

THE “PROOF” OF FOREIGN NORMATIVE FACTS WHICH INFLUENCE DOMESTIC RULES[©]

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This article concerns the ascertainment by judges of normative facts that emanate from within foreign legal orders and must be taken into consideration in the interpretation of domestic rules. The author proposes an analytical approach which is based on three ideas. First, judges must remain in control of the process aimed at ascertaining such facts. Because the interpretation of domestic rules is at stake, they cannot remain passive and rule solely on the basis of the information adduced by the parties, as they normally do while ascertaining the contents of foreign rules under a classic conflict of laws scenario. Second, foreign normative facts are often reasonably disputable, and when that is the case the parties must be afforded the opportunity to comment on whatever information the court intends to rely on while ascertaining the contents of such facts. Finally, the assistance of experts may be necessary in some cases, but full-fledged party-appointed expert testimony will rarely be a cost-effective option. Judges and parties should consider alternative options, such as the testimony of a court-appointed expert or written statements provided by party-appointed experts.

Cet article traite de la détermination par les juges de faits normatifs émanant d'un ordre juridique étranger et qui doivent être pris en considération dans l'interprétation de règles internes. L'auteur propose une approche analytique fondée sur trois idées. D'abord, il revient aux juges de contrôler le processus de détermination de ces faits : comme l'interprétation de règles internes est en cause, ils ne peuvent demeurer passifs et décider sur le seul fondement d'informations fournies par les parties, comme ils le font normalement en déterminant le contenu de règles étrangères applicables au fond du litige. Ensuite, les faits normatifs étrangers peuvent souvent être l'objet de débats entre personnes raisonnables, et lorsque c'est le cas les parties doivent avoir l'occasion de faire valoir leur point de vue au sujet de toute information sur laquelle la cour entend s'appuyer en déterminant de tels faits. Enfin, l'intervention d'experts peut s'avérer nécessaire dans certains cas, mais puisque le témoignage d'experts nommés par les parties s'avérera rarement efficient, les juges et les parties devraient considérer certaines alternatives, comme le témoignage d'un expert nommé par la cour ou le recours à des opinions écrites produites par des experts nommés par les parties.

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I. INTRODUCTION: THE ISSUE IN CONTEXT

Canadian legal orders have become more and more permeable to normative facts¹ that emanate from foreign legal orders and that have the possibility of influencing the interpretation of domestic rules. This phenomenon firstly results from increasingly frequent statutory provisions that incorporate such facts in an explicit manner.² But it also results from the abandonment by the Supreme Court of Canada of traditional conceptions of what constitute sources of law, namely constitutional texts, statutes, local precedents, and statutory instruments in force in the legal order in which a judge is sitting. Nowadays, Canadian courts must also take “context” into consideration,³ and despite persistent uncertainties regarding its scope and its relationship with traditional sources of law, it clearly extends beyond domestic normative facts.

¹ Facts that have relevance to legal reasoning are commonly referred to as “legislative facts,” a concept coined by K.C. Davis in “An Approach to Problems of Evidence in the Administrative Process” (1942) 55 Harv. L. Rev. 364 at 424. See also Notes of the Advisory Committee on rules relating to Rule 201 of the U.S. *Federal Rules of Evidence*, online: Legal Information Institute <<http://www.law.cornell.edu/rules/fre/ACRule201.htm>>. However, the term “legislative” is perhaps not fully adequate because this concept of legislative facts does not only encompass facts that influence the contents of statutory rules; it is also concerned with facts that have a bearing on all other types of rules, such as constitutional and common law rules. Because it is broader and more generic, the term “normative” will therefore be used in this paper.

² See e.g. the definition of “terrorist activity” found in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.01(1), incorporating within Canadian legal orders several offences recognized under international law. Consider also the *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985 (2d Supp.), c. 16 [*Foreign Arbitral Awards Convention*], and the *United Nations Convention on Contracts for the International Sale of Goods*, S.C. 1991, c. 13 [*Vienna Convention on International Sales*] which have been enacted into domestic law by Canadian legislatures.

³ Regarding the Supreme Court of Canada’s unambiguous adoption of E.A. Driedger’s contextual approach to statutory interpretation (“[t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”) in E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87, see e.g. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at 41; *R. v. Gladue*, [1999] 1 S.C.R. 688 at 704; *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at 181; *Francis v. Baker*, [1999] 3 S.C.R. 250 at 267; *R. v. Davis*, [1999] 3 S.C.R. 759 at 779; *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 at 810-11; *Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915 at 934; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at 74-75; *R. v. Ulybel Entreprises Ltd.*, [2001] 2 S.C.R. 867 at 883ff; *Ludco Entreprises Ltd. v. M.N.R.*, [2001] 2 S.C.R. 1082 at 1100; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at 101ff; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at 580; *R. v. Jarvis*, [2002] 3 S.C.R. 757 at 799; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45 at 122; *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 at 493; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at 593. In this respect, see Ruth Sullivan, “Statutory Interpretation in the Supreme Court of Canada” (1998-99) 30 Ottawa L. Rev. 175 at 215ff; S.M. Sugunasiri, “Contextualism: The Supreme Court’s New Standard of Justice Analysis and Accountability” (1999) 22 Dal. L.J. 126.

The most prominent of these foreign normative facts are surely Canada’s international obligations. As actors in the international legal order, judges and legislatures are increasingly conscious of their own responsibilities to promote adherence to the rule of law in international relations.⁴ Judges are also increasingly conscious of the specificity of international rules, as they have acknowledged—absent any legislative directive to that effect—the need to interpret Canada’s treaty obligations in light of international rules of interpretation⁵ that require consideration of various normative facts, such as the different versions of the *travaux préparatoires* of the particular treaty or state practice.⁶

However, the growing influence of foreign normative facts in Canadian legal orders cannot be attributed solely to a desire to promote adherence to the rule of law on the international plane. Take, for example, the Supreme Court’s decision in *Ordon Estate v. Grail*, affirming that the interpretation and development of common law rules in maritime matters must include a consideration of the desire to harmonize rules in jurisdictions involved in maritime trade.⁷ The Court’s well-known decision in *Baker v. Canada* is another example. In that case, a treaty to which Canada is a party but which has not been explicitly implemented by Canadian legislatures, was considered not for the purpose of ensuring compliance with international obligations, but rather because it was held to

⁴ See e.g. *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 (abandoning the idea that Canada’s relevant international obligations could only be taken into consideration when a statute is intrinsically ambiguous); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at 1019 [*Pushpanathan*] (affirming that legislation *must* be interpreted in conformity with Canada’s international obligations under a treaty that has been explicitly implemented within domestic legal orders); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.R. 86 at 100 (“[s]tatutes should be construed to comply with Canada’s international obligations”); William A. Schabas, “Twenty-Five Years of Public International Law at the Supreme Court of Canada” (2000) 79 Can. Bar Rev. 174.

