A Delicate Dance

How to Win Cases and Influence Courts Applying Foreign Law

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A little over a decade ago, the Republic of Bolivia sued Philip Morris in Brazoria County, Texas, state court for health care costs incurred in treating Bolivian citizens for tobacco-related illnesses. The case was quickly removed to Texas federal court and later transferred to Washington, D.C.

In transferring the case, the district court queried why Bolivia

> elected to file suit in the veritable hinterlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel. Though only here by removal, this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparalleled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia!

The court expressed its virtual certainty (tongue pressed firmly in cheek)

> that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks. . . . [I]t is readily apparent, even from an outdated globe such as that possessed by this Court, that Bolivia, a hemisphere away, ain't in south-central Texas, and that, at the very least, the District of Columbia is a more appropriate venue (though Bolivia isn't located there either).

The Texas court is not alone in preferring to outsource questions of foreign law. As Justice Holmes observed nearly a century ago, foreign legal systems can appear to outsiders "like a wall of stone." In an increasingly globalized society, courts and litigants alike must climb that stone wall. Doing so is no mean feat. As Judge Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit noted in a case involving the "transcontinental attempts" of a Frenchman to protect his copyright in photographs of Pablo Picasso's artwork, "determining foreign law and the confusion surrounding the role of foreign law in domestic proceedings" can cause substantial difficulties.

Often it is up to us, as zealous advocates, to assist our clients and the courts in surmounting the challenges posed by disputes involving foreign legal questions or governed by foreign laws. For us, transferring the matter is not a solution—we must scale the wall head-on.

We need not do it alone. Questions of foreign and international law arise both in the U.S. courts and before arbitral tribunals deciding complex commercial disputes. In either forum, we

Illustration by Doug Thompson

frequently find ourselves educating clients and decision makers about the scope, content, and context of foreign laws. In addressing these issues, a partnership with foreign co-counsel and legal experts is indispensable. Over the years, we have developed strategies for identifying and working effectively with foreign co-counsel and legal experts as critical members of our team, using what we call the four **C**s: **c**onnect, **c**ommunicate, **c**ollaborate, and **c**ooperate.

Connection

The first step is connecting with the right foreign co-counsel or legal expert. This involves determining whether you need co-counsel to partner fully in trying the dispute, a legal expert to opine independently on foreign legal questions, or both.

For most disputes in the U.S. courts, you will be working with a foreign legal expert. Under Federal Rule of Civil Procedure 44.1, the "court's determination [of foreign law] must be treated as a ruling on a question of law." Before the rule's adoption in 1966, courts treated questions of foreign law as factual issues, to be proved like any other fact—a position that demonstrated "judicial discomfort with questions of foreign law due to inevitable unfamiliarity with the substance and nuance of the legal systems of other countries." *De Fontbrune v. Wofsy*, 838 F.3d 992, 997 (9th Cir. 2016). Under the regime established by Rule 44.1, courts now—as much as possible—ascertain foreign law in the same manner and to the same extent that they decide domestic law. In other words, the rule "unshackles courts and litigants from the evidentiary and procedural requirements that apply to factual determinations."

Given the complexity of ascertaining foreign law, experts can (and often do) play a critical role in establishing the relevant foreign legal rules and responding to any opposing expert put forward by your opponents. This so-called battle of the experts can be the decisive factor in the increasing number of cases in which a U.S. court is asked to apply foreign law.

At first blush, it may seem like someone from the rarefied towers of academia would be ideally situated for the role. After all, who better than a scholar spending his or her days studying, teaching, and debating to educate the court (and you)?

To be sure, academic lawyers often prove invaluable experts. But in our experience, a vaunted academic career and numerous publications are not the sine qua non for identifying the right foreign legal expert for U.S. proceedings. More often than not, the best possible expert has real-world experience of advocacy or adjudication and at least some familiarity with U.S. legal reasoning and process.

