8 Strategies For Proving The Laws Of Foreign Countries

By **Sarah Prather, Allissa Pollard and Diana Sterk** (May 16, 2025)

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Dueling expert opinions on foreign law were key to the U.S. District Court for the Eastern District of Virginia's May 7 decision in General Cigar Co. v. Empresa Cubana Del Tabaco, which highlights some of the pitfalls surrounding expert testimony on foreign law and Rule 44.1 of the Federal Rules of Civil Procedure.[1]

Tort and contract disputes involving foreign elements may give rise to foreign law questions. Such suits may include actions based on harm that occurred on foreign soil,[2] contract actions with a foreign law choice-of-law clause[3] or commercial disputes with transnational elements as in the General Cigar case.[4]

Rule 44.1 governs federal courts' determination and application of foreign law. The rule provides three broad guideposts: (1) written notice must be provided by the party who intends to raise an issue of foreign law; (2) courts have discretion in the sources they consider to determine foreign law, including conducting independent research; and (3) foreign law determinations are questions of law, not fact.[5]

Courts generally agree that the party seeking to apply foreign law has the burden to prove its content, which requires the party to submit sufficient evidence for the court to determine what the foreign law is. Typical sources of foreign law include primary sources from the relevant foreign law jurisdiction like statutes, codes and cases.

And while there is no stated requirement for expert testimony, recent federal district court decisions confirm that federal courts increasingly rely on testimony from foreign law experts — in the form of a report, affidavit or declaration accompanied by copies of relevant primary sources — to determine questions of foreign law.[6]

The import of experts in proving foreign law demands early planning and careful consideration. Retaining a qualified expert — such as an academic or practicing attorney in the relevant foreign jurisdiction — to opine on the applicable foreign law is practically a must for litigants seeking to apply or challenge foreign law, particularly in high-stakes litigation where prevailing on a claim or defense turns on the application and interpretation of issues of foreign law.[7]

The foreign law expert's report or declaration should provide the court, and opposing parties, with a comprehensive, yet clear and concise overview of the applicable foreign law with cites to primary sources and an analysis of applicable foreign legal principles. Such proof of foreign law is often essential to prevailing on dispositive pretrial motions[8] and educates the court on the applicable foreign law standards governing the claims, defenses and availability of damages in a case.

A robust report from a foreign law expert is as much a settlement tool as it is a motion practice and trial prep tool. Expert testimony on foreign law can significantly shift the leverage in mediation and settlement talks.

Conversely, insufficient proof of foreign law may result in adverse substantive outcomes. Where foreign law has not been adequately proven, courts often revert to applying the law of the forum.[9] Forum law could preclude certain claims or defenses in the litigation, materially affect the value of the case, trigger liability, or expose parties to additional categories or amounts of damages.

When federal litigation requires proving the laws of foreign countries, below are strategic considerations and practical guidance for successfully mapping the terrain of foreign laws and proving their contents.

1. Identify and assess potential issues of foreign law through early case assessment.

Many suits implicating foreign law present a strategic decision of whether to even press for foreign law. Early evaluation of potential litigation outcomes, elements of claims and defenses, and categories of damages recoverable will help reveal whether forum law differs from foreign law.

Certain claims, defenses and categories of damages — such as consequential, punitive or loss of consortium — may not be recognized, or the burden of proof and elements of a claim may materially differ. Or damages may be assessed and calculated differently, or even be limited based on judicial precedent or statute.

If foreign law comes out on top (or bottom), consider seeking (or challenging) the application of foreign law and proving up the content. But if foreign law and the law of the forum are similar, parties may wish to forgo an expert or instead jointly retain one, because courts generally default to forum law when foreign law is insufficiently proven.[10]

2. Give notice of foreign law at the outset.

While issues of foreign law may arise at any time, parties seeking to rely on foreign law should give written notice as early as possible. While there is no set time or format for giving notice under Rule 44.1, notice is intended to avoid unfair surprise and thus needs to be reasonable under the circumstances.[11] Parties can plead foreign law or give written notice through subsequent court filings.

3. Seek an upfront ruling on the application of foreign law.

Where the application of foreign law is contested, parties seeking to apply foreign law should request a briefing schedule on choice-of-law. Without a choice-of-law ruling, uncertainty about the applicable law can hamper parties' efforts to resolve cases, whether through pretrial motion practice or settlement negotiations.[12]

4. Retain a qualified expert on the applicable foreign law to prepare an expert report or declaration on the specific areas of foreign law at issue.

