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Roger J. Miner
U.S. Circuit Judge

The Reception of Foreign Law in the Federal Courts

American Foreign Law Association

Wednesday, May 17, 1995

Drake Hotel, New York City

Noon

I am very pleased for the opportunity to address the American Foreign Law Association on the occasion of its 1995 annual meeting. Since 1925, your Association has been at the forefront in promoting the understanding and appreciation of foreign, comparative and private international law. As is well-known, the membership of this organization is composed of distinguished lawyers, judges and legal scholars who regularly deal with legal issues that transcend national boundaries. I am proud to number among my friends and colleagues a number of officers and members of the Association.

Your membership in this organization enables you to keep up-to-date on recent developments in foreign, comparative and international law. Through your meetings, as well as through the American Journal of Comparative Law and your own Newsletter, you exchange ideas that are valuable to you individually in your work in the international arena. You also provide important public service as an Association by giving your views to the U.S. State Department with regard to treaties and private law conventions being considered by our government. Your public service also is manifested by your status as a Non-Governmental Organization at the United Nations and by your participation in joint educational programs with other organizations concerned with international law. A little later, I shall propose a new project for this

venerable Association. This project will cause you to be of service to another important institution -- the federal courts of the United States.

The global economy has brought an increasing variety of foreign law issues to the federal courts. Indeed, one international commercial transaction may implicate the law of several nations. Aside from foreign law issues arising in cases relating to foreign trade, federal courts throughout this nation are faced daily with immigration matters, tort claims, public law disputes, arbitration enforcement proceedings, domestic relation suits and even criminal cases that call for the determination and application of foreign law. These cases 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. Let me give you an example.

Less than two months ago, a panel of my court was confronted with an appeal from a district court judgment denying relief under a federal statute that allows for discovery in aid of foreign litigation.¹ The litigation for which assistance was sought was pending in France. The district court held, in light of the limited discovery allowed in France, that it would be contrary to French law and policy to permit the discovery to go forward here. The majority of the panel disagreed with the

district court and reversed, concluding that discovery assistance should be provided absent specific direction to the contrary by the foreign court. The majority saw the purpose of the statute as "promoting efficiency in international litigation and persuading other nations, by example, to do the same."² I, for one, have never assumed that it was the duty of our federal courts to persuade foreign courts to do anything. I certainly would never urge them to adopt our discovery practices. The dissenter in the case thought that the discovery procedures allowed by the statute should not be used to evade disclosure limitations imposed by foreign tribunals.

I do not say whether I agree with the majority or the dissent in this particular case. I refer to it only to draw your attention to some of the language in the majority opinion.

Hearken to a portion of the rationale:

The record reveals that this litigation became a battle-by-affidavit of international legal experts and resulted in the district court's admittedly "superficial" ruling on French law. . . . We think that it is unwise -- as well as in tension with the aims of [the statute] -- for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law.³

I suggest that this is the language of uncertainty, of avoidance, and of distaste for foreign law. But I think that the real kicker is in the first sentence of the majority opinion, where the issue is stated thus:

This case raises the question of the degree to which federal district courts, in

deciding whether to order discovery under [the statute] in aid of foreign litigation, should delve into the mysteries of foreign law.⁴

The mysteries of foreign law! What an interesting observation in an era in which the law of foreign nations is so much with us in the federal courts! Be assured that I am not criticizing in any way my distinguished colleague who authored the opinion. He was, after all, Dean of the Yale Law School until he recently joined us. I use his language only to demonstrate that foreign law has not been welcomed in our federal courts.

Our haste to avoid confrontation with foreign law leads us into some strange decisions. For example, a panel of my court some years back held as follows:

While . . . a court is still permitted to apply foreign law even if not requested by a party, we believe that the law of the forum may be applied here, where the parties did not at trial take the position that plaintiffs were required to prove their claims under Vietnamese law, even though the forum's choice of law rule would have called for application of foreign law.⁵

It is strange indeed for a court to consciously apply the wrong law, based on the position taken by the parties, while acknowledging a discretionary authority to apply the right law. Such an approach with regard to questions of domestic law would be highly unusual.

