DETERMINING AND APPLYING FOREIGN LAW: THE INCREASING NEED FOR CROSS-BORDER COOPERATION

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I. Introduction

Twenty years ago, when the State of Rhode Island was revising its rules of court to follow more closely the Federal Rules of Civil Procedure, the inclusion of a rule for proving foreign law[1] (that is non-U.S. law) seemed a bit esoteric to some. The

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The author gratefully acknowledges the research assistance of Luis F. Mancheno, RWU Class of 2013, Courtney Ross, RWU Class of 2015, and the generous support of Roger Williams University School of Law.

1. R.I. R. Civ. P. 44.1. The committee drafting the revisions to the Rhode Island rules included a rule similar to that in the Federal Rules of Procedure, which was originally added in 1966. *See* discussion *infra* text accompanying note 21.

reality today, in both state and federal courts, is that due to increasing globalization, transnational disputes have burgeoned in our courts, as has the attendant need to consider the content of relevant foreign law.[2] Expanding notions of personal and prescriptive jurisdiction in the last half century have led to more cases in our courts involving foreign parties and foreign law.[3] In addition, the ratification[4] or adoption of many private law instruments, both binding and soft-law,[5] has increased the need to consider foreign law. Finally, the dominance of choice of law theory in the United States by those approaches that focus on the content of the law of the jurisdictions having a connection to the issue often necessitates that courts consider the underlying policies and interests in their assessment of whose law to apply.[6] Thus there are two distinct

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2. *See generally* Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97 (2003) (examining choice of law theories used by federal courts); LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 205–32 (Supps. 1996 & 1999) [hereinafter TRANSNATIONAL LITIGATION] (examining the choice of foreign law in American courts and the procedures for proving the foreign law); Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to A Greater Global Understanding*, 46 WAKE FOREST L. REV. 887 (2011) (describing potential means to improve the application of foreign laws); Peter T. Trooboff, *Proving Foreign Law*, NAT'L. L. J. (2006), *available at* http://www.cov.com/files/Publication/166005e7-7c83-43b0-97fc-2d727f4e53cf/Presentation/PublicationAttachment/e1c9224b-4ae7-43b7-8d19-317c1ba3beef/674.pdf (considering the appropriate time to raise foreign law issues); HON. JOHN G. KOELTL, COMM. ON INT'L COMMERCIAL DISPUTE RESOLUTION OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, PROOF OF FOREIGN LAW AFTER FOUR DECADES WITH RULE 44.1 FRCP AND CPLR 4511 (examining Federal Rule 44.1, how it has changed the way American courts examine foreign law, and the issues that arise with different approaches).

3. *See, e.g.*, Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996) (using a database of over 94,000 cases to examine the win rate of foreigners in U.S. courts).

4. In some cases, the United States has acceded to, rather than ratified an international instrument.

5. For example, the United States has approved the form of certain Model Laws, such as those produced by the United Nations Commission on International Trade Law [hereinafter UNCITRAL].

6. The majority of states within the United States utilize some form of interest or policy-driven choice of law theory, such as the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971) or Currie's "governmental interest analysis." *See generally* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS (5th ed. 2010); Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L.

parts to consider when we talk about "applying foreign law"—ascertaining the content of foreign law (the evidentiary aspect) and determining whose law ought to be applied (the choice of law aspect).

This Article begins by providing as background the varied contexts in which U.S. courts may be required to ascertain the content of foreign law (Part II). Part III then looks at how U.S. federal courts[7] approach the issue of proving foreign law and their substantive obligations under Federal Rule 44.1, given that their determination is a matter of law, not of fact, and thus subject to full appellate review.[8] Individual courts and judges view their obligation under Rule 44.1 and how it is met differently.[9]

In Part IV, the Article turns from general issues of accessing foreign law and determining its content to consider the broader view of cross-border efforts to deal with the problem, exploring possible approaches such as international instruments,[10] certification processes,[11] direct judicial communica-

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217, 279 Table 1 (2013) (showing the majority of states within the United States adopt the Restatement as their choice-of-law methodology).

7. Although this Article primarily focuses on the federal courts, the reality is that the majority of states have adopted a version of the Federal Rules and included some form of Rule 44.1. The complication, however, is that many states have multiple rules, sometimes conflicting, in the context of evidentiary rules, judicial notice statutes, and rules of court. *See* TRANSNATIONAL LITIGATION, *supra* note 2, at 228–30.

8. See *infra* at Part III.A for a discussion of the impact of rule 44.1.

9. See *infra* at Part III.B for a discussion of the court's role in producing foreign law.

10. *See* Permanent Bureau, Hague Conference on Private Int'l Law, *Accessing the Content of Foreign Law and the Need for the Development of a Global Instrument in This Area – A Possible Way Ahead*, Prel. Doc. No. 11 A (March 2009), *available at* http://www.hcch.net/upload/wop/genaff_pd11a2009e.pdf (discussing a new Hague convention consisting of three parts). *See also* Council of Europe, European Convention on Information on Foreign Law, Jun. 6, 1968, E.T.S. 62, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/062.htm [hereinafter London Convention] (discussing how the convention can facilitate cross-border information sharing).

