the Commercial Court followed the judgment in Busto, partly because the claimant bank, Dexia, served a notice under s4 of the Civil Evidence Act 1972 in relation to it, which made the findings in that case admissible as evidence of Italian law.

Now that there are two conflicting decisions of the Commercial Court on what Italian law means, there will no longer be a presumption that either judgment is correct, even if a Civil Evidence Act notice is served.

Evidencing foreign law

In FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45 at [148] Lord Leggatt clarified that "it should not be assumed that the only alternative to relying on the presumption of similarity is necessarily to tender evidence from an expert in the foreign system of law".

A range of options are available to the Court, depending on the relative importance of the points in dispute and the complexity/familiarity of the law in question. In the most recent Commercial Court Guide, parties have been encouraged to consider carefully what type of expert evidence may be appropriate, including:

- exchange of expert reports, an experts' meeting and joint memorandum, supplemental reports and oral evidence at trial;
- limiting expert evidence to the identification of the relevant sources of foreign law and of any legal principles on the interpretation and status of those sources; and
- accepting the agreement of the parties on the nature and importance of sources of foreign law and advocates making submissions a trial.

To what extent can questions of foreign law be reviewed on appeal?

Finally, the English Courts' approach to questions of foreign law on appeal has also been the subject of recent judicial deliberation. In Cassini SAS v Emerald Pasture Designated Activity Company & Ors [2022] EWCA Civ 102, both parties apparently accepted that although foreign law findings are treated as findings of fact, they are "not subject to the same restrictions on scrutiny by an appellate court". While the Court of Appeal did not disagree with the first instance judge, it held it was entitled to "consider the expert evidence afresh and form its own view of the cogency of the rival contentions in determining whether the trial judge came to the correct conclusion".

By contrast, in Byers v The Saudi National Bank (SNB) [2022] EWCA Civ 43, the Court of Appeal found that the circumstances in which it could interfere with a finding on foreign law from a lower court were effectively confined to the type of foreign law question where the legal concepts are so similar that the judge provides their own legal input. The Court of Appeal in Byers v SNB held: "this Court should be slow to interfere with the Judge's findings of fact on Saudi Arabian law and should only do so in accordance with the principles applicable generally to findings of fact made by a trial judge who has based his findings on evidence from witnesses." Further, that "[a]ppellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so".

In Deutsche Bank v Comune di Busto Arsizio [2022] EWHC 219 (Comm) (in which judgment was given on the same day as Cassini), in refusing permission to appeal, the Court expressed the view that its conclusions on foreign law were conclusions on factual issues informed by expert evidence which "the appeal court will inevitably be very cautious about disturbing, since they are rooted in the trial judge's greater opportunities to grapple with the expert evidence and hear the evidence of the experts".

While there remains some inconsistency in the appellate Courts' approach to findings of foreign law, it is clear that this is a complex area. If the Court of Appeal decision in Byers v SNB is followed, it may be very difficult to appeal a first instance finding on foreign law, which makes it all the more important to evidence it correctly in the first place.