The decision that I used as my example, Vishipco Line v. Chase Manhattan Bank, was spawned by an action brought by Vietnamese corporations and individuals to recover funds deposited in the Saigon branch of the Chase Manhattan Bank. The

bank had closed the branch following the Communist takeover and argued that it was not obligated to make good on the deposits for a number of reasons. In another bizarre twist in that opinion, Vietnamese law was applied to Chase's affirmative defenses. The panel reasoned as follows: "While Chase invoked foreign law . . . with respect to its own affirmative defenses only, neither party invoked foreign law with respect to Chase's basic obligations to its depositors"6

That case still is cited as precedent by the district courts in this circuit for the proposition that forum law should be applied where the parties do not provide the court with the appropriate foreign law. Just last year, a district court in the Southern District was confronted with claims that revolved around a contract providing that any disputes regarding its terms would be governed by Malaysian law. Citing the Vishipco case, the district court noted the failure of the parties to provide it with the applicable Malaysian legal principles, "deem[ed] the parties to have acquiesced in the application of local law and hence look[ed] to pertinent authority within the forum."7

The failure of the parties to establish foreign law also results in the application of the law of the forum in many other circuits.⁸ My own view of the matter is that a court has the affirmative obligation to seek out the applicable foreign law whether the parties have established that law or not. Let me be clear about any disagreements that I might have with some of the decisions made by panels of my court in regard to the reception

of foreign law. Like all other judges of the court, I am bound by the precedent created by the panels. Our practice is that only an in banc court or a panel decision circulated to the entire court and not objected to can change precedent.⁹

We do have a federal rule, of course, that requires a party who intends to raise an issue concerning the law of a foreign country to give notice of that intention through pleadings or other reasonable written notice.¹⁰ I refer, of course, to Rule 44.1 of the Rules of Civil Procedure, which my scholarly friend, District Judge Milton Pollack, discussed with you at some length when he spoke to this Association on the subject "Proof of Foreign Law" back in 1978.¹¹ 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!

Rule 44.1, originally adopted in 1966, concludes with a very important sentence and it is this: "The court's determination shall be treated as a ruling on a question of law." This provision marked a vast change from earlier federal law, which treated foreign law as a fact question to be pleaded and proved, sometimes to the satisfaction of a jury!¹² Because decisions on foreign law were considered findings of fact, they could be resolved on appeal only if clearly erroneous.¹³ Now, the

decisions on foreign law are specifically designated as rulings of law and thus may be reviewed on appeal de novo.¹⁴

It appears that some federal courts still have not gotten the word and continue to impose upon the parties a factual burden of proof of foreign law. In a case decided in the Southern District just two years ago, the court held that "[f]oreign law is a question of fact which must be proved."¹⁵ The court observed that affidavits of experts on Polish law were unsatisfactory and decided that a hearing would be required to decide the issues. Although the court certainly was entitled to take testimony, its decision on Polish law ultimately would be a legal one, not a factual one. One commentator has opined that foreign law implicates a mixture of fact and law under Rule 44.1. He has characterized foreign law as "a tertium genus, a third category, between fact and law."¹⁶ I disagree and see the decision as purely one of law. Because I have this view, I think that it becomes the duty of the court to find and apply the relevant foreign law as soon as it becomes apparent to the court that foreign law governs.

Accordingly, although it is highly desirable that the parties give notice under Rule 44.1 of the existence of an issue of foreign law at the earliest possible time, I do not think such notice is essential to bring the issue into the case. There are many courts that have considered failure to give adequate notice of a foreign law issue another reason for applying domestic law.¹⁷ Among those courts is my own, the Second Circuit Court