Having both foreign advocacy experience and familiarity with U.S. jurisprudence tends to produce an individual with a creative and pragmatic approach to explaining foreign law in a way that resonates domestically. Frequently, putting foreign legal issues in digestible context requires analogizing foreign laws to the U.S. legal principles with which we are all familiar. Developing the right analogies, of course, demands some understanding of U.S. law. As any scholar or practitioner of comparative law will tell you, relating foreign law to U.S. law requires a holistic understanding of both. As an advocate worth his or her salt will tell you, to express your position memorably, and with clarity, is to win half the battle.

For example, assume A has filed a civil conspiracy claim under the Racketeer Influenced and Corrupt Organizations (RICO) Act against your client, B, in a U.S. court. Both A and B are German entities. A asserts jurisdiction against B to benefit from the broad RICO statute. Part of your effort to dismiss the complaint includes a forum non conveniens argument that the case belongs in Germany. Impossible, responds A. Germany does not recognize RICO civil conspiracy, so dismissal in favor of the German courts is impermissible.

Is it? As a savvy attorney, you know that the proposed alternative forum need not provide the *same* remedy as U.S. law—just some remedy, regardless of how unfavorable the change in the substantive law or the potential amount of discovery.

In other words, you need to show that German law provides an adequate remedy for the claims underlying the RICO civil conspiracy allegations. A German lawyer who has litigated similar claims and understands U.S. law can help do just that, not only by demonstrating the similarities between the available remedies (even if they go by different names), but also by assuring the U.S. court that the claims can be pursued successfully in A's home country, buttressing the point with real-world examples, citations, and statistics. Alternatively, a retired German judge who has decided similar claims may be a persuasive witness before a court inclined to treat him or her as a peer.

The selection of an expert must be performed with tact but also with candor from the outset. Here's an example: A dispute arose in the courts of country M that involved a question of foreign law concerning the regulatory framework governing banks in country Z. The defendants reached out to the recently retired chief justice of country M, who had been a dominant force in molding his country's laws for over a decade, as a testifying expert, only to be informed that he had been retained by the other side.

The claimant's lawyers had neglected to inform the chief justice of the full facts, restricting his expert opinion to abstract legal statements. On cross-examination, the chief justice was shown documents explaining the context of the dispute, culminating in the question of whether he maintained the conclusions he had set out in his report. When he admitted he did not, the case was effectively over.

Disputes raising questions of foreign law often arise before international tribunals. While U.S. attorneys with arbitration

expertise are well situated to present their client's case in such matters, foreign co-counsel play a critical role in developing and presenting legal arguments.

Connecting with the right foreign co-counsel involves a slightly different calculus than choosing the right foreign legal expert. For one thing, you will be working more closely with foreign co-counsel than with a legal expert. For another, co-counsel must join you in zealously defending your client. In contrast, your legal expert must retain independence.

In addition to the obvious prerequisites of skill, relevant experience, and professional reputation, choosing the right foreign co-counsel also requires identifying someone with whom you have chemistry—someone you want as a member of your team. The best foreign co-counsel also will share your enthusiasm for the case.

Working effectively with co-counsel demands a close degree of communication and collaboration. The most successful relationships blossom into real partnerships, with all counsel pulling together as a genuine team. Achieving this kind of relationship is possible only if you can connect with your co-counsel on a personal level. The best (and perhaps only) way to test if you have chemistry with potential foreign co-counsel is by meeting with them (in person or virtually) to discuss the case.

There is always a temptation to go with the biggest name or brightest reputation in choosing co-counsel. To be sure, having the legal equivalent of one of the Beatles on your pleadings can go a long way in establishing credibility on foreign legal questions.

We have found that the best working relationships, most creative solutions, and most persuasive arguments come not just from the legal stars per se, but also from co-counsel who truly care about the matter. This fact may be unsurprising. By partnering with someone who is engaged on the issues, immersed in the facts, thinking constantly about the case, and eager to brainstorm ideas, we have been able to develop creative, persuasive, and ultimately *winning* legal arguments that a more prestigious, but remote, co-counsel never would have conceived.

