

## Reexamining the Legal Expert in International Arbitration

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As international arbitrators and international arbitration counsel, we work in a transnational justice system – whether the specific case goes forward in the New York Convention universe or the ICSID Convention universe. One fundamental feature of that system is that arbitral tribunals regularly apply a wide variety of bodies of law to the dispute, including international law. Indeed, frequently we apply different bodies of law to different issues in the same case.

I want to talk today about how the parties present, and how the tribunal determines, the content of the law that governs the dispute or some component of the dispute – specifically, whether the law should be proved by experts or argued by advocates. I don't mean to address principles that determine *which* law should govern a particular issue. I also don't mean to address the *allocation* of responsibility between the tribunal and the parties in raising issues of law. Rather, my focus is on *what form* the parties' presentations on legal issues should take. As I have just suggested, two different approaches are evident, both in national courts and before international tribunals.

The first approach is that the parties' counsel argue the law by relying directly on primary sources of law – such as statutes and regulations and, in legal systems that consider it a primary source, case law – as well as published secondary sources commenting on that law. Under that approach, a legal question will be briefed and argued in essentially the same manner as a question of domestic law would be briefed and argued in a U.S. or English court.

The other approach is for the parties to present their respective positions in the form of the testimony of a legal expert, submitted initially by way of an expert report, and subject to cross-examination at the hearing. Under this approach, the parties present the law in a manner that resembles, at least superficially, the way in which they would present any other expert evidence – for example, evidence of property value through a property valuation expert, or evidence of a principle of applied physics through an engineering expert.

I confess that I have long been a skeptic of the value of trying to prove the content of the applicable law by the testimony of experts. Perhaps it is because, though I really enjoy cross-examination, I find it an awkward and indirect way to debate a legal point. Perhaps it is because I have cross-examined too many legal experts who, to be polite, could not possibly have believed the views that they were espousing. Or perhaps it is because, whether sitting as arbitrator or serving as counsel, I enjoy, more than any other aspect of a hearing, the real back and forth between tribunal and counsel on the truly critical legal points at issue.

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Back in 2004, I served as program chair for ICCA Montreal. The program had two tracks, and one was styled the contemporary practice of international arbitration. One of the panels was a roundtable on legal experts. The panel was chaired by Karl-Heinz Böckstiegel, and it included five other eminent arbitrators and practitioners. I attended the panel, leaned back, and confidently expected – why, I can't say – that the commentators would all agree that the use of legal experts was not a sensible or efficient way to decide legal issues. My expectation was, shall we say, misconceived. One after the other of the panelists – at least as I recall it – sang paeans to the importance of legal experts in assisting the tribunal to understand the applicable law.

I have been waiting ever since for a chance to revisit the issue directly, to try in a considered way to justify my skepticism, which has only deepened over time. And for that reason I am enormously grateful to Neil for giving me the chance to deliver this lecture and, hopefully, vindicate my position. If I succeed, it would be appropriate to have done so in a lecture honoring Neil, who in both his practice and his writing has done so much to improve the actual practice of international arbitration.

This evening I want to suggest that, in the great majority of cases, the method of advocacy by counsel is more effective and more efficient than that of testimony by legal experts. I will proceed in three steps. *First*, I will consider how expert evidence as to both domestic law and foreign law is treated in a sampling of national legal systems, both civil law and common law, as well as the current practice with respect to legal experts in international arbitration. *Second*, I will explain why we can dispense with legal expert testimony in the great majority of cases. In short, non-legal experts often bring an extremely useful, sometimes even indispensable, specialized knowledge to the tribunal that enables them to better determine the facts. By contrast, legal experts can be dispensed with because their expertise – law – is shared with the tribunal and the advocates. *Finally*, I will consider the practical implications of the issue for the practice of international arbitration from the points of view of the advocate and the arbitrator, and against the backdrop of this transnational justice system in which we operate.

## **I. Comparison of legal systems**

Though the context of international arbitration introduces some specific considerations, the question of how litigants should present the law is not unique to international arbitration. So it may help to begin with a comparative look at how different national legal systems address the challenge in their courts.

