# *Essays*

## The Allegation and Proof of Foreign Law in Spain After the New International Legal Cooperation Act

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**Abstract**

The purpose of this paper is to explain the 'new' regime of allegation and proof of foreign law in the Spanish courts following the International Legal Cooperation in Civil Matters Act.[1] As foreign law has historically been considered by our case law as a 'procedural fact', the International Legal Cooperation Act comes to enshrine this system in Art 33.

### I. Previous Considerations

The new *Ley de Cooperación Jurídica Internacional*[2] (International Legal Cooperation Act) (hereinafter LCJI) seeks to influence one of the most controversial aspects of the Spanish system of allegation and proof of foreign law. The Spanish system is characterized as a mixed system that combines the principle of accusation and evidence, that is, the party must prove in its application of accusation the foreign law that is requested to apply, but there is also the possibility that the court completes said proof, in case it is not sufficiently proven, using whatever means of research it deems necessary. To date, it has not been specified what has to be done in those cases in which foreign law could not be proved. In the forensic practice, two solutions had essentially been proposed, the dismissal of the claim or the application of the *lex fori*. Art 33 of the LCJI opts for the latter solution, which is the traditional one in our system and in the majority of systems of private international law of our neighboring countries. It is also the solution that best suits the constitutional case law, from which it follows that the dismissal of the claim would violate, in certain cases, the right to effective judicial protection.

It should be understood that the lack of proof of foreign law in a judicial process is an exceptional situation that will only happen when the parties fail to prove the foreign law, although the possibility of the court cooperating in the accreditation of said content should not be forgotten. In addition, specific systems in which special laws provide for the same or different solutions should be

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[1] Ley 30 July 2015 no 29 de cooperación jurídica internacional en materia civil (Law of international legal cooperation in civil matters) BOE-A-2015-8564.

[2] BOE (Boletín Oficial del Estado) July 2015 no 182.

respected, as regards, for example, consumer protection regulations, as well as civil registration.

In addition, Art 33 of the LCJI clarifies the interpretation of the probative value of the evidence taken according to the criteria of sound judgment (*la sana crítica*) and determines the value of the expert reports on the subject.

Up until now, it was not legally specified what procedural consequences ensued from the impossibility of proving the foreign law by the interested parties. The doctrine and the forensic practice were divided between two possible solutions: the dismissal of the claim and the application of the so-called *lex fori* or domestic law. The doubt is now resolved: *lex fori* will apply (Art 33 of the LCJI). It should be understood, however, that the lack of proof of foreign law in judicial proceedings is quite exceptional and will only happen when the parties fail to prove the foreign law, without forgetting the possibility of the Court cooperating in the accreditation of said content.

Moreover, Art 33 merely establishes that the Spanish courts will determine the value of proof of the foreign law in accordance with the rules of healthy critical awareness (Art 33, para 2, of the LCJI), and that no report or opinion on foreign law will be binding for those courts (Art 33, para 4, of the LCJI).

The Spanish and Italian legal systems are very similar, perhaps because of the proximity of both countries and because both are inspired by Roman law. This similarity is further evidenced by the fact that both countries belong to the European Union, a fact that brings the two legal systems closer together due to the legal harmonization work carried out by the EU.

Currently, the Spanish courts deal with the application of foreign law to a specific case as a procedural fact. This is not a trivial matter, since this consideration entails a series of very important consequences at the moment of resolving a controversy. Accordingly, we must be clear about this legal concept, treating foreign law as a procedural fact, and the specific alternative that Spanish legislation offers, which strikes a more equitable balance between domestic and foreign law.

Events that are independent of the human will, to which the objective right attributes legal consequences, are considered procedural facts. This implies that, in court, the fact must be alleged and proven by the parties. Otherwise, the fact will not be taken into account by the court in its resolution of a given case. The consideration of the foreign law as a procedural fact entails a series of legal consequences that will be analyzed later.

In opposition to the legal treatment of the application of foreign law in the Spanish system, we bring up the system established in Italy where the application of foreign law is governed by the principle *iura novit curia*, that is, the Italian judge must know the foreign law that must apply, in addition to the most important jurisprudential sources of the controversy in question. For this reason, the foreign law is not considered a procedural fact but a real right. However, in

the Spanish system the principle of *iura novit curia* regarding foreign law has no application. Thus, the parties have to prove the foreign law. Although, both systems agree that a constitutional control of the foreign law must be legally present and applied to the concrete case.[3]

In the Italian law, we find the conflict rule applicable to the case in legge 31 May 1995 no 218 – Reforming the Italian system of private international law, and to be more specific in Art 14. In its drafting, the system of allegation and proof of foreign law has the same mechanisms established in Art 33 of the LCJI, even the precept is very similar, that is, 1) it establishes that the review must be done *ex officio*, 2) that the judge can use the necessary means to verify it, 3) that the parties must collaborate in your contribution, and 4) finally, if the foreign law is not determined, the Italian law will be applied. For this reason, the analysis made of the Spanish legal system can serve to help the understanding of the Italian legal system regarding the subject at hand.

In practice, this means that the foreign law is applied according to its own criteria of interpretation and application over time. It follows that the foreign law operates in the Italian legal system according to the rules of private international law.[4] This must be applied by the Italian judge making use of all the interpretation tools set by the foreign law, without thereby implying an obligation for the judge to acquire jurisprudential or doctrinal sources that corroborate one or another of the possible readings of the normative text.

