
Practitioner's Notebook

PROOF OF FOREIGN LAW—

*By Milton Pollack**

In a recent trial at the federal courthouse downtown, the parties attempted to establish a point of New York law by expert testimony. In addition to the attorney who had represented the plaintiffs until just before trial, two former Justices of the New York Supreme Court were called to the stand. The judge-witnesses agreed that the ruling of a third Supreme Court Justice in an earlier, related litigation was incorrect. The testimony was inconclusive, however, as to the consequences of that earlier ruling under New York law. The matter was submitted to a jury. The jury was so flustered that it returned a verdict which was internally inconsistent in two crucial respects.

I believe such unseemly displays usually can be avoided in establishing the law of, say, Pitcairn's Island, in the South Pacific. Thus, my subject this afternoon is proof of foreign law in federal court proceedings. I will pass over such fine points as whether we are dealing here with law or facts, with substantive law or procedure. Instead, I would like to make some practical proposals, from the viewpoint of one of the beleaguered bureaucrats—the judges—who are obliged to decide cases which turn on foreign law.

Formerly, it was generally held that foreign law was a question of fact to be proved as such by competent evidence. Typically, this was done by examination and cross-examination of expert witness, supplemented with extracts from applicable legal authorities. In 1966 however, Rule 44.1 of the Federal Rules of Civil Procedure was adopted in the effort to furnish federal courts with a uniform and effective procedure for considering and deciding the law of a foreign country. As amended, it now provides in part, "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."

I would like to make two points. First, the Rule does not relieve the parties, or counsel, of the task of demonstrating what the law of a foreign country is. Second, I think we should take advantage of an opportunity it does create: the foreign law should be briefed and argued roughly in the same fashion as the domestic law.

First, the Rule does not relieve counsel of the task of providing all the material necessary for a determination of the foreign law. It is said that Rule 44.1 seeks to cure the former difficulties of proof and allocation of responsibilities between judge and jury by sounding the death knell of the doctrine that the foreign law must be pleaded and proved as a fact.¹ However, the Rule has not eliminated the problem which gave

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1. Miller, "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine," 65 *Mich. L. Rev.* 613 (1967).

rise to that venerable doctrine²—judges with few exceptions don't know foreign law, and generally lack an informed idea of how to find it out on their own.

Some of you will be thinking that Rule 44.1 expressly authorizes the Court to do independent research into the foreign law. Yes, it does—but it doesn't require it to.³ Trial judges usually can't. Indeed, they usually shouldn't. And they probably won't.⁴

We have quite a few things to do besides decoding the *Codigo Civil*. The roughly two dozen judges of the Southern District of New York faced over eighty-five hundred civil filings and about a thousand indictments last year. And, although the Southern District and the Second Circuit Court of Appeals decide far more cases involving foreign law than any other federal courts, the card catalogue in our library has only two dozen entries under "foreign law." The library is crammed with the books we need to fulfill our duty to take judicial notice of the common and statute law not only of the federal government, but of each of the fifty states.⁵

One academic writer implicitly criticized a judge of the Eastern District for being unwilling to travel a mere three miles from the courthouse to do research in one of the international law libraries in Manhattan.⁶ Frankly, and with all due respect, I have come to doubt that the scholarly literature of the academic writers can be of much help in dealing with the problems faced by trial courts.

Researching foreign law is not an appropriate way for federal judges to spend their time. Professor Arthur Miller discerns in Rule 44.1 a federal policy in favor of accurate determinations of foreign law.⁷ The notes of the Advisory Committee, however, suggest an equal or greater concern with resolving foreign law issues efficiently.⁸ It is sometimes forgotten that the federal government is put to no small expense in providing scores of courthouses, hundreds of judges, and thousands of support staff and jurors to the public at a nominal charge. This expense is justified by the need to administer the laws of the United States and to ensure the impartial application of state law in cases involving out-of-state parties. A general concern that people should satisfy their obligations, wherever incurred, opens the courthouse doors to parties asserting rights under foreign law, but that concern is not so pressing as the interest in enforcing domestic law. Certainly it is not so great as to justify devoting more judicial time to cases involving foreign law than

2. Busch, "Outline on How to Find, Plead, and Prove Foreign Law in U.S. Courts With Sources and Materials," 2 *Int. Law.* 437, 437 (1967); Miller, *supra* n. 1 at 606.

