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PRIVATE LAW HAMBURG

HAMBURG GUIDELINES

for Ascertaining and Applying Foreign Law in German Litigation

FOR COURTS, EXPERTS AND LITIGANTS

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PRELIMINARY REMARKS

The court's task of applying the law to the given facts (*da mihi factum, dabo tibi ius*) also extends, should it become relevant, to foreign law. But the court cannot apply foreign law until the content of that law has been established. The court has a variety of resources at its disposal by which to do so, including by obtaining the formal opinion of an expert in the law of the relevant foreign jurisdiction. The ascertainment and application of foreign law raises several legal and practical issues that neither statutory nor case law can completely resolve.

These "Hamburg Guidelines" were drafted at the Max Planck Institute for Comparative and International Private Law in Hamburg and discussed with external legal scholars and practitioners at a conference, held at the Institute, from 16–17 June 2023. The guidelines were finalized following those discussions. They are intended as an aid to all participants in the legal process, but are directed especially at courts, experts, litigants and their legal counsel, to facilitate the efficient, transparent and legally sound handling of issues of foreign law. They are grounded in the practical experience of all participants, in particular the courts and the institutions that regularly provide expert opinions. They also reflect the statutory requirements and restate rules laid down in earlier cases, especially in the jurisprudence of the German Federal Court of Justice (the BGH). However, the issues in those cases are often so specific that the BGH itself may not wish to see their principles generalized. Instead, the Hamburg Guidelines are oriented toward the most common kinds of cases. Therefore – and also because of the immense variety in practice – the guidelines do not claim to offer the right solution to every constellation. In any case, they are not binding.

Article 1 (Foundations) contains relevant information for all participants in the legal process. The subsequent Articles cover the different roles of courts, experts, and parties. A comprehensive reading should therefore produce a complete understanding of the process of ascertaining and applying foreign law. Throughout, the term

"litigant" or "party" will also refer to parties to non-contentious proceedings, especially under the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (the FamFG).

From time to time, illustrative examples and supplementary notes are provided to make the guidelines more informative and easier to use. Where useful, certain principles of statutory and case law are also indicated to aid comprehension.

The Hamburg Guidelines were drawn with civil litigation in mind. But in principle, they apply to other kinds of cases in which a German court or government agency (e.g., the tax or criminal courts; offices of the asylum or public revenue services; personal status registrars) may be called upon to ascertain and apply foreign law.

The Hamburg Guidelines do not address the international jurisdiction of German courts, which the courts can and must address themselves based on domestic law, such as the Brussels Ia and Brussels IIb regulations, or §§ 97 *et seq.* of the FamFG.

For consistency with §§ 402 et seq. of the German Code of Civil Procedure (the ZPO), the Hamburg Guidelines use the pronouns *he, his, him* etc. to refer to experts in the singular.

ARTICLE 1: FOUNDATIONS

§ 1 Distinguishing the roles of the court, experts, and litigants

1. Whether the law to be applied is German law or foreign law is determined by the rules of private international law, which can derive from European Union law, international treaties, and autonomous German law (see Article 3 of the EGBGB). These private international law (or conflict-of-laws) rules are a part of German law; so, finding, interpreting and applying them is a core responsibility of the court. The court cannot delegate this duty to an expert.

2. It is also the court's basic responsibility to ascertain, interpret and apply applicable rules of foreign law. For this, the court may consult a variety of resources and authorities (see below at Article 2, § 3), which includes obtaining an expert opinion.

   Statutory authority: *ZPO § 293*

3. Litigants may assist the court in its investigation of the foreign law. However, beyond their general duty to advance the proceedings, the parties are not generally required to assist the court in this way. Foreign legal norms are handled as matters of law, not as facts of the case, so the burdens of producing evidence and of persuasion do not apply to establishing the content of the applicable foreign law.

   Case law: *BGH,* Beschluss *of 24 August 2022 – XII ZB 268/19, BGHZ 234, 270 (= IPRspr 2022-1).*

§ 2 General aims

The establishment and application of foreign law as part of the adjudication process should further the following interests:

- securing the constitutional guarantee of access to justice;
- rendering decisions consistent with private international law rules, and, where applicable, foreign law;
- avoiding unnecessary or disproportionate cost and delay for everyone involved in the process;
- ensuring that all participants in the adjudication keep to and fulfil their proper role; and
- facilitating transparent communication among all participants.

ARTICLE 2: GUIDELINES FOR THE COURT

§ 1 Finding the applicable law

1. In principle, the applicable law in Germany is German law. But there are cases in which that very law, in particular Germany's rules of private international law, requires that foreign law must apply or be considered. This occurs most frequently in the following circumstances:

   – where the private international law rules applicable in Germany call for the application of foreign law;

   – where it becomes necessary to determine whether an element of a German rule or norm can be satisfied by acts taken or transactions executed abroad (*Substitution*);
   Example: May a foreign notary perform the required notarization under § 129 of the BGB?

   – where the parties executed a contract or the testator executed a will in the mistaken belief that the transaction or instrument would be governed by foreign law, and the foreign law must be consulted to discover the meaning of its provisions (*Handeln unter falschem Recht* or acting under the wrong, i.e., non-applicable, law);

   – when the rules of safety and conduct in a foreign country must be taken account of, for example with regard to foreign traffic laws (see, e.g., Article 17 of the Rome II Regulation);

   – for domestic litigation, to determine whether an action is pending before a foreign tribunal, and if so, when the foreign tribunal became seized of it;

   – where the issue of reciprocity arises in regard to recognition and enforcement in Germany of a foreign judgment from outside the European Union pursuant to § 328, para. 1, no. 5 of the ZPO;

   – where proceedings for the recognition and enforcement of a foreign judgment raise the question of whether the foreign adjudication was manifestly incompatible with core principles of German law;

   – where proceedings for the recognition and enforcement of a foreign judgment or order raise the question of whether the instrument is final under the law of the jurisdiction that issued it (e.g., in the context of support claims certified by a government agency);

   – when a criminal prosecution requires determination of whether an act solemnized under the applicable foreign family law (e.g., a marriage) furnishes grounds for a witness to refuse to testify; or

– in tax law, where "linking rules" align the tax treatment of an entity or issue (e.g., whether an expenditure constitutes a deductible business expense) with the tax treatment of the underlying entity or issue under foreign law (e.g., under §§ 4i, 4k of the EStG).

In each of these cases, the court must independently determine whether foreign law applies or must be considered – which is not the same as conducting an investigation to ascertain the content of that law (see above at Article 1, § 1, no. 1).

2. Any application of Germany's rules of private international law also entails interpreting those rules, for example to determine whether an aspect of the case is "manifestly more closely connected" with another country within the meaning of Article 4, para. 3 of the Rome II Regulation. Problems of what is often called "characterization" (e.g., determining whether the applicable standard of proof or the admission of prima facie evidence is governed by foreign tort law or by the German rules of civil procedure) are, in principle, also to be determined by the court. On characterization, see also below at Article 3, § 4, nos 3, 4.