11. *See, e.g.*, THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATES LAWS, UNIFORM CERTIFICATIONS OF QUESTIONS OF LAW ACT 9, 10 (1995), *available at* http://www.uniformlaws.org/shared/docs/certification_of_questions_of_law/ucqla_final_95.pdf (describing the procedures by which the Supreme Court of a state will certify questions of law); Memorandum of Understanding to Consult and Cooperate on Questions of Law from J. J. Spigelman to the New York Bar Association (Oct. 28, 2010), *available at* http://www.lawl-

tion, and clearinghouse-style national centers.[12] The Article highlights the work of the Hague Conference on Private International Law, with proposals ranging from internet portals for access to foreign law to instruments[13] (both binding and not) to direct judicial communications to judicial assistance[14] to cross-border certification-like procedures. The work underway at the Hague Conference may provide models for greater cross-border cooperation that can be used by U.S. courts.

Creative solutions that can provide efficient and reliable determinations of foreign law are necessary both in the United States and abroad. "Foreign law," like goods and services, is a commodity that crosses borders, and its free movement is essential to support international trade. The inclusion of a provision that requires certification, direct judicial communication, or some other agreed mechanism for exchange in free trade agreements[15] might facilitate application of foreign law in U.S.

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ink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman281010.pdf/$file/spigelman281010.pdf.

12. The work by the European Union is beyond the scope of this article, except as it relates to cooperative activities with the Hague Conference.

13. Permanent Bureau, Hague Conference on Private Int'l Law, Prel. Doc. No. 11 A, *supra* note 10; Permanent Bureau, Hague Conference on Private Int'l Law, *Accessing the Content of Foreign Law: Report of the Meeting of Experts on Global Co-Operation on the Provision of Online Legal Information on National Laws*, Prel. Doc. No. 11 B (March 2009), *available at* http://www.hcch.net/upload/wop/genaff_pd11b2009e.pdf; Permanent Bureau, Hague Conference on Private Int'l Law, *Accessing the Content of Foreign Law: Compilation of Responses to the Questionnaire of October 2008 for the Meeting of Experts on Global Co-Operation on the Provision of Online Legal Information on National Laws,* Prel. Doc. No 11 C (March 2009), *available at* http://www.hcch.net/upload/wop/genaff2009pd11c.pdf.

14. *See, e.g.*, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (describing the methods of judicial assistance regarding service of legal documents) [hereinafter Hague Service Convention]; Convention on the Taking of Evidence Abroad in Civil and Commercial Maters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 744, 847 U.N.T.S. 231 (codified at 28 U.S.C.A. § 1781 (West Supp. 1985)) (describing the procedures of evidence regarding international civil litigation) [hereinafter Hague Evidence Convention].

15. The US-Australia FTA has a provision for recognition and enforcement of a limited type of judgments. United States-Australia Free Trade Agreement art. 14.7, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html. *See* Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitra-*

courts. But unlike the markets for most commodities, there is also a need for diplomacy in the foreign law "market" to avoid having local courts offend foreign sovereigns or populations with parochial interpretations of their law and culture. In the end, the rise in transnational litigation requires U.S. courts—both state and federal—to balance the domestic regulatory interests against the need for international cooperation.

II. The Need to Ascertain Foreign Law in U.S. Courts

U.S. courts, both state and federal, are increasingly deciding transnational cases—cases involving a foreign party, foreign transaction, or some other connection or event in a foreign country. As their transnational caseload grows, U.S. courts are required to ascertain foreign law more and more often. In many transnational cases, courts are confronted with determining what law applies. As a threshold matter, it is important to note that courts may need to consider foreign law as part of their choice of law analysis even if they ultimately determine that the foreign law is inapplicable. And before they can even make that determination, they need to know the content of the foreign law. The overlap between proving the content of foreign law and choice of law necessitates establishing the policies that support the law (or laws) in competition as part of the analysis dictated by the Second Restatement[16] and other forms

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tion, 52 Am. J. Comp. L 543, 557 n.56 (2006) (citing the same treaty). Similarly, other FTAs, including NAFTA, have mechanisms for dispute resolution that could provide models for cooperation in legal systems and their access to foreign law.

16. The Restatement (Second) of Conflicts of Laws § 6 (1971) provides:

> Choice-Of-Law Principles
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and

of modern interest analysis that require consideration of the underlying policies of the law to be applied. Thus, U.S. courts are often required to ascertain both the content of, and policies behind, foreign law in order to determine which law to apply.

The need to ascertain foreign law also plays a role in *forum non conveniens* analysis. For example, when a federal court considers a motion for *forum non conveniens* dismissal (a motion frequently filed in transnational litigation) the analysis requires a determination of whether an adequate alternative forum exists. This in turn could require consideration of the foreign legal system as well as the substantive law of the foreign forum. In addition, the forum court's lack of familiarity with the applicable foreign law also may be a factor in the *forum non conveniens* analysis. The forum's lack of expertise with the foreign law may lead to dismissal for *forum non conveniens.*[17]

Finally, U.S. courts often look to foreign law when asked to recognize or enforce a foreign judgment. This is especially true in states that require reciprocity,[18] where one would need to show that the foreign jurisdiction, such as Oman, would enforce a Texas judgment.

The need to determine the content of foreign law is not a new phenomenon. Indeed, in the 1895 Supreme Court case of *Hilton v. Guyot,*[19] the fountainhead of the doctrine of comity, the Court looked to the law of many jurisdictions and considered how other countries treat similar issues. It referred extensively to foreign law sources—sources which may not always have accurately understood the foreign law. Many of the nineteenth century treatises may have interpreted foreign civil law through the lenses of common-law viewers, detached from the

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(g) ease in the determination and application of the law to be applied.