The Italian judge must judge as the foreign judge would do, deeply understanding the purpose of the norm. As Filippo Corbetta[5] expresses it, the judge,

> 'applying the general interpretative canons existing in that system, and in particular the hermeneutical criteria, rules on the hierarchy of sources and on the effectiveness of the law over time dictated by foreign legislation'.

An example of this is found in the judgement of Corte di Cassazione 26 February 2002 no 2791, in which a resolution on an international food issue is invoked as a violation of law.

It also imposes the impossibility of treating foreign law as a procedural fact since it is proclaimed as an obligation for the judge to know the foreign law, thus proclaiming the *ex officio* application of foreign law as a fundamental element of the Italian legal system. In Italian private international law, the rule outside the forum is the one that solves the controversy.

[3] See G. Zarra, 'Constitutionality Review of Foreign Law: The Relevance of Substantive Concerns' *Rivista di diritto internazionale privato e processuale*, IV, 940 (2017).

[4] See S.M. Carbone, 'La conoscenza del diritto straniero e il giudice straniero' *Il diritto del commercio internazionale*, 193 (2009).

[5] F. Corbetta, 'La Cassazione e l'interpretazione del diritto straniero richiamato dalle norme di conflitto' *Il corriere giuridico*, III, 396 (2003).

In addition to the obligation to know the foreign law, the judge is also obliged to evaluate and know the circumstances that justify its application. This is essential to the correct functioning of the law in accordance with the intent of the lawgiver. The judge thus determines the correct legal basis for his or her decision, including matters determined on the basis of foreign law.

Once the judge has decided autonomously to introduce the foreign law into the legal process, he or she must communicate it to the parties so as not to violate their right of defense or otherwise prejudice their ability to assert their legal rights. On the other hand, the parties can also collaborate with the judge and help him to know the foreign law which must apply. In addition to the means available to the judge, as in Spain, there are the expert opinions, which strive to interpret the foreign law as interpreted by the judge of the forum to which the law belongs.

Given all this, there is an exception in which the foreign right does not have to be applied. More specifically, when there is reciprocity between the foreign law and the domestic law, that is, when the right is equal or similar between the two legal systems, the foreign right does not have to applied as long as there is no discrimination due to the application of Italian law.

Finally, we must conclude this introduction by saying that the Italian judge does not always apply the foreign law. He or she finds a limit in Art 16 of the law, which establishes the public order as a limit to the application of foreign law, that is, if the law as a foreign policy is contrary to public order and the basic principles of the Italian legal system, it cannot be applied by the Italian judge.

## II. What Is Foreign Law?

Foreign law is any norm outside the forum from which we observe. Within such a definition, it is of crucial importance to delimit the consideration of foreign law. The possibility of considering foreign law as law in itself, that is to say, as a legal system applicable in a State, has been discussed doctrinally. For example, parts of the US and Italian doctrine do not consider foreign law as a law in itself applicable in these countries, but rather, the application of that right has to be incorporated into their national legal system, since American and Italian judges can only apply their national legislation. The foreign law is not, in other words, self-executing. Another part of the doctrine is set in the opposite direction, that is, they consider foreign law as their own. The factual nature of foreign law has also been discussed, considering the fact that, to be applicable in the process, foreign law must be alleged.

The consideration of foreign law as a procedural fact has been the traditional position in the vast majority of legal systems in the world. Since the 19th century, that position argues that foreign law is a mere 'procedural fact' and is not 'law'. As Horatia Muir-Watt explains, foreign law cannot be considered as 'law', since if that were the case, the 'sovereign mandates' issued by another country would

be applied in a different country, which would entail an intolerable damage to the state sovereignty of the country whose courts are dealing with the case.[6] 1) Since foreign law is a 'procedural fact', it must be proved by the interested parties. 2) 'Foreign' law is 'foreign'. That is why it cannot be treated as 'equal' to the law of the country whose courts are hearing the matter. As a consequence, the principle of *iura novit curia* should only apply to national law and never to foreign law. 3) In most cases, the application of foreign law benefits exclusively 'particular interests' and not 'general interests', which is why the interested parties must prove the foreign law. If the parties do not prove the foreign law, the domestic law will apply, which may be more harmful to their interests.

This doctrinal opinion[7] derives from Common Law.[8] And, as is customary in Spanish Law, such a primitive doctrine was adopted by the Supreme Court (*Tribunal Supremo*) (SSTS 'judgments' 21 June 1864,[9] 13 January 1885,[10] 26 May 1887[11] and 7 November 1896)[12] on the basis of arguments related to intrusion against Spanish sovereignty, because that foreign law aims to solve problems related to the sovereignty of the States from which such legislative mandates emanate.[13] It is admitted that occasionally this law must be applied, but it is not convenient to do so in an intrusive way because it would attack that foreign sovereignty. This then is the reason why such law is considered a procedural fact, and as a procedural fact it is up to the parties to allege and prove the law. The principle *iura novit curia* does not apply because it only reaches domestic law. The court does not bear the cost of proof and if the parties do not allege or prove the foreign law, it cannot be applied.