⁵ See e.g. *R. v. Parisien*, [1988] 1 S.C.R. 950; *Thomson v. Thomson*, [1994] 3 S.C.R. 551 [*Thomson*]; *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802; *Pushpanathan*, *ibid.*

⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, Can. T.S. 1980 No. 37, arts. 31-32 [*Vienna Convention on Treaties*]. For relevant precedents emanating from national courts claiming that state practice should be taken into consideration in the interpretation of international treaty obligations, see M. Roth & R. Happ, “Interpretation of Uniform Law Instruments According to Principles of International Law” [1997] *Unif. L. Rev.* 700; R. Gardiner, “Treaty Interpretation in English Courts – *Antwerp United Diamond v. Air Europe*” [1994] *L.M.C.L.Q.* 184. For an example of a decision of the Supreme Court where foreign cases were considered in the interpretation of legislation implementing an international treaty to which Canada is a party, see *Canada (A.G.) v. Ward*, [1993] 2 S.C.R. 689 [*Ward*].

⁷ [1998] 3 S.C.R. 437 at 495.

reflect certain *values* that ought to influence domestic law.⁸ Other examples are found in statutory provisions such as those requiring that judges give regard to the *travaux préparatoires* of the UNCITRAL *Model Law on International Commercial Arbitration* when interpreting domestic statutes incorporating the *Model Law*.⁹ In such cases, the integration of foreign normative facts reflects a desire to harmonize specific categories of rules that are considered to belong to normative systems that extend beyond local borders.

The increased influence of these foreign normative facts raises several important questions. Surely, it makes sense in 2005 to expect that judges do not completely ignore Canada's international obligations when they interpret domestic rules. How large a role, however, should these obligations play? Should we expect judges to consider treaty obligations even when the relevant treaty has not been implemented through domestic legislation? Classic doctrine would hold this to be contrary to the fundamental principles of democracy and federalism.¹⁰ But it may make more sense, given the strength of Canada's commitment to international relations based on the rule of law, to require that judges do give regard to these obligations.¹¹ Perhaps democracy and federalism would not be unduly

⁸ [1999] 2 S.C.R. 817 [*Baker*]. For another example of the Court relying on international instruments as reflections of global values that need to be taken into consideration in the interpretation of domestic rules, see *United States v. Burns*, [2001] 1 S.C.R. 283. A parallel can be drawn between this aspect of the Court's recent jurisprudence and the U.S. Supreme Court's decision striking down a Texas statute banning same-sex sodomy among consenting adults. See *Lawrence v. Texas*, 539 U.S. 558 at 576 (2003) [*Lawrence*], in which a majority of justices clearly affirmed that values receiving substantial global support ought to be taken into consideration while interpreting the U.S. Constitution: "To the extent *Bowers* [an earlier decision being overruled] relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* has been rejected elsewhere. See also *Roper v. Simmons*, No. 03-633 (U.S. March 1, 2005). The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P. G. & J. H. v. United Kingdom*, App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* at 11-12, *Lawrence*. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." On this and other U.S. developments, see John K. Setear, "A Forest With No Trees: The Supreme Court and International Law in the 2003-2004 Term" (4 October 2004), online: Social Science Research Network <<http://ssrn.com/abstract=600043>>.

⁹ See e.g. Québec's *Code of Civil Procedure*, Art. 940.6 C.C.P. [*Code of Civil Procedure*].

¹⁰ See e.g. Iacobucci J.'s reasons in *Baker*, *supra* note 8.

¹¹ See e.g. *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537 at 558 (C.A.). See generally R. Provost, "Le juge mondialisé: légitimité judiciaire et droit international au Canada" in Marie-Claire Belleau & François Lacasse, eds., *Claire L'Heureux-Dubé at the Supreme Court of Canada – 1987-2002* (Montréal: Wilson & Lafleur, 2004) 569.

marginalized, as legislatures could always have the last word by enacting legislation discarding an internationalist interpretation considered to be inappropriate; the balance would merely be tilted further toward the promotion of the rule of law on the international plane.

One could also ask what weight judges should give to Canada’s international obligations when they interpret constitutional rules. The idea that international human rights obligations ought to be considered in the interpretation of the *Canadian Charter of Rights and Freedoms*¹² makes, of course, a lot of sense. But should they be afforded as much weight as they are currently given in the interpretation of statutory or common law rules? Some may have understandable reservations; there is a very real risk that reliance on what essentially are compromises between sovereign states will unduly restrict the protection against state power to which individuals are entitled in Canada.¹³

This article, however, addresses a different question: the “proof” of foreign normative facts. It is concerned with the manner in which judges should ascertain such facts. To speak of the proof of foreign normative facts seems appropriate at first glance, given the widely-accepted view that legal sources fall within the ambit of the law of evidence.¹⁴ On second thought, however, it may make more sense to abandon the concept of “proof” in this context in order to clearly emphasize the theoretical distinction between the ascertainment of adjudicative facts—who did what, when, where, how, et cetera—and the ascertainment of facts that influence the contents of the applicable rules. Arguably, the latter ought to be thought of as relating to legal interpretation rather than to the law of evidence.¹⁵

Accordingly, one must give thought to the manner in which foreign normative facts ought to be handled in adjudicative proceedings and, more particularly, to the role judges should play in ascertaining these facts. It is

¹² Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

¹³ See Bastarache J.’s reasons in *R. v. Cook*, [1998] 2 S.C.R. 597 at 677-78. See also Anne Warner La Forest, “Domestic Application of International Law in *Charter* Cases: Are We There Yet?” (2004) 37 U.B.C.L. Rev. 157 at 211ff.

