A U.S. Perspective -- Rule 44.1 of the Federal Rules of Civil Procedure

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I have been asked to describe briefly the operation of and issues arising under Rule 44.1 of the Federal Rules of Civil Procedure. I believe that the experience in the United States raises some important questions about the role of the judge and the parties when a party relies upon foreign law to support a claim or a defense. In summary, we shall see that the courts of the United States have not finally resolved the role of the judge and of experts on foreign law in determining the content of the foreign law on which a party relies. The discussion in the American cases may be useful in addressing this issue in other for a.

In 1966, Rule 44 of the Federal Rules of Civil Procedure were amended to treat a court's determination of the content of foreign law as "a ruling on a question of law." Thus, the United States abandoned the traditional rule, still applicable in England, that foreign laws are proved as facts subject to evidentiary rules. R. Fentiman, *Foreign Law in English Courts* at 173 ("Foreign laws are facts in English doctrine, albeit that their legal character makes them different from other facts." Amended Rule 44.1 also 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." The amended Rule requires that the party which intends to raise an issue concerning foreign law inform the court and parties by "pleadings or other reasonable written notice."

This change in the Federal Rules followed or led to similar action by a number of states. For example, New York proceeded to amend its Civil Practice Law and Rules (CPLR) to allow a court to take judicial notice of foreign law at the request of a party which provides "sufficient information to enable" the court to comply and also furnishes notice to its adversary. (CPLR § 4511). New York also imposed an express pleading requirements when a cause of action or defense relies on foreign law (CPLR § 3016(e)(providing that the "the substance of the foreign law relied upon shall be stated").

The notice requirement under Rule 44.1 and similar state statutes is designed to prevent the unfair surprise to both the court and opposing counsel by raising foreign law late in a proceeding. How late is too late? The cases demonstrate that it is always advisable to

raise the possible application of foreign law to a disputed issue as early as practical in the proceedings. This is often not burdensome when parties are aware of the potential pertinence of foreign law to key issues in a dispute well in advance of actual litigation.

Enactment of Rule 44.1 did not fully resolve the issues of how to determine the content of foreign law. In a characteristically blunt speech in 1978, Judge Milton Pollock reminded members of the American Foreign Law Association that Rule 44.1 did not "relieve the parties, or counsel, of the task of demonstrating what the law of a foreign country is." M. Pollack, "Proof of Foreign Law," 26 Am. J. Comp. L. 470 (1978). Reminding his audience that "[w]e have quite a few things to do besides decoding the *Codigo Civil*," Judge Pollack saw the Rule as an opportunity and urged that "foreign law should be briefed and argued roughly in the same fashion as the domestic law." Judge Pollack expressed skepticism about whether experts who support by written submission particular interpretations of foreign law should appear as witnesses and testify.

In a report, the Committee on International Commercial Disputes of the Association of the Bar of the City of New York under the chairmanship of Lawrence Walker Newman surveys how the federal and New York reforms "are working today." 61 *The Record of the Association of the Bar of the City of New York* 49 (2006). After not only reviewing the cases but also interviewing a number of judges who have confronted foreign-law issues in recent litigation, the Committee concludes in a thoughtful analysis that "the reform procedures of the 60s have had to be modified in practice to allow for practical realities." The Committee discusses the experience of federal and state courts with determining foreign law in cases that used party-appointed expert witnesses, court-appointed experts and special masters on foreign law. In the end, the report recommended that judges be guided and were being guided by the "freedom of the reformed rules, tempered with common sense." In particular, the report draws a key distinction -- between the role that a U.S. judge can play in finding applicable standards when the law at issue is likely to be accessible (*e.g.*, English law) and that same judge's greater reliance on experts and other resources when there is a paucity of written material about the applicable law, language challenges in reading available cases and jurisprudence or other difficulties (*e.g.*, Chinese law).