### **A. Civil-law jurisdictions**

At one extreme, some civil-law jurisdictions regularly receive expert evidence even on questions of domestic law. In Brazil, for example, the court has a duty to decide the law itself independent of the parties' submissions.<sup>1</sup> Yet in Brazilian court proceedings, and especially in Brazilian domestic arbitrations, parties often submit legal opinions written by

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<sup>1</sup> Superior Tribunal de Justiça (STJ) [Superior Court of Justice], REsp [Special Appeal] 1682986/RJ, *Cia Sulamericana de Tabacos vs. Fazenda Nacional*, Rapporteur, Justice Herman Benjamin, Second Chamber, judgment of 19 Sept. 2017, DJe 09/Oct/2017 (Brazil), at 8 (referencing the Latin maxims “iura novit curia” and “da mihi factum dabo tibi ius” to hold that the judge is bound only by the facts pleaded by the parties but is otherwise free to apply to those facts the legal rules the judge deems appropriate).

professors on issues of Brazilian law, including contract law, securities law, and even civil procedure.<sup>2</sup>

A similar approach applies to foreign law – the judge is responsible for interpreting the law independently, except that in the foreign law context, the judge “may” require the party invoking foreign law to prove the text of a legal authority and that it is currently in force.<sup>3</sup> For foreign law, the presentation of expert opinions is common.

Other civil-law systems take a similar view, at least in regard to foreign law. In Germany, for example, foreign law is treated as a question of law. As such, the court is not confined to the law presented by the parties, nor is the presentation of the law restricted to any particular form – courts may rely on primary sources, commentary, or the argument of counsel.<sup>4</sup> In France, foreign law was historically treated more like a question of fact for the parties to prove, but in 2005, the Cour de Cassation recognized that courts could also determine foreign law on their own initiative.<sup>5</sup> Yet in both France and Germany, as in Brazil, parties typically rely on legal experts to present foreign law.

So far as I understand, this practice is not based on concerns about the ability of judges to evaluate and interpret law, particularly when it comes, as in Brazil, to a country’s own law. Rather, it rests on traditional civil-law views about the respect owed to legal scholarship. Before the move toward modern codifications, scholarly views were often regarded as the primary source of law.<sup>6</sup> Historically, in some civil-law systems, litigants or courts asked legal scholars – or a bench of professors at faculties of law – to present opinions to the court, which at times were treated as binding.<sup>7</sup> In effect, the law professors were asked to decide the law for the state-appointed judge.<sup>8</sup> Today, of course, the Codes

<sup>2</sup> See, e.g., Tribunal de Justiça de São Paulo (TJSP) [Sao Paulo Court of Appeal], *Apelação* [Appeal] 0035404-55.2013.8.26.0100, *GP Capital Partners V and Smiles LLC v Rodrigo Martins de Souza & ors*, Rapporteur Judge Pereira Calças, First Business Law Chamber, judgment of 26 August 2015 (referencing three legal opinions rendered by Brazilian professors on disputed questions of Brazilian arbitration law).

<sup>3</sup> Article 14 of Brazilian Law-Decree No. 4657 (1942) provides that “not knowing the foreign law, the judge may require the party invoking it to prove its text and that it is currently in force.”

<sup>4</sup> *Zivilprozessordnung* (ZPO) [Code of Civil Procedure] §293 (“The laws applicable in another state, customary laws, and statutes must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.”).

<sup>5</sup> Compare the *Lautour* case, Cass. Civ., 37.414, 25 May 1948 (holding that a party seeking to assert a judicial claim has the burden of proving the foreign law on which that claim is based), with the *Aubin* (Cass. Civ. 1<sup>re</sup>, 00-15734, 28 June 2005) and *Itraco* (Cass. Com., 02-14686, 28 June 2005) cases (“It falls to the French judge who deems a foreign law to be applicable to establish, either sua sponte or upon the request of the party invoking the foreign law, the content of such a law, with the help of the parties or personally if necessary, and to decide the disputed question in conformity with the foreign law.”).

<sup>6</sup> See, e.g., Stefan Vogenauer, “An Empire of Light? Learning and Lawmaking in the History of German Law,” 64(2) *Cambridge L.J.* 481, 485–91 (2005); see also R.C. van Caenegem, *Judges, Legislators and Professors* (1987) (discussing more broadly the roles played by different actors in shaping the law within different legal traditions).

<sup>7</sup> Vogenauer, *supra*, at 485–86.

and other legislation are the primary source of law in civil-law systems, and the court may consult and interpret that legislation for itself. But the practice of appealing to scholarly authority persists.

## B. England

In England and in many other systems that follow the English legal tradition, the approach is different. The courts will not hear expert evidence on domestic law; they expect domestic law to be presented through argument by counsel. But they treat foreign law as a factual issue that the parties must prove through expert witness testimony.<sup>9</sup> In English courts, foreign law cannot be proved merely by submitting the text of foreign legislation or cases or commentary interpreting it.<sup>10</sup> In the absence of evidence of foreign law, the courts will apply English law.<sup>11</sup>