¹⁴ It is commonly accepted that proof must be made of some domestic sources not covered by the doctrine of judicial notice as well as sources relating to foreign rules applicable in light of relevant conflict of laws rules. See e.g. David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 2nd ed. (Toronto: Irwin Law, 1999) at 294; J.W. Strong, ed., *McCormick on Evidence*, 5th ed. (St. Paul: West Group, 1999) vol. 2 at 395.

¹⁵ Another option is to consider that the ascertainment of such facts relates to procedural law, as is the case in the United States since the adoption of the *Federal Rules of Civil Procedure*: Hans W. Baade, “Proving Foreign and International Law in Domestic Tribunals” (1978) 18 Va. J. Int’l L. 619 at 625. See also FED. R. EVID. 201, 28 U.S.C. app. (2000) [*Federal Rules of Evidence*] which provides for the judicial notice of certain adjudicative facts, but where no mention is made of normative facts.

initially tempting to favour one of the two possible approaches to be discussed in Part II. These approaches immediately spring to mind because they are well-known and widely resorted to in the ascertainment of foreign and domestic rules respectively. However, as Part II demonstrates, neither approach seems adequate in the context of foreign normative facts bearing upon the content of domestic rules. As such, Part III proposes an alternative approach that seeks to strike a balance between the liberty judges must have while interpreting domestic rules and basic requirements of procedural fairness mandating that the parties have an opportunity to comment on any information on which the decision will be based.

II. TWO UNSATISFACTORY APPROACHES TO HANDLING FOREIGN NORMATIVE FACTS IN ADJUDICATIVE PROCEEDINGS

A. *The Ignorant Judge*

The “ignorant judge” approach rests on two basic ideas. The first is that judges have no knowledge—and cannot be expected to have any knowledge—of foreign normative facts they may be required to take into consideration. The second is that judges should not enquire about such facts on their own. Rather, the ascertainment of foreign normative facts should be party-led and judges should, as a general rule, be bound by the parties’ initiatives; they should normally limit themselves to drawing conclusions from information adduced by the parties.

This approach naturally comes to mind because of its similarity with the treatment traditionally afforded to foreign rules in common law jurisdictions as well as in many civil law jurisdictions under a classic conflict of laws scenario. Generally, foreign rules are treated as adjudicative facts, hence the requirement for parties to plead and prove their contents before they can have any bearing on the court’s decision.¹⁶ This idea of a correspondence between foreign rules and adjudicative facts is shaky at best, and it does not provide a convincing explanation for similar treatment of the two. From a substantive point of view, however, this approach does reveal that public policy is not really concerned with the application—let

¹⁶ See *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; Richard Fentiman, *Foreign Law in English Courts – Pleading, Proof and Choice of Law* (Oxford: Oxford University Press, 1998) at 3; Bernard Audit, *Droit international privé*, 3rd ed. (Paris: Economica, 2000) at 237-38: “[d]u fait du rapprochement effectué entre la loi étrangère et un fait, ainsi que du caractère principalement accusatoire de la procédure civile, on a traditionnellement considéré que la tâche d’établir le contenu de la loi étrangère incombait aux parties”; Brigitte Herzog, “Proof of International Law and Foreign Law Before a French Judge” (1978) 18 Va. J. Int’l L. 651.

alone the *correct* application—of foreign rules to an international dispute because conflict of laws rules should essentially be geared towards satisfying the litigants’ interests and legitimate expectations. Whether such an approach should still prevail in a day and age when comity, understood as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation”¹⁷ constitutes a “key principle underlying all private international law rules”¹⁸ is by no means obvious and deserves further attention from scholars and courts.¹⁹ This being said, treating foreign rules as facts has one important advantage: by limiting the judge’s role to drawing conclusions from information that has been adduced by the parties, compliance with basic requirements of procedural fairness is ensured.²⁰

It may be, despite the central role played by comity nowadays, that we should not be too concerned if judges do not apply—or do not apply correctly—foreign rules to which relevant conflict of laws rules point. But the matter is entirely different when judges are considering foreign normative facts that influence domestic rules. The notion that “like cases be treated alike” is a fundamental legal principle. As such, while one of the roles of the judiciary is the resolution of disputes between private parties, it never solely acts for the benefit of individual litigants. Its decisions have precedent-setting value and may affect how future disputes will be

¹⁷ *Hilton v. Guyot*, 159 U.S. 113 (1895) at 164. See also *R. v. Spencer*, [1985] 2 S.C.R. 278 at 283; *Morguard Investment Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1096; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907 at 939; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205 at 219 [*Spar Aerospace*].

¹⁸ *Spar Aerospace*, *ibid.* at 217.

¹⁹ In Québec, courts now have the power to take judicial notice of foreign rules or to ask that proof thereof be made. However, the litigants remain in control insofar as the application of foreign rules is concerned because the courts’ powers can only be exercised if foreign law has been pleaded. See Art. 2809 C.C.Q. Interestingly, FED. R. CIV. P. 44.1, 28 U.S.C. app. (2000) [*Federal Rules of Civil Procedure*] provides that “[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” This suggests that courts sometimes have an independent duty to get it right on matters of foreign law, which would mean that at least *some* conflict of laws rules are mandatory. See e.g. *Twohy v. First Nat. Bank of Chicago*, 758 F. 2d 1185 at 1193 (7th Cir. 1985): “[i]n determining ... questions of [foreign] law, both trial and appellate courts are urged to research and analyze foreign law independently.” See also *infra* note 22. Recent developments in France also suggest that judges have a duty to get in right on matters of foreign law: Horatia Muir Watt, *Fonds de Garantie Automobile [FGA] c. M. Manuel Mesquita, Société D. & J. Sporting Ltd. c. Société Orchape, SA & M. Marzouk Ahidar c. Mme Fatima Abahri, ép. Ahidar*, Case Comment (2003) 92 Rev. crit. dr. int. privé 86.

²⁰ On these requirements, see *infra* 9.

resolved.²¹ Hence, the idea that lies at the heart of most, if not all, legal systems is that judges should always remain firmly in control of the interpretation of domestic rules.²² Clearly then, it would be unacceptable that their conclusions concerning the contents of foreign normative facts which may influence domestic rules be exclusively based on information adduced by the parties.

