

The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions

by GABRIELLE KAUFMANN-KOHLER*

I. PRELIMINARY COMMENTS

REFLECTING BACK on the cases in which I have been involved as an arbitrator, and certainly forgetting some of them, I realized that I have resolved disputes under German, French, English, Polish, Hungarian, Portuguese, Greek, Turkish, Lebanese, Egyptian, Tunisian, Moroccan, Sudanese, Liberian, Korean, Thai, Argentinean, Colombian, Venezuelan, Illinois, New York ... and Swiss law. Do I know these laws? Except for New York law, which I learned many years ago and would not pretend to know now, and Swiss law, which I practise, although not that often as you see, the answer is clearly no. So how did I apply a law unknown to me? By ignoring it? By focusing on the facts and the equities? How did I become educated in the law? How did counsel teach me?

These are the questions that I would like to address with you now. I would like to do it in four steps:

- first, I will define the topic and put it into the proper perspective;
- secondly, I will draw a parallel with the position before national courts, because arbitration practitioners often approach this issue by reference to the practice in their courts;
- thirdly, I will review the rules and the practice in international arbitration; and
- fourthly and lastly, I will consider case management (*i.e.* the arbitrator's perspective) and advocacy (*i.e.* counsel's perspective).

* Professor, University of Geneva; Partner, Schellenberg Wittmer, Geneva; and President, Swiss Arbitration Association. Luncheon address, Fifteenth Annual International Commercial Arbitration Workshop: Arbitral Advocacy, held at Dallas, Texas on 17 June 2004, presented by the Institute for Transnational Arbitration of the Center for American and International Law.

II. DEFINING THE TOPIC

The topic is the status of the substantive law governing the dispute before the arbitrators.¹ Is it a fact to be proven by the parties or is it law to be investigated by the arbitrators? The topic is not about the law that governs the arbitration procedure, nor about the law that governs the arbitration agreement, nor is it about which substantive law applies. We assume that this choice has been made by the parties or the arbitrators. With this choice having been made, the focus is on how to identify and establish the contents of the chosen law.

I remember a deliberation many years ago. My co-arbitrator suggested dismissing a claim because, he said, ‘they have not proven the law’. I was young and inexperienced, and surprised: ‘But they do not have to prove the law!’, I replied. And that is when I realized that we were working on very different assumptions.

‘Working on different assumptions’. Let us take a step back for a moment. Over the last few decades, we have witnessed a powerful wave of harmonization of arbitration laws in the world, the ‘globalization of arbitration’, if you prefer.² This movement started with the New York Convention, continued with the UNCITRAL Arbitration Rules, the UNCITRAL Model Law, institutional rules, and many national statutes, with one notable exception, which is the US Federal Arbitration Act. Who knows – maybe one day it will follow suit. Within this harmonization movement, one principle dominates: party autonomy. Autonomy allows the parties to shape the proceedings before the arbitrator according to their needs. If they do not use their freedom, the arbitrator will substitute for them and set the rules.³ Party autonomy and the default powers of the arbitrators have proved to be effective tools in creating a standard arbitral procedure – a transnational or global arbitral procedure.⁴ The

¹ On this topic, *see in particular* Julian D. M. Lew, ‘Proof of Applicable Law’ in Klaus Peter Berger, Werner F. Ebke, Siegfried Elsing, Bernhard Großfeld and Gunther Kühne (eds), *International Commercial Arbitration, Festschrift für Otto Sandrock zum 70 Geburtstag* (Heidelberg, 2000), pp. 581–601; Gabrielle Kaufmann-Kohler, ‘*Iura novit arbiter*. Est-ce bien raisonnable?’ in Anne Héritier Lachat and Laurent Hirsch (eds), *De Lege Ferenda: Réflexions sur le droit désirable en l’honneur du Professeur Alain Hirsch* (Editions Slatkine, Geneva, 2004), pp. 71–78; Gabrielle Kaufmann-Kohler, ‘Globalization of Arbitral Procedure’ in (2003) 36 *Vanderbilt Journal of Transnational Law* 1313; Julian D. M. Lew, Loukas A. Stelis and Stefan M. Kroell, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague 2003), pp. 440–445.

² Those who have read Amy Chua’s *World on Fire* (Arrow Books, 2004) know about the dangers of a certain type of globalization, but that is a different topic.

³ *See*, instead of many other provisions, art. 19 of the UNCITRAL Model Law on International Commercial Arbitration.