In part, the English approach may derive from the traditional emphasis of the common law on witness testimony as opposed to documentary evidence. But the requirement of expert testimony often is justified on the basis of concerns about the ability of English judges to understand and interpret foreign law correctly. In the words of the leading English treatise on conflict of laws, foreign legal authorities “can only be brought before the court as part of the evidence of an expert witness, since without [the expert’s] assistance the court cannot evaluate or interpret them.”<sup>12</sup> Unlike in civil law systems, the use of expert testimony is based not on deference to academic authority, but rather on concerns about the accessibility of foreign law to English judges. Nonetheless, in the case of conflicting expert witness testimony, an English court may look at the sources behind the experts’ reports to resolve the conflict.<sup>13</sup>

## C. The United States

### 1. Historical development

The U.S. legal system, which of course grew out of the English one, initially followed a similar approach. Like the English courts, U.S. courts would not hear evidence

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<sup>8</sup> *Id.* at 486 (“Although final judgment was formally rendered in the name of the court that had referred the case, the collective opinion given by the *Spruchkollegium* [a bench of law professors] was usually given in the form of a judgment and was binding on the court, so the professorial bench was de facto acting as a collegiate body of judges.”).

<sup>9</sup> Lord Collins et al., *Dicey, Morris & Collins on the Conflict of Laws*, Rule 25(1) (15th ed. 2017) (“In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means”).

<sup>10</sup> *Id.*, para. 9-013 (citing, e.g., *Bumper Development Corp v Commissioner of Police of the Metropolis*, [1991] 1 W.L.R. 1362 (CA)).

<sup>11</sup> *Id.*, Rule 25(2) (“In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.”); *but see id.* para. 9-027 (noting that courts are more likely to apply English common law than purely domestic statutes as the default law).

<sup>12</sup> *Id.*, para. 9-013.

<sup>13</sup> *Id.*, para. 9-017 (“If the evidence of several expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony.”).

on their own laws, but they required the laws of other jurisdictions to be proved as fact.<sup>14</sup> This even included the laws of other U.S. states, which were traditionally considered “foreign law” outside the boundaries of the state that enacted them.<sup>15</sup> Expert testimony was not always required – for example, copies of statutes certified by officials of the relevant state were admissible in evidence.<sup>16</sup> But out-of-state law was still treated as a fact to be proved.

Sometime around the beginning of the 20th century, however, statutes and case law from every U.S. state became available in law libraries throughout the country.<sup>17</sup> As a result, requiring “proof” of another state’s law, whether through expert witnesses or other means, came to be seen as needlessly inefficient.<sup>18</sup> By the end of the 1930s, nearly every commercially important U.S. state – either by statute or by judicial decision – had adopted the rule that courts must take “judicial notice” of the statutes and judicial decisions of other U.S. states and territories.<sup>19</sup> This meant that advocates could cite and argue another state’s law just like local law. And it meant that the court could invoke an out-of-state legal authority even if it was not raised by the parties, though the court was not required to do so.

Because this approach worked well for the law of other U.S. states, a number of states partially extended it to non-U.S. law, mostly around the middle of the 20th century.<sup>20</sup> Where non-U.S. law was involved, proof through expert testimony was retained as an option and remained common in practice. But the parties were now free to rely directly on non-U.S. legal sources. The decision whether to “take judicial notice” of non-U.S. law, or to require the parties to present proof through experts or other means, became a matter of the court’s discretion.<sup>21</sup>

## 2. The modern approach

The modern approach is reflected in Rule 44.1 of the Federal Rules of Civil Procedure, which was added to the federal rules in 1966. Rule 44.1 governs the procedure in the U.S. federal courts, but similar rules exist in most of the U.S. state-court systems.

Under Rule 44.1, once a party gives notice that it is relying on foreign law, the court “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”<sup>22</sup> The court’s decision is treated as a decision on a question of law, not fact, which means that it is

<sup>14</sup> See, e.g., Otto C. Sommerich & Benjamin Busch, “The Expert Witness and the Proof of Foreign Law,” 38 *Cornell Law Quarterly* 125, 127–130 (1953); Arthur Nussbaum, “The Problem of Proving Foreign Law,” 50 *Yale Law Journal* 1018, 1018–1023 (1941).

<sup>15</sup> See, e.g., William B. Stern, “Foreign Law in the Courts: Judicial Notice and Proof,” 45 *California Law Review* 23, 24 (1957); Nussbaum, *supra*, at 1020.

<sup>16</sup> See, e.g., Sommerich & Busch, *supra*, at 129–130; Stern, *supra*, at 26–27.

<sup>17</sup> See, e.g., Nussbaum, *supra*, at 1020; Stern, *supra*, at 24.

<sup>18</sup> See Nussbaum, *supra*, at 1020.

<sup>19</sup> *Id.* at 1020–1021.

<sup>20</sup> See Stern, *supra*, at 39.