B. *The Learned Judge*

A second approach treats such facts in the same manner as most domestic normative facts falling within the ambit of traditional sources of law and does not require them to be “proved” the way disputed adjudicative facts are. Under this second approach, judges would be expected to either have knowledge of such facts or at least be able to ascertain them in a reliable manner. Judges would also be free to rely on information other than that which was adduced by the parties and debated at trial.

This approach is also inadequate, however, because it overlooks a significant difference that exists between foreign normative facts and most domestic normative facts. Normally, the latter, like, for example, the text of a statute, the reasons issued by a court in an earlier case, *travaux préparatoires*, et cetera, are, from the judge’s point of view, easily ascertainable by consulting reliable sources. These facts are thus not reasonably disputable,²³ and it may for that reason make sense to assume,

²¹ See generally Dominique d’Ambra, *L’Objet de la Fonction Juridictionnelle: Dire le Droit et Trancher Les Litiges*, t. 236, (Paris: Librairie Générale de Droit et de Jurisprudence, 1994). See also Jean-Guy Belley, “Une justice de la seconde modernité: proposition de principes généraux pour le prochain Code de procédure civile” (2001) 46 McGill L.J. 317 at 325ff.

²² See e.g. rule 22.1 of the *Joint American Law Institute / UNIDROIT Working Group on Principles and Rules of Transnational Civil Procedure*, UNIDROIT 2003, Study LXXVI Doc. 10, online: UNIDROIT International Institute for the Unification of Private Law <<http://www.unidroit.org/english/publications/proceedings/2003/study/76/s-76-10-e.pdf>>, which, interestingly, also suggest that the judge’s responsibility should extend to foreign rules: “[t]he court is responsible for determining the correct legal basis for its decisions, including matters determined ... [by] foreign law ... [and] may rely on a legal basis not advanced by the parties only upon giving them the opportunity to comment.”

²³ But this is not true for all domestic normative facts that need to be considered in the interpretative process. Social context, for example, needs to be taken into consideration by courts called upon to interpret common law rules. See *R. v. Salituro*, [1991] 3 S.C.R. 654 at 670: “[j]udges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country.” But the contents of such normative facts are not always undisputable, and for that reason it may not be appropriate to consider that they always fall within the ambit of the doctrine of judicial notice. To that effect, see *inter alia* Danielle Pinard, “La connaissance d’office des faits sociaux en contexte constitutionnel” (1997) 31 R.J.T. 315. For a different view, see also Ann Woolhandler, “Rethinking the Judicial Reception of Legislative Facts” (1988) 41 Vand. L. Rev. 111.

as we seem to do in Canada, that basic requirements of procedural fairness should not prohibit a judge from determining freely the contents of a rule that is exclusively influenced by domestic normative facts.²⁴ Indeed, the fundamental principle, referred to by civil law jurists as the *principe du contradictoire*, which states that judges should never be allowed to decide cases on the basis of information other than that which was adduced and debated at trial, should only operate when the information at issue is reasonably disputable. When that is not the case, there is little problem in affording judges greater liberty, which is why the development of the doctrine of judicial notice was possible in the common law tradition.²⁵

But while domestic normative facts are normally not reasonably disputable, that is certainly not the case with respect to the kind of foreign normative facts which are increasingly incorporated within domestic legal orders. Take, for example, foreign precedents, which the U.S. Supreme Court has declared ought to be given *considerable weight* in the interpretation of international treaties.²⁶ Locating them and ascertaining their contents may not present great difficulties to an American judge if they all emanate from within jurisdictions like Canada, the United

²⁴ See e.g. Léo Ducharme, *Précis de la preuve*, 5th ed. (Montréal: Wilson & Lafleur, 2001) at 24 (“le tribunal n’est pas tenu de rendre jugement uniquement en fonction des moyens de droit qui sont plaqués devant lui; il peut faire appel à toute règle de droit, que les plaideurs l’aient invoquée ou non”).

²⁵ See e.g. Paciocco & Stuesser, *supra* note 14 at 290: “[j]udges may, on their own initiative, take judicial notice with no input from counsel.” The doctrine of judicial notice is unknown in the civil law tradition. However, it is accepted that a judge may rely on general facts that are not reasonably disputable. See e.g.: J. Ghestin & G. Goubeaux, *Traité de droit civil – Introduction générale*, 4th ed. (Paris: L.G.D.J., 1994) at 629-30. The idea that it is appropriate for judges to rely on domestic normative facts that were neither invoked at trial by the parties, nor subsequently presented to them for comments, is open to criticism. While the contents *per se* of most domestic normative facts (the words enacted by a legislature, what a court said in an earlier case, and so on) are indeed not reasonably disputable, the conclusions to be drawn from these facts are often uncertain and anything but beyond reasonable debate. It may thus make more sense for judges to always give parties an opportunity to comment on domestic normative facts which were not adduced at trial and which they intend to rely on while reaching conclusions of law. This approach has gained ground in civil law and common law jurisdictions in recent years. See generally John A. Jolowicz, “The Use by the Judge of his Own Knowledge (of Fact or Law or Both) in the Formation of his Decision” in John A. Jolowicz, ed., *On Civil Procedure* (Cambridge: Cambridge University Press, 2000) 243 at 253-56. See also, in particular, Lord Mustill’s comments in *Hoecheong Products Co. v. Cargill Hong Kong Ltd.*, [1995] 1 W.L.R. 404 at 409 (P.C.): “It does of course happen from time to time that a Court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The Court may wish to take the new matter into account. Before doing so, it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them.”

²⁶ *Air France v. Saks*, 470 U.S. 392 (1985). For an example of use by the Supreme Court of Canada’s foreign precedents in the interpretation of an international treaty, see *Ward*, *supra* note 6.