The Spanish case-law doctrine is based on three propositions:

Firstly, foreign law is not treated as law, as this would be an attack against Spanish sovereignty, since it would mean accepting in Spain 'mandates of foreign sovereigns'. Therefore, for the Supreme Court (TS), foreign law is treated as a 'procedural fact'. As such, foreign law must be invoked and proved 'at the request of a party' (among others, SSTS of 21 June 1864, 20 March 1877,[14] 13 January

[6] H. Muir Watt, *Loi étrangère* (Paris: Dalloz Droit international, 1998), II, 2.

[7] See A. Muñoz Aranguren, 'Bodum USA, Inc. v La Cafetière, Inc.' *Revista para el Análisis del Derecho*, II, 1-39 (2012).

[8] *Mostyn* v *Fabregas* (1773) 20 St Tr 82, [1775] 1 Copp 161, [1775] 98 ER 1021 and *Church* v *Hubbart*, 6 US (2 Cranch) 187, 1804.

[9] Tribunal Supremo 21 June 1864, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[10] Tribunal Supremo 13 January 1885, ibid.

[11] Tribunal Supremo 26 May 1887, ibid.

[12] Tribunal Supremo 7 November 1896, ibid.

[13] See A.L. Calvo Caravaca and J. Carrascosa González, 'Aplicación del Derecho extranjero y la nueva Ley de Enjuiciamiento Civil' *Anales de Derecho*, XVII, 285, 286 (1999); J.C. Fernández Rozas, 'Artículo 12, apartado 6 del Código Civil: Aplicación judicial y extrajudicial del Derecho extranjero', in M. Albaladejo and S. Díaz eds, *Comentarios al Código Civil y Compilaciones forales* (Madrid: Edersa, 1995), II, 994.

[14] Tribunal Supremo 20 March 1877, available at https://tinyurl.com/y7x5y578 (last visited

1885, 26 May 1887, 28 January 1896, 7 November 1896, 19 November 1904,[15] 1 February 1934,[16] 9 January 1936,[17] 17 July 1937,[18] 29 September 1956,[19] 16 December 1960,[20] 30 June 1962,[21] 6 June 1969[22] or 5 November 1971).[23] [24]

Secondly, the judge has the power, but not the obligation, to 'intervene' in the proof of foreign law. But great care must be taken: never did the TS indicate when the judge 'may intervene' in the proof of foreign law, so it was discretionary ('technical discretion' was the expression used), but the truth is that, rather than discretionary, the intervention of the court to that effect was truly arbitrary (among others, SSTS 26 May 1887, 13 January 1885, 30 January 1930, 21 February 1935, 16 June 1935, 16 October 1940, or of 14 December 1940).

Thirdly, if foreign law is not proved by the interested party, the Spanish court should rule in accordance with Spanish substantive Law.

The TS position changed after the turning point established by the Constitutional Court (*Tribunal Constitucional*, hereinafter TC) from the year 2000 with its new doctrine[25] regarding the violation of the right to effective judicial protection and the consideration of the proof of foreign law as 'law' in itself, not as a 'fact', although the law of the forum should be applied, in a subsidiary way, when foreign law cannot be proved.

This doctrine suffered a back-and-forth process due to the position taken by the TS in the SSTS of May 22,[26] 2001 and of May 25,[27] 2001 in the *Sala de lo Social* (Social Chamber), whose origin is in the STS of February 19, 1990,[28] also of the *Sala de lo Social*, which held that there was another result of the non-allegation of foreign law in the corresponding proceedings: the dismissal of the claim.

The mentioned position originated in the *Sala de lo Social* of the TS, stating that the dismissal occurs because the one who has the burden of proving the

27 December 2018).

[15] Tribunal Supremo 19 November 1904, ibid.

[16] Tribunal Supremo 1 February 1934, ibid.

[17] Tribunal Supremo 9 January 1936, ibid.

[18] Tribunal Supremo 17 July 1937, ibid.

[19] Tribunal Supremo 29 September 1956, ibid.

[20] Tribunal Supremo 16 December 1960, ibid.

[21] Tribunal Supremo 30 June 1962, ibid.

[22] Tribunal Supremo 6 June 1969, ibid.

[23] Tribunal Supremo 5 November 1971, ibid.

[24] F.J. Garcimartín Alférez, 'Nota a STS 17 diciembre 1991' *REDI*, XLIV, 239-243 (1992).

[25] Tribunal Constitucional 8 February 2000 no 10, available at https://tinyurl.com/y9dtbdxg (last visited 27 December 2018). Tribunal Constitucional, sentencia 26 July 2001 no 155, available at https://tinyurl.com/y9vd5atq (last visited 27 December 2018) and Tribunal Constitucional, Sentencia 11 February 2002 no 33, available at https://tinyurl.com/y8zyh3xc (last visited 27 December 2018).

[26] Tribunal Supremo 22 May 2001, available https://tinyurl.com/y7x5y578 (last visited 27 December 2018) (Recurso de casación para unificación de doctrina 2507/2000.lo Social).

[27] Tribunal Supremo 25 January 1999, ibid.

