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Application of foreign law by Ukrainian courts

Olena Kibenko
Judge
Supreme Court, Ukraine

INTERNATIONAL CONFERENCE
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‘That national courts increasingly refer to the case law of foreign and international courts is a phenomenon indicative of the era in which we live. That is to say, the era of globalisation … Courts, particularly supreme or constitutional courts, are more than ever looking at how complex jurisprudential problems are resolved in judicial decisions of foreign countries’

Justice John L Murray, “Judicial Cosmopolitanism” (2008)

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Application of foreign law:

- **Cases with international elements** (foreign law is applied according to the choice-of-law rules or as a parties' choice);

- **Untypical, complicated cases** (judges look at how complex jurisprudential problems are resolved in judicial decisions of foreign countries or on a supranational plane)

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Case law:

Decision of the Supreme Court of 11 March 2024, case no.911/231/22

https://reyestr.court.gov.ua/Review/118036504

The SC applied the law of England and the BVI to determine whether companies that had been struck off the register could participate in a general meeting of shareholders of the Ukrainian company, given that they had subsequently been restored to the register.

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Two dissenting legal opinions of judges Olena Kibenko and Ganna Vronska

of 11 March 2024, case no.911/231/22

https://reyestr.court.gov.ua/Review/118197795
https://reyestr.court.gov.ua/Review/118258670

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The procedure for determining the content of a foreign law provision by a court is set out in Article 8 of the Private International Law Act 2005.

It states that when applying the law of a foreign state, a court or other body shall determine the content of its rules by their official interpretation, application practice, and doctrine in the relevant foreign state.

To determine the content of the foreign law, a court or other body may apply under the procedure established by law to the Ministry of Justice of Ukraine or other competent authorities and institutions in Ukraine or abroad or engage experts.

Parties have the right to submit documents confirming the content of the foreign law rules to which they refer in substantiating their claims or objections and otherwise assist the court or other body in establishing the content of these rules.

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The decision of the Grand Chamber of the Supreme Court of 16.03.2021 case no.904/2104/19

9.14. Given the court's obligation to apply foreign law when considering cases in legal relations with a foreign element, the court determines the content of foreign law ex officio (by the official principle). To implement this obligation, the court uses the following methods of obtaining information on foreign law:

1) the judge in charge of the case itself clarifies the content of foreign law;
2) use of expert opinions;
3) diplomatic procedure for obtaining such information;
4) official request through the Ministry of Justice of Ukraine;
5) obtaining information through the legal aid system;
6) exchange of legal information;
7) direct relations of courts of different states and other competent authorities;
8) establishment of foreign law by the parties, etc.

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The decision of the Grand Chamber of the Supreme Court of 16.03.2021 case no.904/2104/19

9.16. Thus, the determination of the content of foreign law rules to be applied to legal relations with a foreign element **is the duty of the court** hearing the case and **carried out ex officio**, while the parties to the case who are interested in the application by the court of the law of the relevant foreign state have the right to assist the court in taking measures to determine the content of foreign law rules by submitting to the court documents confirming the content of such rules, which they refer to in support of their claims or objections.

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Main issues regarding the case no.911/231/22

- **How to treat foreign law - as a matter of law or as a fact to be proven? Does the court have an obligation to establish the content of foreign law on its own, or can it rely on the parties' evidence?**
- **How does a judge ascertain what foreign law is?**
- **Can judges search for sources of foreign law themselves (using a library or internet resources), or are they obliged to do so by making official inquiries through the Ministry of Justice or to experts?**
- **Who can be an expert who provides an opinion on the content of foreign law?**
- **Who can translate foreign law sources? Can a court use modern translation tools?**
- **Is it necessary to discuss with the parties the content of the foreign law sources the court intends to apply?**

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Guidelines for ascertaining and applying foreign law in German Litigation 2023 (The Max Planck Institute for Comparative and International Private Law)

The Hamburg Guidelines aim to facilitate the transparent, efficient, and legally sound handling of foreign law in German litigation. They were finalized at the Institute by Ralf Michaels, its director, and Jan Peter Schmidt, the head of the Centre for the Application of Foreign Law. Their completion follows intensive consultations with judges, attorneys, and other practitioners as well as with legal scholars both at the Institute and elsewhere.