Kingdom, and Australia. But what if he or she is called upon to interpret the *Vienna Convention on International Sales*,²⁷ which has already generated more than a thousand judicial decisions emanating from dozens of jurisdictions, many of which belong to different legal traditions?²⁸ Or, what about the so-called “North-American insurance practice” which, according to two fairly recent Supreme Court of Canada decisions, must be considered in the interpretation of Québec insurance law?²⁹ What of the “law in force in jurisdictions involved in maritime trade”?³⁰

These are all normative facts which may be reasonably disputable. Therefore, judges should not be free to consider them if the parties have not had a sufficient opportunity to provide comments and arguments on them. For example, one would no doubt find it inappropriate for a judge, seized of a motion seeking the recognition and enforcement of a foreign arbitral award, to communicate directly with the arbitrators to enquire as to whether they have indeed failed to act impartially and then to rely on the result of that enquiry in his or her decision.³¹ It would similarly be inappropriate if the judge instead relied on relevant foreign precedents—retrieved during the deliberation and not subsequently submitted to the parties for comment—while determining the meaning and scope of the public policy exception found at article V(2)(b) of the *New York Convention*.³²

²⁷ *United Nations Convention on Contracts for the Sale of Goods*, schedule to the *International Sale of Goods Contracts Convention Act*, R.S.C. 1991, c. 13.

²⁸ See e.g. the Pace Law School database, online: CISG Database <<http://www.cisg.law.pace.edu>> which contains reports of over 1100 cases from dozens of jurisdictions, and in which it is said that there have possibly been more than double this number of rulings relevant to the interpretation of the *Convention on Contracts*, *supra* note 2.

²⁹ See e.g. *Caisse populaire des Deux Rives v. Société d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995; *Chablis Textiles Inc. (Trustee of) v. London Life Insurance Co.*, [1996] 1 S.C.R. 160.

³⁰ See *supra* note 7.

³¹ This may also constitute a breach of a rule providing for the confidentiality of the deliberations of the arbitral tribunal. See e.g. *Noble China Inc. v. Lei*, (1998) 42 O.R. (3d) 69; F. Bachand, *Noble China Inc. v. Lei*, Case Comment (2000) 4:1 Mod. Arb. L.Q. Rep. 43. But that is of course a very different question.

³² *Foreign Arbitral Awards Convention*, *supra* note 2.

III. AN ALTERNATIVE APPROACH: JUDICIAL AUTONOMY, PROCEDURAL FAIRNESS, AND EFFICIENT EXPERT ASSISTANCE

The analysis so far reveals that a satisfactory approach to the ascertainment of foreign normative facts ought to achieve a proper balance between, on the one hand, the liberty judges must have while interpreting domestic rules and, on the other, basic requirements of procedural fairness mandating that the parties have an opportunity to comment on any information on which the decision will be based. Of course, no significant difficulty arises if the foreign normative facts at issue are not reasonably disputable. As long as one accepts that the legitimacy of adjudication is, generally speaking, not imperilled when judges base their decisions on domestic normative facts that have not been debated at trial,³³ there is no reason why foreign normative facts which are not reasonably disputable ought to be dealt with differently. For example, we should not consider that an injustice will be suffered if a Québec judge, seized of a dispute arising in connection with an international commercial arbitration, refers, pursuant to article 940.6 of the *Code of Civil Procedure*, to the *travaux préparatoires* of the UNCITRAL Model Arbitration Law, even if those were ignored at trial.³⁴

More often than not, however, judges are faced with foreign normative facts that are open to reasonable debate. How judges should then proceed will depend on whether the assistance of experts will be needed. If experts are not necessary, a judge who finds that the information provided by the parties as to the contents of the relevant normative facts is insufficient will have to seek out additional information on his or her own, bearing in mind that the parties must always be given the opportunity to comment on reasonably disputable information that may influence the decision. However, determining the necessity of expert assistance is not always an easy task. The next two sections will discuss when resort to experts is in fact necessary and what a judge should do in those particular circumstances.

³³ And it may very well be that it is when their *effect* on the contents of the domestic rules at issue cannot be said to be beyond reasonable contestation. See *supra* note 25.

³⁴ The *travaux préparatoires* were published, *inter alia*, in the *United Nations Commission on International Trade Law's Yearbook*, a source whose accuracy cannot reasonably be questioned. For a detailed list of the *travaux préparatoires*, see the UNCITRAL Model Arbitration Law *Travaux Préparatoires*, online: UNCITRAL <<http://www.uncitral.org/english/travaux/arbitration/ml-arb/travaux-ml-arb-index-e.htm>>.

A. *Assessing the Need for Expert Assistance*

Resort to expert assistance will not always be needed because the additional expenses and delays will only be justified when such assistance is *necessary*, not when it is merely *helpful*. As the Supreme Court of Canada made clear in *R. v. Mohan*,³⁵ helpfulness—which is the relevant threshold in the United States³⁶—sets too low a standard; the input of one or more experts is only appropriate when the “subject-matter of the inquiry [is] such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.”³⁷ In other words, when ordinary people are likely to reach reasonably accurate results on their own, experts should not be resorted to, even if their intervention could help reduce the risk of reaching inaccurate conclusions. Necessity, or more precisely the likelihood of necessity, is what matters.³⁸

Whether this test is met will of course depend to a large extent on the specific circumstances of each case. But while assessing the need to resort to experts in the specific context of this article, two general propositions ought to be considered. First, it would make little sense to think in terms of the conclusions that could be drawn by ordinary *people*, as suggested by the above-quoted extract from *Mohan*; law being a specialized field, resort to expert knowledge would almost invariably be necessary. The analysis must be contextualized and necessity must be thought of in terms of what ordinary *judges* are likely or unlikely to accomplish without

³⁵ [1994] 2 S.C.R. 9 [*Mohan*].

³⁶ See also *Federal Rules of Evidence*, *supra* note 15 at rule 702. See also Strong, *supra* note 14, vol. 1 at 58: “[T]raditionally the subject of the inference must be so distinctively related to a science, profession, business or occupation as to be beyond the ken of lay persons. Some cases say that the judge has discretion in administering this rule. Other cases admit expert opinion concerning matters about which the jurors may have general knowledge if the expert opinion would still aid their understanding of the issue. *The latter standard is codified in Federal Rule of Evidence and Revised Uniform Rule of Evidence 702. In fact, Rule 702 seems to permit expert opinion even when the matter is within the jurors’ competence if specialized knowledge will be helpful, as it may be in particular situations.*” [Emphasis added.]

³⁷ W.J. Byrne and A.D. Gibb, *Beven on Negligence*, 4th ed. (London: Sweet & Maxwell, 1928) at 141, cited in *Kelliher (Village of) v. Smith*, [1931] S.C.R. 672 at 684 and also cited in *Mohan*, *supra* note 35 at 23.