17. *See, e.g.,* Taylor v. Daimler Chrysler Corp., 196 F. Supp. 2d 428, 434 (E.D. Tex. 2001) (dismissing for *forum non conveniens* after applying Texas conflict of laws most-significant relationship analysis and determining that Mexican law would apply and that a Mexican court "which understands that law far better than this one, should hear the case.").

18. In the United States, the recognition and enforcement of foreign judgments is governed by state law. U.S. federal courts generally apply the recognition law (statutory or common law) of the state in which they sit and where recognition is sought. *See* TRANSNATIONAL LITIGATION, at 209–10.

19. 159 U.S. 113, 210–26 (1895).

foreign legal traditions and culture that properly put the law in context.[20]

III. How U.S. Federal Courts Approach Foreign Law

In 1966, as part of the major revisions to the federal rules and the inclusion of transnational elements,[21] Rule 44.1 was added to the Federal Rules of Civil Procedure. Entitled "Determining Foreign Law," Rule 44.1 provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.[22]

A. *The Impact of Rule 44.1*

Rule 44.1 fundamentally changed how foreign law is treated in U.S. federal courts and in the many state courts that have followed the federal example. First, the determination of foreign law became a question of law, not of fact. Second, the determination became subject to *de novo* appellate review.[23] Third, as emphasized in the Advisory Committee Notes, the

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20. *See generally*, Louise Ellen Teitz, *The Story of* Hilton*: From Gloves to Globalization*, *in* Civil Procedure Stories: An In-depth Look at the Leading Civil Procedure Cases 445 (Kevin Clermont ed., 2d ed. 2008) (discussing the impact of *Hilton v. Guyot*).

21. Prompting this change in part were the Unif. Interstate and Int'l Procedure Act § 4.03, 13 U.L.A. 355 (1962), and the work of the Project on International Procedure of the Columbia University School of Law. *See* Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1016 (1965) (describing a wave of proposed changes in the early 1960s). The official name of the project is the "Project on International Procedure of the Columbia University School of Law," which in 1960 teamed up with the Commission on International Rules of Judicial Procedure, created by Congress in 1958. The purpose of the collaboration was to revise unilaterally the rules on foreign procedure domestically, "obviat[ing] the need for international regulation," as well as the notion that rule making by treaty would "invade areas traditionally covered by state law." *Id.*

22. Fed. R. Civ. P. 44.1.

23. Fed. R. Civ. P. 44.1 Advisory Committee's Note ("Under the third sentence, the court's determination of an issue of foreign law is to be treated

methods of proving foreign law were freed from some of the limiting rules of evidence and opened to proof by a variety of means.[24] The varied mechanisms for ascertaining foreign law, however, raise issues of reliability, efficiency, and appropriate context.[25]

Prior to the enactment of Rule 44.1, the content of foreign law was treated in federal courts as a matter of fact, and its determination by the court was subject to review under the highly deferential "clearly erroneous" standard. Rule 44.1's recharacterization of this determination as a question of law is significant for two reasons. First, it changed the relevant standard of review, requiring the courts of appeal to review the trial court's determination of foreign law *de novo*. Perhaps most importantly, characterizing the determination of foreign law as a question of law implicitly imposes the ultimate duty to determine the content of the foreign law on the court—whether or not the parties offer sufficient proof. This duty raises two related questions. Who has the obligation to provide the content of the foreign law—the court or the parties? And should the court default to local law when the parties either fail to prove sufficiently foreign law or agree to ignore it? Second, at the trial court level, the change from a factual question to be proven by the evidence to a question of law opened up the possibility for summary disposition, an avenue presumed closed when foreign law was a matter of "fact."

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as a ruling on a question of 'law,' not 'fact,' so that appellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a).").

24. FED. R. CIV. P. 44.1 Advisory Committee's Note ("The second sentence of the new rule describes the materials to which the court may resort in determining an issue of foreign law. Heretofore the district courts, applying Rule 43(a), have looked in certain cases to State law to find the rules of evidence by which the content of foreign-country law is to be established. The State laws vary; some embody procedures which are inefficient, time consuming and expensive. In all events the ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43." (citation omitted)).

25. *See infra* at Part III.C (discussing the available means for proving foreign law, including requiring the parties to prove the law, the court hiring its own experts or the court doing its own research, as well as the problems that arise with each method).

B. *The Court's Role in Determining Foreign Law*

Rule 44.1 and the Advisory Committee Notes suggest that the court may require the parties to produce briefs or evidence (affidavits, expert testimony, treatises) of the content of the foreign law. The cases show that this can be done not only at the district court level but also at the court of appeals level. The Advisory Committee Notes also highlight the court's freedom to supplement party-prepared materials with its own research:

> In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by the materials presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.[26]

The question of who has the ultimate obligation to produce the foreign law under Rule 44.1 remains one of the major differences between the approaches taken by various U.S. federal courts today. Prior to 1966, when foreign law was a matter of fact and had to be proved, the obligation to produce it was clearly on the parties. Neglecting to prove foreign law generally meant failure to prove a necessary fact, and therefore resulted in judgment against the party relying on the foreign law. Since 1966, the change from fact to law and the attendant change in the standard of review place the ultimate duty to determine correctly foreign law on the court—on the judge. Whether this duty also implies that the court has the obligation to produce the content of the foreign law itself if the parties fail to do so is viewed differently among the circuits.[27]

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26. FED. R. CIV. P. 44.1 Advisory Committee's Note (1966).