<sup>21</sup> See, e.g., New York Civil Practice Law and Rules, Rule 4511 (formerly Civil Practice Act § 344-a, adopted 1943).

<sup>22</sup> Federal Rules of Civil Procedure, Rule 44.1.

reviewed de novo on appeal.<sup>23</sup> Although the rule allows the court to conduct additional research on its own, in practice U.S. courts will normally look to presentations by the parties.<sup>24</sup> The text of the rule, however, does not say whether it is better for courts to hear expert testimony on foreign law, or simply hear briefing and argument from the parties’ counsel with citations to relevant authority.

The disagreement over which approach is preferable – expert evidence or direct reliance on foreign sources – is well illustrated by the differing views of three highly respected federal judges in a 2010 decision of the United States Court of Appeals for the Seventh Circuit.<sup>25</sup> That case, *Bodum v. La Cafetière*, was a dispute between two competing manufacturers of French-press coffee makers over the interpretation of a noncompetition agreement governed by French law. The underlying French law issue – which involved basic principles of contractual interpretation – was not difficult, and all three judges agreed that the trial judge had reached the correct result. All three also agreed that the trial judge had acted within his authority under Rule 44.1 by hearing testimony from French legal experts. But they differed sharply, and wrote at some length, on whether legal expert testimony was actually useful or appropriate in a case of that kind.

Judge Easterbrook took the view that published translations of the French Civil and Commercial Codes, together with English-language treatises on French law, were the best source for determining French legal principles.<sup>26</sup> Although he allowed that expert testimony might be “essential” if foreign law had not been “translated into English or glossed in treatises or other sources,” he saw no reason to introduce expert testimony when those sources were available.<sup>27</sup> In particular, Judge Easterbrook was concerned that relying on expert testimony might introduce what he called an “adversary’s spin” that would not be present in published treatises.<sup>28</sup> He also expressed concern about unnecessary cost.<sup>29</sup>

Judge Posner joined Judge Easterbrook’s opinion, but also wrote separately. He described relying on expert testimony as a “common and authorized but unsound judicial practice.”<sup>30</sup> He noted that party-appointed experts are “selected on the basis of the convergence of their views with the litigating position of the client.”<sup>31</sup> Judge Posner recognized that the same risk of partisanship also exists with expert testimony on “a scientific or other technical issue.”<sup>32</sup> But he saw far less reason to tolerate this risk when the question is a legal one. As Judge Posner remarked, “judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles,

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<sup>23</sup> See Advisory Committee Note, Federal Rules of Civil Procedure, Rule 44.1 (1966).

<sup>24</sup> See, e.g., Milton Pollack, “Proof of Foreign Law,” 26 *American Journal of Comparative Law* 470, 470–473 (1977).

<sup>25</sup> *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624 (7th Cir. 2010).

<sup>26</sup> *Id.* at 629.

<sup>27</sup> *Id.* at 628–629.

<sup>28</sup> *Id.* at 629 (“Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case.”).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 631.

<sup>31</sup> *Id.* at 633.

<sup>32</sup> *Id.*

statutes, and cases ... to provide neutral illumination of issues of foreign law.”<sup>33</sup> And even if the relevant published materials were in a foreign language, he pointed out, the parties could have them translated into English.<sup>34</sup>

Judge Wood disagreed with her colleagues. She noted that Rule 44.1 does not impose any hierarchy for sources of foreign law, and she expressed concern that U.S. judges might overestimate their own ability to grasp the nuances of foreign law.<sup>35</sup> She noted in particular that U.S. judges might be too quick to assume that foreign law mirrors U.S. law.<sup>36</sup> While Judge Wood did not object “in principle” to reliance on published materials, she took the view that hearing expert testimony might be “most efficient and useful” compared to requiring the judge to “wade through a number of secondary sources.”<sup>37</sup> Even when secondary sources are readily available, in Judge Wood’s words, “there will be many instances in which [expert testimony] is adequate by itself or ... provides a helpful gloss on the literature.”<sup>38</sup> Thus, she concluded, her colleagues’ criticism of the use of foreign law experts was not justified.

#### **D. Practice in international arbitration**

Of course, cases like *Bodum* deal with the problem of how judges in a national legal system, accustomed to applying their own law, should ascertain the contents of foreign law. In international arbitration, however, this distinction does not apply, at least not in the same way. In a commercial case, the issues, including most frequently contract interpretation, will be governed by a certain law. And in most cases the arbitrators will be specifically trained in one or more specific bodies of law – not necessarily the same body as the law governing the contract. But unlike court proceedings, which are tied up with a given national legal system, international arbitration is a transnational process. There is no “local” law. And for that reason, as has been often said, there can be no “foreign” law.

