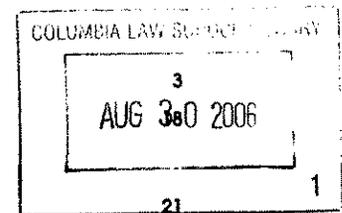


THE RECORD

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ship, and we have established the Program on the Legal Profession to foster interdisciplinary research on the changes affecting lawyers and related professionals—very much including issues involving gender—and to build closer links between the bar and the academy.

I'll close with an anecdote involving a former and different Harvard Law School. Some years back, a young woman named Hillary Rodham faced a tough decision between the law schools of Harvard and Yale. She writes in her book *Living History* that she made her choice after attending a cocktail party at Harvard. At that party, a Harvard Law professor she describes as "straight out of the Paper Chase" responded to her question about the two schools in the following way: "Well, first of all, we don't have any close competitors"—(this is still something we believe, but we try not to say it)—"Secondly, we don't need any more women at Harvard."⁴⁹

Needless to say, that reply made her choice quite easy.

Flash forward to 2003. When Senator Hillary Clinton inscribed her book for me, she wrote—"to my friend Elena—who would have made sure I went to Harvard." Of course, I like to think she's right. And I also like to reflect on how those few words show how much has changed. A female senator from New York. A female Dean of Harvard Law School.

There's no doubt that much progress has been made. There's no doubt we need much more. Again, thank you for being here. I look forward to hearing from you—both now and in the future.

49. HILLARY RODHAM CLINTON, *LIVING HISTORY* 38 (2003).

Proof of Foreign Law After Four Decades with Rule 44.1 FRCP and CPLR 4511

*The Committee on
International Commercial Disputes*

Procedures for proving foreign law were dramatically overhauled for the federal courts in 1966 with the adoption of Rule 44.1, Fed. R. Civ. P. and Rule 26.1, Fed. R. Cr. P. A similar overhaul took place for the state courts of New York with the adoption in 1963 of CPLR 4511. This Committee, which focuses on improving procedures for litigating and arbitrating international commercial disputes, set out to survey how these reformed procedures are working today, and to recommend guidelines for using them optimally. In addition to reviewing relevant cases and articles, practitioners from the Committee who themselves have been involved in cases where foreign law had to be proved interviewed federal and state judges about their experiences.

We conclude that the reform procedures of the 60s have had to be modified in practice to allow for practical realities. For example, a judge is handicapped from doing independent legal research on the law of some Third World countries, which cannot readily be traced into objectively verifiable documents such as statutes and reports of judicial decisions. Reliance on experts in foreign law depends also on their reliability. On the other hand, use of court-appointed experts and special masters can clash with the demands of our adversary system.

The judges we interviewed have found ways to construct individualized solutions, which more or less work. We recommend that such individualized solutions be followed, with all their imperfections, in preference to categorical solutions such as having the judge research all foreign law issues or leaving it to the lawyers to produce reliable experts or suffer the consequences.

BACKGROUND OF THE 1960S REFORMS

The background reasons for the new rules of the 1960s were set forth persuasively in a comprehensive article by Professor Arthur Miller: "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for Die-Hard Doctrine." 65 Mich. L. Rev. 613 (Feb. 1967). We refer the reader to Prof. Miller's article, whose most important conclusions are set forth more briefly in the Advisory Committee Notes to Rule 44.1.

In a nutshell, the courts were liberated from the constrictions of the older approach which treated proof of foreign law as proof of fact. There had been requirements that foreign law be pleaded, thereby creating issues to be researched that might never arise, that proof be limited by the rules of evidence, thus increasing the costs and difficulties of proof, that summary judgment be denied when the parties dispute the content of foreign law, even though the judge is able to reach an opinion about what the applicable foreign law provides, and that appellate review be limited by the "clearly erroneous" standard, largely immunizing district court determinations from independent review by the Courts of Appeal. All these problems were swept away by the reforms of the Federal Rules.