3. It is also for the court to determine whether Germany's private international law rules refer the issue to the foreign substantive law or to the foreign jurisdiction's private international law rules (see Article 4, paras 1 & 2) of the EGBGB). If the German private international law rules refer the matter to foreign private international law rules, then those rules determine what law applies, and the court may consult an expert in such a case (see below at Article 2, § 5). If the court has reviewed foreign private international law rules, this fact is to be indicated in the decision even if those rules do not call for "renvoi", which is to say, for German law to apply (but also see below at Article 2, § 1 no. 5).

Examples:

– *Where an issue arises of the parentage of a child who habitually resides in France, the court must examine whether French private international law refers the issue to German law or possibly even the law of a third state (renvoi).* Article 19, para. 1 (1) EGBGB; Article 4, para. 1 (1) EGBGB.

– *Where the last habitual residence of the deceased was in South Africa, the court must determine whether the private international law rules of South Africa refer the issues to German law or possibly even to the law of a third state.* Article 21, para. 1 & Article 34 of the European Succession Regulation. *South Africa is among the many non-European jurisdictions whose private international law rules subject succession to real property to the law of the place where the property is located, resulting in renvoi where real property is situated in Germany.*

Case law: *BGH,* Beschluss *of 4 October 1990 – XII ZB 200/87, IPRspr 1990-73 (= NJW 1991, 3088 (3090)).*

4. Where the German rules of private international law refer an issue to the law of a foreign country that is politically subdivided into distinct jurisdictions (see Article 4, para. 3 of the EGBGB), the court must determine, on its own, whether the private international law rule in question refers the matter directly to the law of the pertinent political subdivision or whether there are internal conflict-of-laws rules in the foreign country that should be consulted first. The court may seek the opinion of an expert to ascertain such rules, or even to determine whether the foreign jurisdiction comprises several distinct jurisdictions in the first place.

   Examples:

   – *Under Article 11, para. 1 of the Rome I Regulation, the formal validity of a contract is governed by the law of the place where the contract was made, for example the United States. Each US state is a political subdivision that for private-law purposes constitutes a separate jurisdiction. Pursuant to Article 22, para. 1 of the Rome I Regulation, each territorial unit counts as its own country, such that Art. 11, para. 1 of the Rome I Regulation refers directly to the law of the state in which the contract was formed. Hence, parties who contract in Miami, for example, do so subject to the formalities prescribed by Florida state law.*

   – *When a succession case involves the law of the United States – e.g., because the testator's last habitual residence was there, see Art. 21, para. 1 of the European Succession Regulation – then Art. 36, para. 1 requires ascertaining whether the law of the United States has internal conflicts rules that determine which state's law should apply. The answer is no, and so the applicable law is to be ascertained under Article 36, para. 2 of the European Succession Regulation.*

   – *Pakistani family law contains different rules for members of different religions. If Germany's private international law rules refer an issue to the law of Pakistan, say, because one of the parties to a marriage is Pakistani (see Article 13, para. 1 of the EGBGB), then the first sentence of Article 4, para. 3 of the EGBGB refers the question of the applicable religious law to the interpersonal conflict-of-laws rules of Pakistan.*

5. Where the result would be the same under either the foreign or the domestic law, normally it is moot to determine which law actually applies. In principle, only an appellate court needs to determine the applicable law, because only questions of German law are reviewable; questions of foreign law are not. An exception to this is when the foreign law would be contrary to German public policy, since in that case, German law would supply the missing rule and thus apply in either case.

   Case law: *OLG Hamburg,* Beschluss *of 29 March 2021 – 2 W 17/20, IPRspr 2021-3 (= IPRax 2023, 90).*

   Note: *The same is true for the appellate courts ("Beschwerdegerichte") under the FamFG.*

§ 2 The court's duty to investigate the foreign law

1. The court must investigate the foreign law *ex officio* and as a rule must apply it as would a court of the foreign jurisdiction.

   Statutory authority: *ZPO § 293.*

   Notes: *Investigating the law that applies in another country is the trial court's responsibility, also to the extent a referral to the Court of Justice of the European Union depends on it (BGH,* Urteil *of 25 January 2022 – II ZR 215/20, IPRspr 2022-110).*

   Adversarial proceedings in matrimonial and family-law matters are made subject to ZPO § 293 by FamFG § 113 para. 1, sent. 2. In non-contentious proceedings under the FamFG, the case-law on ZPO § 293 is to be taken into account as well.

2. The right to a fair hearing requires that if foreign law will supply the rule of decision, the court must instruct the litigants about this fact and must give them the opportunity to submit evidence to establish the content of the foreign law. If the court develops a preliminary view based on its own investigation of the content of the applicable foreign law (see below at Article 2 § 3 no. 1), it must communicate it to the parties.

3. In summary proceedings, the court's duty to conduct an investigation into the applicable foreign law is, in principle, the same as in ordinary proceedings. However, given the expedited nature of the action, it may be impossible to establish the content of foreign law. See below at Article 2 § 7.

4. If only property rights or other economic interests are at issue and the parties make detailed, concurring submissions as to the applicable foreign law, the court may accept these submissions as correct without violating its duty to conduct an investigation as long as the submissions are sufficiently persuasive and the court can tell they rely on good legal authority. However, in proceedings to determine questions of personal status or that affect the rights of non-parties, particularly in family law, the court is normally barred from assigning such weight to submissions by the parties. On submissions by the parties, see below at Article 4.

   Case law: *BAG,* Urteil *of 10 April 1975 – AZR 128/74, IPRspr 1975-30b (= NJW 1975, 2160)*

5. If a party submits an opinion by a private expert, it weighs the same as other kinds of party-submitted documentary evidence. The court must evaluate it as it would any other item within its duty to conduct an investigation.

§ 3 Establishing the content of the applicable foreign law

1. Proof of foreign law is only required to the extent the foreign law is unknown to the court. This means that the court may investigate the applicable foreign law on its own, above all by consulting the publications and online resources at its disposal, possibly combined with the use of machine translation tools. The court will thereby often be able to establish the context of the applicable foreign law with sufficient certainty.

   Notes: *The court's own investigation will often suffice in less complex cases. Even if inconclusive, it can still form the basis for instructing the parties (on which see above at Article 2, § 2, no. 2) and ordering an expert opinion (on which see below at Article 2, § 6).*

   A regularly updated list of standard German-language literature on private international law is available at <www.hhleitlinien.de/literatur>.