[28] Tribunal Supremo 19 February 1990, ibid.

legal norm must provide a basis for its claim, according to the conflict rule, and has not done so, for which that party must withstand the consequences of lack of proof. The claim would also be dismissed when the foreign rule which must be alleged and proved is not alleged or proved, thus provoking the application of the law of the forum when it is more beneficial. As we have seen, it violates the doctrine that the TC was defending. This case-law criterion was eliminated by STS 1056/2005,[29] which provoked the retroactivity of the doctrine dictated by the TC.[30]

Art 33 of the LCJI complements Arts 281 and 282 of the LEC[31] (Civil Procedural Act, *Ley de Enjuiciamiento Civil*) insofar as it delegates in the latter the means of proof of foreign law. It is the legal corroboration of the doctrine maintained by the Supreme Court and the Constitutional Court, since it establishes as *ultima ratio* the application of Spanish Law when the contents of foreign law cannot be proved, although the proof of foreign law is a priority over the subsidiary application of the Spanish Law, and the regime of proof of foreign law is subject to the same rules as any other evidence. It strengthens the thesis of the proof at the request of a party.

## III. Proof of Foreign Law

We must remember that foreign law is a 'procedural fact' with special characteristics, but, in any case, it is a fact and, as such, must be alleged and proved by the parties.

Art 33, para 1, of the LCJI determines that the proof of the content and validity of foreign law will be subject to the rules of the Civil Procedure Act[32] (hereinafter LEC) and other provisions on the subject. This statement must be understood in two ways.

Firstly, the regulation of the LEC in relation to the allegation and proof of foreign law is a regulation 'of general lines'. That is, it can be said that Art 281, para 2, of the LEC contains a system of 'open texture' in relation to the proof of foreign law.[33] This means that the Spanish system does not enforce an exhaustive and detailed regulation of the proof of foreign law in the LEC. The Spanish system could have determined what the means of proof of foreign law are, as well as the procedural timing relative to the application of such law. The Spanish system could have rigidly established the obligation of the court and/or parties to prove foreign law in all or some cases and it did not. Another way was

[29] Tribunal Supremo 4 November 2004 no 1056, ibid.

[30] See M.V. Cuartero Rubio, 'Prueba del derecho extranjero y tutela judicial efectiva' *Derecho Privado y Constitución*, XIV, 21 (2000).

[31] Ley 7 January 2000 no 1 De Enjuiciamiento Civil (Of Civil Lawying) BOE-A-2000-323.

[32] BOE 8 January 2000 no 7.

[33] See F.J. Garcimartín Alférez, n 24 above, 239-243.

established: to provide the 'guidelines' of the legal regime of proof of foreign law, which intentionally left to the courts the task of elaborating answers to questions not regulated in the LEC. For this reason, the Spanish regulation on the proof of foreign law is a combination of 'basic legal regulation' and 'case-law development regulation'. This option in favor of a 'flexible system' should be valued very positively. In effect, this allows the traditional rigidity of the rules of private international law to give way to an 'intelligent' legal regime, capable of adapting itself to international private situations in the changing context of twenty-first century globalization.[34] Rigid systems and prescriptive regulations governing the proof of foreign law are inconvenient, although certain authors, such as Álvarez González, defend such regulations in the name of 'legal certainty'.[35]

This flexible system has two variables: 1) the type of referral made by the conflict rule. There are conflict rules that require an *ex officio* accreditation of foreign law, such as the rules of materially oriented conflicts. Other rules of conflict provide judicial protection to the claimant provided that he proves the foreign law. In these cases, it is the claimant who decides if he wants a judicial protection based on such law. 2) There is also the attitude observed by the parties at the time of the proof of foreign law. There are cases in which the parties can perfectly allege foreign law. In other occasions, the parties cannot allege it, so they will need legal aid. The court must cooperate in this proof because conflict rules are mandatory, thus preventing the parties from playing with the applicable law.

This duality allows for cases in which the proof is applied either at the request of a party or *ex officio*, because Art 33 of the LCJI does not resolve this matter, although the three (or four) guiding principles of the proof of foreign law (mandatory rules, operative nature of the norm, open texture system and flexible regime) allow for the solution of different assumptions in practice. The duality is that which is inferred from Art 281 LEC, since the general rule is evidence at the request of a party, and the exception is the *ex officio* application by the court, when it widely knows the applicable law. This can be seen when a court has heard a case where foreign law should be applied, and subsequently, the same court must hear a case whose law related to the former. Here we find a situation in which the court knew in advance the applicable law and, therefore, the principle *iura novit curia* is applicable to it.

Getting down to details, the LEC merely states that 1) foreign law must be proved (but it does not indicate whether foreign law must be proved 'action by action', that is, each time some foreign law is applicable). 2) The content and validity of foreign law must be proved (nothing is said about 'other questions'

[34] See J. Carrascosa González, *Desarrollo judicial y Derecho Internacional Privado* (Granada: Comares, 2004), 205-211.

[35] See S. Álvarez González, 'Aplicación judicial del Derecho extranjero: la desconcertante práctica judicial, los estériles esfuerzos doctrinales y la necesaria reforma legislativa' *Diario La Ley*, no 6287, 1, 1-5 (2004).

related to foreign law whose proof had been required by the traditional case law of the TS, such as 'applicability to the case of foreign law', its 'interpretation', etc). 3) As a general rule, the proof of foreign law is carried out 'at the request of a party' (Art 282 LEC, all proof shall be made at the request of a party, not only the proof of 'facts'), but it is true that 'exceptions' to that rule are possible (Art 281, para 2, LEC, although it is also true that the LEC does not indicate 'in which cases the court may and/or must intervene in the proof of foreign law'). 4) 'Foreign law' is something completely different from 'procedural facts': procedural facts are subject to certain rules of proof that are not applicable *tout court* to foreign law.