The new Federal Rules were supposed to give federal judges free rein to determine foreign law as a question of law rather than one of fact. No pleading was required, just notice of a foreign law issue. The judge could consider the testimony of expert witnesses called by the parties or appointed by the Court, and reports of a special master familiar with the relevant law, or use a good law library that had the relevant foreign law on its shelves. In theory at least, the judge could call up a professor friend who had studied the foreign law in question, bring the parties' experts to his chambers *ex parte* for a chat on the issues, and visit *ex parte* with foreign scholars.

The same was more or less true for New York state courts, except that New York procedure used the concept of "judicial notice" to describe the Court's role in deciding foreign law, a term the federal rule eschewed. New York procedure also still required that foreign law be pleaded (CPLR 3016(e)),

and CPLR 4511(b) explicitly required a party relying on foreign law to furnish the Court "sufficient information to enable it to comply with the request" to take judicial notice of the foreign law, as opposed to leaving it to the judge.

THE DISPUTE OVER HOW MUCH TIME AND EFFORT JUDGES SHOULD INVEST IN RESEARCHING FOREIGN LAW: POLAR VIEWS

One of the new rule's earliest critics was Judge Milton Pollack of the Southern District of New York ("SDNY"). In "Proof of Foreign Law," 26 Am. J. Comp. Law 470, 471 (1978), he wrote: "We have quite a few things to do besides decoding the *Codigo Civil*." As a distinguished New York State Supreme Court jurist told us in an interview, when a foreign law issue raises its head, judges hope mightily that the parties can be induced to stipulate to the law of the forum. This view holds that courts are too busy to make independent determinations of foreign law and are practically constrained to rely on experts produced by the parties, much as they did before the new rule took effect.

On the other side stands Judge Roger Miner of the Second Circuit, who wrote that Rule 44.1 "provides that '[t]he 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.' This clearly provides the federal courts with a tremendous amount of flexibility in ascertaining foreign law. It is just too bad that they do not use it! . . . The global economy has brought an increasing variety of foreign law issues to the federal courts . . . [Cases involving issues of foreign law] are beginning to form a significant part of the business of the federal courts. And yet the tendency of the federal courts is to duck and run when presented with issues of foreign law. Why should this be so, when we federal judges have at hand so many methods that we may employ to resolve foreign law issues? I think that the answer lies in our fear of the unknown." "The Reception of Foreign Law in the U.S. Federal Courts," 43 Am. J. Comp. Law 581, 584-85 (1995).

Judge Miner has carried his view into practice. For a panel of the Second Circuit, he upset a district court decision because the judge had decided the case on the law of the forum, New York, when he should have based his decision on the controlling law of the Mexican Civil Code. *Curley v. AMR Corporation*, 153 F.3d 5 (2d Cir. 1998). The result was the same under both legal systems, but the Court held that Mexican law should have been studied and applied. The Court ordered supplemental briefing

regarding the contents of the Mexican law at issue and conducted independent research as well, and specifically noted that forum law is to be applied only when both parties fail to present any evidence as to the content of foreign law. *Id.* at 14 (citation omitted).¹

Judge Miner's view has also been followed in a recent study for the Federal Judicial Center: Friedman, "Countering Judicial Reluctance to Use Foreign Law." Draft 4/10/04.

HOW TRIAL JUDGES DEAL WITH PROVING FOREIGN LAW TODAY

Judges have told us that the present regimen leaves them with many problems. If they rely on expert witnesses whom the parties produce, they are leery of being blindsided by partisan guns for hire whom they cannot adequately check because of their own lack of familiarity with the law in question. Court appointed experts and special masters knowledgeable in foreign law can undercut the adversary system, since judges may be unduly influenced by the person they appoint. And thirdly, some foreign legal systems, such as those of Indonesia and Kazakhstan, are much harder to study than others, such as those of England and Canada.

A. Using the Parties' Expert Witnesses on the Foreign Law In Question

Experts on foreign law share the infirmities of other hired gun experts. Parties paying for experts usually make sure in advance that the expert will give opinions to their liking, or they will hire a different expert who will.