of Appeals. In Clarkson Co. Ltd. v. Shaheen,¹⁸ a panel of my court said that it was acceptable for the district court to apply New York law in determining the obligations of the directors of a Canadian corporation. The reason given was that no party claimed that Canadian law was applicable, and each party "seems to have assumed that New York law governs."¹⁹ This approach puts me in mind of a case that I encountered in my early days as a traveling rural trial lawyer. The case was an action to recover the price of some lumber that the plaintiff had sold to the defendant. When my adversary and I appeared for a pre-trial conference before the elderly county judge who was to hear the case, we advised the judge that the sale of goods at issue was governed by the provisions of the Uniform Commercial Code. I shall never forget his response: "I have not yet learned the Uniform Commercial Code," he said, "and I would like you both to stipulate to try this case under the old law." My adversary and I thought it best to adjourn the case so it could be heard by a judge who was more current on the law. I am sure you see the analogy with the approach to foreign law taken by some federal courts.

In the past, courts have indulged in a variety of what I call fictitious presumptions concerning the governing law in situations where foreign law obviously is applicable but the parties have not pleaded or established it. One author has listed these presumptions as follows: "that the foreign law is the same as the forum's common law, that foreign law is identical

to the forum law, that foreign law is based on generally recognized principles of civilized nations, and finally, that the party by not proving the foreign law has essentially acquiesced to the forum law."²⁰ I am particularly amused by the "principles of civilized nations" presumption because it seems to me so much easier to ascertain the law of one nation than to go to the trouble of identifying a rule common to all civilized nations. Presumptions just are not substitutes for the real thing. By now, you are aware of the fact that I consider it the duty of the federal courts, both trial and appellate, not only to identify issues of foreign law independently but to ascertain the correct law and apply it. Certainly, Rule 44.1 provides us with many ways to get it right. We must get all the help we can from the lawyers in a case, of course, but we must assure ourselves that we have the right law to apply. That is the way we do it in regard to domestic law and that is the way we must do it in regard to foreign law.

I think that the Seventh Circuit Court of Appeals had it right when it stated that, in determining questions of foreign law, both trial and appellate courts must research and analyze the law independently.²¹ In the case in which that statement was made, the Seventh Circuit undertook its own detailed analysis of the Spanish law relating to the right of a shareholder of a corporation to sue for injury to the corporation. The court quoted with approval in the course of its decision this statement by a commentator: "'All too often counsel will do an inadequate

job of researching and presenting foreign law or will attempt to prove it in such a partisan fashion that the court is obliged to go beyond their offerings.'"²² While I am in agreement with the idea that the courts must do their own analysis, I do not agree that the work of the attorneys often is inadequate. In most cases, the foreign law is completely and fairly presented on all sides, and the court can proceed to do its job. I once wrote an opinion for a panel of our court that revolved around the Ecuadorian Law of Guaranty and found the foreign law well and fully presented.²³ It is always a pleasure to have a case where the lawyers are so helpful, whether the case involves domestic law or foreign law.

In fact, our federal courts have shown a commendable ability to get their hands around foreign law when fully briefed on the issues. A few years back, a judge in the Southern District of New York had no trouble in identifying and applying the law of Kenya in an action to recover damages for injuries sustained in a rhinoceros attack in Kenya.²⁴ The defendant was not the rhinoceros, but ABC Television, which had elicited the assistance of the plaintiff, a former big game hunter and safari guide, in making a documentary film. The plaintiff alleged that a photographer acted recklessly and provoked a rhinoceros cow to charge while defending her calf. The court denied a motion for partial summary judgment made by the defendants.

A panel of my court just last year had no trouble in finding that a ruling of the Paris Court of Appeals conferring exequatur

on an arbitration award was within the category of judgments enforceable under the New York Money-Judgment Recognition Act.²⁵ In deciding that the decree conferring exequatur was the functional equivalent of a French judgment for the sums specified in the award, we had the benefit of affidavits from a retired judge of the highest tribunal in France, the Cour de Cassation. A few years back, my court, apparently fully informed on the issue, dealt with the Dominican law of affiliation in an action brought against the Immigration and Naturalization Service challenging a denial of preferential immigration status.²⁶ And in a case arising out of the purchase of furs at an auction in Finland, a Southern District court applied Finnish law without difficulty after examining the affidavits of Finnish attorneys submitted by both sides.²⁷ The court also found in that case that the foreign law did not conflict with a strong public policy of the forum, an interesting issue that I may address on another occasion.