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Hamburg Guidelines

The foreign law only requires proof to the extent that it is unknown to the court. This means in particular that the court may and often can determine the content of the foreign law **through its own research, primarily with the help of accessible literature, Internet sources and translation programs**.

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Hamburg Guidelines

If the court's own research does not lead to a sufficiently reliable result, for example because there is neither a relevant Supreme Court ruling nor a clear wording of the law (see → Art. 2 § 3 No. 4), the court has the following options at its disposal to determine the foreign law:

- the invitation to the parties to make specific statements on foreign law known to them or accessible to them (especially if it is their home law), e.g. to present texts of standards and court decisions (with reference to the source and, if necessary, a simple translation);
- the use of the European Convention on Information on Foreign Law of 1968 ('London Convention');
- the use of the European Justice e-Justice Portal (https://e-justice.europa.eu);
- obtaining information from German embassies, consulates, ministries or a chamber of foreign trade;
- the use of an expert report from another procedure which concerns the same issue and is not unreliable due to its age (Section 411a of the Code of Civil Procedure);
- obtaining an expert opinion.

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Hamburg Guidelines

If the decision depends on foreign law, the court must **discuss this with the parties** (fair hearing) and give them the opportunity to present their views on its determination and content. If the court has formed a preliminary opinion on the content of the foreign law, e.g. based on its own research, it will **communicate this to the parties**.

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Hamburg Guidelines

As a rule, it is advisable to clarify **who is to be appointed as an expert** before drafting the decision to take evidence (see → **Art. 2 § 6 No. 1**). For this purpose, it is advisable to consult the parties.

The selection is made in compliance with the general provisions, especially Sections 404 and 406 of the Code of Civil Procedure. The expert must be able to use primary sources to find out about the relevant details of the legal system in question. **Previous expertise in the legal system in question is desirable, but not strictly necessary. Solid knowledge of private international law and general comparative law is also desirable.**

Members of academic institutes for foreign law or university lecturers with relevant qualifications, but also independent experts (e.g. from the legal profession) **who have special knowledge of a foreign legal system (e.g. due to studies there or admission to the bar there) may be considered as experts.**

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Hamburg Guidelines

It is also possible to **appoint an expert from the relevant legal system** itself. This can have the **advantage** that the person appointed can provide information more quickly and reliably, particularly on the practice of their local law, than an expert from Germany. Possible **disadvantages** of appointing foreign experts are translation difficulties and a lack of familiarity with the requirements of the private international law applicable to German courts and German court proceedings, in particular with the formal and substantive standards for the preparation of expert opinions for German courts, as well as the lack of the possibility of threatening or ordering coercive measures against the expert.

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The reasons for the decision must show how the foreign law was determined. This applies both to the selection of the sources of information and – if there are remaining doubts about the content – to the depth

The reasons for the decision should not just refer to the report in general terms, but should also reflect the content of the report itself that is relevant to the result and explain why the court has adopted it. If the content of the report is disputed, the court must, as is the case with other assessments of evidence, justify why it follows it or not. The report should be described as precisely as possible, taking into account the anonymization requirements (e.g. with the date and internal file number of the expert).

The primary and secondary sources on which the court relies should be listed as fully as possible in the decision and, where the wording is important, reproduced in the original text. In the case of non-standard languages (in case of doubt, all languages except English), a German translation of the texts should be included. As far as possible, official sources should be referred to for both the original text and the translation, and these should then also be named. If the court relies on a translation other than an official one, it should justify this.

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What do we need to improve the situation?

- a Guidance on the application of foreign law in Ukrainian litigation processes, such as the Hamburg Guidelines 2023;

- a training program for judges covering international private law (conflict of laws), international commercial law, international arbitration, the ECtHR, and commercial laws of foreign jurisdictions (i.e., English law);

- a language proficiency program for judges.

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Thank you for your attention!

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