When an expert such as a doctor or an economist testifies about a question of fact, the judge can let the jury decide which expert they believe; in a bench trial, the judge can do the same thing, relying on credentials, how the expert stands up on cross, demeanor, etc. Under Rules 44.1, 26.1 and CPLR 4511, however, the judge must make a determination of the law, so that if the judge lacks sufficient knowledge of the expert's

1. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204 (2d Cir. 2003) (per curiam) is instructive on this point as well. Here, a party offered only affidavits regarding the interpretation of Korean law, but not "any of the relevant Korean law itself." *Id.* at 209. The court held that such submissions are insufficient and correspondingly declined to independently investigate and determine the substance of Korean law. *Id.* ("the dearth of evidence offered by SKM prevents this court from properly considering its request for dismissal based on an issue of foreign law. While courts are not precluded from engaging in their own information gathering with regard to issues of foreign law, we do not believe it is appropriate for this court to do so in these circumstances."). *Id.* at 209 (citing Fed. R. Civ. P. 44.1)).

subject to decide what to believe, the problem cannot be given to a jury or resolved as for a fact witness. According to the Second Circuit, the district court's opportunity "to assess the witnesses' demeanor provides no basis for a reviewing court to defer to the trier's ruling on the content of foreign law. In cases of this sort, it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998). See also, *United States v. Jurado-Rodriguez*, 907 F. Supp. 568, 574 (E.D.N.Y. 1995) (Weinstein, J.) ("The court found him credible, though, as indicated below, it did not accept all of his conclusions."). The judge has to have other ways to resolve disputes among the experts.

Judge Miner addressed this issue as follows:

I do not agree with those who consider an expert automatically suspect because he or she is retained by one side or the other. If we think we are getting some "junk" foreign law from an expert, we can take a leaf from the book given to us by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*. In that case, it was determined that a federal judge should act as a gatekeeper in deciding whether to admit scientific evidence. I think that a federal judge can also act as a gatekeeper in deciding whether to accept the foreign law opinion of an expert. Testimony will sometimes be required to determine whether an expert's opinion is reliable or relevant. I am not greatly enamored of taking testimony from a foreign law expert, however, and think that it would be necessary only in a rare case.

Miner, *supra*, at 588.

Without input from the parties' expert witnesses, however, a judge may have to start from scratch in what, for many foreign law systems, might seem like a trackless waste. Judge Helen Freedman of the New York State Supreme Court told us that she needed the parties' experts on foreign law, but suggested that there would be some wisdom in screening them as in *Daubert*, so that the parties have to produce reliable help for the court or risk losing for want of usable expert testimony.

Judge Jed Rakoff, SDNY, suggested another form of compromise. In *United States v. Schultz*, 178 F. Supp.2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003), he heard two experts on Egypt's law of antiquities, neither of whom he considered wholly reliable. Using the Egyptian law authorities cited by the experts, however, he independently reviewed the statutes and concluded that the opinion of the government's expert

witness was more consistent with them. The Second Circuit concurred and affirmed.

The problem, however, was not a simple one. It was a criminal case and the issue was whether the defendant had received stolen property (Egyptian antiquities) with criminal intent. This entailed the question of not only how the foreign statute read, but also how it was enforced, and known to be enforced. Had the defendant's conduct actually violated Egypt's law of antiquities as it was carried out in practice so that he acted with criminal intent? This, Judge Rakoff says, was a mixed question of law and fact, even if only a question of law under Rule 26.1 F. R. Cr. P., the criminal law equivalent of Rule 44.1 FRCP. For the fact portion, he felt he had to weigh the experts' credibility and he wound up evaluating them. Was this the equivalent of a *Daubert* hearing? Did it turn the whole question into one of fact? It made sense, as both Judge Rakoff and the Second Circuit concluded, but he may have moved back to the old theory that foreign law in such cases had to be proved as fact.

Another potential approach is to set conflicting experts up against each other during a hearing and have them each succinctly respond to the other's points as opposed to the typical scripted direct and cross-examinations. Former Judge Martin, SDNY, and Professor Hans Smit of Columbia University have employed and have been involved in similar methods in both litigation and international arbitrations, and find them to be helpful. Such a jot-for-jot give and take should allow the Court to obtain a better grasp of not only the content of foreign law, but of its intellectual underpinnings and interstices as well.