But what if we are not confident that we are fully informed on the foreign law, and what if we are not informed at all? It seems clear that both our trial and appellate courts can turn to the lawyers for information. That is just what a Southern District court did on a motion for summary judgment in a case that turned on the enforceability of contracts under Italian law.²⁸ It was not disputed that Italian law governed, but neither side provided the necessary information to enable the court to make the correct decision. In a written opinion, the

court was first constrained to disabuse counsel of the notion that the issue was a factual one to be resolved at trial. The court then directed the plaintiff to file within twenty days "a legal memorandum and accompanying documentation supporting its proposition that valid contracts existed under Italian law."²⁹ Defendant was afforded fifteen days in which to reply. I think that this was a very effective use of court resources, because the court was able to call upon its most important resource -- the lawyers in the case.

Recalling the text of Rule 44.1, a court may consider any relevant material or source, including testimony, whether or not submitted by a party or whether or not admissible in evidence. This certainly gives us a much broader spectrum than we have in identifying domestic law. One treatise has listed the variety of sources and materials that federal courts have had reference to in ascertaining foreign law. These include the written or oral testimony of experts, home-grown and foreign; copies of a foreign country's code or laws, including statutory provisions of the relevant law in the original or in translation; reference works; decisions of foreign courts; law reviews and treatises; and the reports of special masters expert in foreign law and fluent in the foreign language.³⁰

In the end, whatever the source, we federal judges must ourselves be certain that we have it right and that we do not allow a bad result just because we are on unfamiliar ground. A lot of what I now deal with in the Court of Appeals was

unfamiliar to me before I became a federal judge, but I cannot, in the manner of that old country judge, avoid the responsibility of deciding cases on the basis of correct law. I must use all the resources available to me to resolve the question.

In most of the foreign law cases that I have participated in, the affidavits of experts have been supplied, along with copies of pertinent laws and codes. These have proved sufficient to allow me to make up my own mind about the applicable foreign law after completing any research that I have considered necessary. Foreign law experts come from many places. In a case now sub judice before a panel on which I am serving, a Columbia Law School professor and a former judge of the Supreme Court of the Netherlands have given affidavits of opinion on the Dutch law of civil conspiracy. Although the opinions differ, both affidavits are straightforward and helpful.

I do not agree with those who consider an expert automatically suspect because he or she is retained by one side or the other.³¹ If we think that 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.³² 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.

It seems to me that the federal courts should make more use of court-appointed experts in all kinds of cases where an expert opinion would be helpful. I think that in close questions of foreign law, where experts engaged by the parties are in serious disagreement, the court should appoint its own expert in an effort to close the gap. Rule 706 of the Federal Rules of Evidence provides that "[t]he court may on its own or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations." The issue for the expert may be clarified at a pre-trial conference and the expert's findings must be provided to the parties, who may depose or cross-examine the expert. The compensation of the court-appointed expert must be paid "by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as costs."³³

The use of a court-appointed expert is a highly desirable tool for ascertaining the governing foreign law and, as one author has stated, "[p]ersuasive advice submitted to the court may prompt a stipulation that settles the foreign law question."³⁴ The elaborate system provided by Rule 706 for testing the opinion of a court-appointed expert means that we are pretty sure of getting the foreign law right in a case where such

an opinion is given. It does not by any means, however, divest us of our independent duty of research, for the responsibility of arriving at a correct decision is ours and ours alone.³⁵ Expert opinion, whether from the parties or from a court-appointed expert is only one way for us to get there. And get there we must, without applying the law of the forum when it does not apply, without utilizing fictitious presumptions, without regarding the search for foreign law as an arcane enterprise whose mysteries we cannot fathom, and without evading the responsibility that every court in this nation has -- to find the law and apply it.