Following the reasons given above, I considered that 'facts' must be alleged to the action in terms of Art 399 LEC. But foreign law is not a 'procedural fact': Art 281, para 2, LEC clearly separates facts and foreign law. This distinction involves several consequences:

1) Foreign law should not be alleged by the parties as if it were only another 'procedural fact'. The application of foreign law to a specific case does not depend on whether the parties allege it or not: it derives directly from the Spanish conflict rule. Foreign law in a specific case does neither depend nor can depend on the parties alleging it or not. Foreign law is applied to a case because it is so ordered by the Spanish conflict rule. Therefore, no party has to 'allege' foreign law to the action. Indeed, foreign law 'is already in the action' immediately after the Spanish conflict rule orders to apply a foreign legal system. This is because, as stated in Art 12, para 6, Civil Code,[36] conflict rules are 'imperative' and, consequently, the application of foreign law designated by said rule is not disposable by the parties. Foreign law 'is in the action' because this is indicated by the Spanish conflict rule, which is an imperative norm. Consequently, if a party or both parties do not allege the foreign law, it neither disappears nor ceases existing in the proceedings, because it still is the law applicable to the case, whether or not the parties want it, since the Spanish conflict rule so provides.

2) If the party does not allege a 'fact', that fact is not taken into account by the court to rule on the case; the fact 'disappears from the proceedings', the fact does not exist (*quod non est actis non est in mundo*). But if a party does not allege the foreign law, that law does not 'disappear' from the proceedings, because it remains the law applicable to the case, whether the parties want it or not, whether the parties say it or not, whether the parties allege it or not.

3) Foreign law is not a notorious fact, which would exempt it from proof, and neither is it an admitted fact, that is, not disputed by the parties in the cases governed by the operative principle (Art 281, para 3, LEC). This provision does not comprise foreign law, but only procedural acts in the strict sense. And the foreign law does not have that character, constituting a kind of *tertium genus*,

[36] BOE 25 July 1889 no 206 Real Decreto 24 July 1889 por el que se publica el Código Civil (royal decree of July 24 1889 why the Civil Code is published) BOE-1889-4763.

since, without being a procedural fact, it will have to be proved, generally by the parties. Since it is law, it is not possible to require its knowledge by the judicial body, since the presumption *iura novit curia* is not applicable in this case.

4) Legal foundation of the claims of the parties is always 'objective'. There is a correct legal foundation for each claim. It must be that basis and not a different one. Therefore, if an assumption is governed by foreign law, the parties must base their claims on such foreign law, and if they do not do so but, on the contrary, base their claims on Spanish Law, the claim must be dismissed. And it must be dismissed because in such a case, the legal basis of the claim of the parties is incorrect. The court should not do the counsels' work as they are professionals in the technical defense of the parties. If the legal basis is incorrect, the claim, or the statement of defense, is dismissed: the legal claim is rejected because it is not well founded.

In order to arrive at this understanding, it is has been necessary to get around the centenary case-law of the TS that maintained the following in relation to the allegation of foreign law: a) foreign law must always be alleged by the interested parties; b) the lack of allegation of foreign law by the parties leads to the 'non-application' of foreign law to the case; c) the correct procedural time for the allegation of foreign law is the court of first instance and not the appeal or cassation court; d) foreign law must be alleged in the phases of the action suitable for the provision of 'facts': nowadays, in the claim and the statement of defense.

Secondly, there are many omissions in the LEC on the proof of foreign law, which the LCJI has hardly solved.

## IV. Object of Proof of Foreign Law

We turn back to Art 33, para 1, of the LCJI where it says that the 'content and validity' must be proved, as established in Art 281, para 2, LEC.

By 'foreign law', we must understand the entire foreign legal system, including all types of legal norms which integrate it and which are applicable to the specific case: written rules, custom and other rules that are substantive law as case law or general principles.

The following aspects must be proved: a) the content of foreign law: the wording of the foreign rules; b) the validity and existence of foreign law, which is important in relation to newly created countries and in cases of possible contradiction between the laws of a particular country and the constitution of that country; c) the specific interpretation of the rules of foreign law, this includes, where appropriate, proof of foreign case law which applies and interprets foreign law; and d) the applicability of foreign law to the specific case. As a result, if foreign law is proved in detail, such foreign law will not give rise to 'the least reasonable doubt in the Spanish courts', as the Supreme Court stated (SSTS of

11 May 1989,[37] 25 January 1999 and 17 July 2001).[38]

In the United States, we find more discrepancies in this sense: we find cases in which it is sufficient to allege the validity and the content of the law, besides an opinion of an expert.[39] On the contrary, the Court of Appeals for the Second Circuit[40] rejected the use of an opinion prepared by a foreign lawyer on the interpretation of the applicable foreign norm as a means of proof-specifically, of Spanish Law – because of the lack of references in his opinion to the Spanish interpretative case Law on that norm, which prevented the US court from having an accurate picture of the way in which it was interpreted by the Spanish judges.