B. Use of a Court-Appointed Expert

A judge who mistrusts the expert foreign law testimony presented by the parties, or is not wholly comfortable with it, can appoint his or her own expert under the reformed rules. The problem, as both Judge Rakoff and former SDNY Judge John Martin pointed out to us, is that once a Court appoints its own expert, it tends to favor the opinion of the expert it has appointed, so that the appointment may undercut the adversary system even when the parties' expert witnesses are well qualified.

Judge John Koeltl, SDNY, a member of the subcommittee that prepared this report (but who did not participate in the interviews of other judges), says that to avoid this problem he subjects his court-appointed expert to vigorous cross-examination by the parties and avoids ex parte discussions with that expert.

There is a cost from imposing such restrictions. Since Rule 44.1 and

26.1 are supposed to allow the judge great freedom in researching foreign law, cutting off ex parte contact with an expert the judge trusts reduces that freedom. Ideally, as Judge Rakoff puts it, an expert should be available to discuss issues informally and privately with the judge, like a law clerk. He fears that the tensions with the adversary system would be too great if he did so, and he does not, and neither does Judge Koeltl, although in theory the judge should not be limited by such concerns. In practice, neither of these judges engages in ex parte discussions with the expert witnesses on foreign law, whether court-appointed experts or experts produced by the parties.

C. Appointment of a Special Master on Foreign Law

Use of a special master familiar with the foreign legal system raises many of the same issues as does the court-appointed expert, for a judge may favor the opinions of such a master over well qualified experts produced by the parties. Since a master sits in a quasi-judicial role, however, the parties may have more leeway to persuade the master at a hearing, as opposed to the court-appointed expert, who reaches his or her conclusions before the hearing and can only be challenged by cross-examination. See generally, Manual for Complex Litigation (Third) § 21.52 (Federal Judicial Center 1995) ("A special master may be asked to make findings of fact, but due process requires that these be based upon evidence presented at an adversarial hearing.") (footnote omitted).

There are at least three reported decisions reviewing the analysis of a special master charged with the task of applying foreign law. See *Henry v. S/S Bermuda Star*, 863 F.2d 1225 (5th Cir. 1989); *Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc.*, No. 00-CV-6739 (CBM), 2003 WL 2006598 (S.D.N.Y. May 1, 2003); *Corporacion Salllvadorena de Calzado, S.A. (Corsal, S.A.) v. Injection Footwear Corp.*, 533 F. Supp. 290 (S.D. Fla. 1982). These courts vary in terms of the level of scrutiny given to the special master's analysis. In *Henry*, the Court undertook a plenary review of the foreign law at issue. In so doing, the Court declined to adopt portions of the special master's report. In *Corporacion Salvadorena*, the Court was presented with a controversy governed by the law of El Salvador, and the experts' affidavits were contradictory in every material respect. The Court opined that the appointment of a special master was "the most satisfactory means of reaching an ultimate decision in this case." *Id.* at 293.

The Court also noted that the special master's conclusions enjoy "a strong presumption of validity" but that her findings may be disregarded when "after reviewing the entire evidence [the Court] is left with the defi-

nite and firm conviction that a mistake has been made, even though there may be some evidence to support the erroneous finding." *Id.* at 299. The Court conducted what might be termed an intermediate level of scrutiny and ultimately adopted the recommendation of the special master. *Id.* at 300.

Lastly, in *Finance One*, a case controlled by Thai law, the Court sought the assistance of a special master "because the court's library does not carry Thai reporters, nor are they available on Westlaw or Lexis." *Id.* at *1. After a brief review of the master's report, the Court adopted it in its entirety with relatively little analysis. *Id.* at *2.

In addition, some lawyers think that use of a special master can help compensate for some judges who are too busy or too inexperienced in foreign law to adjudicate the matter properly. The master is freer to give and take with the parties and their experts than a court-appointed expert, and the master's report may be the best thing available under those circumstances.