3. Notes of the Advisory Comm. On Rules, Rule 44.1; 5 J. Moore, *Federal Practice* ¶ 44.1.04 (2d ed. 1977).

4. Schlesinger, "A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law," 59 *Cornell L. Rev.* 1, 19-20 (1970).

5. *Owings v. Hull*, 34 U.S. (9 Pet.) 607, 625 (1835) (Story, J.); Kaplan, "Continuing Work of the Civil Committee in 1966—Amendments of the Federal Rules of Civil Procedure (II)," 81 *Harv. L. Rev.* 591, 613-14 n.303 (1968).

6. Alexander, "The Application and Avoidance of Foreign Law in the Law of Conflicts," 70 *Nw. U.L. Rev.* 602, 617-18 & n. 72 (1975).

7. Miller, *supra* n. 1 at 728.

8. Advisory Comm. Notes, *supra* n. 3.

to those presenting only domestic law issues—yet that would be the result if judges regularly attempted independent research into the foreign law.

In addition, parties who accrue rights or obligations pursuant to the law of a foreign country are likely to be in a better position to research that law, perhaps with the help of native counsel, than such sedentary sorts as judges. Accordingly, it is reasonable to assign most of the burden of demonstrating foreign law to the parties, and not the court. I leave for another occasion the nice issue of *which* party should be obliged to carry the load.

In terms of simple self-interest, a litigant should strive for a full exposition of the governing law, because Rule 44.1 does nothing to ameliorate the awful consequences of a failure to prove the foreign law. In a case involving only domestic law, no matter how uninformed and unhelpful the lawyers, the judge is obligated to know and apply the governing law, and he has a fair chance of doing so correctly. I recently disposed of a motion largely on the basis of a clearly determinative provision of the Rules of Civil Procedure, even though that provision was not pointed out in over a hundred pages of briefs from three law firms. In contrast, if the law of a foreign country is not proved, there is no telling what will happen. In the Second Circuit, a failure by both parties to give notice of reliance on the law of a foreign country normally results in application of local law.⁹ However, one of the Rule's drafters has written that the court may raise a foreign law issue sua sponte,¹⁰ and the Second Circuit seems to have recognized that it has this authority.¹¹ If the foreign law is asserted but not adequately demonstrated, the Court is entitled to ask the parties for more material.¹² If the response is unsatisfactory, there is venerable authority for concluding that the party relying on the foreign law has failed to prove his claim or defense.¹³ However, there is also authoritative language indicating that in such cases the foreign law should be presumed to be identical to local law.¹⁴ There is substantial scholarly support for the view that local law should be applied as such if no other law has been proved.¹⁵ Finally, there is some uncertainty as to whether the consequences of a failure to demonstrate the foreign law are determined by

9. See e.g. *Fairmont Ship Corp. v. Chevron Int'l Oil Co.*, 511 F.2d 1252, 1261 n.16 (2d Cir.), cert. denied, 423 U.S. 838 (1975).

10. Kaplan, *supra* n. 5 at 616.

11. *Bartsch v. Metro-Goldwin-Meyer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir.), cert. denied, 393 U.S. 826 (1968).

12. See e.g. *Miller v. Wells Fargo Bank Int'l Corp.*, 406 F. Supp. 452, 482 (S.D.N.Y. 1975), *aff'd*, 540 F.2d 548 (2d Cir. 1976); *Gadd v. Pearson*, 351 F. Supp. 895, 906 (M.D. Fla. 1972); *Allianz Versicherungs-A.G. v. S.S. Eskisehir*, 334 F. Supp. 1225, 1227 (S.D.N.Y. 1971).