³⁸ This point is often overlooked in connection with foreign rules applicable under a classic conflict of laws scenario. Absent any agreement by the parties to the contrary, resort is very often made—at least here in Canada—to the assistance of experts. But at times one is left with the impression that it could hardly be said the trial judge was not likely to reach correct conclusions without the assistance of experts. Can it really be said, *e.g.*, that a Québec judge sitting in Montréal is unlikely to reach correct conclusions on a point of French employment law absent expert assistance (see *e.g. Deschênes c. Nurun Inc.* (4 June 2003), Québec 200-05-014316-009, (Qc. S.C.)), when thorough and up-to-date restatements contained in the *Juris-Classeur* can be found in or accessed freely from any Montréal law library?

resorting to expert assistance. Second, consideration must be given to the fact that judges are themselves experts at legal interpretation, which involves drawing conclusions from normative facts. Consequently, expert assistance should normally be necessary only in connection with the ascertainment of the foreign normative facts *per se*. Assistance should not be extended to the related yet qualitatively different issue of which conclusions ought to be drawn from those facts, unless the interpretation of such facts requires an analysis that is so unintelligible to the ordinary judge that he or she cannot be expected to reach accurate results on his or her own. This situation, however, only seems likely in highly exceptional cases.³⁹

One could also ask what role, if any, party autonomy should play in determining whether experts are required. Due to the influence of the adversarial model, which heavily emphasizes party autonomy in the control and conduct of adjudication, judges should, as a general rule, uphold an agreement of the parties requesting the intervention of one or several experts. If no such agreement has been reached, however, judges should raise *proprio motu* the issue of whether expert assistance will be needed, seek the parties’ views, and then decide whether they will likely reach correct conclusions on the sole basis of readily available material and literature. Ideally, judges should do this during the pre-trial phase or as soon as they become aware of their obligation to consider foreign normative facts that may influence the rules applicable to the case. Furthermore, because judges must always remain in control in order to uphold their fundamental duty to determine the contents of domestic rules, they should never consider themselves bound by an agreement of the parties that seeks to *exclude* expert assistance, a result that will likely occur under a classic conflict of laws scenario.⁴⁰

To illustrate how necessity should be assessed consider, for example, a motion seeking the recognition and enforcement of a foreign arbitral award filed with the British Columbia Supreme Court under the *Foreign Arbitral Awards Act*,⁴¹ which implements the *New York Convention*. Suppose that the motion is contested on the ground that the award has been set aside by the courts of the jurisdiction in which it was made. It is

³⁹ Consider, e.g. the Supreme Court’s statement relating to the interpretation of international conventional obligations in *Thomson*, *supra* note 5 at 577, to the effect that “[b]y and large, international treaties are interpreted in a manner similar to [Canadian] statutes.”

⁴⁰ For a discussion of conflict of laws cases where the parties had implicitly or explicitly agreed to exclude resort to expert witnesses and where courts determined the contents of foreign law on the sole basis of foreign legal materials, see Fentiman, *supra* note 16 at 257-61.

⁴¹ R.S.B.C. 1996, c. 154.

not clear from the text of the *Convention* whether courts *must* or merely *may* dismiss the motion under such circumstances. What is clear, though, is that the judge would have a duty to take into account Canada's international obligations under the *Convention*, which would mean a consideration of the normative facts alluded to in articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.⁴² Given the voluminous and overwhelming content of such normative facts, including the text of the *Convention's* other five official versions⁴³ or case law emanating from the 132 other countries that are parties thereto,⁴⁴ initially, a judge may question his or her ability to draw appropriate conclusions. However, after having raised the issue with the parties and having surveyed the relevant literature, the judge would probably realize that since the issue has generated such interest worldwide, with several international commercial arbitration experts have published extensive analyses directly on point,⁴⁵ he or she would be quite likely to draw reasonably accurate conclusions on his or her own. No expert assistance would be required, but the judge would always need to ensure that the parties be given the opportunity to comment on information he or she may have retrieved that could, in turn, impact the final decision.

This process may still lead to the result that the assistance of one or more experts is necessary. What should judges then do?

B. *The Judge's Role in Handling Expert Assistance*

Because party autonomy occupies, for better and for worse, such a prominent place in the model of adjudication that prevails throughout Canada, resort to party-appointed experts will initially always be possible. Consequently, judges should start by consulting the parties and enquire about their intentions. The parties' initial preference will likely be to resort to party-appointed experts rather than one or more court-appointed experts.⁴⁶ Indeed, litigants in Canada, like in many common law jurisdictions, very often resort to party-appointed experts to assist the court in determining the contents of foreign rules under a classic conflict of laws

⁴² *Vienna Convention on Treaties*, *supra* note 6.

⁴³ *Ibid.* at art. 33.

⁴⁴ *Supra* note 6.

⁴⁵ See *inter alia* H.G. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (The Hague: Kluwer, 2002) and the numerous references contained therein.

⁴⁶ See *e.g.* *supra* note 9 at art. 414ff and the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 52.03.

scenario. They most often do so out of a need to retain as much control as possible over the process and also out of a fear that judges may be unduly influenced by court-appointed experts.⁴⁷ They would likely perceive the process of ascertaining foreign normative facts in a similar matter. But one may wonder whether resorting to party-appointed experts would really be desirable and what, if anything, a judge could do if he or she believes that it would not.

A judge may seriously doubt the desirability of proceeding in this manner because of a general reluctance toward instituting party-appointed experts, a practice that has been widely and severely criticized by commentators and judges for more than a century.⁴⁸ Not only is resorting to party-appointed experts very often the most expensive and most complicated means by which adjudicators can acquire specialized knowledge necessary to resolve a dispute, it is by no means obvious that the presentation and confrontation of opposed theses really leads to more accurate conclusions. Indeed, the proximity between party-appointed experts and what are essentially their clients⁴⁹ prevents adjudicators from assuming that the conclusions reached are in fact objective and unbiased. And, too often, cross-examination will simply reduce their usefulness rather than introduce more accurate conclusions to the adjudicators.⁵⁰

⁴⁷ See e.g. Fentiman, *supra* note 16 at 235. See also *ibid.* at 281: “[i]n English law neither the court nor a party has ever apparently sought the appointment of an independent expert in disputes concerning foreign law.”