How do you determine whether a potential co-counsel has this genuine enthusiasm for the case? Again, the initial due diligence call is key. The most engaged and enthusiastic will have done some research on the matter beyond whatever you provided in setting up the conversation. They will ask insightful questions on the call, potentially raising arguments or pointing to facts that they view as particularly helpful or harmful to the case. Like a talented improv comic, they may take a "yes, and" approach to the conversation, taking what you have said and elaborating on it from their legal perspective. They will follow up after the call with additional questions and ideas, demonstrating the thought they have continued to put into the case (prior to billing).

The initial call also offers a chance to evaluate the creativity and openness of potential co-counsel. One of the most exciting and rewarding aspects of a case involving multiple legal systems or lawyers from multiple legal traditions is the opportunity to craft new arguments and approaches from established principles. Seizing this opportunity requires an open mind, a willingness to brainstorm freely, and a comfort with departing from how things have always been done.

Of course, some potential arguments may simply not work (or, in the words of one of our former co-counsel, may "fly like a crocodile"). A lawyer whose instinctive reaction to all questions about potential arguments and approaches is simply "that is not possible" is unlikely to adopt a creative and collaborative approach in developing the case.

Communication

As in all relationships, communication with foreign co-counsel is key. At the outset, it is important to establish expectations and boundaries. Doing so includes a candid, up-front discussion about the scope of co-counsel's role, any budgetary restraints, and upcoming deadlines. Discussing these issues early on not only provides clarity about co-counsel's role and ensures an efficient division of labor; it also sets the stage for a collaborative relationship moving forward. Full and frank dialogue forms the basis of a successful partnership throughout the proceedings.

It is also important to show respect to your colleagues. As the case and the relationship progress, keep co-counsel informed. Invite co-counsel to brainstorming sessions and tag-up meetings on the status of the matter or schedule a regular check-in. Circulate drafts of pleadings, ensure their names are on the briefs if permissible under the jurisdiction's pro hac vice rules, share thoughts about case strategy, and reach out with questions (large and small) about foreign law. Communicating both fully and frequently with foreign co-counsel ensures that they have a complete picture of the case, the strategy, and the relevant facts and issues. Bringing co-counsel in at all stages of the proceedings will prevent you from going down any rabbit holes or wasting time with legal theories that may ultimately prove unavailing (or nonexistent) in the foreign legal regime. It will help co-counsel develop and articulate the best possible foreign legal arguments. It fosters a team spirit.

It is also important to recognize cultural sensitivities. Oftentimes, the task of coordinating with foreign co-counsel is handed off by busy partners to associates, sometimes even more junior associates. Thus, a mid- or junior-level associate could be providing instructions to a well-established foreign partner. Such a scenario is awkward for all concerned and should be avoided. Instead, more junior members of the team should aim to build a channel of communication with their cohorts on co-counsel's team. This channel can then be used to address less-pressing issues, with senior team members copied as needed. For the

higher-level issues, more senior members of the team should communicate with their counterparts directly, fostering a personal relationship that can yield dividends in the future.

Effective communication is not just about the frequency of your conversations; it's also about how you communicate. In this regard, it's important to recognize the limits of your own grasp of foreign law and innate bias toward the U.S. legal system.

To be clear, we do not mean that having a bias—or a tendency to perceive facts and craft legal arguments through the lens of U.S. law—is bad for a U.S. attorney. A U.S.-centric perspective is not only understandable; it's a net positive for an American attorney. Although expertise and deep familiarity with U.S. law are broadly helpful, they can lead you to unintentionally ask the wrong questions.