13. *Cuba R.R. v. Crosby*, 222 U.S. 473, 480 (1912); *Walton v. Arabian American Oil Co.*, 233 F.2d 541, 546 (2d Cir.), cert. denied, 352 U.S. 872 (1956).

14. *Walter v. Netherlands Mead N.V.*, 514 F.2d 1130, 1137 n.14 (3d Cir. 1974), cert. denied, 423 U.S. 869 (1975); *Bartsch v. Metro-Goldwin-Meyer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir.), cert. denied, 393 U.S. 826 (1968).

15. Currie, "On the Displacement of the Law of the Forum," 58 *Colum. L. Rev.* 968 (1954).

state law, under *Erie Railroad v. Tompkins*, or under federal law.¹⁶ State law, if applicable, may be exotic: some states would apply a mythical common law which is not actually in force anywhere.¹⁷ Once when it was applying Georgia law to a failure to prove foreign law, the Fifth Circuit felt obliged to explain that the law on this subject "need not . . . necessarily make sense."¹⁸

So, the parties have the burden of demonstrating the relevant law of foreign countries. How should they do it? I will not attempt to address all the difficulties of locating the relevant authorities and putting them in proper form to present to the court. I would merely like to suggest that you *do* locate those authorities, and that you *do* present them to the court, and that you endeavor to persuade the court as to what conclusions should be drawn from those authorities just as you would with domestic law.

Of course, you must be sensitive to the divers requirements of different judges—Rule 44.1 authorizes us to be idiosyncratic in specifying the proof required to demonstrate the foreign law.¹⁹ But I suggest to judges and lawyers alike that, as a substitute for ordinary legal argument, expert testimony leaves much to be desired. I hasten to point out that I do not contest the importance of foreign law experts—their assistance is often essential. But why should they take the witness stand?

I am aware of the authority to the contrary. Some common law jurisdictions hold that expert testimony is indispensable—no matter how unambiguous a foreign statute, it will not be given effect unless a witness swears that it means what it says.²⁰ Some not-so-ancient decisions of the federal courts are to similar effect.²¹ This doctrine seems based on the view expressed by Justice Holmes with respect to the bafflingly alien law of Puerto Rico. Holmes said:²²

When we contemplate such a system from the outside it seems a wall of stone, every part even with all the others, except as far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar could never have got from the books.

16. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) would seem to dictate application of state law, because the choice among possible consequences of a failure to prove foreign law will normally determine the outcome of the case. Thus, state law was applied in *Krasnow v. National Airlines*, 228 F.2d 326, 327-28 (2d Cir. 1966). However, Professor Miller argues that federal courts are free to develop their own rules governing this issue, to implement policies implicit in Rule 44.1. Miller, *supra* n. 1 at 729-30. Federal court opinions on this issue often do not mention either state law or the *Erie* problem. See e.g. *Bartsch v. Metro-Goldwin-Meyer, Inc.*, 391 F.2d 150, 155 n. 3 (2d Cir.), cert. denied, 393 U.S. 826 (1968).

17. Crampton, Currie & Kay, *Conflict of Laws* 56 (2d ed. 1975).

18. *Budget Rent-A-Car Corp. v. Fein*, 342 F.2d 509, 514 n. 9 (5th Cir. 1965) (Brown, J.).

19. Kaplan, *supra* n. 5 at 616.

20. 7 J. Wigmore, *Evidence*, § 2090a (3d ed. 1940).

21. *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962) (translation of foreign statute not valid proof; sworn affidavit of expert witness required as a minimum).

22. *Diaz v. Gonzalez*, 261 U.S. 102, 106 (1923).