⁴⁸ See e.g. Lord Woolf, *Access to Justice – Final Report of the Lord Chancellor on the Civil Justice System in England and Wales* (London: The Stationary Office, 1996) at 137; Strong, *supra* note 14 at 80; G.C. Harris, “Testimony for Sale: The Law and Ethics of Snitches and Experts” (2000) 28 Pepp. L. Rev. 1 at 39; Glenn R. Anderson, “Clear and Partial Danger: Defending Ourselves Against the Threat of Expert Bias” (2004) 83 Can. Bar Rev. 285. Regarding resort to party-appointed experts to ascertain information that influences legal rules, see J.H. Merryman, “Foreign Law as a Problem” (1983) 19 Stan. J. Int’l L. 151.

⁴⁹ For a revealing practical account, see Steven Moss, “Opinions for Sale: Confessions of an Expert Witness” *Legal Affairs* (March/April 2003) online: Legal Affairs: The Magazine at the Intersection of Law and Life <http://www.legalaaffairs.org/issues/March-April-2003/review_marapr03_moss.html>. See also the English Court of Appeal’s comments in *Abbey National v. Key Surveyors*, [1996] 3 All E.R. 184 at 191 (C.A. (Civ. Div.)): “It was argued that appointment of a court expert was pointless, since it merely meant the instruction of an additional expert whose opinion would carry no more weight than any other. We feel bound to say that in our opinion this argument ignores the experience of the courts over many years. *For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.*” [Emphasis added].

⁵⁰ But for a more optimistic view of the contribution party-appointed experts can make in connection with specialized information bearing upon the contents of domestic rule, see Baade, *supra* note 15 at 641-42.

A judge may also believe that a court-appointed expert may be better-suited to the ascertainment of foreign normative facts because of the strictly empirical nature of the task at hand.⁵¹ Indeed, because the expert's mandate should usually be limited to ascertaining foreign normative facts,⁵² the risks that he or she will fail to present to the court a broad enough range of possible theories and conclusions—an argument often heard in support of resorting to party-appointed experts—does not seem significant.

Many judges may thus envy their English colleagues, who were recently granted the power to order that expert evidence sought to be adduced by two or more parties be adduced by a single expert.⁵³ Canadian judges enjoy no such power, but this does not mean that they cannot, whenever they feel that it would be appropriate, raise the possibility of resorting to a court-appointed expert and discuss it with the parties during the pre-trial phase. Some litigants may very well change their minds and conclude that it would indeed make more sense to proceed in that manner. Judges should always ensure, however, that parties who agree to the intervention of a court-appointed expert also waive their rights to subsequently adduce party-appointed expert testimony to rebut or defend a conclusion reached by the court-appointed expert. Absent such an undertaking, the process risks become even more costly and complex than if party-appointed experts were employed.

If the parties are not willing to provide such an undertaking, a judge who prefers not to resort to full-fledged, party-appointed expert testimony could propose that the parties agree on excluding any oral examination of the experts, whether in chief- or cross-examination. The expert's opinion would thus be provided to the court through written statements, which would not merely be prepared in fulfillment of a procedural condition to the admissibility of subsequent testimony (as is normally the case), but which would rather be treated by the court as actual testimony. This

⁵¹ For the opinion of an American judge favourable to resorting to court-appointed experts in order to ascertain foreign law, see Roger J. Miner, "The Reception of Foreign Law in the U.S. Federal Courts" (1995) 43 Am. J. Comp. L. 581.

⁵² Thus excluding the issue of which conclusions ought to be drawn from such facts. On this distinction, see *supra* note 12.

⁵³ Rule 35.7 of the *The Civil Procedure Rules 1998* (U.K.), S.I. 1998/3132 L.17 reads: "(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only. (2) The parties wishing to submit the expert evidence are called 'the instructing parties'. (3) Where the instructing parties cannot agree who should be the expert, the court may - (a) select the expert from a list prepared or identified by the instructing parties; or (b) direct that the expert be selected in such other manner as the court may direct." On this provision, see *inter alia* Lord Woolf C.J.'s reasons in *Peet v. Mid-Kent Healthcare* (2001), [2002] 3 All E.R. 688 at 689-95 (C.A. (Civ. Div.)).

solution may be particularly appealing to litigants who are ready to concede that proceeding in the traditional manner is not desirable but who are not willing to agree, for tactical reasons, on the appointment of a single expert.

Some judges who feel particularly strongly about the need for and the effectiveness of cross-examination may, quite understandably, be initially reluctant to proceed in this manner. They will find little comfort in the fact that written statements prepared by party-appointed experts have been used for decades in France to determine the contents of foreign rules under a classic conflict of laws scenario,⁵⁴ since cross-examination, at least as it is known in the common law tradition, is unavailable in civil law jurisdictions.⁵⁵ However, they should give serious thought to the cost-effectiveness of this method, which has been substantially demonstrated in England, where it is routinely used to determine the contents of foreign rules in interlocutory proceedings.⁵⁶ Perhaps more importantly, this method has been adopted in the United States, where "the use of affidavit evidence without examination is [nowadays] commonplace" for all matters which raise issues of foreign law, whether interlocutory or not.⁵⁷ Surely, this method would not have gained such support in the United States if the opportunity to cross-examine experts who offer opinions on foreign normative facts was in fact a necessary condition to the effectiveness of the process.

If the parties are not willing to make concessions and insist on proceeding through full-fledged party-appointed expert testimony, then so shall it proceed. Will the process then resemble that followed when expert opinion is sought on matters relating to adjudicative facts? Not quite, because the judge's fundamental responsibility to determine the contents of domestic rules⁵⁸ significantly affects how he or she should react in situations of uncertainty.

Where adjudicative facts are concerned, we do not expect from fact-finders that they seek out additional information or otherwise cause additional information to be adduced if, after the trial has ended, they are unable to conclude on a balance of probabilities that a material fact has

⁵⁴ See e.g. *Audit*, *supra* note 16 at 237ff. Establishing the contents of foreign rules through written statements prepared by party-appointed experts has been expressly contemplated in the *Civil Code of Québec* Art. 2809 C.C.Q since 1994. However, litigants do not elect to proceed in this manner very frequently.