In retaining an expert on foreign law, consider whether they are trained in or admitted to practice in the relevant foreign jurisdiction and whether they have judicial, teaching or publication experience with the specific area of foreign law at issue. Unlike other experts, foreign law experts are not subject to Rule 702 — including its qualification requirement.[13]

Typically, a foreign law expert will be asked to prepare a comprehensive, yet concise report or declaration on the specific area of foreign law at issue that:

- Identifies sources consulted, such as statutes, codes and cases;
- Summarizes the relevant legal principles with cites to primary sources; and
- Attaches copies of the primary sources of foreign law cited, including a certified English translation as appropriate.

Ideally, reports will lead with primary sources from the foreign jurisdiction and rely on secondary sources like treatises and practitioner guides as needed for context and to fill in the gaps.[14] Parties should exercise caution before instructing an expert to apply foreign law to the facts of the case because it could unnecessarily increase expert costs, as such testimony is often disregarded.[15]

5. Prepare to take and/or defend depositions of foreign law experts.

Consider whether to depose an opposing party's foreign law expert, particularly when there are dueling interpretations of foreign law. Depositions can elicit admissions that undermine the foreign law expert's opinions by revealing errors in their analysis or that they overlooked key primary sources, among other things.

Parties also should consider planning for and preparing their own foreign law expert to be deposed, perhaps even for the first time, as American-style depositions are not components of some foreign legal systems.

Topics to cover in a deposition may include the expert's training, experience and expertise in the specific area of foreign law at issue, including whether they are admitted to practice in the foreign jurisdiction at issue or have taught or published on relevant aspects of the foreign law; the sources that the expert consulted in preparing the report; and foreign legal principles addressed in the report as well as any shortcomings with or criticisms of the expert's analysis of those principles.

6. Strategically use foreign law expert reports as leverage in settlement and mediation discussions.

Robust proof of foreign law can provide a party with significant leverage in mediation and settlement talks. A credible argument that foreign law favors one party's position may facilitate quicker out-of-court compromises or lower settlement values.

On the other hand, the lack of authoritative proof of foreign law may hinder meaningful settlement discussions or result in higher settlement demands and values. Mediators rely on clear legal frameworks, and parties with no expert evidence to support their position on foreign law may have difficulty convincing the mediator of that position.

7. Stipulate to agreed-upon principles of foreign law where possible.

When there is agreement on certain aspects of foreign law, consider trying to reach a stipulation to narrow the areas of dispute. A joint stipulation may minimize briefing or reduce depositions of foreign law experts. Courts may even order the parties to submit a joint statement or stipulation on undisputed aspects of the governing foreign law.[16]

8. Request a hearing for the court to decide issues of foreign law.

Parties may wish to request oral argument on contested issues of foreign law, if allowed under local rules or the judge's individual practices. Some courts may call for live testimony from the parties' foreign law experts to help decide disputed issues or interpretations of foreign law.[17]

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[1] General Cigar Co. v. Empresa Cubana Del Tabaco, 2025 WL 1333227, at *8-12, *15 (E.D. Va. May 7, 2025).

[2] See, e.g., Arlanxeo Canada, Inc. v. Kaydon Ring & Seal, Inc., 2025 WL 964258, at *1, *9 n.9 (contract and negligence claims arose from manufacturing activities in Ontario and Pennsylvania and there was an "outstanding conflict of laws question").

[3] See, e.g., Ampelmann Operations B. V. v. Atl. Oceanic UK LTD., 2025 WL 377718 (W.D. La. Feb. 3, 2025) (denying vessel seizure to satisfy maritime lien because charter agreement had Dutch choice-of-law provision and Dutch law did not recognize maritime liens).

[4] See, e.g., General Cigar Co., 2025 WL 1333227, at *8-12, *15 (commercial dispute alleging trademark infringement required court to "determine the applicable Cuban trademark law"); Blue Axis Glob. Ltd. v. Alopex Advisors, LLC, 2025 WL 343500 (S.D.N.Y. Jan. 30, 2025) (attachment request turned on merits of claims being arbitrated under Hong Kong law); Collision Commc'ns, Inc. v. Nokia Sols., --- F.Supp.3d ----, 2025 WL 357731, at *1, *11 n.8 (D.N.H. Jan. 31, 2025) (contract dispute raised issue of whether company's dissolution constituted performance under Finnish law).

[5] Fed. R. Civ. P. 44.1 ("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."); see id. at advisory committee notes to 1966 adoption (noting that courts "may engage in [their] own research and consider any relevant material thus found").