And that brings me back to the American Foreign Law Association, an organization whose members include the foremost foreign law experts in our nation. I suggest that you undertake this project: prepare a booklet of your members who are willing to act as experts for cases in the federal courts. For each of these, specify the foreign law of his or her expertise, together with educational background, professional experience and present affiliations. Distribute these booklets to the federal trial and appellate courts throughout the nation and to those members of the bar engaged in international practice. Help us assure a warmer reception for foreign law in the federal courts. Help us dispel the mysteries of foreign law. Help us get it right.

ENDNOTES

1. Application of Euromepa S.A., --- F.3d ---, 1995 WL 127165 (2d Cir. Mar. 20, 1995).
2. Id. at *6.
3. Id. at *4.
4. Id. at *1.
5. Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 860 (2d Cir. 1981), cert. denied, 459 U.S. 976 (1982).
6. Id.
7. Kleartex (U.S.A.), Inc. v. Kleartex SDN BHD, 1994 WL 733688, at *15 n.5 (S.D.N.Y. June 9, 1994).
8. See 9 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2247.
9. See United States v. Johnson, 14 F.3d 766, 769 (2d Cir. 1994).
10. See Cunard S.S. Co. Ltd. v. Saleen Reefer Servs. AB, 773 F.2d 452, 460-61 (2d Cir. 1985).
11. See Milton Pollack, Proof of Foreign Law, 26 Am. J. Comp. L. 470 (1978).
12. John R. Brown, 44.1 Ways to Prove Foreign Law, 9 Mar. L. Rev. 179, 184 (1985).
13. Id.
14. See 12A Fed. Proc. L. Ed. § 33:601.
15. Weiss v. Glemp, 792 F. Supp. 215, 229 (S.D.N.Y. 1992).
16. Stephen L. Sass, Foreign Law in Federal Courts, 29 Am. J. Comp. L. 97, 98 (1981).
17. See 12A Fed. Proc. L. Ed. § 33:594.
18. 660 F.2d 506 (2d Cir. 1981), cert. denied, 455 U.S. 990 (1982).
19. Id. at 512 n.4.
20. Yolanda M. Morentin, Failure to Prove Foreign Law in U.S. Courts, 5 Ariz. J. Int'l & Comp. L. 228, 232 (1988).

21. Twohy v. First Nat'l Bank of Chicago, 758 F.2d 1185, 1193 (7th Cir. 1985); see also Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 488-89 (3rd Cir. 1993).
22. Twohy, 758 F.2d at 1193 (quoting Wright & Miller, supra note 8, § 2444).
23. Indasu Int'l, C.A. v. Citibank, N.A., 861 F.2d 375 (2d Cir. 1988).
24. Mathews v. ABC Television, Inc., 776 F. Supp. 821 (S.D.N.Y. 1991).
25. Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994).
26. De Los Santo v. INS, 690 F.2d 56 (2d Cir. 1982).
27. Finnish Fur Sales Co., Ltd. v. Juliette Shulof Furs, Inc., 770 F. Supp. 139 (S.D.N.Y. 1991).
28. IMAF, S.p.A. v. J.C. Penney Co., 1989 WL 54128 (S.D.N.Y. May 15, 1989).
29. Id. at *7.
30. 12A Fed. Proc. L. Ed. § 33:597; see also United States v. First Nat'l Bank of Chicago, 699 F.2d 341, 344 (7th Cir. 1983); Annotation, Raising and Determining Issue of Foreign Law Under Rule 44.1 of Federal Rules of Civil Procedure, 62 A.L.R. Fed. 521, 534-38 (1983).
31. See, e.g., John H. Merryman, Foreign Law as a Problem, 19 Stan. J. Int'l L. 151, 157 (1983).
32. 113 S. Ct. 2786 (1993).
33. Fed. R. Evid. 706.
34. John R. Schmertz, The Establishment of Foreign & Int'l Law in American Courts, 18 Va. J. Int'l L. 697, 713 (1978).
35. Cf. John G. Sprankling & George R. Lanyi, Pleading and Proof of Foreign Law in American Courts, 19 Stan. J. Int'l L. 3, 81 (1983).