⁵⁵ On the examination of witnesses in the civil law tradition, see H. Kötz, "Civil Justice Systems in Europe and the United States" (2003) 13 *Duke J. Comp. & Int'l L.* 61.

⁵⁶ *Fentiman*, *supra* note 16 at 203ff.

⁵⁷ *Ibid.* at 204, 279-80.

⁵⁸ See *supra* note 7.

either been proved or disproved. If the judge cannot conclude on a balance of probabilities that the doctor was either negligent or not, this uncertainty need not disappear before a decision can be made. We accept that adjudication takes place in situations of uncertainty, as rules of a special kind—relating to the burden of proof—operate to allocate risks between the parties in such situations; the party bearing the burden of proof with respect to a material fact that has neither been proved nor disproved on a balance of probabilities will lose on that fact. As such, the rules relating to the burden of proof operate to allocate risks between the parties in such situations; the party bearing the burden of proof with respect to a material fact that has neither been proved nor disproved on a balance of probabilities will lose on that fact.⁵⁹ Similarly, when uncertainty occurs in connection with foreign rules applicable under a classic conflict of laws scenario, no further enquiry is needed before adjudication can occur.⁶⁰ Judges are simply expected to rule in accordance with domestic law.⁶¹

Adjudication should not be possible in cases of uncertainty regarding foreign normative facts that bear upon the contents of domestic rules because the judge's fundamental responsibility to determine the contents of such rules entails that any uncertainty must be eliminated before a decision can be made. If the judge is unable to draw sufficiently accurate conclusions after specialized knowledge has been provided by the parties' experts or the court-appointed experts, more must be done. In most cases, the judge should be able to clarify matters by using his or her

⁵⁹ This idea that the essential function of rules relating to the burden of proof is to allocate risk in situations where the fact-finder is unable to conclude, in light of the applicable standard of proof, that a material fact has either been proved or disproved, is accepted in both the common law and the civil law traditions. Compare, e.g., *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 at 699 (Sopinka J., dissenting: "Only if the evidence were so evenly balanced that a determinate conclusion could not be reached would resort to the legal burden of proof have been necessary.") and *Caisse populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282 at 300 [*Maniwaki*] ("[t]he uncertainty and doubt which subsist once evidence has been adduced must necessarily be resolved against the party which has the burden of such proof"). As Professor Perrot notes in "La charge de la preuve en matière d'assurance" (1961) 32 *Rev. gén. ass. terr.* 5 at 7-8, cited in *Maniwaki*: "[T]he practical issue of how to assign the burden of proof arises only in those situations where the process of weighing the evidence has produced no result. Then and only then is it essential to resolve the problem ... only if none of that evidence appears to the judge to be decisive does he or she consider the issue of how to assign the burden of proof, so as to decide which of the two parties will be believed on the basis of its mere assertion." On the possibility that quite different standards of proof are applied in each tradition, see Kevin. M. Clermont & Emily Sherwin, "A Comparative View of Standards of Proof" (2002) 50 *Am. J. Comp. L.* 243; M. Taruffo, "Rethinking the Standards of Proof" (2003) 51 *Am. J. Comp. L.* 659.

⁶⁰ Which is possible because public policy, as was mentioned, is not concerned with the application of foreign rules. See *supra* note 6.

⁶¹ See Audit, *supra* note 16 at 244; Gérald Goldstein & Ethel Groffier, *Droit international privé*, vol. 1. ("Théorie générale") (Cowansville: Éditions Yvon Blais, 1998) at 234ff; Art. 2809 C.C.Q.

common law powers to ask supplemental questions to witnesses,⁶² which could be resorted to irrespective of whether the experts were examined or not. But only in those rare cases where even supplemental questioning by the court will fail to eliminate the uncertainty, it seems that judges will have no other choice but to appoint another expert who will be given the task of providing them with whatever additional information is necessary.

IV. CONCLUSION

The increased influence of foreign normative facts on domestic legal orders is significantly changing how propositions we consider to constitute valid law are formed. While it could probably be argued that rules of legal interpretation were historically based on two fundamental objectives—respect for the democratic principle and compliance with rules that are reasonably certain and predictable—this is no longer true today. Legal interpretation has inherited two more objectives: promoting adherence to the rule of law in international relations and satisfying the increasing need to harmonize certain categories of rules with those in force elsewhere. Law is thus evolving in such a way that awareness of and openness to foreign and transnational legal systems will become basic and essential aspects of what constitutes *thinking as a jurist*.

But the increased influence of foreign normative facts on the contents of domestic rules is also bound to have concrete repercussions on a more practical level, and we ought to be thinking about those as well. Three basic ideas underlie the analysis of the “proof” of such normative facts proposed in this paper.

The first is that judges must always remain in control of the process aimed at ascertaining these facts. They cannot remain passive and rule on the sole basis of information that the parties have adduced, like they most often do with respect to adjudicative facts or foreign rules under a classic conflict of laws scenario. Because the interpretation of domestic rules is at issue, they must adopt a more active role, one that will ensure that they will, at the end of the process, have at their disposal sufficient information to allow them to draw conclusions regarding the impugned foreign normative facts. Second, judges must keep in mind that these facts will often be reasonably disputable. When that is the case, compliance with the *principe du contradictoire* is essential: the parties must always be afforded the opportunity to comment on whatever information the court intends to rely

⁶² See generally *R. v. Brouillard*, [1985] 1 S.C.R. 39. In Québec, this power is codified in the *Code of Civil Procedure*, *supra* note 9 at Art. 318: “The judge may ask the witness any question he deems useful according to the rules of evidence.”

upon while ascertaining their contents. Finally, expert assistance may be necessary to allow judges to draw accurate conclusions regarding foreign normative facts. When that is the case, judges should bear in mind that resorting to full-fledged, party-appointed testimony may not be desirable because the input of a single expert or the use of written expert statements may be sufficient and thus much more cost-effective. While, as things now stand in Canada, they could not prevent the parties from resorting to full-fledged, party-appointed expert testimony, judges should, in appropriate cases, ensure that the parties are at least aware of and have given thought to these alternatives.