A strict view was maintained regarding the proof, of which it was only necessary to prove 'the content and the validity' based on the rule *inclusius unius exclusio alterius*: 'the inclusion of one excludes the other'. Following this view could give rise to inadequate results by the Spanish courts as they fail to know the interpretative criteria that the foreign courts apply. The court of the forum must rule as a foreign court would do.[41] From this latter interpretation, we get several ideas: a) in principle, all foreign rules are applicable. The referral made by the Spanish conflict rule to foreign law is complete and not only the rules of domestic law are included, but the special rules of foreign law by extension are also included. But the Spanish judge will not apply the Spanish conflict rule unless the return referral and the second-degree referral are allowed. b) Any foreign source from which laws emanate, including legal institutions of foreign origin, must be applied. c) Foreign law must be applied with the interpretation given by its courts. d) The rules of public or private law will be applied whenever they have an effect on individuals.

## V. Means of Proof

If we consider foreign law as a procedural fact, it is necessary to use the means of proof that the LEC provides, since procedural issues of this type consider the procedural law of the forum which hears the case.

Art 281, para 2, LEC refers to the proof of foreign law. However, foreign law, rather than being 'proved' must be 'accredited'.[42] Proof is an activity designed for 'procedural events'. Foreign law is not a mere 'procedural fact'. Therefore, its accreditation does not strictly follow the rules on rigorous proof of

[37] Tribunal Supremo 11 May 1989, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[38] Tribunal Supremo 17 July 2001, ibid.

[39] *Universe Sales co.* v *Silver Castel*, LTD, 182 F.3d 1036 (9th Cir. 1999) and *Curely* v *Amr Corp*, 153 F.3d 5, 11 (2nd Cir. 1998).

[40] *Carlisle Ventures* v *Banco Espanol de Credito*, 176 F.3d 601, 608 (2nd Cir. 1999).

[41] Tribunal Supremo 24 June 2010 no 390, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[42] STS 157/1997.

procedural facts.

The system of accreditation of foreign law is a flexible system, based on the freedom of means of evidence or 'free evidence'.[43] Thus, the accreditation of foreign law is facilitated and its correct application is enhanced.

There is no closed list of appropriate means to accredit foreign law. The legislator did not intend to formulate that 'closed list', precisely to facilitate the accreditation of foreign law.

Therefore, all means, instruments, and technical tools, by their very nature, are suitable to prove the content of foreign law, whether or not they are means of evidence included in those admitted by the LEC (Art 299, para 3, LEC, by analogy). Examples: the examination or opinion of an 'expert in foreign law' (*Expert Witness*) is appropriate to accredit foreign law, although Art 299 LEC does not include it as a 'means of evidence'.

In the case of authentic evidentiary means, such as expert or documentary evidence, they do not need to strictly conform to the requirements that the LEC establishes to such means, as the TS allows some flexibility.[44]

a) Proof through public documents. The means of evidence most commonly used by individuals to prove foreign law is proof by means of public documents (Art 317 LEC). For example, certificates issued by the General Subdirectorate of International Legal Cooperation of the Spanish Ministry of Justice on the content of foreign law are public documents. These certificates can only be requested by the courts, not by the parties. Certificates issued by foreign diplomatic or consular officials accredited in Spain are also public documents and they must be legalized and translated into Spanish as the official language (Arts 323, para 3, and 144 LEC), as well as certificates issued by Spanish diplomatic or consular officials accredited in the state whose legal system is sought to be proved.

b) Photocopies. In Spanish courts, it is common for the parties to provide 'simple photocopies of various isolated rules'.[45] Such documents are not public documents. In addition, such photocopies do not offer the possibility to prove the foreign law with certainty, and for that reason they should not be admitted to that effect.

c) Private documents. Other non-public documents, such as private collections

[43] Audiencia Provincial de Huesca, Sentencia December 2005 no 297, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[44] STA 390/2010. In this sense, see A. Ortega Giménez and P. Heredia Ortiz, 'Cuestiones prácticas acerca del régimen de alegación y prueba del derecho extranjero en España. ¿Por qué debe probarse, qué debe probarse y cómo debe probarse el derecho extranjero en España?' *Revista Economist & Jurist*, CLXVIII, 80-85, 80 (2013); A. Ortega Giménez, 'Aplicación del derecho extranjero por los tribunales españoles para conocer de un supuesto de resolución unilateral de un contrato de agencia comercial internacional. Comentario a la SAP Madrid núm. 17/2013, de 18 de enero' *Revista Boliviana del Derecho*, XVIII, 514-523, 514 (2014).