27. TRANSNATIONAL LITIGATION, *supra* note 2, at 222–23.

1. *Approaches Placing the Duty to Determine the Content of Foreign Law on the Court*

Some courts have clearly stated the court's responsibility for determining the correct foreign law, whether or not the parties provide the foreign law. The Seventh Circuit has for more than 25 years clearly announced the court's responsibility for determining the correct foreign law. Indeed, in a recent case, *Bodum USA, Inc. v. La Cafetiere, Inc.*,[28] all three judges on the panel commented on the way in which the court might choose to meet its obligation of determining the French law at issue, discussing the appropriate "hierarchy" of foreign law sources. In *Twohy v. First National Bank of Chicago*,[29] an earlier case concerning an action brought by the majority shareholder of a Spanish corporation, the Seventh Circuit affirmed the application of Spanish law, to which the parties had stipulated, while emphasizing that the court must apply the appropriate law even when the parties stipulate to the application of a different law.[30] After acknowledging that both trial and appellate courts have a duty to research and analyze foreign law, the Court of Appeals focused on the trial court's obligation:

> Nor are we convinced that the district court fully met its duty to ascertain foreign law under Rule 44.1, although we recognize that investigating Spanish law on the relevant issue presents no simple task. Nothing in Rule 44.1 strictly requires a district judge to engage in private research . . . . Under these circumstances, however, it would have been appropriate for the court to demand a more "complete presentation by counsel" on the issue, as suggested in the Advisory Committee's Note to Rule 44.1 . . . .[31]

It is the duty of the court—trial as well as appellate—to decide how to accommodate its obligation under Rule 44.1. The parties can be required to provide the foreign law using expert witnesses or published sources, the court can hire an

28. 621 F.3d 624, 628–29, 631–32, 638 (7th Cir. 2010). *See* discussion *infra* at Part III.C.2 (discussing the judge's criticism of reliance on experts in determining foreign law and the promotion of reliance on judicial research as an improved method for establishing foreign law).

29. 758 F.2d 1185 (7th Cir. 1985).

30. *Id.* at 1191.

31. *Id.* at 1193–94.

expert or special master of its own, the court can do its own research—or some combination of all of these.[32] Indeed, often parties brief issues of domestic law, the briefs and materials are scanty or insufficient, and so the judge and the law clerk do the research to fill the gaps. Of course, in the domestic context there is not as much danger that one might misconstrue sister state law or take it out of context. But in the context of foreign law, statutes and codes removed from context can lead to improper assumptions and incorrect decisions.

2. *Approaches Placing the Duty to Determine the Content of Foreign Law on the Parties*

By ruling that parties can impliedly waive the applicability of foreign law, some courts place the obligation to produce foreign law squarely on the parties. In stark contrast to the Seventh Circuit's approach in *Twohy*, some courts simply ignore foreign law when the parties agree that some form of U.S. law applies or otherwise fail to provide the content of foreign law.[33] Such agreements would seem to be subject to challenge, especially since the parties cannot necessarily avoid mandatory law,[34] and whatever law the court applies is subject to full review. For example, even if the parties in a tort case involving New Hampshire and Massachusetts stipulate that Massachusetts law applies to a certain issue, choice of law is still a legal question, and it is ultimately for the court to determine which state's substantive law is applicable. The fact that an applicable law may be foreign should not change the court's choice of law analysis, although it may affect the mechanisms and means the court employs to determine the content of the foreign law. Nor does one want to skew precedent by having a U.S. court that defaults to forum law hold that the law of negligence is the same in Colombia and New York. By defaulting to forum law, courts so construing Rule 44.1 place the burden of proving foreign law on the proponent of that law, a result contrary to the expressed goals leading to the addition of the Rule in 1966.

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32. The wide range of available means will be discussed *infra* Part III.C.

33. *See, e.g.*, Carey v. Bahama Cruise Lines, 864 F.2d 201, 205–06 (1st Cir. 1988) (discussed *infra* text accompanying notes 35–36).

34. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187(2)(b) (1988).

Even when the parties do not agree that U.S. law applies, some courts default to U.S. law when the parties fail to produce potentially applicable foreign law. For example, in a case involving an injury that occurred in Mexican territorial waters on a vessel owned by a Cayman Islands corporation,[35] the First Circuit made it clear that the court had no obligation either to make sure the parties provide the foreign law or to determine the content itself. Instead it assumed the parties impliedly waived the issue in favor of forum law:

> By their silence, the litigants' consent to having their dispute resolved according to the law of the forum. This arrangement is not unwelcome from the court's perspective because it is spared a complicated international choice-of-law problem and can apply law with which it is more familiar. We do not see any harm in a court deferring to the litigants in these circumstances.[36]

It is of course difficult to justify this attitude, either in principle or on policy grounds, since if it is error to apply the forum's law, that error should be corrected. This approach should be rejected under Rule 44.1, as it is disingenuous to accept a solution in a transnational case that would be unacceptable in a case involving wholly domestic law. Given the increasing accessibility of foreign law sources and the significance foreign law plays in U.S. courts, parochial approaches should not be tolerated in the transnational context any more than they would be if the parties had presented to the court a choice between Louisiana and Massachusetts law.