Just two years after his speech, Judge Pollack confronted the issue in *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1276 (S.D.N.Y. 1980) aff'd, 633 F.2d 203 (2nd Cir. 1980), where the parties had stipulated that the open claims were governed by Colombian law. A kidnapping victim had sued the parent U.S. corporation of his Colombian employer and alleged that the parent was liable for the kidnapping under Colombia's labor code and other local law and therefore owed the victims compensation. The plaintiff introduced an affidavit from experts and argued in pleadings and orally that Colombian law allowed his claim. Citing his 1978 speech, Judge Pollack explained that "[e]xpert testimony is no longer an invariable necessity in establishing foreign law, and indeed, federal judges may reject even the uncontradicted conclusions of an expert witness and

reach their own decisions on the basis of independent examination of foreign legal authorities." The court made clear that it had read carefully the analysis of the experts and even agreed with that of defendant's expert. However, Judge Pollack confirmed that the court had "fully conducted its own examination of the authorities provided."

If a trial court fails to do the kind of homework that Judge Pollack carried out in *Beatrice Foods*, then the likelihood of reversal increases greatly. In *Universe Sales Co. Ltd. v. Silver Castle Ltd.*, 182 F.3d 1036 (9th Cir. 1999), the defendant's Japanese law expert, a Japanese attorney specializing in trademark and contract law, showed that Japanese contract, not trademark law, was controlling. He also demonstrated that a license agreement is valid and royalties are due even if the licensor does not hold the registered trademark. The Ninth Circuit reversed the district court's grant of summary judgment because the trial judge had failed to credit the unrebutted presentation and interpretation by the expert and conducted no research of its own. The Court of Appeals found that the district court, having been presented with an argument as to the applicability and content of Japanese contract law, should have either conducted its own research or instructed the parties to present further evidence regarding the interpretation of the Japanese law.

In some instances, the appellate court will sometimes do the work of the trial court. For example, in *Twohy v. First National Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985) Seventh Circuit agreed with the trial court's holding but added "we cannot fully endorse the court's method of reaching its conclusion." Judge Cummings noted the "conclusory nature" of the affidavits from the defendant's foreign-law experts and the absence of references to controlling authority in plaintiff's experts. Referring to "[d]istinguished commentators [who had] noted the benefits, and at times necessity, of independent research and analysis by courts on questions of foreign law," the Seventh Circuit conceded that "investigating Spanish law on the relevant issues presents no simple task." The appellate court concluded that the trial court should have demanded a more "complete presentation by counsel" as the Advisory Committee on Rule 44.1 had recommended. The Court of Appeals then proceeded to its own careful analysis of Spanish law that provided the missing support for the trial court's conclusions.

Within the past three years, the Seventh Circuit has again confronted the issue of the role of the judge and of experts in determining the content of foreign law on which the parties rely. The cases are particularly instructive because they have elicited opinions from three of the most respected Court of Appeals judges in the United States, all of whom serve as faculty of the Chicago Law School. Further, Judge Diane Wood is the author of numerous articles and speeches on international economic law and other issues relating to the foreign relations law of the United States and widely viewed as among our country's most knowledgeable judges in this field. The views of these judges are already influencing how other members of the United States judiciary approach the issues, *see, e.g., Estate of Yael Botvin v. Islamic Republic of Iran*, 772 F.Supp. 2d 218, 228 n. 9 (D.C. 2011)(Urbina, J.)(summarizing the learning from the Seventh Circuit, warning of the

particular dangers when a defendant does not appear so that the expert for only one party presents an opinion to the court and concluding that in such situations the court "must at least conduct sufficient independent research to guard against erroneous or exaggerated claims by partisan experts").

The most recent dialogue in the Seventh Circuit includes a lengthy opinion by Judge Richard Posner in *Sunstar, Inc., v. Alberto-Culver Co.,* 586 F.3d 487 (7th Cir. 2009). In that case, Judge Posner wrote for a unanimous three-judge panel in resolving whether the holder of a particular type of Japanese trademark license is under Japanese law permitted to use variants of the licensed trademarks. Finding that question to be an issue of law under Rule 44.1, Judge Posner noted that practitioners or professors who testify on the meaning of foreign law "are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by the client." He continued, "Those are banes of expert testimony." Pointing to the availability of translations of foreign legal materials into English, Judge Posner added that "[r]elying on paid witnesses to spoon feed judges is justifiable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn." *Id.* at 496 . Judge Posner proceeded to render a learned opinion on the relevant point of Japanese law, citing a number of published sources for his analysis.