In one case, we asked foreign counsel whether we could bring a claim sounding in tort in our proceeding. "Yes, of course," our counsel responded. "Great," we said. "What kind of tort action works here?" "You can make out a claim in tort," co-counsel repeated. This went on for longer than we would care to admit before we finally asked how we should frame the claim.

Our co-counsel was from a civil law country, and the relevant legal system did, indeed, provide a remedy sounding in tort. Unlike the U.S. system, there were not multiple different types of tort. There was simply the principle that one who harmed another could be liable for resulting damages. Once we asked co-counsel the right question (how to frame our claim), the pleading came together rather quickly and well.

Had we simply stopped asking questions upon hearing that the foreign legal system did not consider a contract procured under duress to be unenforceable, we would have left an important argument on the table. Engaging foreign co-counsel and experts in helping to craft the most effective arguments involves openly communicating the end goals for our client. Framing our questions in terms of the desired outcome, rather than asking whether foreign law provides the same or similar mechanisms as our own, has proved essential to developing creative and comprehensive arguments together with our co-counsel.

We have discovered that (as in life) a diversity of perspectives and backgrounds leads to the strongest possible position. Our American perspective leads us to ask about creating novel arguments or applying existing principles in new circumstances. Our co-counsel's varied perspectives help us consider facts in new ways, frame our claims differently, and develop arguments we might otherwise overlook. In short, the result of our open, frank, and ongoing dialogue with co-counsel is invariably a compelling presentation of our client's case.

Full and frank communication likewise helps establish a collaborative relationship—one in which questions are freely asked and ideas freely discussed. Collaborating requires relinquishing at least some control, being open to new ideas, and acknowledging when you are wrong. These are not always the hallmarks of our profession. They are the signs of a healthy working relationship with foreign co-counsel. Ultimately, you want co-counsel to share ideas and feedback freely. The goal is to create and foster a genuine team spirit—and that can be achieved only by jointly developing strategies, acting cohesively, showing respect, sharing credit, and commiserating over any procedural losses during the case.

For example, you may be tempted to perfect a draft pleading before sharing it with co-counsel. The impulse is understandable. You want to impress and put your best foot forward. As we all know, perfecting a pleading takes time. Waiting until your ideas are fully fleshed out and elegantly articulated can mean co-counsel has less time to consider the arguments advanced under foreign law, provide thoughtful feedback, and conduct necessary research. Receiving a "draft" that appears to have sprung, like Athena, fully formed from your mind can also make co-counsel feel less invested, as though they are being asked to sign off on your work, rather than collaborate in developing the client's case. It is thus important to set aside pride and share an earlier draft or outline so that you can work *with* co-counsel on the parts pertaining to foreign law and receive the full benefits of their expertise and insight.

Collaboration

Collaboration also promotes greater efficiency. Assume you have to develop an argument under Australian law. You may be tempted to assign a junior associate on your team to do the research—after all, Australian cases are in English and readily available online. Your associate will probably do a decent job. An Australian associate on co-counsel's team is likely to be far more efficient. Coordinating directly with one of co-counsel's team members can ensure you get the most thorough research; the advantage of an Australian perspective on Australian law from the outset; and a more efficient, less costly process for your client.

Developing collaboration requires showing respect for co-counsel's subject-matter expertise. A small (yet rarely employed) gesture is to put your co-counsel's name first on the briefs, if consistent with the appearance rules of the forum. This token of respect can obtain outsized importance from the perspective of firms that have participated in international arbitrations as "local" counsel (a formulation to be avoided) but rarely have been taken seriously. Such a gesture also reinforces co-counsel's role in the case and can encourage active, ongoing participation as full members of the team, with a stake in the outcome and ownership over decisions.

In turn, that sense of ownership and spirit of ongoing participation can lead to stronger submissions or a tighter case strategy. In one case, co-counsel called us a couple of days before a filing with exciting news: A recent opinion from his country's highest court had excellent implications for our client. He had prepared a translation and explained exactly how he thought we could use

the court's reasoning to our advantage. If our co-counsel felt as though his role was simply to sign off on our briefs or make an appearance to lend credence to our arguments, he would not have paid such close attention to advantageous legal developments. The recent decision could have gone overlooked. Instead, he felt invested, empowered to bring new arguments and ideas to the table, and respected for his expertise.