Some choice of law theories sanction defaulting to forum law when the parties fail to prove foreign law. With the addition of Rule 44.1, any deficiency in the proof of foreign law is to be treated as a question of law, and is often treated as a conflict of laws issue—whose law should the court apply? Some choice of law theories default to the law of the forum when the content of the foreign law has not been sufficiently proven, embracing a presumption that the foreign law is like the law of the forum, or presuming that the parties have selected forum law (the latter even occurring in some cases with a choice of law clause to the contrary). This can mean that a party's failure

35. Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988).
36. *Id.* at 206.

to prove the content of foreign law leads by default to application of the forum's law.[37] Thus, if a court is required to construe a contract between a Rhode Island buyer and a Mexican seller with inadequate or no proof of the foreign (Mexican) law, the court might simply apply Rhode Island law either as a default to forum law or as an assumption that Mexican and Rhode Island law are the same—a situation not very likely when one compares a civil law jurisdiction with a common-law jurisdiction.

Courts that default to forum law in the absence of sufficient proof of foreign law construe Rule 44.1 to place the burden of proving foreign law on the foreign law's proponent. This result is contrary to the expressed goals which led to the Rule's addition in 1966. The problem reflects a disconnect that exists in many courts between the practical means of establishing foreign law in the evidentiary sense and the choice of law theory that dictates what substantive law applies. Thus, there is an inconsistency between the procedure dictated by Rule 44.1, which imposes the responsibility for ascertaining the foreign law on the court, and choice of law theories that fill gaps in knowledge of foreign law with forum law.

C. *Filling the Void: The Available Means for Proving Foreign Law*

As noted above, both federal trial and federal appellate courts have a duty to decide how to accommodate Rule 44.1. The parties can be required to provide the foreign law, by affidavit, treatise, or expert testimony. The court can hire an expert (or special master) of its own,[38] or can simply do its own

37. Karim v. Finch Shipping Co., 265 F.3d 258, 271–72 (5th Cir. 2001). It is interesting to note the Fifth Circuit's comments here, holding that expert testimony stating Bangladeshi courts would look to Indian and British cases for guidance was sufficient to establish the applicability of Indian and British law in the case, and in *Banco de Credito Industrial, S.A. v. Tesoreriá General de la Seguridad Social de España*, 990 F.2d 827 (5th Cir. 1993), since this court also at times has approved of the district court defaulting to forum law in the absence of proof of foreign law. *Cf.*, Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000 (5th Cir. 1990) (holding that a court may apply the law of the forum unless the burden of proving an applicable foreign law is met).

38. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842, 847 (S.D.N.Y. 1986), *aff'd in part, modified in part by* 809 F.2d 195 (2d Cir. 1987).

research. Ideally the court will use some combination of these methods.

A party intending to raise foreign law must provide notice to the opposing party, and, presumably, to the court. Although Rule 44.1 mandates notice, it does not specify the time or method, other than "by pleadings or other reasonable written notice." The Advisory Committee Notes emphasize on the one hand flexibility in the time and manner of notice, and on the other, "unfair surprise."[39] The Rule allows notice to be given when the applicability of foreign law becomes evident, often not until during discovery, at the pre-trial conference, or even at trial.[40]

In keeping with the goal of maximizing flexibility for raising foreign law, Rule 44.1 authorizes a court to consider any type of evidence, limited only by relevancy. The wide range of potential sources of information is not limited by the Rules of Evidence or by the source of the materials. By making admissibility a non-issue, Rule 44.1 broadens the scope of evidence, preventing efforts to prove foreign law from being hindered by time-consuming admissibility battles.

Courts may rely on treatises, especially when the foreign law in question is relatively simple, or is traceable to specific ordinances or codes. Treatises may also provide a general per-

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39. The FED. R. CIV. P. 44.1 Advisory Committee's Note states:

> The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable. The stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice. If notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.

40. Federal case law tends to support allowing proof of foreign law, except when the tardiness of notice unfairly prejudices the opposing party, such as when it is first raised on appeal. *See, e.g.*, Ruff v. St. Paul Mercury Ins. Co., 393 F. 2d 500 (2d Cir. 1968) (holding a party must give "reasonable written notice" in the district court proceedings in order to raise an issue concerning the law of a foreign country on appeal and no such notice was made in the district court proceedings); 9A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 2443 (3d ed. 2013).

spective on an area of foreign law and help to identify the law's underlying policies. Although judges consider themselves competent to make assessments of the quality and accuracy of treatises on U.S. law (both state and federal) they sometimes hesitate to rely on treatises when the law in question is not their own or requires familiarity with a foreign law. Relying on an English language treatise on foreign law or an English translation of a foreign treatise is often far from ideal.