⁴ On this topic, *see in particular* Axel Baum, ‘Reconciling Anglo-Saxon and Civil Law Procedure: The Path to a Procedural Lex Arbitrationis’ in *Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* (Cologne/Berlin/Bonn/Munich, 2001), pp. 21–30; Christian Boris, ‘The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process’ in Stefan N. Frommel and Barry A.K. Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration* (The Hague, 1999), pp. 1–18; Peter S. Caldwell, ‘Arbitration Procedures: Harmonization of Basic Notions: Differing Approaches’ in *Globalization and Harmonization of the Basic Notions in International Arbitration* (IFCAI Conference, Hong Kong International Arbitration Centre, 1996), pp. 101–103; Siegfried H. Elsing and John M. Townsend, ‘Bridging the Common Law: Civil Law Divide in Arbitration’ in (2002) 18(1) *Arbitration International* 59; Andreas Lowenfeld, ‘International Arbitration as an Omelette: What Goes into the Mix’ in Frommel and Rider, *supra*, pp. 19–30; Jan Paulsson, ‘Arbitration Procedures: Harmonization of Basic Notions: Differing Approaches’ in *Globalization and Harmonization of the Basic Notions in International Arbitration, supra*, pp. 76–87; Kaufmann-Kohler, *supra* n. 1.

remarkable achievement of such a transnational procedure is that it merges divergent civil procedure traditions. This is no surprise. International arbitration is a place where actors from different backgrounds, arbitrators and counsel, meet, work, and must reach a result together, *i.e.* they must resolve the dispute. As a consequence, they have no choice but to agree on common methods to achieve this result. Examples of such mergers were discussed this morning: limited discovery, witness statements in lieu of direct examination, and there are others.

Within this transnational procedure, there are very few areas where no consensus is established nowadays. The status of substantive law is precisely one of these areas.⁵ Although one may observe a transnational practice gradually emerging, it has not yet been clearly articulated.

III. PRACTICE IN NATIONAL COURTS

Many arbitration practitioners approach the status of the law governing the merits by reference to the rules applicable in their home courts. With due respect, such an approach makes little sense. The situation in national courts and that in international arbitration are very different. National courts have a *lex fori* and any other law is foreign. Arbitral tribunals have no *lex fori* and, hence, the very concept of foreign law is misplaced.

Whatever the merits of equating national courts and international arbitration, since the assimilation is often made, we cannot dispense with looking at the application of foreign law in national courts. It varies significantly. Simply put, there are two main theories. Some jurisdictions regard foreign law as a fact which must be proven by the parties. If it is not proven, then the *lex fori* applies as a substitute. The best example of this approach is English law, where the contents of foreign law are generally established by expert witnesses and the court chooses which expert evidence it prefers.⁶ Unlike many civil law jurisdictions, French law shares this approach.⁷

⁵ Other differences relate, for instance, to the role of the arbitrator in bringing about a settlement (*see* on this topic Klaus Peter Berger, *International Economic Arbitration* (Deventer, Boston, 1993), pp. 582–588) or the question whether the proceedings are adversarial rather than inquisitorial (*see* on this topic Marcus S. Jacob, 'The Adversarial v. Inquisitorial Principles of Dispute Resolution Within the Context of International Commercial Arbitration' in (2001) 16(12) *Mealey's International Arbitration Report* 32).

⁶ This may be viewed as an oversimplification. Indeed, in English courts, foreign law is a fact of a very special nature; *see* Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, Oxford, 1998).

⁷ After various changes in French case law (*see e.g.* *Bisbal*, Cour de cassation, 12 May 1959, *Revue critique de droit international privé* (1960), 62–66; *Compagnie algérienne de Crédit et de Banque v. Chemouny*, Cour de cassation, 2 March 1960, *Revue critique de droit international privé* (1960), 97; *A v. T*, Cour de cassation, 25 November 1986, *Revue critique de droit international privé* (1987), 383; *Reyes Perez v. Barcelo Mercader*, Cour de cassation, 25 May 1987, *Journal du droit international* (1987), 927; *Rebouh et Schule*, Paris Cour de cassation, 11 and 18 October 1988, *Journal du droit international* (1989), 349), this principle was finally established in the *Coveco* case (Cour de cassation, 4 December 1990, *Revue critique de droit international privé* (1991), 558, commentary by Niboyet-Hoegy).

By contrast, Swiss or German law treats foreign law as law; the court can or must research foreign law *ex officio*.⁸

In between these two extremes, one finds US law, specifically Rule 44.1 of the Federal Rules of Civil Procedure (FRCP). Originally, the United States followed the English approach,⁹ which I understand is still close to the hearts of many US judges and litigators. As a result, Rule 44.1 provides a balanced solution:

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

In other words, foreign law is law and the court has broad authority to conduct its own research, but no duty to do so. Admittedly, different circuits apply this provision differently¹⁰ and failure to prove foreign law may result in the application of the forum's law by default.¹¹ But this is not my concern here. My point is that the contents of Rule 44.1 can provide helpful guidance for arbitration practice.¹²

IV. ARBITRATION LAW AND PRACTICE

This brings us to the issue of arbitration law and practice. Guidance is practically non-existent in national arbitration laws. There are neither statutory rules nor

⁸ For Swiss law, see art. 16 of the Swiss Private International Law Act 1987. For German law, see Jan Kropholler, *Internationales Privatrecht* (5th edn, Tübingen, 2004), pp. 625–630. For a comparison of the major European systems on this topic, see Trevor C. Hartley, 'Pleading and Proof of Foreign Law: The Major European Systems Compared' in (1996) 45(2) *International and Comparative Law Quarterly* 271.