While state court practice is outside the scope of this article, state courts generally require evidence of foreign law similar to that required by federal courts, including expert materials, there are some differences. In New York, for example, courts may take judicial notice of foreign law, in addition to considering evidence from foreign law experts. See, e.g., Ecclesv. Shamrock Cap. Advisors, LLC, 42 N.Y.3d 321, 341 (2024) ("A court should consider the

merits of expert affidavits and other submitted materials, make a determination as to their sufficiency, and take judicial notice of foreign law as it deems appropriate."); N.Y. C.P.L.R. 4511(b) (McKinney) (providing for judicial notice of foreign law). Rule 44.1, in contrast, does not include "the concept of 'judicial notice' in any form" and "refrains from imposing an obligation on the court to take 'judicial notice' of foreign law." Fed. R. Civ. P. 44.1 advisory committee notes to 1966 adoption.

[6] See, e.g., Collision Commc'ns, Inc., --- F.Supp.3d ----, 2025 WL 357731, at *11 n.8 (contents of Finnish law were "insufficiently developed" where plaintiff only "provided th[e] court with three pages excerpted from an unknown and uncertified document that purport[ed] to translate sections of a Finnish act to English," and did "not provide[] th[e] court with other authorities on Finnish law, such as an affidavit from an expert in Finnish law"); see also Meghji v. Into The Block Corp., 2025 BL 77184, at *14 n.8 (Bankr. S.D.N.Y. Mar. 10, 2025) ("[n]either party has proffered affidavits as to the applicable governing standard under English law").

[7] While the Supreme Court has endorsed courts' reliance on expert submissions to help determine foreign law under Rule 44.1, see, e.g., Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 585 U.S. 33 (2018), at least a few judges have criticized the practice as a "common and authorized but unsound judicial practice" because federal courts typically cannot rely on expert testimony when interpreting domestic law, applying state law, or deciding other issues of law. See Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 631-68 (7th Cir. 2010) (Posner, J., concurring); Sunstar, Inc. v. Alberto-Culver Co., 586 F.3d 487, 495-96 (7th Cir. 2009) (Posner, J.) (explaining that although Rule 44.1 "permits foreign law to be proved by testimony or affidavits of experts, and that is the route followed in most cases," "other sources of foreign law, such as articles, treatises, and judicial opinions," are "superior sources"). Although this is the minority view, consider checking the judge's individual practices with respect to expert testimony on foreign law, before going to the expense of engaging an expert.

[8] See, e.g., Luterv. Scheepswerf Groot-Ammers B.V., 2025 BL 86636, at *5-6 & *6 n.7 (S.D. Fla. Mar. 17, 2025) (ordering parties with dueling foreign law experts to file a joint statement of undisputed foreign legal principles).

[9] See Meghji, 2025 BL 77184, at *14 n.8 (where the parties had not presented evidence of applicable foreign law, court assumed foreign law was the same as forum law).

[10] See id.

[11] See Fed. R. Civ. P. 44.1 advisory committee notes to 1966 adoption.

[12] See, e.g., N.H. Ins. v. Havecon Projects B.V., 2024 BL 482981, at *6-7 (W.D. Mich. Dec. 10, 2024) (pointing out that "it [wa]s not clear if either party wishes to proceed under Dutch law," where defendants initially sought dismissal under Dutch law but later under Michigan law, and in opposing summary judgment under Dutch law, plaintiff only "tersely cited two provisions of the Dutch Civil Code" from which "[i]t [wa]s not clear if the[] claims can even be brought under Dutch law" and thus "fail[ed] to adequately prove foreign law").

[13] See, e.g., Echevarria v. Expedia, Inc., 2025 WL 659648 (S.D. Fla. Feb. 28, 2025); Arlanxeo Canada, Inc., 2025 WL 964258.

[14] See General Cigar Co., 2025 WL 1333227, at *11-12 (rejecting certain opinions of one party's Cuban law expert as unsupported by any Cuban legal authority).

[15] Compare Arlanxeo Canada, Inc., 2025 WL 964258, at *16 ("disregard[ing] the portions of the [Ontario law expert's] testimony and report that apply the law of Ontario to the facts of the case"), with Echevarria, 2025 WL 659648, at *1 (courts "may permit testimony from a foreign law expert involving the application of foreign law to the facts of the case").

[16] See, e.g., note 8.

[17] See, e.g., Echevarria v. Expedia Group, Inc., 2025 WL 947483, at *7 (S.D. Fla. Mar. 28, 2025).