The Internet has provided easy and earlier access to sources of law that were not previously available to the general public, especially governmental and intergovernmental documents. Many governmental and intergovernmental entities now have their own open access web sites,[41] and many court systems now make their rules and reports of their decisions available online. With the Internet's convenience there comes an attendant danger of misperception for want of an adequate background or context. Thus, internet access to foreign law does not make resort to experts less likely or less important; rather, it casts them in the role of placing the online legal materials in the appropriate light.[42]

Although Rule 44.1 does not specify the form in which proof of foreign law should be presented, the most common and most preferred sources of foreign law are expert witnesses. The expert may be a national of the country whose law is at issue, a law professor knowledgeable about the foreign law, or a legal professional licensed by the foreign country.[43] Expert witnesses present their opinions through affidavits or through testimony (in person or by deposition). An expert's affidavit interpreting a foreign law (and if necessary authenticating it) is often both efficient and sufficient, especially for determinations made on summary disposition.

The use of experts by both parties tends to invite a battle of experts. In such cases, the court must often choose between

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41. The Hague Conference's website is an example of a website that provides transparent access to most of its work. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net.

42. *But see* Judge Posner's position, discussed *infra* at text accompanying notes 53–54 (discussing Posner's criticism for the "unsound judicial practice" of relying on experts to establish foreign law, when judges have the ability to research materials on the foreign law themselves).

43. For further discussion of the types of evidence and examples of the use of experts, see generally Matthew J. Wilson, *supra* note 2.

conflicting views. Although judges routinely select between conflicting expert opinions in other contexts (such as the opinions of economic experts in commercial or antitrust cases) the typical judge may become intimidated by the prospect of applying foreign law and hesitate to rely on expert witnesses. Outside the foreign law context, experts typically are called to give opinions on issues of fact, and the fact finder may accord their testimony whatever weight he chooses. Such reliance on expert opinion is afforded deference on review by an appellate court. However, when the issue is the content or meaning of foreign law, Rule 44.1 dictates its treatment as an issue of law, and the court's decision will be subject to *de novo* review by the appellate court. Thus, the trial judge's assessment of expert opinions receives no deference and is left wide open for full scrutiny.

When experts disagree on foreign law issues, courts appear to give more weight to experts who are nationals of the foreign country and practice law there.[44] But the court is not bound to give any credence to an expert's testimony and is not limited to the experts provided by the parties. Under Rule 706 of the Federal Rules of Evidence the court may consult its own expert for an opinion on the content of foreign law.[45] This option accords with the intent of Rule 44.1 to allow broad inquiry. Although the option is available when one party lacks funds for an expert it seems to be exercised more commonly when the court finds the expert evidence supplied by the par-

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44. *See, e.g.*, In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842, 847 (S.D.N.Y. 1986), *aff'd in part, modified in part by* 809 F.2d 195 (2d Cir. 1987) (giving more weight to Indian practitioner's testimony than to that of nonmembers of Indian bar).

45. *See generally* John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 MAR. L. 179, 194 (1984). The Federal Rules of Evidence provide for court-appointed experts. FED. R. EVID. 706 provides:

> Court-Appointed Expert Witnesses
>
> (a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

ties inconclusive or insufficient.[46] The cost of the court appointed expert may be apportioned among the parties.[47]

There is increasing concern with the amount of court time spent determining foreign law, particularly when experts are consulted. The central role played by experts in determinations of foreign law has also raised issues about their neutrality and objectivity. While ethical obligations impose some restraint on lawyers, both those representing parties and those serving as experts, non-lawyer experts are not subject to the same restraints. Courts have the power to sanction parties and their counsel both for action in bad faith[48] and for breach of the appropriate disciplinary code. American courts may not hold foreign lawyers acting as experts to the same statutory duties that American lawyers are subject to, but the foreign experts are still subject to the professional codes of conduct and ethical obligations of their home jurisdictions. Moreover, as professional witnesses open to employment in future cases, experts on foreign law may be restrained by concern for their reputations and credibility.

The use of experts was extensively criticized in *Bodum*,[49] a recent Seventh Circuit case which advocated replacing the practice with direct judicial research. Forced to consider French law, the court extensively discussed both the French legal system and French substantive law. Although the judgment was unanimous, all three judges on the panel separately commented on the methods for determining foreign law. The court's opinion, authored by Judge Easterbrook, eschews the use of experts, indicating that although allowed under Rule 44.1, they are not required. Analogizing the task of determining French law to determining the law of Louisiana, Judge Easterbrook's opinion finds the use of foreign law experts unnecessary.[50] This view overlooks the fact that considerations of for-

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46. For example, in one recent Second Circuit case, Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82 (2d Cir. 1998), the appellate court found that the parties had failed to provide evidence of choice of law in an international copyright case, assuming that Russian law applied. The court, in addition to requesting supplemental briefs, appointed a law professor as an expert amicus curiae.

47. FED. R. EVID. 706 (c)(2).

48. Chambers v. Nasco, Inc., 501 U.S. 32 (1991).

49. Bodum USA Inc. v. La Cafetiere, Inc., 621 F.3d 624 (7th Cir. 2010).

50. *Id.* at 628–29.

eign law require an understanding of the broader legal culture, which is not required in any significant way when viewing the law of another U.S. state. Instead of using experts, Judge Easterbrook's opinion advocates judicial research through treatises, which he suggests "do not have the slant that characterizes the warring declarations presented in this case."[51] According to Judge Easterbrook, "French law, and the law of most other nations that engage in extensive international commerce, is widely available in English."[52] Such statements about the availability of foreign law and treatises in English may not be accurate and may suggest an Anglophile attitude that could be offensive to countries with emerging economies.

In his concurrence, Judge Posner goes further to criticize the "unsound judicial practice" of using experts for testimony or affidavits instead of the judge doing research.