Judge Posner's views do not, however, constitute the only perspective on the issue on the Seventh Circuit. Just a year after the decision in *Sunstar*, Chief Judge Frank H. Easterbrook wrote for a unanimous panel in *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.23d 624 (7th Circ. 2010). The other judges on the panel were Judge Posner and Judge Wood. In *Bodum*, Judge Easterbrook was interpreting the rights granted under a license agreement governed by French law and relating to a French-press coffee maker. He reviewed the history to Rule 44.1 and its terms which allow "but do not compel" expert testimony. Warning that "[t]rying to establish foreign law through experts' declarations not only is expense . . . but also adds an adversary's spin, which the court then must discount." Judge Easterbrook referred to Judge Posner's opinion in *Sunstar* and the virtue of published sources that do not usually reflect "the slant that characterizes the warring declarations presented in this case." *Id.* at 629. The Judge carefully reviewed the relevant French law on finding the shared intent of parties to an agreement. He showed how that intent could in this case be readily discerned from the contract language itself and explained why extrinsic evidence might not be admissible under French law and, in any event, would not support any different view of the relevant intent.

Judge Posner wrote a rather lengthy concurring opinion whose principal purpose was to elaborate on his opinion in *Sunstar* that criticized "a common and authorized but unsound judicial practice" of establishing the meaning of foreign law by testimony or affidavits of expert witnesses. *Id.* at 631. Because Judge Posner is well known for his sharp-edged analysis of legal issues and colorful writing (*e.g.*, "But our linguistic provincialism does

not excuse intellectual provincialism"), his concurring opinion merits attention. While saying that he is not being critical, his opinion seems especially harsh on the district court for having relied on the expert opinions that were submitted and conducted "not research of its own." Judge Posner then presented a lengthy analysis of civil and common-law contract rules, the role of extrinsic evidence in contract interpretation in both systems and the error in French law that he believes was committed by one of the experts. He concluded that the expert affidavits presented by the parties "had produced only confusion" and that the parties "should have relied on published analyses of French commercial law."

Judge Wood did not disagree with the holding in the case regarding the interpretation of the contract in question. However, she wrote to express her disagreement with Judge Posner's view that "expert testimony is categorically inferior to published, English-language materials." *Id.* at 638. She emphasized the risks of relying on translations that may well overlook "nuances in the foreign law" and deftly illustrated the *faux amis* in the French language that can lead American lawyers "to assume that foreign law mirrors U.S. law when it does not." In short, Judge Wood explained that in many cases "an acknowledged expert in foreign law will be helpful" even if there is an article or other source available in English which has translated the French materials. Judge Wood does not object to written sources or to judges delving into foreign legal materials. Rather she warned that judges should not "disparage oral testimony from experts in the foreign law." The evidence rules of the federal courts furnish, she reminded, "tried and true methods" for testing the testimony of experts and protecting "the court against self-serving experts in foreign law."

In view of these cases in the United States, what is the optimal role of an expert, whether appointed by parties or the court? It would appear that an expert is best utilized to present reasoned and balanced support for a particular interpretation of the foreign law pertinent to the issue presented and to assist counsel with responding to submission by any experts on the other side. Further, when the trial court intends to conduct its own research, the better practice would be to alert the parties and afford them an opportunity to comment on the judge's preliminary conclusion, again often with experts helping to analyze the court's research. Wright and Miller at § 2444 (discussing whether the judge has a duty to notify if he consults materials other than those presented by the parties). In summary, there is a strong case for concluding that it would be a mistake to take an all or nothing approach to the use of foreign legal experts in providing foreign law in the United States -- and possibly elsewhere.