> It's important to recognize the limits of your own grasp of foreign law and innate bias toward the U.S. legal system.

In another case, we went to our co-counsel with what we thought was an ingenious new legal argument—one that could not fail to win the case. She disagreed, patiently explaining that our theory was not workable. It flew like a crocodile. We pushed back (as lawyers are wont to do), but she stood her ground, trusting that, in the end, what we wanted was her candid opinion and best advice. She was correct in that trust. We acknowledged her superior expertise and dropped our novel theory for her tried-and-true analysis. As it turns out, her analysis was correct.

Cooperation

Successful past collaboration serves as the foundation for further cooperation. Rather than viewing co-counsel as a competitor for future work, consider them a potential partner in creating additional opportunities.

Transcontinental working relationships allow you to network, grow, and ultimately broaden the suite of skills that you can offer your clients. In the right circumstances, a partnership can be much greater than the sum of its parts.

Take another recent example. We had a long-term working relationship with counsel D, who played a critical role in a lengthy international arbitration. In turn, when he was approached by a long-standing client with a high-value potential international arbitration, he brought the opportunity to us. Alone, neither of us would have been able to pursue the opportunity. His firm lacked the international arbitration chops. We would have never learned of the dispute at such an early stage in the process without his connection to the client. Together, we made a formidable team.

This kind of international cooperation can be a potent force in generating business. The United States is home to many of the world's Fortune 500 companies. New York's role as a banking hub and the sheer size of our economy means our courts have potential jurisdiction over numerous foreign entities (and their assets). Doing business here requires compliance with U.S. regulations—and that means receiving the advice of U.S. attorneys. As a result, a close relationship with a U.S. firm can be a boon to foreign co-counsel.

The same is true in reverse. Foreign counsel will have their own networks of contacts, substantive expertise, and ability to generate business. In an increasingly globalized environment, those contacts will (at some point) likely need advice on questions of U.S. law or assistance in an international commercial dispute. When that happens, you want to be the first person your co-counsel calls for the joint pitch. Yet, lawyers on both sides often approach these opportunities with all the subtlety of a teenager on a first date. You can skip that awkward phase if you already have developed a collaborative and open relationship with co-counsel through your past work together.

You can also avoid it by using the same **Cs** during the pitch process: **Connect** with co-counsel about the opportunity early. Or, if co-counsel has contacted you, do your diligence, ask insightful questions, and follow up with additional ideas to demonstrate your enthusiasm for the case and eagerness to work together as a team. **Communicate** throughout the process, sharing ideas, thoughts on how to pursue the opportunity, and updates on next steps. **Collaborate** to develop the pitch, explaining to the client how your established working relationship and complementary skill set—how you **cooperate**—will inure to the client's advantage.

It is also important to foster your relationship even when no specific client or matter is in sight. The best path to pursuing those opportunities may be through small, trust-building steps, rather than cutting to the chase. Maybe it is an invitation to participate in a joint pitch for a representation where co-counsel's expertise will be useful. Maybe it is by collaborating on an article that addresses a particularly dynamic industry or sector. Maybe it is the simple act of putting co-counsel forward for an award or accolade in their jurisdiction. It takes application and creativity to identify areas for ongoing cooperation and then to take concrete steps to foster that cooperative spirit into the future.

Though cooperation takes more patience and discipline than the traditional competitiveness of litigators, it yields dividends in the long term. Remember, in a world where retirement occurs later and later, you and your colleagues are likely to be practicing law for decades. Building and nurturing relationships takes time and mutual respect. Yet, we know of no other way to pursue a flourishing litigation practice in an increasingly global and interconnected world. ■