> I do not criticize the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. It is excusable only when the foreign law is the law of a country with such obscure or poorly developed legal system that there are no secondary materials to which the judge could turn.[53]

Made in the context of French commercial law, Judge Posner's comments may reflect the easy accessibility of materials on that subject. Judge Posner's confidence in the use of secondary sources, including treatises, to research foreign legal systems whose materials are not readily accessible in English[54] (and as he recognizes, unlike him, most judges are not fluent in multiple languages) may not always be well-deserved. Commentaries and treatises often reflect the authors' interpretation, so that one is still often captive to the reliability of the "narrator."

The danger of course of solely relying on judicial research is that we bring our own inherent prejudices and preconceived notions to our reading of foreign law, and often unconsciously

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51. *Id.* at 629.

52. *Id.* at 628.

53. *Id.* at 633–34 (Posner, J., concurring).

54. Judge Posner recognizes that, unlike him, most judges are monolingual. *Id.* at 633.

incorporate them into our analysis of foreign law and legal systems. Indeed, in her concurrence Judge Wood criticizes her colleagues' view that expert testimony is "categorically inferior" to published English-language materials. Judge Wood suggests that courts may (and by implication should) utilize both experts and the court's own research to determine foreign law in the appropriate case.

> Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not. As the French might put it more generally, apparently similar phrases might be *faux amis*.[55]

Even with the increasing availability of access to both published sources of foreign law (especially on the internet) and trained experts on foreign law, the concerns of reliability, neutrality, and costs continue to dominate the discussion. As noted above, many of the existing avenues for determining foreign law have shortcomings. Aside from the danger of improper or naïve interpretation of comparative law ("false friends"), at least on the trial level, judges have limited resources, including law clerks. With overloaded dockets and the need in the federal system to hear criminal matters first, is judicial research of foreign law the best use of time and resources? Reviewing and assessing expert testimony may be less time-consuming than doing independent research, and is often more likely to be accurate and reflect the legal context. Although questions of expert reliability and neutrality can be remedied by the use of court-appointed experts and special masters, these options add financial costs for parties and court systems.

It is not only federal courts that are being asked to determine and apply foreign and international law, state courts are also facing the problem more and more frequently. Indeed one can see the range of foreign law issues and the related questions of parochialism and misunderstanding in some states where the legislatures have banned the reliance by

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55. Bodum USA Inc. v. La Cafetiere, Inc., 621 F.3d 624, 638–639 (7th Cir. 2010) (Wood, J., concurring).

courts on foreign law.[56] In states that have businesses engaged in major international trade (such as New York, California, Texas, Illinois, and Florida) and in states along the borders with Canada and Mexico, there is an increasing need for reference to foreign law, both for the initial choice of law inquiry and for the eventual application of foreign substantive law. It is no wonder that the New York state courts have signed a voluntary memorandum of understanding with the courts in one part of Australia.[57] In these times of increasingly smaller budgets for federal and state courts, here and abroad, efficient mechanisms for determining foreign law are desperately needed to fill the void. Memoranda of understanding, direct judicial communication, certification procedures, lawyer and institutional clearinghouses and networks, and even international instruments may provide options—often, however, with additional time or resource implications.

IV. Cross-border Efforts and Models of Cooperation

Up to this point this Article has focused primarily on the approaches to and rules for obtaining foreign law in U.S. courts, with an emphasis on the federal courts. But U.S. courts are not alone in having to determine and apply foreign law—the problem is increasing worldwide. In the European Union, for example, the universal application of the Rome I and II

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56. The best known of these is the amendment to the Oklahoma Constitution, the "Save Our State Amendment," referred to popular referendum by H.R.J. Res. 1056 (amending Okla. Const. art. 7, §1 (2010)). "The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution . . . . The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law . . . ." The Tenth Circuit subsequently enjoined the enforcement of the amendment. Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012). For further discussion and sources on this amendment, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 Am. J. Comp. L. 217, 295 n.439 (2013).

57. *See infra* text accompanying note 82 (describing the Memorandum of Understanding between the court in New South Wales and the New York which states that "if a substantial legal issue in proceedings before one Court is governed by the law of the other Court, each Party shall give consideration, in accordance with its Rules and procedures, to taking steps to have any such contested issue of law referred to the Party of the governing law for an answer to be provided in accordance with the procedures of the requested jurisdiction.").

regulations[58] means that courts there must determine not only the law of their twenty-six fellow Member States but also the law of non-E.U. countries.[59] Courts and administrative agencies[60] around the world need to find reliable and cost-effective means to ascertain the content of foreign law.[61] The prevailing mechanisms are insufficient, unreliable, or both,[62] and often fail to meet the need for quick responses and for accurate interpretation as well as failing to interpret the foreign law through the appropriate comparative law lense. Although there are examples of regional instruments, such as the "London Convention"[63] and the "Montevideo Convention,"[64] these conventions have not been widely used and are at least 30 years old.[65] Many countries rely on bilateral agreements

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58. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6; Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40.

59. The European Commission and the Hague Conference on Private International Law held a joint conference on "Access to Foreign Law in Civil and Commercial Matters" from February 15–17, 2012. The "Conclusions and Recommendations" of the conference are available at HAGUE CONF. ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/upload/foreignlaw_concl_e.pdf (last visited Apr. 1, 2013).