International arbitral tribunals will also differ from national courts in the composition of their members. In a national court proceeding, the dispute will be heard by a judge or judges who are accustomed to applying their own domestic law and may only infrequently encounter issues of foreign law. International arbitrators, by contrast, routinely decide disputes that arise under a variety of different laws – or in the case of investor-state or state-to-state disputes, that arise under international law. International arbitrators regularly hear cases governed by bodies of law other than those in which they are formally qualified, and we expect them to be fully comfortable doing so.

That is part of the essential skill set. We are convened here in Hong Kong. But if I polled this room and asked the number of different laws under which each of us had either put on or heard cases, that number would be many times, I am confident, the number of laws in which we each are qualified.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 634.

<sup>35</sup> *Id.* at 638–639.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 639.

<sup>38</sup> *Id.*

So in the international context, one would think, the traditional concern at least in common-law countries – that judges may need expert testimony to help them understand foreign law or break out of their parochial mindset – should not apply. Modern arbitration laws and institutional rules are agnostic on the question of how arbitrators may determine the content of applicable law, even in England.<sup>39</sup> And what little soft law there is that addresses the question – for example, the ILA International Arbitration Committee’s Report on “Ascertaining the Contents of the Applicable Law” and the ALI/UNIDROIT Principles of Transnational Civil Procedure – is agnostic too.<sup>40</sup>

So the question is posed: in a transnational justice system, in which there is neither local nor foreign law, and in which we have a right to expect that the decision-makers be skilled in dealing with legal authority from disparate legal systems, is there any justification for presenting the parties’ respective positions on legal issues by way of “proof” rather than advocacy?

## II. Why Legal Experts?

### A. Experts and their specialized knowledge

To answer that question, we should begin by looking at the purpose of expert witness testimony generally, and then examine how legal experts fit that purpose.

Why do courts and arbitral tribunals hear expert witness testimony at all? A good explanation, I think, can be found within the legal system of the United States – specifically, in Rule 702(a) of the Federal Rules of Evidence. That rule says:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

That statement captures nicely why both courts and arbitrators find it useful to hear from technical or other experts. For example, like most arbitrators and counsel, I do not have an engineering background, and I lack the knowledge needed to solve engineering problems. If the parties are presenting arguments to me about whether, for example, a particular building design meets certain technical standards, or whether a design defect caused an aerospace product to perform poorly, or whether a software package met the agreed specifications, it might well help to hear from engineering experts who can explain the meaning of those standards and interpret the data presented by the parties.

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<sup>39</sup> Audley Shepard, “Applicable Substantive Law,” in *Arbitration in England, with Chapters on Scotland and Ireland* (Julian D. Lew et al. eds.), ch. 12, ¶¶ 12-57–12-58 (Kluwer 2013).

<sup>40</sup> See, e.g., Filip De Ly, “International Law Association International Commercial Arbitration Committee’s Report and Recommendations on ‘Ascertaining the Contents of the Applicable Law in International Arbitration,’” 26(2) *Arb. Int’l* 193, 210 (2010) (noting that “save in the exceptional cases where the parties have dealt with the matter, the arbitrators will need to decide how to approach the contents of law question, without any general rules to guide them. The freedom of the arbitrators in this respect will be largely unfettered.”).

In other words, the expert has *specialized knowledge* (engineering knowledge) that will help the *trier of fact* (the arbitral tribunal) evaluate the *evidence* (the relevant technical data) in order to *determine a fact in issue* (whether the product met the required standard or caused a specific failure). The key here is that the expert has specialized knowledge that neither the parties' counsel nor the members of the tribunal have.

And that is the reason why, conversely, international arbitrators do not need to rely, in the vast majority of cases, on legal experts testifying as witnesses: the arbitrators and counsel share the expert's "specialized knowledge" – *the knowledge of law and, more precisely and hence critically, the capacity to read, weigh, and evaluate legal texts, whether statutes, regulations, cases, treatises, or other sources*. In short, both the arbitrators and counsel, like the legal expert, are trained to *think like lawyers*.

Let me start with what I take to be the clearest case: cases governed by international law, including treaty interpretation, such as cases arising under bilateral or multilateral investment treaties. The notion that the arbitrators sitting in such a case need to be taught international law by legal experts on the Vienna Convention on the Law of Treaties, or the Energy Charter Treaty, or the ICSID Convention, is just strange.

To state the obvious, I am not saying that international law experts have no place in those cases. To the contrary, they have a central place: the arbitrators should be well trained international lawyers, and so should counsel. Neither arbitrators nor counsel need be expert, of course, in every aspect of international law. But they should have the intellectual tools to be able to evaluate international law arguments on any aspect of the field, as well as the sources on which those arguments rely.