D. Varying Difficulties with Different Foreign Legal Systems

One variable that the reformed rules do not address is the foreign legal system itself. If the issue is the law of England, for example, American judges have little difficulty reading English statutes and cases. Once one crosses into civil law systems, the difficulties multiply. For third world systems, which may lack case reports and readily accessible published statutes, and whose enforcement may follow often mysterious local customs, not to speak of corruption, the difficulties multiply exponentially.

Thus the law of England may sometimes be treated like the law of an American sister state. One of our committee, however, remembers a notorious case where the events happened in London, and Judge Jack Weinstein, EDNY, concluded that he found the affidavits of Queen's Counsel for both sides too partisan to be relied on. Though the case was decided on other grounds, the judge's rejection of the parties' legal expert affidavits left a situation where the acceptable method of proof was unclear.

When it comes to civil law jurisdictions, there is a much greater departure from our traditions. Judicial decisions count for less in discerning the law, and the language of statutes more; yet the underlying concepts in those statutes may be alien. Witness Judge Miner's opinion about Mexican law in *Curley v. AMR Corporation*, where the Second Circuit panel undertook to decide whether the defendant who was sued for tort had acted "illicitly or against good customs and habits." 153 F.3d at 15. That standard may have been easy enough to apply in the case before the Court,

where the conduct in question was clearly not tortious, but it is not hard to conceive of situations where an American court would be hard put to decide on its own what conduct would violate the "good customs and habits" of Mexico.

The case of *Henry v. S/S Bermuda Star*, 863 F.2d 1225 (5th Cir. 1989) presents a diligent judicial application of foreign law. The case involved a labor dispute governed by Panamanian law and the district court employed a special master to assist it. Despite the special master's report, the Court researched Panamanian law on its own and even launched into a disquisition on the differences between civil law and common law. Thereafter, the Court rejected the special master's statutory construction regarding pay calculations.

In so doing, the Court disregarded two federal district court opinions and an interpretative opinion of *Panama's Ministry of Labor and Social Welfare*, *id.* at 1232, clung to the language of the Panamanian Labor Code and acted as a civil law court would in the process. *Id.* Because its analysis differed from that of the special master's, the Court proclaimed that it was now "plunged into virgin waters" and independently determined a subsidiary issue of Panamanian labor law. *Id.* In determining this latter issue, the Court, again acting as a civil law court, looked to past practices of compensation and the Labor Code. *Id.* 1232-33 ("Under the civil law approach, a specific provision. . .prevails when in conflict with a general provision."). Thereafter, the Fifth Circuit panel continued its role of civil law court and decided a host of remaining issues. *See, id.* at 1234-39.² The Court concluded the case by returning to its common law roots by distinguishing precedent and examining the scope of a federal statute via examination of legislative intent and statutory construction. *Id.* at 1239-41. The contrast in approaches is evident. *See also* an article by the opinion's

2. The Fifth Circuit made the contrast of its common law role quite clear:

Were we a United States Court applying United States law, we would be inclined by the authority cited by the seaman to hold that the Decree has been incorporated. But, we sit as a United States court applying Panamanian law within the constraints of a civilian law system. Under our understanding of the probable doctrine (n.24, *supra*) without three judgments of the same court mandating incorporation of Cabinet Decree No. 221—thus the thirteenth month pay provision—into the Labor Code, we are directed to return to the text of the Labor Code. The express provisions of the Code and the Special Master's analysis leads us to hold that the thirteenth month pay bonus is not incorporated into the Labor Code. Until a third Supreme Court of Justice decision incorporates the Cabinet decree into the Labor Code or the Code is amended to achieve this incorporation, the thirteen month pay bonus does not apply to seamen on vessels in the international service such as the BERMUDA STAR.

author: John R. Brown, "44.1 ways to prove Foreign Law," 9 Maritime Lawyer 179 (1984).

When the question is one of law for a Third World country thin in written sources of law, or where the courts are corrupt, the problem can be overwhelming. Judges tend to have the parties produce foreign law experts and struggle with the results.