[45] Audiencia Provincial de Tenerife 13 April 2004 no 132; Audiencia Provincial de Alicante 12 May 2004 no 265; Audiencia Provincial de Baleares 26 April 2005 no 171, all available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

of laws or the doctrinal works of foreign authors have a greater probative value than 'simple photocopies'. Although for years the TS case law has been reluctant to admit these documents to prove foreign law, there is no reason to eliminate them radically as 'means of accrediting foreign law'. It will be necessary to decide in each specific case whether a particular private document, such as an authorized foreign doctrinal text, may serve to accredit foreign law 'with certainty'.

d) Expert evidence. It is also possible to prove foreign law through 'expert evidence' exclusively (Art 335 of the LEC). Such expert opinion may consist of a report requested by the parties drawn up by 'experts in foreign law'. It is not necessary that such 'experts' be subjects of the foreign nationality of the country whose law is sought to be proved. However, the so-called 'party's report', a report drafted by legal experts at the request of one party, is not a permissible means of evidence, as the expert 'takes sides' in favor of the specific claims of that party.[46]

e) Expert Witness. As has been already said in relation to the 3 March 1997 STS,[47] foreign law, rather than needing to be 'proved', must be 'accredited'. This entails that 'means of accrediting foreign law' other than, technically speaking, 'means of evidence' admitted as such in the procedural laws, may be used. For this reason, the examination of 'expert witnesses in foreign law' (*Expert Witness*), a mechanism widely used in other countries, but little used until now in Spain, can be accepted as a means of accreditation of the foreign law. According to the TS case law, two legal consultants with expert's knowledge in foreign law of the country of origin are needed (SSTS of 28 October 1968, and of 3 February 1975, although the one of 9 November 1984 held that the opinions of those legal consultants are not binding).

f) 'Accepted facts' are not operative. The proof of foreign law cannot be accepted through the 'doctrine of accepted facts'. In general, as is well known, in civil proceedings, the facts admitted by both parties do not need to be proved. However, it is not permissible for the parties to 'agree' that foreign law does not need to be proved, so that the content of foreign law is fixed 'by agreement between the parties'. Art 281, para 3, LEC only applies to 'facts', not to 'foreign law'.

The general regime established by the TS admits that foreign law must be proved through 'public documents' and, moreover, through 'Expert evidence', a joint report, legalized and translated, carried out by two legal experts of the foreign country whose law must be proved (among others, SSTS of 13 January 1885, 19 November 1904, 25 February 1926; of 30 March 1928, 12 December 1935, 6 December 1961, 29 September 1961, 30 June 1962, 28 October 1968,[48] 6 June

[46] Audiencia Provincial de Alicante 28 April 2005 no 154, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[47] Tribunal Supremo 3 March 1997, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[48] Tribunal Supremo 28 October 1968, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

1969, 5 November 1971, 12 March 1973,[49] 3 February 1975,[50] 12 November 1976,[51] 27 April 1978,[52] 9 November 1984[53] and 23 October 1992).[54] Now, this case law must be reviewed very deeply, since at the present time, and after the entry into force of the LEC, it can be affirmed that a) 'cumulative proof' of foreign law by documentary evidence and expert evidence is not required. b) Proof of foreign law may be admitted by public and private documents, or by other means of evidence, such as the examination of an *Expert Witness*, provided that such means permit the 'foreign law' to be proved 'with certainty'. We must also point out that Art 33, para 4, LCJI indicates that no opinion will be binding on international judicial bodies, as had already been indicated in case law.

The solution that must be provided by the case-law process should limit the evidence to the mere knowledge of the case by the judge with respect to the validity, content, and interpretation of foreign law.

Art 33, para 2, LCJI determines that the courts will determine the probative value of the evidence taken in accordance with the Laws of 'sound judgment'. This precept highlights an advance regarding the hard line that represents the case law, providing a reason why the judge will be free to verify the accreditation of the foreign law, without needing to demand all means that the TS requests, although it is possible that the judge asks for even more evidence if he is not convinced.

## VI. The Sound Judgment

The 'sound judgment' allows us to adjust to the 'changing local and temporal circumstances and to the particularities of the concrete case'. As reiterated case law has established, 'sound judgment' is not encompassed by legal rules nor is it defined in any normative text, hence its adaptability. It is often identified with the maxims of experience which, as STEIN[55] points out,

> 'are definitions or hypothetical judgments of general content, detached from the concrete facts that are judged in the proceedings, but which are independent of the particular cases from which they have been deduced and which, above those cases, seek to be valid for new ones'.[56]

Case law has offered a plurality of notions 'but ultimately links them to logical

[49] Tribunal Supremo 12 March 1973, ibid.
[50] Tribunal Supremo 3 February 1975, ibid.
[51] Tribunal Supremo 12 November 1976, ibid.
[52] Tribunal Supremo 27 April 1978, ibid.
[53] Tribunal Supremo 9 November 1984, ibid.
[54] Tribunal Supremo 23 October 1992, ibid.
[55] See F. Stein, *El Conocimiento Privado del Juez* (Bogotá: Editorial Temis, 1999), 21.
[56] See X. Abel Lluch, *Valoración de los medios de prueba en el proceso civil* (Madrid: La Ley, 2014), 4.

principles, or to rules born of experience',[57] Such principles or rules constitute 'the path of human discourse that must be followed to value(,) without voluntarism or arbitrariness(,) the data provided by evidence'.[58]

The 'sound judgment' is a system of motivated free valuation. The free valuation of evidence should not be confused with judicial discretion, since, as has rightly been said, 'the principle of free belief has freed the judge from the rules of legal proof, but has not dissociated him from the rules of reason'. A free valuation must be a reasoned valuation, and the judge must explain how and why he gives credibility to the testimony, the expert or the party, in observance of the duty to motivate judicial decisions (Art 120, para 3, Spanish Constitution,[59] and Art 218 LEC). The rules of healthy critical awareness constitute the record that rationalizes judicial discretion in the valuation of testimony. It has been said with precision that

> 'in contrast to other legal systems in which, as a reaction to the legal evidence, the accent is placed on the freedom of the judge, the Spanish system puts the emphasis on the rationality that must be at the base of the valuation'.