Equally clear is the case of a dispute governed by a legal system in which the arbitrators, or a majority of them, are qualified. A tribunal consisting of Chinese lawyers surely does not need to hear an expert on Chinese law, or of Hong Kong lawyers an expert on Hong Kong law, or of New York lawyers an expert on New York law.

Now, it might be said, the situation is different when arbitrators are presented with a legal expert opinion on a body of law in which they are not trained. Consider a contract case, whether a purely commercial case or one arising from an investment agreement, that is governed by a national law in which the arbitrators, or at least a majority of them, are not trained. In these cases, it might be said, the legal expert brings necessary "specialized knowledge": that is, knowledge of the specific body of law in which the arbitrators are not trained.

I say, not so. To the contrary, the relevant "specialized knowledge" is not that of a specific body of law, but that of legal reasoning, or – if you want – of law itself.

Of course, I do not claim that a lawyer trained in one legal system as such knows all the laws of all legal systems. That is not the question. The question is whether a person trained in the law can competently decide between two competing legal arguments, laid out by competent counsel, when he or she is not trained in the specific body of law within which the legal argument unfolds, without the assistance of a legal expert.

The answer should be "yes." No matter what body of law we operate in, we lawyers perform the same tasks. We listen and read closely, carefully interpreting

language and text. We care about words, about their shades of meaning. We also look at the context, object, and purpose of utterances to better interpret them. We apply rules, and we weigh principles, sometimes contradictory ones. We analogize. We identify and consider the policies that underlie the rules and principles that we apply.

I could go on, but you know what I would say. This is the stuff of legal reasoning. I am not a South African lawyer, or a Vietnamese lawyer, or a Russian lawyer. But I know what statutes are, and what treatises do, and what cases mean in systems where they count. And, most fundamentally, I know what the process of legal reasoning looks like.

Here's the crux: Whether it is a legal expert or an advocate who is presenting his or her view of the applicable legal principles, I, acting as arbitrator – as law decider – need to adopt that iteration of the law that I find most compelling, most persuasive, in light of the available legal authorities that stand independent of the case being presented. It should not matter very much that the distinguished professor or practitioner presenting the expert legal opinion sincerely believes the case he or she is presenting, or that the advocate is fulfilling his or her responsibility, consistent with a duty of candor, to put the argument in the strongest form. Indeed, even if we assume the most independent and conscientious legal expert alive, he or she will still have needed to come to the conclusions presented by the very process of legal reasoning with which we are all familiar. I, acting as arbitrator, cannot adopt those conclusions as a matter of the expert's authority. I must still judge the quality of the conclusion against the process by which it was reached and the independent legal materials on which it rests.

So let us consider the competing methods of determining the content of the applicable law – that is, proof or argument – against that objective.

*First*, arguing law rather than trying to prove it is more consistent with the adversarial process by which contemporary arbitration is conducted. That point follows directly from the one I just made – that regardless of whether the legal expert sincerely believes the view he or she is espousing or is simply opining in accord with the position of the retaining party, the expert must deliver the goods in the sense of providing a well-reasoned, well-supported conclusion. The process of reaching and explaining a legal conclusion is, by its nature, a dialectical process of argument. If an expert is a lawyer – whether a law professor or practitioner – and has been retained to testify on legal topics, the expert will proceed in the same way the advocate would.

*Second*, it is more helpful to the tribunal if the person presenting the law is free also to argue without restraint as to the underlying facts and the application of the law to the facts. But that is something we generally do not want experts to do. Working either as counsel or arbitrator, we try hard to ensure that the expert expresses opinions only within his or her expertise – for example, if A, B, and C, then X; if A, B, C, and D, then Y; and if A and B, but not C, then Z.

It is not *just* that so much in the law turns on the application of the law to the facts. That can be said also of many other disciplines. For example, to return to the expertise I've been using as a comparator, an engineering principle surely can gain life by its application to a given set of facts or data. But we try hard to preserve the distinction between the expert opinion and the underlying facts in order to preserve the clarity of the expertise being brought to bear and the boundary of that expertise. We need not do that

with legal principles, because we, as lawyers, ourselves are experts in arguing law and facts – and we can identify the boundary as we hear the presentation.

*Third*, presenting the competing legal positions by advocacy rather than testimony is more efficient. We all know that the process of identifying an appropriate expert, of any kind, and then working with the expert so that he or she addresses the relevant issues can be time consuming and expensive. It is simply easier – and, to my mind, more natural – to work with a lawyer preparing to argue the relevant legal issues as a member of the counsel team than to weave an independent expert’s testimony into the overall case.

