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"Attention Choice of Law Litigants: The Evidentiary Rules of the Foreign Law Game Have Changed"

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Imagine the following: At long last, your case that has been many months or even years in the making is finally going to trial. In the intense weeks preparing for trial, it becomes apparent that you have a good argument for applying foreign law, a law that entitles you to prevail as a matter of law. At what you deem the appropriate time, you announce to the trial court, with great confidence in your foreign law argument: "Your Honor, under the law of [Mexico, Norway, Barbados, etc.], the [Plaintiff/Defendant] cannot prevail as a matter of law." You accordingly request that the Court take judicial notice of the law of [Mexico, Norway, Barbados, etc.], as you thought it could. Opposing counsel gleefully informs you and the court that you waived this argument, oh, way back when, 45 days before trial. And opposing counsel is correct.

As if choice of law issues were not already sufficiently complex, a November 2000 decision of the Corpus Christi Court of Appeals is the first decision to apply a new rule in the Texas Rules of Evidence, which throws another procedural and evidentiary hurdle into the choice of law game. See *In re Estates of Garcia-Chapa*, 33 S.W.3d 859 (Tex. App. - Corpus Christi 2000, no pet.). *Garcia-Chapa* requires that to preserve a choice of law issue for appeal, where the foreign law is that of a foreign country, any translation of a foreign document, such as the foreign law, must be filed and served on all parties 45 days prior to trial. *Id.* at 862. This rule effects a dramatic change to what previously had been the only applicable procedural rule for choice of law issues, Rule 203 of the Texas Rules of Evidence, which requires only 30 days' notice of the intent to raise an issue under foreign law and to provide all parties with the text and translation of the foreign law.¹ See Tex. R. Evid. 203.

Aside from the missed deadline, another significant error in the above scenario is the failure to recognize that two different rules of evidence control choice of law issues. A quick reminder of this difference is in order. Different procedures apply for determining the law of merely another state and the law of a foreign country. Texas Rule of Evidence 202 controls the former; Texas Rule of Evidence 203 controls the latter. Texas Rule of Evidence 202 does refer to "judicial notice" of another state's law, and there is no timetable or deadline in that rule for raising the issue. See Tex. R. Evid. 202. But that judicial notice does not happen in a vacuum; the party requesting judicial notice nevertheless must provide the court with "sufficient information to enable it properly to comply with the request." *Id.* It was no doubt the more lax procedural structure of Rule 202 that the trial lawyer above had in mind. Unfortunately, his great choice of law issue was one under the law of a foreign country, which is controlled by a different rule entirely: Texas Rule of Evidence 203.

In stark contrast to Rule 202, Rule 203 dictates a more specific procedure and a more definite deadline for proving up the foreign law: "A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law."

Tex. R. Evid. 203.

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Thus, contrary to Rule 202's provision for raising the issue of a foreign (state's) law "at any stage", Rule 203 requires giving notice "in the pleadings" or "other reasonable written notice" 30 days prior to trial. Logically, the Rule also requires that the sources on which one relies for the foreign law be translated: all parties must be served with "a copy of the foreign language text and an English translation." Tex. R. Evid. 203.2

Thirty days before trial comes quickly enough. Imagine the dismay of the lawyer above when he calls his firm's appellate lawyer for some quick briefing on the choice of law issue and learns that the Corpus Christi Court of Appeals is the first court to apply a 45-day pretrial deadline in the Rule 203 context. With no mention at all in Rule 203 of a 45-day deadline, one has good cause to wonder about the origins of that deadline. The answer lies in a relatively new, almost never cited rule of evidence: Texas Rule of Evidence 1009, a rule added only when the Texas Rules of Evidence were amended in 1997 and became effective on March 1, 1998. See *In the Supreme Court and the Court of Criminal Appeals of Texas: Approval of Revisions To The Texas Rules of Evidence*, 60 Tex. B. J. 1129, 1156 (1997) (announcing amendments to Texas Rules of Evidence and including Texas Rule of Evidence 1009); see also Tex. R. Evid. 1009 cmt. ("Comment to 1998 change: This is a new rule").