   Two other major German-language sources on foreign law subjects are the series IPG: Gutachten zum internationalen und ausländischen Privatrecht, *which collects expert opinions, and IPRspr:* Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts, *which aggregates court decisions (<www.iprspr.de>). Many opinions of the CJEU also contain detailed indications on the law of various countries.*

2. If the court is still uncertain after exhausting its own resources – perhaps because it could not find unambiguous statutory language or pertinent rulings by the high court of the jurisdiction in question (on which see below at Article 2, § 3, no. 4) – the court may resort to the following methods of establishing the content of the applicable foreign law:

   - if the applicable foreign law is known or readily accessible to the parties (especially when the parties are from the relevant country), the court may instruct them to submit evidence of its content in the form of statutory texts or court decisions, indicating sources and providing a simple translation if necessary;
   - the court may resort to the European Convention on Information on Foreign Law of 1968 (the "London Convention", <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=062>);
   - the court may search the European e-Justice Portal (<https://e-justice.europa.eu>);
   - the court may seek information from German embassies, consulates and government ministries or from one of the German chambers of commerce abroad;
   - the court may consult an expert opinion obtained in a different proceeding that addresses the same issue and that is not so old as to be unreliable (ZPO § 411a); or
   - the court may seek an expert opinion.

   Notes: The European Convention of 1968 on Information on Foreign Law (the "London Convention") only permits abstract questions, not case-specific questions, and answers are only given in the form of verbatim statutory language or judicial opinions. Thus, seeking legal information under the London Convention is only recommended where the court can tide its way with abstract answers to particular questions (see below at Article 2, § 3, no. 4). The court must consider the costs incurred for translation as well as what is often a slow turnaround. Experience shows that some countries cooperate far better than others.

   Liaison judges from the European Judicial Network in civil and commercial matters can assist in procuring statutory texts and foreign decisions; however, their role does not consist in providing legal opinions.

   On seeking information from embassies, chambers of commerce and other institutions, see BGH, Urteil *of 16 October 1986 – III ZR 121/85, IPRspr 1986-3 (= NJW 1987, 591); BFH,* Urteil *of 7 December 2017 – IV R 23/14, IPRspr 2017-3, marginal note 39 (= BStBl II 2018, 444, marginal note 39); BGH,* Beschluss *of 24 May 2017 – XII ZB 337/15, IPRspr 2017-304 (= NJW-RR 2017, 902).*

3. The court has discretion to decide how to investigate the foreign law as long as it is consistent with the court's duties and conducive to the goals stated in Article 1, § 2. The more complex and unfamiliar the applicable law is relative to the law of the forum, the higher the call for a diligent investigation. While the court must determine the scope of the investigation, party submissions can be influential, including a private expert's opinion. The court must grapple with party submissions commensurate with their level of detail.

   Notes: BGH, Urteil *of 30 April 1992 – IX ZR 233/90, BGHZ 118, 151 (= IPRspr 1992-265 = NJW 1992, 2026); BGH,* Urteil *of 14 January 2014 – II ZR 192/13, IPRspr 2014-276 (= IPRax 2017, 517); BGH,* Beschluss *of 26 April 2017 – XII ZB 177/16, NJW-RR 2017, 833; BGH,* Beschluss *of 17 May 2018 – IX ZB 26/17, IPRspr 2018-297 (= EuZW 2018, 732); BGH,* Urteil *of 18 March 2020 – IV ZR 62/19, IPRspr 2020-99, marginal note 24 (= EuZW 2020, 580).*

4. If additional information would be hard to obtain, in straightforward cases the court may rely on black letter law as long as nothing indicates that the foreign courts deviate from it in practice. There is no need to seek an in-depth expert report to resolve a well-defined issue that seems ordinary enough to the court. Before rendering a decision on such a basis, the court will instruct the parties about its intention.

   Notes: In a case concerning a standard matter of Ecuadorian family law, the BGH, Beschluss *of 24 May 2017 – XII ZB 337/15, IPRspr 2017-304 (= NJW-RR 2017, 902), ruled it sufficient for the lower court to rely substantially on information from the Ecuadorian embassy. In another ruling, the BGH ruled it sufficient for the lower court to rely on a translation and explanation of the relevant foreign statute in the German academic literature (*Beschluss *of 26 April 2017 – XII ZB 177/16, NJW-RR 2017, 833, marginal note 25). The ruling in BGH,* Urteil *of 21 January 1991 – II ZR 49/90, IPRspr 1991-1b (= NJW-RR 1991, 1211) ("prendas navales") makes it clear that an in-depth account of the foreign law in practice is required only where shown to deviate from the letter of the law. And while the BGH,* Urteil *of 18 March 2020 – IV ZR 62/19, IPRspr 2020-99, marginal note 24 (= EuZW 2020, 580), held it insufficient for the lower court to rely on its own loose translation of an applicable foreign norm, this precedent is likely of no consequence if there is no doubt about the substance of the norm and no sign that the foreign practice deviates from it.*

That the BGH in its Urteil *of 14 January 2014 – II ZR 192/13, IPRspr 2014-276 (= IPRax 2017, 517) ruled information obtained under the London Convention (see above at Article 2, § 3, no. 2) insufficient was because the foreign government agency did not respond completely to the question put to it.*

5. In view of the cost and delay of obtaining an expert opinion, the court should only engage an expert if it has found that the applicable foreign law cannot be investigated to sufficient certainty by any faster, simpler and less expensive means. Cost alone, however, even if far in excess of the amount in controversy, does not obviate the need to obtain an expert opinion.

   Case law: BGH, Urteil *of 14 January 2014 – II ZR 192/13, IPRspr 2014-276 (= IPRax 2017, 517).*

6. In deciding how diligently to investigate the applicable foreign law, the court should bear in mind that in many jurisdictions, the case law and legal literature are often much less extensive than in Germany, such that not even a major investigation would get a clearer answer. A merely abstract notion that the foreign law could be other than it appears does not call for further investigation.

§ 4 Particulars in proceedings to determine fee waivers and legal aid

1. The court may not deny a fee waiver or legal aid application based on a summary review of foreign law if there is a non-negligible possibility that the application of foreign law would support the applicant's legal position. If arriving at final judgment ultimately requires that an expert opinion should be sought, a fee waiver or legal aid should be granted, and an expert opinion should be sought in the main proceeding.

2. As to the application and interpretation of the rules of private international law, the same principles apply to proceedings to determine fee waivers and legal aid as apply in the main proceeding (see above at Article 2, § 1).

§ 5 Choosing and contacting an expert

1. Usually, the question of who to nominate as expert should be settled before the order for evidence to be taken is drafted (see below at Article 2, § 6, no. 1). This should be done in consultation with the parties.

2. The choice of an expert is guided by the general provisions, primarily ZPO §§ 404, 406. In particular, the expert must be capable of ascertaining the relevant details of the applicable foreign law from primary sources. While desirable, prior expertise in the applicable foreign law is not strictly necessary. Also desirable is a firm understanding of private international law and of general comparative law.