*Fourth*, we might ask ourselves, what is the most effective way to *test* a legal opinion? When a party’s legal position is presented through an expert, the expert may be subjected to cross-examination. Let’s be concrete, and consider how we cross-examine legal experts. One strategy is to ask the legal expert to assume facts other than the ones he or she has been instructed to assume, and thus force the expert to alter his or her conclusions or lose credibility. Or the cross-examiner could point the expert to language in the authorities cited that the expert has failed to quote and that are in tension with other passages that he or she has quoted. Or the cross-examiner could point the expert to authorities that the expert did not cite at all. The goal would be to show that the expert’s conclusions are unreliable because based on a partial or distorted account of the relevant authorities.

But what I have just described – applying legal conclusions to competing versions of the facts, distinguishing authorities or contesting their interpretation, adducing other ones in support of one’s position – is precisely the process of legal argument. There is no reason to conduct that process indirectly through cross-examination when it can be done directly through argument. It is true, I will confess, that our fun quotient as counsel would decrease if we no longer had the opportunity to cross-examine legal experts, but the efficiency and effectiveness of the exchange would be better served.

*Finally*, by leaving legal issues to argument, we would moot the structural tensions that many see in the institution of the independent, but party-appointed, expert, which arise mainly from the manner in which expert witnesses are selected. In addressing these tensions, let me be clear: I do not subscribe to a cynical view of party-appointed experts. As counsel, I would simply not put on an expert witness who would express an opinion that he or she did not genuinely hold. Not only is that inconsistent with the standards by which we all want to practice, but also, as we just discussed, there is this process we call cross-examination, and it can go a long way to exposing poorly justified and hence unhelpful expert opinions, regardless of the subject matter. Still, we know that there is a perception, and in some cases the reality, that at least some independent experts operate as “hired guns.”

I do not intend to extend my remarks to the debate about party-appointed experts more generally by proposing how the structural tensions to which they are subject might be mitigated or eliminated. Others, including Neil in a recent piece, have made concrete proposals to that end.<sup>41</sup> I will also not try to explain why, in my view, tribunal experts are

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<sup>41</sup> Neil Kaplan, “The Use of Experts in International Arbitration,” in *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* 187 (Shaughnessy & Tung eds., 2017); see also Doug Jones, “Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last,” 24(1) *Arb. Int’l* 137 (2008).

rarely if ever an adequate substitute. For present purposes, I make the considerably more modest point that, to the extent that these structural tensions limit the utility of party-appointed experts, we can bypass those tensions in the case of legal expertise by receiving legal submissions in the form of advocacy.

At this juncture, please permit me to add three points of clarification. *First*, you know the adage, never say never. There are few subjects on which we can be absolute, and I would not go so far as to suggest that there are no circumstances in which expert testimony about the content of law might be useful. For example, if the outcome of a legal issue depends on customary practice that is not adequately reflected in written sources of law or described in published commentary, testimony may be necessary to establish the content of the relevant practice. But I submit that these cases would be rare, and that in the vast majority of cases in which legal experts testify, the law should be argued instead.

*Second*, expert testimony of lawyers also may be useful to resolve questions of fact – by which I mean the actual facts of the case, not the contents of a particular law. For example, in the context of an agreement to indemnify for legal costs, an issue could arise as to whether a lawyer’s fees were reasonable in the relevant market for legal services. In cases of that kind, testimony of an expert on legal practice in the relevant jurisdiction may well be essential – but only to assist the arbitrators in determining questions of genuine fact, not to opine on the content of the law.

*Finally*, none of the points I’ve made depends in any way on whether the legal principle in question is treated as “law” or as “fact” within the context of the relevant proceeding. It is often said, dating back to a pronouncement of the Permanent Court of International Justice in the *Upper Silesia* case, that “[f]rom the standpoint of international law . . . municipal laws are merely facts.”<sup>42</sup>

We should avoid confusion from this statement. When international law governs, national law may qualify as merely a factual predicate to which an international rule applies. Thus, the mere fact of enacting a certain statute or failing to repeal it at the national level may constitute an international wrong: in that sense, domestic law is merely fact. But in investor-state cases today, the national law of the host state may supply the governing law in whole or in part – subject always to the bedrock principle that where international law supplies the rule of decision, a state cannot resort to national law to trump it. But as relevant here, the classification of national laws as “fact” or “law” has no bearing on the most effective and efficient method for determining the content of those laws. The method should be the same regardless of whether national laws supply the rule of decision or are relevant for some other reason.

### III. Conclusion

In reading in the international arbitration literature in preparation for these remarks, I have come to suspect that the consensus, if such it was, that I thought I had discerned back at that panel at ICCA Montreal has begun to break down.<sup>43</sup> The most compelling

<sup>42</sup> *Certain German Interests in Polish Upper Silesia*, PCIJ, Series A, No. 7, p. 19 (1926).