In Garcia-Chapa, the Corpus Christi Court of Appeals determined the appellants had a slam dunk case for applying Mexican law: "Here, the decedents are Mexican nationals who resided in Mexico their entire lives, died in Mexico, and, aside from the funds before the trial court, only owned property in Mexico. Due to the large amount of Mexican and other foreign capital in Texas banks, it is important for us to maintain a stable system to resolve disputes over such assets. Texas courts should not interrupt foreign disputes over foreign capital which is located in Texas. See *Albuquerque Nat'l Bank v. Citizens Nat'l Bank*, 212 F.2d 943, 948-49 (5th Cir. 1954). The funds in question are the only connection between the decedents and Texas. Since the factors listed in the Restatement support the application of Mexican law to this controversy, this is therefore a case where substantive Mexican law should be applied."

In Garcia-Chapa, 33 S.W.3d at 862.

But then the court seized on Rule 1009 to state as follows: "However, Mexican law cannot be applied to this case because appellants did not follow the procedures required by Texas law."

Id.

Ouch.

It is no wonder appellants "did not follow the procedures required by Texas law." As of this writing, no other court in the state of Texas apparently has determined, in either a published or unpublished decision, that a foreign law is subject to Rule 1009. Indeed, no court apparently has applied the new rule in any context.

Notwithstanding the considerable distance in the rule book between Rule 203 and 1009, *Garcia-Chapa* clearly requires that Rule 1009 be read in conjunction with Rule 203 and that the translation, which will almost inevitably be necessary when proving up foreign law, be ready to file 45 days prior to trial. Rule 1009 appears to be a response to many unanswered evidentiary issues regarding the translation of foreign law. It provides detailed guidance on, for example, (i) when to object to the translation (15 days prior to trial) and how to object, Tex. R. Evid. 1009(b); (ii) the effect of failing to object or offer a conflicting translation, Tex. R. Evid. 1009(c); and (iii) incredibly, whether the conflicting translations raise a genuine issue of material fact that must be "resolved by the trier of fact." Tex. R. Evid. 1009(d). Fortunately, the rule also has built into it the authority for the trial court to enlarge (or shorten!) those deadlines "upon motion of any party and for good cause shown." Tex. R. Evid. 1009(f).

But even with the thirty-day pre-trial deadline that existed when only Rule 203 was implicated for foreign law issues, these deadlines pose a logistical nightmare for the unprepared. For in addition to briefing the substantive choice of law issues, the attorney given this briefing assignment also has to tend to the following time-consuming details:

- find a reputable expert to attest to the foreign law;

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- obtain an original, official copy of the statute or regulation at issue;
- find a translator;
- allow time for the statute to be translated;
- obtain an affidavit regarding the translator's qualifications and the fairness and accuracy of the resulting translation;
- make certain all of this is "signed, sealed, and delivered," and served on opposing counsel, at least 45 days prior to trial.

The lesson to be learned here is that whenever foreign law may be an issue, be it another state or another country, counsel must be wary not only of deadlines in the applicable rules or statutes but also of any hybrid requirements of the applicable appellate court and any recent rule changes, for which there may not even be any case law. Fortunately, the 2001 edition of O'Connor's Texas Rules*Civil Trials includes in the commentary section a discussion of Rule 1009 in the context of proving up foreign law under Rule 203. See Justice Michol O'Connor, O'Connor's Texas Rules*Civil Trials: Practice Guide & Annotated Texas Rules of Civil Procedure & Evidence 279-80 (2001). Now that Rule 1009 has received some press, perhaps it will no longer pose such a potent procedural trap for choice of law litigants who previously looked solely to Texas Rule of Evidence 203 as the last word on proving up foreign law.

1. **PRACTICE TIP:** If you're looking at choice of law, you may also be contemplating filing a motion to dismiss for forum non conveniens under Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (Vernon 1997 & Supp. 2001). Whether a different state or country's law applies to the case, however, is just one of several elements in the forum non conveniens analysis. Nevertheless, be aware that the forum non conveniens statute also has tight deadlines. For example, the motion is timely only if it is "filed not later than 180 days after the time required for filing a motion to transfer venue of the claim or action." *Id.* § 71.051(d) (Supp. 2001). In addition, the motion must be set for hearing not less than 30 days prior to trial, with not less than 21 days' notice to opposing counsel of that hearing date. *Id.* For good cause and at the request of any party, the trial court may enlarge these time periods. *Id.* § 71.051(g).

2. Bear in mind that even though thirty days is the deadline for alerting all parties and the trial court of an "intent" to rely on foreign law, substantive briefing on the choice of the law issue will still be necessary. Ideally, that briefing should follow closely on the heels of the initial "reasonable written notice," if not actually accompany it.