3. The pool of potential experts includes the membership of academic institutes for the study of foreign law and duly qualified university teachers, as well as independent experts, who may be practicing attorneys as long as they possess specialized knowledge of the foreign jurisdiction. Such knowledge may be shown by university studies or a licence to practice law in the relevant jurisdiction, for example.

4. The expert does not need to be based in Germany but may also be based in the pertinent jurisdiction, which can even help to establish the foreign practice more quickly and reliably. But there are potential drawbacks to nominating an expert based abroad: difficulties of translation; lack of awareness of German private international law rules and procedure, especially the formal and substantive standards that govern expert opinions; lack of material options for compelling or sanctioning an expert outside Germany.

   Note: Engaging an individual who resides abroad to submit a written report (ZPO § 411 Abs. 1) does not require process under Article 19 of the European Union Taking of Evidence (Recast) Regulation of 2022 because it does not amount to an exercise of sovereign authority. Nor does it constitute an inadmissible circumvention of judicial assistance according to § 63 of the ZRHO. Subpoenaing the expert to amplify the report during oral testimony (ZPO § 411, para. 3) does not necessitate a formal request unless the subpoena threatens sanction or penalty. However, securing the foreign expert's oral testimony via videoconference (ZPO § 128a, para. 2) does require a request for judicial assistance.

5. After the court has identified an expert but before it issues the order, the court should exchange letters, emails or phone calls with the candidate to see if they can accept the engagement. This avoids sending the case files back and forth and revising the order if the person declines.

6. Once the person has declared their general ability and willingness to provide an expert opinion, they should be sent the case file for preliminary review.

   Note: Sending the case file is recommended for two reasons. One, the court cannot always be sure what facts are relevant. Two, sending the file permits potential conflicts of interest to be identified and aired early in the proceedings. On conflicts of interest, see also below at Art. 3, § 1, no. 2.

§ 6 Drafting the order for evidence to be taken (the *Beweisbeschluss*)

1. The *Beweisbeschluss*, the order for evidence to be taken, must set forth the issues of foreign law, identify the nominated expert, and set a deadline for submission of the report. In some cases, the order should summarize the facts the expert should base his analysis on (see below at Article 2, § 6, no. 9) and make indications about an advance of costs (see below at Article 2, § 6, no. 11).

2. The question concerning which evidence is to be taken (the *Beweisfrage* or *-fragen* if there is more than one) should be formulated in accordance with the general division of responsibilities between court and expert (see above at Article 1, § 1). In particular, the court cannot delegate its task of consulting and applying Germany's rules of private international law. Nor can it pose questions about the validity of the case in general or particular claims of the plaintiff. On the court's task of applying the law to the operative facts, see below at Article 2, § 9, no. 1.

3. In formulating its questions, the court should mind that foreign law may differ from German law in its doctrinal structure (see also below at Article 3, § 1, no. 6). If possible, the court should ask open-ended questions aimed at establishing the content of the applicable foreign law.

Examples:

- *Rather than limiting the scope of the question to damages in breach of contract, the court should consider phrasing the question to cover extracontractual liability too (as long as the same foreign law applies). The issue is then not one of "contractual liability", but simply one of "liability".*
- *Rather than simply asking whether a particular act results in a valid testamentary disposition under the applicable foreign law, the court should consider including the possibility that the act in question constituted a lifetime donation as well.*

4. Notwithstanding that the court should formulate open-ended questions, the issues should always be limited to those aspects of the foreign law that are relevant to deciding the controversy.

   Example: If the validity of a will is disputed, instead of framing the issue as, "What is required in order for a will to be effective in Turkish law?", the question should specify the occasion for doubt as to validity. For instance, consider framing the question as:

   - *What formal requirements does Turkish law impose on the making of wills?*
   - *Does Turkish law permit an agent to make a will on behalf of the testator?*

5. If the relevant aspects of the applicable foreign law can be clearly defined, the court should formulate its questions in the abstract.

   Examples:

   - *"How is intestate succession regulated in the law of Tunisia?"*
   - *"Under Polish law, does a plaintiff's compensable loss include pre-litigation attorney's fees?" (For automobile accidents, though, this question can be answered by consulting the German-language literature on Polish law.)*
   - *"Concerning transnational corporations, does Namibian law adhere to incorporation theory, or how else does it determine the applicable law?"*

6. If an abstract question appears ill-advised because it would be overinclusive of irrelevant matter or because the court cannot confidently frame the legal issue in terms of a definite aspect of the applicable foreign law, then the court should formulate the question in a case-specific way.

*Example: The question should not be, "How is a contract formed under the law of England?" but rather, "Under English law, do the particulars related herein [*see below at Article 2, § 6, no. 9*] give rise to a valid a contract?"*

*If possible, the pivotal issue should be specified: "Under English law, given the factual pattern related herein [*see below at Article 2, § 6, no. 9*], did Smith contract in his own behalf or in behalf of Turner?"*

*Mind that it is for the court to apply the pertinent law to the operative facts, and also to interpret the contract. However, experts may deliver their own conclusions as to those issues as well (*see below at Article 2, § 9, no. 1; Article 3, § 3, no. 5, and Article 3, § 5*).*

7. The order may also seek discussion or disputation of party submissions, including of a private expert's report (see above at Article 2, § 2, no. 5).

   Example: "Under Spanish law, is the managing director of a stock corporation bound to carry out directives of the board? The memorandum should include critical analysis of the letter of M.S., attorney with the law firm of T.C., dated 26 February 2019."

8. Where possible, the questions of foreign law should be inclusive enough to avoid the need for a supplementary report (see also below at Article 2, § 8, no. 2). In some cases, it will be advisable to stagger the questions or make some questions contingent on others.

   Examples:

   – *"1. Given the facts related herein, do California's conflict-of-laws rules refer the issue back to German law?*
     2. If you conclude that the answer to number 1 is no, [question of California substantive law]."

   – *"1. Given the facts related herein, did the parties conclude a valid contract under Chinese law?*
     2. If you conclude that the answer to number 1 is yes, then does the Chinese law of contracts furnish a basis upon which plaintiff can seek the recovery she claims, and in the amounts that she claims?
     3. If you conclude that the answer to number 1 is no, does Chinese law furnish any other basis upon which plaintiff may seek the recovery she claims in terms of compensatory and consequential damages, and if so, what must be shown in order for her to recover on that basis?"

9. The order will set forth as much as possible the facts to be assumed by the expert (see above at Article 2, § 6, no. 1). The court should keep in mind, however, that the set of relevant facts itself can depend on the applicable foreign law (see below at Article 2, § 6, no. 10; on charging the expert with construing the facts, see below at Article 3, § 2, no. 3).