This rationality 'necessarily demands that the decision be explained and subject, in turn, to the criticism of a higher court' and also demands the 'primacy of factual assessment in the motivation of the judicial decision', because judicial discretion is only prevented by the correct formation of the factual assessment.[60]

The 'sound judgment' supposes an approach of the valuation of evidence from the perspective of the means and not of the end. It has been rightly said that 'sound judgment' is a means; free belief is an end or an outcome'. Perhaps the success and persistence of the centenarian expression of healthy critical awareness consists in having displaced the notion of probative value from the perspective of the result to that of the means, because with it the motivational instrument is pointed out and emphasized.

So what do the rules of healthy critical awareness consist in? Because having acted in the indicated way means that the concept has not been delimited and, with that, that valuation is: a) not subject to criteria of rationality; b) finally, not subject to the control of a higher instance. The expression of valuation in conscience of the evidence, joint valuation of the evidence, valuation of the expert evidence in agreement with the other evidence taken, and others of similar type, are not sufficient to comply with the right of the parties to a judicial decision

[57] Audiencia Provincial de Madrid 28 November 2006 no 681, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[58] Audiencia Provincial de Guipúzcoa 15 May 2006 no 147, available at https://tinyurl.com/y7x5y578 (last visited 27 December 2018).

[59] BOE 29 December 1978 no 311 Constitución Española de 1978 Spanish Constitution of 1978) boe-a-1978-31229.

[60] See B. Barrios González, 'Teoría de la sana crítica', available at https://tinyurl.com/yb2ykdwc (last visited 27 December 2018), 1-53, 44-46 (2006).

well founded and do not make it possible to review the decision by the corresponding higher body, since the latter can evaluate the irrationality of the argument when it is explicit, but such valuation is impossible in cases where terms of pure generality have been used.

## VII. Consequences of Non-Allegation or Proof of Foreign Law

It is common enough that one of the parties neither can allege nor prove foreign law in the case presented. The LEC does not offer solutions to such situations, so both doctrine and case law have established different alternatives to solve the question. Before the enactment of the LCJI, these have been the most minority theses, but the following three have been the most argued:

a) Application *ex officio* of foreign law: it has been defended by several authors[61] that foreign law must be applied *ex officio* due to the imperative nature of the Spanish conflict rules provided by Art 12.6 of the Civil Code,[62] but such an argument is not enough because the Spanish system of allegation and proof of foreign law is designed so that the burden of proof falls on the parties according to Art 282 LEC, which applies to Art 281, para 2, LEC when it is determined that the court can use any means of evidence necessary for its application. Although explicitly stated as 'the burden of proof', there may be a broad interpretation, which may be extended to the allegation of law. In this way, we can think that the court does the work of the parties by correcting their mistakes. Such a thesis should not be applied because it goes against the principle of consistency of the judgment, the operative principle, and that of party disposition.

b) Dismissal of the claim: it is one of the most defended theses. If a dispute is to be governed by foreign law, and one party alleges on the basis of Spanish Law, such party should have its claims dismissed. Arguments in favor are based on the impossibility of an application *ex officio* of foreign law, but which also forbids to directly apply Spanish Law, in addition to the fact that the court has no obligation to apply foreign law because such an obligation falls on the parties. In addition, the court must not do the work that has been incorrectly done by the counsel of a party, or even by the counsels of the two parties, who try to frame a case through the application of Spanish Law when foreign law should be applied. It reinforces the legal certainty, because the case will not be solved with another law except the one indicated in the norm. Justice is not denied, so it does not amount to a *non liquet*, and the principle of effective judicial protection is not violated since the claim has been valued as such and a response to the claim requested by the corresponding party has been given. It also produces a limited

[61] See S. Álvarez González, 'La aplicación judicial del Derecho extranjero bajo la lupa constitucional' *REDI*, I, 205, 205-223 (2002); B. Barrios González, n 60 above, 483-503.

[62] See J.C. Fernández Rozas, n 13 above, 973-1082.

effect of '*res judicata*' because once dismissed – without entering into a dispute on the merits of the case – the party whose claim has been dismissed can file its claim again arguing with a different cause of action.

Following the enactment of the LCJI, Art 33, para 3, provides that, exceptionally, Spanish substantive Law will apply when foreign law has not been proved. Therefore, this latter thesis has been legally recognized. It argues that Spanish substantive Law should be applied when there is a lack of allegation or proof of foreign law, thus avoiding the denial of justice and infringement of Art 24 CE. In this way, it enshrines foreign law as a 'procedural fact', so if it is not alleged or proved, it disappears from the proceedings but, as we have already explained, it is not a mere procedural fact. Apart from that, it has particularities that make it more than a fact. This thesis has been widely followed since the beginning of the problem of the application of foreign law in the nineteenth century. But against this thesis we must affirm that, contrary to the thesis of the dismissal of the claim, this theory 1) violates the imperative nature of the Spanish conflict rules, 2) brings legal insecurity because it is not known from the outset which law is to be applied, and 3) favors strategic behaviors when choosing the applicable law (gaming the system).