It is now quite clear, however, in the Second Circuit, that expert testimony is not an invariable necessity in proving foreign law.²³ Indeed, federal judges may reject even the uncontradicted conclusions of an expert,²⁴ and reach their own decisions on the basis of independent examination of foreign legal authorities.²⁵

Even if foreign law were as impenetrable as has been suggested, it does not help to put the expert on the witness stand. In other contexts, this formal mode of presenting testimony serves three functions: the witness is made available for cross-examination; he is cautioned against dissembling on pain of the penalties of perjury; and his views are elicited by questioning subject to the rules of evidence. Yet, Rule 44.1 makes the rules of evidence inapplicable to demonstrations of foreign law, except as regards relevance. And the traditional devices for assuring veracity, the oath and, in part, cross-examination, are not really responsive to the problems of ascertaining the foreign law: daily experience shows that lawyers expert in the domestic law may reach a variety of conclusions as to its import in the best of faith.

Finally, cross-examining other experts may enhance the accuracy of their testimony, even induce them to revise their conclusions. There is little hope of this, however, in the case of legal experts. If there were, the Court of Appeals might obtain additional guidance by having appellate counsel cross-examine one another during oral argument. In fact, one lawyer cross-examining another on his legal conclusions leads primarily to semantic wrangling.

In any event, though we view another country's law but through a glass darkly, I am less pessimistic than Justice Holmes as to our ability to handle foreign legal authorities. Of course, arguing foreign law is more complex than when the law is domestic. More of the steps must be spelled out, more assumptions made explicit, less taken for granted. Yet, if what is relied on is *law*, and not some primitive religion or the whim of a tyrant, the form of reasoning will be familiar. In civil law countries, the express language of statutes may be entitled to more weight than we give it, and judicial decisions to less²⁶—but the law is still proved by pronouncements of suitably constituted authorities. I am told that in Mexico a single decision construing a statute has no precedential effect, but that a line of consistent decisions has. That's not our rule, but the notions of precedent and construction are familiar, and an American court can understand and apply the Mexican rule if it is called to the court's attention.

From the litigant's point of view, some judges insist, and rely, on expert testimony and you will of course humor them. But in general,

23. *Lady Nelson, Ltd. v. Creole Petroleum Corp.*, 236 F.2d 684, 687 (2d Cir. 1961) (Friendly, J.).

24. *Sequros Tepeyac, S.A. v. Bostrom*, 347 F.2d 168, 174-75 n. 3 (5th Cir. 1965); *Usatorre v. The Victoria*, 172 F.2d 434, 438-39 (2d Cir. 1949).

25. See *First National City Bank v. Compania de Aguaceros, S.A.*, 398 F.2d 779 (5th Cir. 1968).

26. See generally *Usatorre v. The Victory*, 172 F.2d 434, 439-43 & nn. 8-16 (2d Cir. 1949).

whether or not American judges actually can comprehend the foreign law, the appearances are such that we are likely to think we can, and a party is well advised to brief and argue the foreign law in the same manner as is done with the domestic law, if only for that reason.

I began this afternoon insisting that lawyers still bear the burden of demonstrating the foreign law which was assigned to them when the world was believed to be flat. I have ended up espousing the up-to-date view that the foreign law should be argued and briefed like the domestic law. But I am not being inconsistent.

A lawyer relying on the law of a foreign country has a distinctive burden with respect to furnishing legal material to the court. Indeed, my suggestion that he argue the foreign law as he would the domestic law actually may enhance that burden. You should not simply introduce an expert to swear to what the law is: you should cite authorities. Yet you cannot cite *Fallos de la Corte Suprema*—the Argentine Supreme Court reports—like Federal Second: you must furnish a copy of the case in translation. In addition, as I mentioned, you cannot take so many things for granted. You may have to establish a nation's peculiar views of precedent, by a text or judicial pronouncement. As you can see, I envision plenty of work for foreign law experts. But not testifying—desk work. When the time comes to marshal the authorities—to show the judge what they require him to do in the particular case, the law should be briefed and argued from the counsel table, not sworn to from the witness stand.