   Statutory authority: ZPO § 404a, para. 3.

   Examples:

   – *"The expert should proceed on the basis of the following facts. On 24 June 2018, the parties contracted for the delivery of metal pipes. The defendant subsequently failed to deliver by the agreed dates. For this eventuality, the contract contemplated […]. The defendant's position is that this term constitutes an unenforceable liquidated damages clause under English law […]."*

   – *"The expert should assume that the petitioner is not the biological father and the adverse party not the biological mother of the child."*

10. The order may clarify that the set of relevant facts or facts to be investigated turns on the content of the applicable foreign law.

    Example: "Under French law, does liability turn on whether the defendant was aware of a particular circumstance?"

11. The court's duty to investigate the applicable foreign law forbids it from making the engagement of an expert contingent upon a cost advance.

    Case law: BGH, Urteil *of 17 September 2009 – I ZR 103/07, NJW-RR 2010, 1059.*

    Note: In practice, cost advances are often requested by the court and paid by the parties.

12. The court will set a reasonable deadline for the expert to submit his report. The expert must provide a signed copy of the report. It is recommended that the court consult with the expert before setting the deadline.

    Statutory authority: ZPO § 411, para. 1.

13. If not already done, the expert should be sent the case file no later than upon being nominated (see above at Article 2, § 5, no. 6).

§ 7 Inability to establish the foreign law

1. Failure to ascertain the applicable foreign law does not justify either dismissal of the lawsuit or a decision based on an assumed burden of proof.

2. If it is largely or totally unworkable to investigate the applicable foreign law, the court must not simply apply German law instead. Rather, it must see if it can compensate for the missing rule, perhaps by drawing – with the help of an expert opinion – an appropriate inference from known elements of the foreign law or by consulting a different foreign law that is closer in substance to the one in question. Historical or comparative law considerations as well as private international law principles can be grounds for finding that a different jurisdiction's substantive law is a close proxy.

3. The same considerations apply if the contemplated investigation would be unreasonably time-consuming, especially where it would probably still be inconclusive.

§ 8 Handling the expert's report

1. Often it will not be possible to give a definitive answer to a question of foreign law (see also above at Article 2, § 3, no. 6). If no significant doubt can be substantiated to indicate that the findings are implausible or incorrect, the court may decide based on the given investigation, including any expert reports.

2. If the parties raise questions or register doubts about the correctness of the report, the court will not immediately elicit a response from the expert. Instead, the court will consider whether the parties' questions are relevant and substantial enough to warrant further investigation or are already covered by the existing report. Speculative arguments will not disturb well-substantiated statements of foreign law in the report.

   Examples:

   – *In a detailed response, counsel for one side casts doubt on various aspects of the report. The court does not seek a blanket rebuttal from the expert, but rather evaluates the relevance and probative value of the objections. If they are substantial, the court formulates follow-up questions for the expert.*

– *The report sets forth in detail, citing ample authority, that the Namibian law applicable to transnational business organizations abides by incorporation theory. Counsel for one of the parties inquires whether seat theory could apply anyway, but is unable to substantiate the concern. The court should dismiss the inquiry as unsupported.*

3. The expert's oral testimony (which may be obtained via videoconference, see ZPO § 128a, para. 2) may be useful to clarify or complement the written report, but often it will not add anything new. In the interest of saving time and money, the recommended approach may be to give the expert a list of questions in advance. Experience shows that many times, written amplification or complementation of the report will do.

   Statutory basis: ZPO § 411, para. 3.

   Note: The recommendation to stick to written procedure does not apply to expert opinions on the content of foreign law in criminal proceedings, because in that setting, purely written procedure would violate the principle that proof-taking must proceed in open court.

4. To the extent the expert has independently construed the relevant facts (see below at Article 3, § 2, no. 3), the court must review the accuracy of the expert's conclusions.

§ 9 Applying foreign law to render a decision or ruling

1. It is for the court to render a decision based on the applicable foreign law. In particular, this means the court must apply the foreign law to the facts independently. If the expert advances a legal conclusion on the basis of the applicable foreign law (see also below at Article 3, § 3, no. 5 & § 5), the court must nonetheless arrive at its own conclusion.

2. In the reasons for its decision, the court must show how the foreign law was investigated, tracing not only the selection of sources but, if doubt still exists as to the content of the foreign law or its sources, also assessing the persuasiveness of the cited authorities (see also above at Article 2, §§ 2, 3).

Note: If it is not clear from the reasons for the judgement that the trial court upheld its duty to adequately investigate the applicable foreign law, it is grounds for reversal on appeal, because the appeals court will infer that the foreign law was not adequately investigated (BGH, Urteil *of 20 July 2012 – V ZR 135/11, IPRspr 2012-23, marginal note 12 (= MDR 2012, 1077); BGH,* Beschluss *of 6 October 2016 – I ZB 13/15, IPRspr 2016-219, marginal note 66 (= NJW-RR 2017, 313 marginal note 66).*

3. The court must not refer to the expert report in blanket fashion. Instead, it must set forth the contents of the report that were relevant to the court's own conclusions and explain why the court adopted these as its own. If the contents of the report are disputed, the court must do just as it does in appraising evidence in general: set forth why its decision is or is not guided by disputed elements of the report. The court must refer to the report with maximum precision but also uphold its duty to protect anonymity (for example, by referencing the date and the expert's internal file number).

4. The court's reasons for its decision must indicate as completely as possible the primary and secondary sources it is based on. If any part of the decision turns on verbatim language, the source must be quoted directly. Sources in a language other than English should have a German translation appended to them. For both source text and translation, official sources should be identified and cited by name. If the court resorts to any kind of unofficial translation, it should give reasons for doing so.

5. If the court was unable to identify sufficient sources, the reasons should set forth the court's search methods and places consulted.

6. The expert should receive a copy of the decision at the conclusion of the proceedings. Copies should also be sent to the indicated collections (e.g., IPRspr, IPRax) as well as to law journals that cover the particular area of substantive law (such as FamRZ for decisions involving foreign family law).

ARTICLE 3: GUIDELINES FOR EXPERTS

§ 1 Preparation and observations

1. Upon receiving an inquiry from the court (see above at Article 2, § 5), the expert will act without delay to determine whether the engagement is within his expertise and whether he can deliver his report by the deadline. If not, he must notify the court without delay.

   Statutory basis: ZPO § 407a, para. 1.

2. The expert must act without delay to determine whether there is any reason to doubt his impartiality. If so, the expert must notify the court right away.

   Statutory basis: ZPO § 407a, para. 2.

   Note: This can be a particular issue if not many people in Germany deal with the jurisdiction in question, because then the expert will often be personally acquainted with counsel for one of the parties. The personal acquaintance of counsel and expert by itself does not pose a conflict of interest.

