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Google is your friend

H3.1

Expert evidence of foreign law features in a significant proportion of Commercial Court trials. Foreign law is a matter of fact to be proved by evidence, but CPR 32.1(b)/(c), 35.1, 35.4(1) and 35.5(1) give the Court flexibility in determining how the content of foreign law is proved at trial (see FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45 at [148]).

3

Think ahead

H3.2

*As part of their preparations for any Case Management Conference at which directions for the filing of evidence are to be given, the parties **should consider the approach to invite the Court to take to the proof of foreign law** where disputed issues of foreign law will or may arise for determination at trial and **be ready to discuss that question with the Court.***

4

The “orthodox” approach

H3.2(a)

The Court can direct an exchange (simultaneous or sequential) of expert reports, an experts’ meeting and joint memorandum, and (if strictly required) supplemental reports following the joint memorandum, from experts to be called to give oral evidence at trial if their evidence is not agreed.

5

A hybrid approach

H3.2(b)

*The Court can direct such an exchange of reports (etc), but on the basis that the experts will **not give evidence at trial** although their evidence is not agreed, or do so **only on some of the matters covered** by their reports although their evidence on other matters is also not agreed, with the advocates making submissions at trial by reference to the reports and foreign law materials filed.*

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Limiting expert evidence

H3.2(c)

*The Court can **limit the expert evidence to identification of the relevant sources of foreign law**, and of any legal principles as to the interpretation and status of those sources, with the advocates making submissions at trial as to the relevant content of foreign law by reference to the sources thus identified.*

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Do It Yourself

H3.3(d)

*In some cases, the Court may be prepared to take **judicial notice**, or accept the **agreement of the parties**, as to the nature and importance of sources of foreign law, and have the advocates make submissions at trial as to the relevant content of foreign law by reference to the sources thus identified, **providing the source materials from their own researches**.*

8

A “flexible approach”

Soriano v Forensic News LLC & Ors

- ▶ Default application of English law is “not unqualified”
- ▶ Modern cases “show much greater practicality and flexibility”
- ▶ “Common sense” or “sensible inferences” are fine
- ▶ Justified by approach in *Brownlie II*?

9

Does it depend on the judge?

Pescatore v Valentino

Nevertheless, I am sure that I can take judicial notice of the fact that the substantive law of property and inheritance in civil law countries, such as Italy, is very different from that which applies in common law countries, such as England ... All this is, in the technical sense, notorious.

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There are still limits

Gulf International Bank BSC v Aldwood

- ▶ Flexibility does not mean ditching Part 35
- ▶ Permission is needed for expert foreign law reports
- ▶ Don't just exhibit them to a witness statement
- ▶ Prepare a list of issues for the experts to consider

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Think about the practicalities

Emerald Pasture Designated Activity Company & Ors v Cassini SAS

- ▶ Physical presence:

"He was in a position to take **visual cues** as to whether I was taking in what he was saying and offer to give explanations."

- ▶ Interpretation:

"Professor Le Corre gave evidence through an interpreter via a video-link which itself **tends to discourage clarificatory questions from the judge.**"

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And don't forget

32PD 3.3.4

It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF.

Chancellor's note:

"... a party calling a factual or expert witness remotely should have obtained any necessary permission **by the date of the PTR**"