⁹ Before Rule 44.1 was enacted, foreign law was considered by US federal courts as a matter of fact and review of the determination of foreign law by the appellate courts was subject to the 'clearly erroneous' standard (see e.g. *Reissner v. Rogers*, 276 F.2d 506 (D.C. Cir.), cert. denied, 364 U.S. 816 (1960)). On foreign law in US courts in general, see Louise Ellen Teitz, *Transnational Litigation* (Michie Law Publishers, Charlottesville, 1996), pp. 205–232 and supplement 1999, pp. 39–40.

¹⁰ For an analysis of Rule 44.1 Federal Rules of Civil Procedure and its application by US courts, see Louise E. Teitz, 'From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in U.S. Courts' in (2003) 34(1) *Journal of Maritime Law and Commerce* 97.

¹¹ Review on appeal, however, remains possible, as Rule 44.1 subjects foreign law issues to full review by appellate courts: *United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983). On the issue of appellate review under Rule 44.1, see also Teitz, *supra* n. 10 at pp. 115–118.

¹² See also Rule 4511 N.Y.Civ.Prac.L. and Rules on judicial notice of law. According to Rule 4511(b), 'every court may take judicial notice without request of ... the laws of foreign countries or their political subdivisions'. Further, under Rule 4511(c), 'whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his findings or charged to the jury. Such findings or charge shall be *subject to review on appeal as a finding or charge on a matter of law*'. Finally, Rule 4511(d) provides that, 'in considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research. Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law and the unwritten or common law of a jurisdiction may be proved by witness or printed reports of cases of the courts of the jurisdiction' (emphasis added).

case law. Indeed, matters involving the application of substantive law by the arbitrators largely escape any control by the courts, be it at the annulment or the enforcement stage,¹³ except perhaps under the US standard of manifest disregard of the law, which, as we all know, is very rarely applied.

There is, however, one interesting rule in the English Arbitration Act 1996, which signals a departure from the strict view of foreign law as a fact. Section 34 of this Act provides as follows:

- 34(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.
 (2) Procedural and evidential matters include ...
 (g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

So much for arbitration laws. And what about arbitration practice? It may be that others have clearer views. For my part, the picture is blurred. I do not identify a uniform, homogeneous practice. Sometimes parties do not address the law at all, because the case is about facts and possibly contract interpretation. Sometimes they argue the law and simply file supporting legal authorities. Sometimes they add legal opinions and sometimes they also offer oral expert testimony. Do they believe that the arbitrator is bound by that evidence? Is it evidence at all? And does the arbitrator feel bound?

I remember an arbitration in which Algerian substantive law governed. The dispute turned on the interpretation and adaptation of the price indexation clause in a long-term gas supply contract. The parties had filed some legal authorities, statutory provisions and commentaries about contract interpretation. That was all, and it was sufficient because the resolution hinged on facts and contract interpretation, until we reached the claim for late interest, specifically compound interest. Could it be allowed under Algerian law? Would it be regarded as a violation of public policy at the time of enforcement, which may have to be sought in Algeria? The tribunal had no input from the parties. Following my civil law instincts, I started researching Algerian contract law and then encountered two difficulties. First, I did not really know whether I was supposed or expected to do so (in any event, I would have asked the parties' comments on the results of my research). Secondly and foremost, the relevant materials were in Arabic, to which I had no access without hiring a translator, which I would not have done

¹³ With respect to annulment, in lieu of many others, see art. 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration under which there is no scope for review of the merits of the award, except within the narrow bounds of public policy. In connection with enforcement, see with the same approach in Art. V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is confirmed by case law. See e.g. *Norsolor S.A. v. Pabalk Ticaret Ltd.*, Austrian Supreme Court, 18 November 1982, (1984) IX *Yearbook Commercial Arbitration* 159; *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd.*, English Court of Appeal, 24 March 1987, (1988) XIII *Yearbook Commercial Arbitration* 522; *Société Compañía Valenciana de Cementos Portland v. Société Primary Coal Inc.*, French Cour de cassation, 22 October 1991, *Revue de l'arbitrage* 3 (1992), 457.

without consulting the parties. To make a long story short, I gave up and asked the parties for brief legal submissions limited to compound interest under Algerian law.