3. If the expert is uncertain about the scope or content of the engagement, he must seek clarification from the court without delay. If the investigation appears likely to incur disproportionate costs in relation to the controversy or costs significantly in excess of a requested cost advance, the expert must timely notify the court.

   Statutory basis: ZPO § 407a, para. 4.

   Notes: The consequences of a failure to notify the court of disproportionately high costs are addressed in § 8a, para. 3 of the JVEG. The consequences of a failure to notify the court of costs in excess of a cost advance are addressed in § 8a, paras. 3 & 4 of the JVEG; and see below at Article 3, § 6, no. 2.

   The expert need not repeatedly draw attention to the disproportionate expense or to the fact that a cost advance stands to be exceeded. It is up to the court to communicate unambiguously the amount of any advance. If the situation repeats and the expert again recognizes that the costs will exceed a second advance, he must again notify the court before incurring such costs.

4. Experts should verify the court's assessment of how private international law applies to the case (see above at Article 2, § 1). If the expert concludes that the case does not call for an investigation into the foreign law because German law ought to apply, then the expert must notify the court to avoid unnecessary costs. The same goes for when the file indicates that the factor that determines the applicable law needs clarification (e.g., a person's nationality or habitual residence).

   Statutory basis: ZPO § 407a, para. 4

5. The expert will also notify the court if the order is not readily comprehensible or if it goes against the requirements stated in Article 2, § 6.

   Examples:

   – *The facts of the case are highly complex and disputed. The expert asks the court to establish a set of facts for him to work with.*

   – *The court has formulated the issue broadly, asking what is required for a contract to be formed in English law. The expert studies the file and finds that the outcome turns on a much narrower question (e.g., whether a contract was concluded by means of representation), so the expert suggests that the court should limit its inquiry accordingly. In a situation like this, the expert may alternatively proceed as described below in Article 3, § 1, no. 7.*

6. The expert should make sure that his answers to the court's questions about the applicable foreign law will help the court determine the issues. If the expert concludes that the adjudication would be better served by different questions, the expert must notify the court, particularly where this conclusion is based on the expert's knowledge of the foreign law.

   Examples:

   – *In line with German matrimonial practice, the court asks about the financial disclosures the spouses are entitled to under the applicable foreign law. But the spouses have no claim to such disclosures under that law, which instead authorizes the family court to conduct an investigation. The expert report will explain this different mode of gathering information and suggest potential ways to reconcile the two.*

   – *The court seeks a report on English law about rules analogous to the German rules on the division of marital property in divorce. The expert advises that England, unlike Germany, is not a community property jurisdiction, so different mechanisms apply, such as alimony payments and asset transfers. The expert may also proceed as described below in Article 3, § 1, no. 7.*

7. The expert may make slight modifications or deviate from the letter of the order without coordinating with the court if it obviously furthers the purpose of establishing the content of the foreign law, the expert deems it unproblematic, and he details what was done in his report (see below at Article 3, § 2, no. 2).

8. It is recommended (but not formally required) that the expert estimate his expenditure in terms of hours as precisely and realistically as possible and provide his estimate to the court. (On what happens when the expert's fee exceeds a cost advance, see below at Article 3, § 6, no. 2). If the expert realizes he will likely not meet the court's deadline, he will inform the court of a completion date that is feasible for him, but with due regard to the urgency of the proceedings (e.g., in child custody or international child abduction cases).

9. Because rendering an expert opinion on the applicable foreign law requires specialized legal and linguistic knowledge, it is appropriate to award the highest category of fees as provided in § 9, para. 1 of the JVEG, Anlage 1.

   Case law: OLG Dresden, Beschluss *of 23 January 2019 – 3 W 652/18, IPRspr 2019-350 (= NJW 2019, 1236)..*

10. In certain kinds of cases, for instance with very large amounts in controversy or where investigating the applicable foreign law promises to be very laborious, the expert's fee may deviate from the statutory fee schedule pursuant to § 13 of the JVEG.

11. If the expert declines the engagement, he can nonetheless assist the court by informally directing it to pertinent German-language legal literature, potentially relevant aspects of private international law, or to someone the court might approach instead.

12. Experience shows that phone calls between court and expert often get far better results than written correspondence.

§ 2 The expert opinion: General purpose and methods

1. The opinion should respond to the questions in a way that enables the court to determine the substantive issues on its own as warranted by the findings of the investigation (see above at Article 2, § 2, no. 1).

2. If the expert believes that the order is overbroad or will not accomplish that aim, he should suggest specific changes. The expert can also deviate from the order without coordinating with the court if it is sure to further the interest of resolving the dispute. For example, the expert may rephrase an issue or disregard an issue that is immaterial to the adjudication. The report must explain the expert's approach.

Examples:

- *The court asks several questions about the requirements for a damages claim under foreign law, as well as about when such a claim is subject to prescription. The expert realizes that the claim is prescribed, and so he prioritizes this issue and does not reach the other questions, because responding to them would be laborious and the answers irrelevant to the outcome of the case. The expert's report explains this approach but makes clear that the expert is prepared to respond to the other questions if the court so requests.*
- *The report sets forth the order verbatim, followed by "I take the court's question to mean that the issue is […]".*

3. If the court sets forth facts for the expert to regard as established (see above at Article 2, § 6, no. 9), then he must stick to them. If the court has not provided such a summary and the expert does not request one (see above at Article 3, § 1, no. 5), then it is up to the expert to construct and set forth in his report a factual account based on the case file (see below at Article 3, § 3, no. 1). Once the court receives the report, the court must determine whether the expert's account is accurate.

4. The expert must strive to determine and present the content of the applicable foreign law as it would be applied by a court of the foreign jurisdiction. This means foremost that the expert must consult and evaluate statutes and any high-court or pertinent lower-court decisions, regardless of whether court decisions are looked upon as legal authority in that jurisdiction. If this approach fails to yield clear results, the court's questions are to be addressed through other sources, in particular through legal literature or

accounts of administrative practices. For any of the above, the expert must take into account the relevance or weight of a given statute, scholarly opinion or other authority in the foreign legal practice.

5. The expert is free to consult informally with other persons who have expertise in the applicable foreign law in order to confirm or complement his findings. His report must identify any information obtained this way.

   Examples:

   – *"Personal written communication, Professor Silvia Lopez, Catholic University, Lima, Peru, 25 January 2021."*

   – *"Personal oral communication from the director of the Ahmadiyya Court of Arbitration in Offenbach, 3 July 2022."*

§ 3 Contents of the report

1. The report opens with a statement of the facts, either per the court's instructions (see above at Article 2, § 6, no. 9) or as constructed by the expert from his own review of the case file (see above at Article 3, § 2, no. 3).