<sup>43</sup> See, e.g., Judith Gill, “The Development of Legal Argument in Arbitration: Law as an Afterthought – Is It Time to Recalibrate Our Approach?,” in *Practising Virtue – Inside International Arbitration* 398, 403 (David Caron et al. eds., 2015); Nigel Blackaby & Alex Wilbraham, “Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration,” 31(3) *ICSID Review* 655, 660–61 (2016).

evidence of that change comes, paradoxically, not from an arbitral tribunal but from a court, albeit one with an unconventional legal provenance and architecture.

I refer, as many of you will recognize, to the judgment rendered by Michael Hwang in his capacity as Chief Justice of the Court of Appeal of the Dubai International Financial Centre Courts in *Fidel v. Felecia & Faraz*.<sup>44</sup> Among other issues, the Court of Appeal had to decide how courts should determine the content of non-DIFC UAE law before the DIFC courts. The decision is instructive for at least three reasons. *First*, of course, Michael is an eminent member of the international arbitration community. *Second*, the DIFC courts are a young institution, and Article 50 of the DIFC Court Law empowered the court, on this matter of procedure, to apply the rules it “consider[ed] appropriate to be applied in the circumstances.”<sup>45</sup> Hence, the court was writing on a near-clean slate, unburdened by the historical traditions of either the civil law or the common law. *Finally*, the DIFC courts, as the decision in *Fidel* emphasizes, have much in common with international arbitration tribunals, including by virtue of the diversity of the bench.

Ultimately, the court adopted what it termed “the International Approach.”<sup>46</sup> Though it did not formally exclude the possibility of using expert opinions, it held that the primary form of arguing non-DIFC UAE law before the DIFC courts, and even further *all* questions of non-DIFC law, should be through legal submissions. The court explained that, while international arbitration has historically followed the English law approach – of requiring legal experts to give testimony subject to cross-examination – “the tide is now turning.”<sup>47</sup> The court called the method of receiving legal testimony subject to cross-examination both “doctrinally unnecessary” and “forensically inefficient.”<sup>48</sup> Thus, the court directed that the presumptive rule should be that legal experts are to write briefs, make submissions applying the legal principles to the facts as alleged by the parties, and argue for a particular decision to be delivered by the court.<sup>49</sup>

I would like to close with the proposal that the international arbitration community adopt a very strong presumption that, in arbitral proceedings, the law should be argued by counsel rather than testified to by legal experts. After listening to me for the last hour, it will come as no surprise that when serving as counsel, I almost always urge my clients and adversaries to proceed in that manner, and when serving as arbitrator, I always raise with the parties whether that might indeed be the most effective and efficient way to go.

In addition to the gains in effectiveness and efficiency I have already identified, that practice would have three other consequences to be welcomed. *First*, it would strengthen the premium we already put on cross-border collaboration between lawyers from different jurisdictions. Often when we compose a team for a particular case, we will include lawyers with different skill sets, including legal backgrounds, and often from different firms or jurisdictions. The chance to collaborate with smart and principled

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<sup>44</sup> *Fidel v. Felecia & Faraz* [2015] DIFC CA 002, Claim No. CA 002/2015 (Nov. 23, 2015).

<sup>45</sup> Under Article 50 of the DIFC Court Law, the rules of evidence to be applied were “the rules that (a) are prescribed in DIFC law; or (b) are applied in the courts of England and Wales; or (c) the DIFC Court considers appropriate to be applied in the circumstances.”

<sup>46</sup> *Fidel*, para. 67.

<sup>47</sup> *Id.*, para. 72.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, para 73.

lawyers from around the world is one of the great joys of the practice of international arbitration. But that kind of collaboration also inures to the effectiveness of the presentation. It is more effective, and hence more conducive to just outcomes, to include the law-presentation function as an integral part of the counsel team, either by designating a person qualified in the governing law as the advocate on those issues or by having that person centrally involved in the development of the position.

*Second*, it would legitimate the demand that international arbitrators develop as an essential part of their skill set the ability to work effectively and open-mindedly in legal systems in which they are not trained or formally qualified. Parties, of course, have substantial input into the constitution of arbitral tribunals, and they will be able to demand that skill where it is important. We should see it as an essential component of the qualifications we expect to see in first-rank arbitrators.

And *finally*, it should increase the international community's confidence in international arbitration as a truly transnational justice system by reinforcing the capacity of international arbitration tribunals to deal organically with the multitude of national laws, as well as international and transnational law, that play a role in the system, making an important contribution to productive commercial and investment activity by providing fair, independent, and efficient dispute resolution. In that system, we should resolve again that there be no such thing as foreign law.

I have very much appreciated your patience.