One solution to the problem of unprovable foreign law may be to use the methods that Professor Miller says courts followed before 44.1, when it was too hard to prove foreign law. If the principle of law at issue was "rudimentary," i.e. the same principle that you can assume exists in all civilized jurisdictions, you discern it and follow it. Thus, e.g., if the defendant has struck the plaintiff without cause he is liable for damages. Contracts should be carried out as written, and so on. Such an approach would eliminate many problems. It is similar to an assumption that when the foreign law is too hard to discern you follow the law of the forum, an assumption frequently made.

Another possible solution is to allocate a burden of proof to one of the parties. That would enable the case to be resolved, but it would convert the inquiry into one of fact and violate the command in the last sentence of Rule 44.1, which makes the question one of law. Judge Guido Calabresi of the Second Circuit said to us during his interview that a Court is tempted to allocate a burden of proof, but at the end of the day it would probably have to do what it considers fair. This pushes the Court to the "rudimentary" principles approach, or to the assumption that the law of the forum applies.³

CONCLUSIONS AND RECOMMENDATIONS

The reforms of Rule 44.1 FRCP, Rule 26.1 FRCrP and CPLR 4511 have to be applied in a practical way. Thus, e.g., where the foreign law is readily determinable, as usually for the law of England, and the parties produce clearly reliable experts on foreign law, the Court can hear the testimony, check the legal sources provided, and comfortably reach its conclusions of law. Those conclusions are likely to be sound.

When any of these factors change, the Court's procedure also has to change. When the experts do not appear to be reliable, the Court may do well to first screen them and then if still not satisfied consider using a

3. See also Pollack, *supra*, at 471 ("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.") (emphasis in the original).

court-appointed expert or a special master versed in the applicable law. In doing so, most judges believe that some deference must still be paid to the adversary system. The neutral expert must be subject to cross examination and probably should not communicate *ex parte* with the Court, despite the lack of restrictions in Rule 44.1 and its related rules. The special master must be open to vigorous criticism in an appeal to the district court from the master's decision.

Where the law of the foreign legal system comes from a civil law jurisdiction or a Third World country, the Court should make sure that it has adequate expert help familiar with how law is made in the relevant country. Independent determinations can be made when the principles are "rudimentary," but great care has to be taken where they are not, despite the freedom that 44.1, 26.1 and CPLR 4511 give to the judge. Before embarking on such a determination, the Court should consider the stakes involved, the abilities of the parties to bear the transaction costs of producing experts, including substitutes for experts who originally prove inadequate, and the importance of the point or points of law for the case. Where the situation warrants it, a court-appointed expert or special master can be appointed. Where it does not, the Court should press the parties to supply proper expert help, and failing that, should consider applying the law of the forum to the extent that cases like *Curley v. AMR Corporation*, Judge Miner's decision, allows it. A judge doing his own research should try to have his or her views checked by knowledgeable foreign lawyers.

In short, we recommend that judges and litigants should be guided by the freedom of the reformed rules, tempered with common sense, and this is what good judges and litigants seem to be doing.

January 2005

The Committee on International Commercial Disputes

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Letter to Congress re: USA Patriot Act and H.R. 3199 and S. 1389

The following letter, drafted by the Committee on Civil Rights, was sent by Bettina B. Plevan, President of the Association, on September 21, 2005 to members of the U.S. Senate and House of Representatives.

Dear Senators and Representatives:

DI am writing on behalf of the Association of the Bar of the City of New York to address certain provisions of the USA PATRIOT Act being considered by the Conference Committee, reflected in bills passed by the House and Senate, H.R. 3199 and S. 1389. H.R. 3199 and S.1389 address several of the particularly troublesome provisions of the PATRIOT Act but do not cure their fundamental deficiencies.

INTRODUCTION

The Association is particularly concerned about four provisions of the PATRIOT Act:

Section 206, which now permits "roving" and "John Doe" wiretaps not limited to particular facilities or targeted individuals;

Section 213, which permits delayed-notice or "sneak and peek" search warrants, i.e., secret searches without contemporaneous notice to the target;