2. The report sets forth the foreign law only to the extent necessary, whether to resolve the issues or to facilitate the reader's understanding. The report avoids gratuitous excursions, such as lengthy historical accounts not directly connected to current law. Responses to abstractly formulated issues (see above at Article 2, § 6, no. 5) are reduced to what the expert deems essential to resolving them.

   Example: If the order seeks to discover the Tunisian rules of intestate succession, but all the heirs are first-order heirs, then no discussion is needed of who is next in line or of any of the rules concerning representation.

3. The report indicates as completely as possible the primary and secondary sources upon which the expert bases his opinion. If any element of the opinion turns on verbatim legal language, the report cites the operative language directly, along with a German translation of any source-language other than English. Where possible, the original and the translation should both be cited from official publications identified in the report. If the report cites an unofficial translation, the expert should state his reasons for resorting to an unofficial source.

4. If sufficient sources or authorities cannot be found, the report will say what places or resources were consulted or searched or queried and by what means or methods.

5. It is for the court – not the expert – to apply the foreign law to the facts (see above at Article 2, § 9, no. 1). However, if the order asks the expert to investigate the foreign law specifically in relation to the case (see above at Article 2, § 6, no. 6), and if the operative facts are not disputed or if the court has set them forth directly, then the expert may also state the substantive conclusion or conclusions that would follow from his findings. This can help avoid uncertainty and misunderstanding.

   Examples:

   – *If the expert concludes that the applicable foreign law holds the seller liable for certain kinds of representations about the quality of the goods, as a rule the court is better situated than the expert to determine whether the seller's representations satisfy the relevant standard in the present case. On how to proceed if the relevance of one question depends on the resolution of a prior question, see below at Article 3, § 3, no. 7.*

   – *In a succession case, if the degrees of kinship or the relationship of the heirs to the deceased is settled, the expert will typically not just report on the abstract rules of intestacy, but rather will state the outcome in this particular case. I.e., "The surviving spouse is entitled to one-quarter of the estate, the son to three-quarters."*

6. If a reasonably intensive and extensive investigation of the applicable foreign law still does not yield clear answers to the court's questions, the report will fully disclose the extent of uncertainty. If possible, the report will then prognosticate about how a court of the jurisdiction would decide. The prognosis may be based on the expert's own experience and consideration of comparative law.

7. If the questions are presented in a prescribed sequence, but the expert realizes that a certain ruling on one issue would render the other issues irrelevant, this can be handled in two ways. Either the expert can refer priority questions back to the court so the court can determine them first (perhaps aided by an interim report), or the expert can address the issues in the order he sees fit. The case itself will dictate which approach makes the most sense in light of the express goals of the expert opinion procedure. See Article 1, § 2.

   Example: Whether the English private international law rules call for the application of German law in a succession case depends on whether the decedent was last domiciled in England or Germany. Determining the domicile requires weighing certain objective as well as subjective factors, and it can only be done by the court.

Whether the expert ought to seek resolution of the domicile issue before analysing the outcome under English substantive law depends on how elaborate the explication of English law would be. If short and straightforward, it may be best to proceed with a plenary response to all the questions. But if that would be time consuming and expensive, it may be best to clarify the relevance of contingent issues first.

8. In general, the expert should permit his report to be disseminated for reference in other cases. This permission should be unconditional, provided that his authorship is duly indicated and that the report is shared in its entirety and with no modifications.

   Note: This directive mainly aids the courts, which ought to be able to compile and share expert opinions on foreign law amongst the judiciary. Keep in mind, however, that an opinion can be rendered obsolete by new legislation or a landmark decision. Experts bear no responsibility for subsequent developments beyond a potential duty to notify the court of a such a development. .

§ 4 Domestic private international law in the expert's report

1. The court cannot engage an expert to opine on domestic private international law rules. See above at Article 1, § 1. Therefore, while experts ought to feel certain about how those rules affect the case (see above at Article 3, § 1, no. 4), they are normally not called upon to address them. Certain exceptions to this rule are mentioned below. Treatment of these domestic private international law rules should be brief, and controversial elements should be left up to the court.
2. If the applicable law depends on the other jurisdiction's private international law rules (especially where "renvoi" would have to be taken into account, on which see above at Article 2, § 1, no. 3), then a complete treatment of the question of what law applies will typically aid comprehension. The report should therefore begin with an account of the domestic private international law and demonstrate how the issue is thereby referred to the foreign private international law rules.
3. Explanations of domestic private international law can also advance the proceedings if the expert has reason to believe that the court and litigants may both be overlooking a key aspect of the case, for example a characterization problem or a hidden transitional rule (on characterization, see above at Article 2, § 1, no. 2).

Examples:

- *The court is obviously proceeding under the assumption that the availability of interest during legal proceedings (*Prozesszinsen*) is governed by the foreign tort law (the* lex causae*). The expert opines that the court could consider characterizing the issue as procedural and therefore subject to the German rule on* Prozesszinsen *(§ 291 of the ZPO).*
- *The expert points out that where the assessment of damages is complex, the court could consider whether certain aspects of the litigation may be deemed procedural and therefore subject to disposition under ZPO § 287.*

4. Occasionally, the application of a rule of private international law requires an understanding of a particular rule or legal institution of the foreign substantive law. Since the latter is properly the expert's domain, in this case he must also address German private international law. This is often an issue when questions of characterization arise.

   Example: There is no way to determine whether an "institution contractuelle" in French law should be characterized as a contract of inheritance or as a donation inter vivos *(with different conflicts rules applying) without first analysing the purpose and function of the French legal device.*

§ 5 The expert's role in particular kinds of cases

1. **Interpretation of legal transactions.** If evidence is ordered to determine the substance of a legal transaction (for instance a contract or a will) under foreign law, the expert only states the applicable rules and principles in the abstract, because it is up to the court to determine how those rules apply to the particular contract (see above at Article 3, § 3, no. 5). However, the expert should identify and include in his report any related case law from the foreign jurisdiction. Investigating and assessing any relevant subjective elements in relation to the declarants is a question of fact for the court.

2. **Contributory negligence.** If the order concerns an issue of contributory negligence on the part of the plaintiff in a tort case, the expert will set forth the applicable rules and principles in the abstract and leave it for the court to apply them to the operative facts. This is especially so when it comes to determining specific fault ratios. However, the expert should identify and include in his report any related case law.

3. **Recovery for pain and suffering.** The principle set out in the previous item also applies where the order seeks the rules governing plaintiff's recovery for pain and suffering or other non-economic damages.

4. **Judicial discretion.** If the foreign law places the determination of the claim at the discretion of the tribunal, the expert will explain the standards or principles that guide how a tribunal of the pertinent jurisdiction exercises its discretion. Here, too, the expert will identify and include in his report any pertinent case law.

