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Obtaining information on foreign law

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Introduction

In its judgment of 16 March 2022,⁽¹⁾ the Supreme Court confirmed the principles of determining the content of foreign law and foreign judicial practice for Polish court proceedings.

This issue is crucial to ensuring that the parties' rights are duly protected and that the correct judgment is issued in cases with an international element. Indeed, an incorrect determination of the content of foreign law and its erroneous application may be an effective basis for objections raised by parties against a court judgment.

The new judgment of the Supreme Court confirms that, in the first instance, the court may determine the content of foreign law on its own by means available to it. If the court is unable to establish the necessary information in this way, it should seek the opinion of an expert or utilise the Minister of Justice.

Rules for obtaining information

The rules for obtaining information on the law and practice of a foreign country and the existence of reciprocity in relations with a foreign country are regulated by article 51a of the Act on the Organisation of Common Courts of 27 July 2001.

Under these rules:

- The court may determine and apply the applicable foreign law ex officio. The court may request the Minister of Justice to provide the text of the law and to clarify the foreign judicial practice.
- The court may ask the Minister of Justice for information on the existence of reciprocity in relations with a foreign country.
- To determine the contents of a foreign law or foreign judicial practice, or the existence of reciprocity, the court may also apply other measures, including expert opinions.

The provision was added to the Act on the Organisation of Common Courts in 2017 to unify the procedure before the civil and criminal courts. Previously, article 1143 of the Code of Civil Procedure contained a similar solution. In contrast, the Code of Criminal Procedure did not contain provisions governing the declaration of foreign law and reciprocity.

Rules on submitting requests for information to Minister of Justice

The rules for a court submitting a request to the Minister of Justice for a text of foreign law, a clarification of foreign judicial practice or for information as to the existence of reciprocity in relations with a foreign state are detailed in the Executive Order of the Minister of Justice of 28 January 2002 (as amended).

According to section 5 of the order, when submitting a request to the Minister of Justice, the court should:

- specify in detail the legal issue requiring clarification;
- indicate the date by which the legal status should be determined; and
- at the request of the Minister of Justice, also send the case file.

Ex officio court action

If a foreign law applies in a case, the court is obliged to determine and apply it ex officio at every stage of the case, regardless of whether the parties to the proceedings have invoked the need to apply its provisions in a particular situation.

The case law to date clearly emphasised that, in both respects, the court is charged with a statutory duty, regardless of the degree of activity of the parties in this respect. In particular, it is the court's duty, not the parties', to undertake all activities, including gaining access to the text and the accepted interpretation of foreign law, enabling the court to properly grasp the normative state of affairs forming the basis for adjudication. The activity of the parties, in this respect, may be helpful but its absence may not be negatively sanctioned.⁽²⁾

Supreme Court judgment

Cases with a foreign element are often characterised as being considerably complex and comprehensive. Consequently, deciphering the content of foreign law is often not an easy task for the court. However, the court may do so by any means available.

In particular, in a recent judgment of 18 March 2022, the Supreme Court confirmed that the court is not under an obligation to use an

expert opinion or the position of the Minister of Justice to decipher foreign law, as other means may also be the source for determining the content of foreign law. If the court, using all the means available to it in its own capacity, is unable to determine the content of the foreign law, it should then consult an expert or utilise the position of the Minister of Justice.

The ruling confirms the case law to date, according to which a court may, in practice, determine the content of foreign laws on its own. It may also make use of a translator to translate the text of foreign law provisions, the content of commentaries and the case-law interpreting those provisions.

Thus if the court obtains sufficient knowledge of the provisions relevant to the decision, it does not need to seek other means to determine the content of the foreign law. In this situation, the court is not obliged to appoint a court expert (eg, a lawyer specialising in the law of a given country).

Similarly, if the court obtains information on foreign law from the Minister of Justice and considers that this is sufficient to decide the case, then there is no obligation to obtain an opinion from a court expert.

Exception

The regulation in question is an exception to the principle according to which the content and interpretation of the law are not subject to determination by expert opinion. In the Polish legal system, the *iura novit curia* principle applies. As a rule, an expert opinion may only provide expert knowledge which the court could not establish on its own, or which could not be solely based on other evidence submitted by the parties to the proceedings.

Comment

The correct handling of these issues by the court is of utmost importance. An incorrect determination of the content of foreign law and its erroneous application may be an effective basis for objections raised by the parties against a court judgment.

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Endnotes

(1) II CSKP 200/22.

(2) See Supreme Court judgment of 14 July 2010, V CSK 7/10.