I mention this story to show that, unless the substantive law is that of a trustworthy arbitrator, the arbitral Tribunal may have no reliable access to the necessary legal materials. Admittedly, the arbitral Tribunal could appoint a local lawyer as an expert. This would, however, most often be excessively cumbersome.

V. CASE MANAGEMENT AND ADVOCACY

At present, there exists no well-settled arbitration practice. If it were to come into existence, what form would such practice take? From an arbitrator's perspective, I am inclined to take inspiration from Rule 44.1 FRCP.¹⁴ Similarly, I am struck by the 1929 opinion of the Permanent Court of International Justice, the predecessor of the ICJ, in the *Brazilian Federal Loans* case, in which I read:

although the Court does not consider itself bound to know the local law of the states appearing before it, at the same time it does not consider such law simply a question of fact to be proved by evidence produced by the parties. This is important for it leaves the Court free, perhaps even obligated, to resolve through its own researches any uncertainty concerning such a law, if the parties fail to produce adequate proof.¹⁵

On this basis, whenever the parties may have different understandings about the need to prove the law, it makes sense to address the issue at the initial procedural hearing. Indeed, efficient case management in a transcultural environment requires transparency and predictability. If counsel agrees, one may then provide a rule along the following lines, subject of course to any adjustments required to take into account the needs of the case and the culture of the parties or of counsel:

The Parties shall establish the contents of the law applicable to the merits. The Arbitral Tribunal shall have the power, but not the obligation, to make its own inquiries to establish such contents. If the contents of the applicable law are not established, the Arbitral Tribunal is empowered to apply any rules of law which it deems appropriate.

I believe that this is a fair restatement of the rule that is progressively emerging, or is already in use, but simply without being sufficiently articulated up to the present.

What about the advocate's perspective? What should his or her strategy be? How does he/she best educate the arbitrator? The answer is typically a lawyer's answer: it all depends. On what does it depend?

Before going into this issue, a threshold question needs to be addressed: should a party appoint an arbitrator who knows the applicable law? Not necessarily.

¹⁴ The same suggestion is already found in Lew, *supra* n. 1 at p. 599.

¹⁵ (1929) PICJ, SER. A no. 21; also quoted in Lew, *supra* n. 1 at p. 600.

Other factors may prevail: professionalism, case management skills, experience, availability, knowledge of the trade or the industry. Knowledge of the applicable law may, however, play a more prominent role when the outcome turns on a very technical legal issue.

After the appointment, on what considerations does the advocate's strategy depend? Three factors must be taken into account:

- Does the arbitration involve a lot of complex legal issues?
- Does a member of the tribunal have knowledge of the governing law? If so, who? The Chair? One of the co-arbitrators? The one you have appointed or the other one? If it is the other one, can he or she be expected to give competent and reliable input on the applicable law to the Chair?
- Do the arbitrators come from legal cultures where the law must be proven, or will they consider that they have control over the law (*iura novit arbiter*), or will they be used to a mixed approach like the one adopted in the procedural rule set forth earlier?

Counsel's choice will then depend on the combination of these factors. My purpose is not to give a cookbook recipe; it would be useless, because it would necessarily be oversimplistic. Let me just highlight a few thoughts:

- First, if there are a number of complex legal issues and the Chair comes from a legal culture where the law must be proven, it is advisable to file an opinion by a legal expert and, depending on the case, offer his or her oral testimony as well.
- Further, if no one on the Tribunal, or possibly only the co-arbitrators, but not the Chair, have expertise in the applicable law, it will often be advisable to tender legal evidence.
- But one should not file a legal opinion in an arbitration where the Chair comes from a country in which he or she expects to have control over the law and is an authority in the field. For instance, do not submit an opinion to a Swiss contract law professor in which one of his colleagues purports to teach him about how to construe a contract. He may resent being given lessons and be negatively influenced, or simply ignore the opinion. If proof of the law is sometimes insufficient, it can also be overdone. As always, the best rule is to use reasonable judgement.
- By contrast, when the case raises a very technical issue of law which is not settled, it may make sense to produce legal evidence even if the arbitrators know the legal system at issue, provided it is given by someone whose authority they are likely to recognize.
- Moreover, whether you offer legal evidence or not, you should make sure that the arbitrators have easy access to the necessary legal materials, court decisions, excerpts from treatises, cases, together with translations – good translations; legal translation is an art in of itself, which does require attention because it can make a significant difference.

- Finally, whenever you have doubts on the expectations of the arbitrator about proof of the substantive law, it is best to raise them at the initial procedural hearing.

These few thoughts are tentative and personal. Nonetheless, I hope that they may contribute to better case management and advocacy, and thereby to increased efficiency of international arbitration.