5. **Where the expert applies the law to the operative facts.** In these and other similar cases, the expert may also opine as to how the rules apply to the facts of the present case, as long as the report also clarifies that any such assessment is without prejudice to the court's ultimate decision (see above at Article 3, § 3, no. 5).

6. **Challenges and defences.** For the sake of impartiality, experts should not explore the devices by which litigants can prosecute, challenge or defend against the substantive claims in a lawsuit unless the court has sought evidence in regard to them. However, if it is only for lack of familiarity with the foreign law that the court has not ordered proof of such devices, the expert will point them out to the court (see above at Article 3, § 1, no. 6).

   Examples:

   – *If the order is expressly limited to discovering the claims that arise from breach of contract (rather than being open-ended in terms of the grounds upon which recovery can be sought; see above at Article 2, § 6, no. 3), then the expert will not opine on extracontractual claims, though they may be warranted. But if the foreign law is such that certain categories of damages are recoverable on different grounds than in German law – for example, that certain losses are recoverable in torts rather than in contracts – then the expert will suggest expanding the order.*

   – *If the expert realizes that one of the litigant's claims is subject to a defence under the foreign law (e.g., that it is prescribed), the expert's opinion will concern the defence only to the extent the court's questions embrace it. However, if the court seems not to have asked about the defence because it is unknown in German law, the expert will point it out. In this context, it needs to be taken into account that the subtle distinction between defences that litigants must raise in pleadings and procedural hurdles that the court must raise on its own motion might not exist at all or in the same form in the foreign jurisdiction.*

– *Adjudicating a claim to the distribution of proceeds from the sale of property, the court seeks an opinion as to whether the applicable foreign law regards the sale as valid if the person who executed it lacked the requisite authority. Here, the expert will not take it upon himself to point out that the foreign law allows the property owner to ratify the sale (thus opening the door to a claim for distribution of the proceeds), because German law is analogous in this regard.*

7. **Public policy (*ordre public*).** Whether applying the foreign law will produce an outcome contrary to German public policy is a question of German law and thus for the court to decide. The expert only opines on public policy to the extent that the determination turns on specifics of the foreign law (like when the purpose of the substantive rule becomes an issue). The expert may likewise opine on ways in which the applicable foreign law might be interpreted in accord with German law, or on ways in which gaps that result from a partial non-application may be filled.

§ 6 Late submission of reports and excess costs

1. If and when the expert realizes that he will miss a deadline, he should notify the court at once and provide a revised completion date.

2. If and when the expert realizes that the costs of his investigation will significantly exceed an earlier advance, he should notify the court without delay (see also above at Article 3, § 1, no. 3). Otherwise, he will only be entitled to a fee in the amount of the advance.

   Statutory authority: JVEG § 8a, para. 4.

   Note: Both the legislator and the courts have taken the view that excess costs are significant starting at 20–25 % higher than what was originally contemplated (see BT-Drs. 17/11471 (new), 260; OLG Brandenburg, Beschluss *of 25 October 2022 – 12 W 32/22, BeckRS 2022, 32993; LG Dortmund,* Beschluss *of 20 May 2021 – 9 T 112/21, BeckRS 2021, 14054).*

ARTICLE 4: GUIDELINES FOR LITIGANTS

1. Since it is for the court to conduct the investigation into the applicable foreign law (see above at Article 2, § 2, no. 1), litigants are in principle not obligated to contribute to the investigation beyond their general duty to advance the proceedings. But if litigants do possess specialized knowledge of the foreign law, or if it is obvious that the investigation would be significantly easier for them than for the court, it is recommended that litigants do in fact aid in the investigation. In particular, litigants may furnish the court with any (not merely cherry-picked) sources or legal authorities at their disposal. Litigants who fail to provide such assistance run the risk of forfeiting the right to appeal on grounds that the trial court erred by not conducting a more extensive investigation.

   Case law: BGH, Urteil *of 30 March 1976 – VI ZR 143/74, IPRspr 1976-2 (= NJW 1976, 1581(1582)); BGH,* Urteil *of 30 April 1992 – IX ZR 233/90, BGHZ 118, 151 (= IPRspr 1992-265 = NJW 1992, 2026 (2029)).*

2. Litigants may base their submissions on the opinion of a privately engaged expert. The court will assign such an opinion the same weight as any other party submission in evidence; in particular, no presumption of objectivity will attach to it (see above at Article 2, § 2, no. 5). If it looks like the court will eventually seek an expert opinion anyway, it may be advisable to skip the private expert and suggest that the court should initiate the procedure.

3. If it looks like the investigation will be disproportionately expensive or time-consuming, litigants may consider stipulating that the case should be governed by German law, provided that the applicable private international law rules permit that choice.

4. Litigants should assist the court as much as possible in crafting the Beweisbeschluss (the order for evidence to be taken). The aim is to avoid having the expert opinion turn out to be incomplete or unusable.

5. Litigants are permitted in principle to ask for amplification of any portion of the report. However, their objections must have a reasonable basis and cannot be merely speculative (see also above at Article 2, § 8, no. 2). Since the expert opinion will presumably be grounded in an evaluation of the relevant primary and secondary authorities (see above at Article 3, §§ 2, 3), it may be advisable to obtain a private expert's opinion to substantiate any objections.

6. Litigants may propose that an expert report obtained for use in a different proceeding be entered in the present proceeding (see above at Article 2, § 3, no. 2).

7. Under no circumstances should the parties directly contact or communicate with a court-appointed expert.

Abbreviations, Institutions and Terms Not Translated

Anlage	Annex (to the JVEG)
Beschluss	Decision (of a court)
Beweisbeschluss	Order for evidence to be taken
Beweisfrage	Question concerning which evidence is to be taken
BAG	Bundesarbeitsgericht, the Federal Labour Court
BFH	Bundesfinanzhof, Germany's highest tribunal on taxation
BGB	*Bürgerliches Gesetzbuch,* German Civil Code
BGH	Bundesgerichtshof, the Federal Court of Justice
BT-Drs.	*Bundestags-Drucksache,* Protocols of the Bundestag
EGBGB	*Einführungsgesetz zum Bürgerlichen Gesetzbuche,* Introductory Act to the Civil Code
EStG	*Einkommensteuergesetz,* Act on the Taxation of Income
FamFG	*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit,* Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction
IPG	*Gutachten zum internationalen und ausländischen Privatrecht,* Expert Opinions on Private International Law and Foreign Private Law
IPRspr	*Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts,* German Cases in Private International Law
JVEG	*Justizvergütungs- und entschädigungsgesetz,* Act on Court Fees and Compensation
LG	Landgericht, regional court
OLG	Oberlandesgericht, higher regional court
Urteil	Judgment (of a court)
ZPO	*Zivilprozessordnung,* Code of Civil Procedure
ZRHO	*Rechtshilfeordnung für Zivilsachen,* Regulation on Judicial Assistance in Civil Matters

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