60. Although this article has focused on courts, the content of foreign law is necessary for other forms of "tribunals." For a consideration of the need for foreign law in arbitration, see Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313 (2003), and INTERNATIONAL LAW ASSOCIATION, FINAL REPORT: ASCERTAINING THE CONTENTS OF THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION (2008).

61. As mentioned earlier, the problem is two-fold—gaining access to the foreign law and determining the content of the appropriate foreign law, the latter being the portion that requires legal analysis.

62. HAGUE CONFERENCE ON PRIVATE INT'L LAW, FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW: SUMMARY OF THE RESPONSES TO THE QUESTIONNAIRE 10–12 (2008), *available at* http://www.hcch.net/upload/wop/genaff_pd09ae2008.pdf.

63. *See* European Convention on Information on Foreign Law, Jun. 6, 1968, E.T.S. No. 62. For a more recent example of a regional instrument, see Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases, Jan. 22, 1993, No. 263 [hereinafter Minsk Convention].

64. The Inter-American Convention on Proof of and Information on Foreign Law, May 8, 1979, 1439 U.N.T.S. 111 [hereinafter Montevideo Convention].

65. *See* FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW, *supra* note 62, Part I – Status of Implementation and Operation of Treaties on Proof of

which are often limited in scope (restricted, for example, to civil and commercial matters).

The burgeoning need to determine the content of foreign law in all types of cross-border cases—from commercial to family to criminal—and the absence of efficient and workable mechanisms has resulted in increased interest in developing models for cross-border cooperation. The Hague Conference has been working on the issue of foreign law for almost a decade. Its work on access to foreign law includes both being able to find the content of the foreign law and being able to apply it to the problem—creating a portal to the information and a uniform means of access, and then addressing the cooperative exchange to determine the law to be applied.

In general, common law countries have been more reluctant to consider the issue than civil law countries—perhaps because for common-law lawyers, the question of foreign law is more focused on how the law applies to certain facts, and there is a reluctance to view law in isolation. One can compare the approaches to the question of whether there is personal or adjudicative jurisdiction. Under U.S. law the determination is both constitutional and factual, including a balance of fairness factors as part of the analysis. In contrast, in the European Union, the Brussels Regulation[66] provides for jurisdiction based on the nature of the claim and its relationship to forum, and this is done by code. If you asked a common-law judge whether there is personal jurisdiction, it would not necessarily be clear-cut or determinative.

Several models for determining foreign law already exist. Mechanisms for cross-border cooperation range from informal memoranda of understanding, such as those currently in effect between New South Wales and the New York state courts,[67]where there is no binding obligation, to multilateral

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or Information on Foreign Law (Questions 1–8) (examining data on the number of states and state efforts to engage in bilateral treaties on proof of or information on foreign law).

66. Council Regulation 44/2001, 2001 J.O. (L 12). *See also* the new Council Regulation 1215/2012, 2012 J.O. (L 351) (details the regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

67. Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (Dec. 20, 2010), *available at* http://www.supremecourt.

conventions that require reciprocal performance, such as the Hague Evidence Convention.[68] The exchange of information can occur through administrative units, such as Central Authorities, or it may be in the form of direct judicial communication, which as discussed below has been particularly successful in the context of the 1980 Hague Child Abduction Convention. A hybrid option in the form of a cross-border "certification" process[69] similar to that currently used by many federal courts to resolve questions of uncertain state law is another possibility. Soft law models that rely on networks of lawyers or "think tanks" could also be incorporated into either a voluntary or mandatory system of cooperation.

Most of the models discussed below present several issues, most obviously financial cost and delay. The height of the obstacle varies with the legal system, including whether it is one that guarantees access to justice for its citizens. In addition, models that use judges to answer the foreign law questions may raise constitutional or structural issues of whether the court can provide an opinion on a case not pending before that court (the case would be pending in the Requesting State, but not in the Requested State).[70] Direct judicial communications raise questions of due process, an obstacle which may be overcome by avoiding ex parte communications.[71] In contrast, models employing the cooperation of networks of attorneys or

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lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation/SCO2_agreement_newyork.html; J.J. Spigelman, *Proof of Foreign Law by Reference to the Foreign Court*, 127 L.Q. REV. 208, 216 (2011) (discusses an innovative mechanism that has been adopted in New South Wales, whereby a question of foreign law may be referred to a foreign court for determination).

68. Hague Evidence Convention, *supra* note 14.

69. THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATES LAWS, *supra* note 11, at 5-6. To this day only eight states and the District of Columbia have enacted this Act. UNIFORM LAW COMMISSION LEGISLATIVE FACT SHEET – CERTIFICATION OF QUESTIONS OF LAW (1995), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Certification%20Of%20Questions%20of%20Law%20(1995) (last visited Oct. 10, 2013).

70. For example, federal courts in the United States have a constitutional requirement of a "case or controversy" from Article III. U.S. Const. art. III, § 2.

71. For example, the direct judicial communications model has been criticized by some for its ex parte nature and for concerns about confidentiality. *See, e.g.*, Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions (June 1–10, 2011), Report of Meeting No. 10 (June 7, 2011), 2:

academics suggest the specter of conflict of interests, bias, and partiality. On the other hand, in the United States we often employ "hired guns" as experts, which has also raised the question of neutrality—a factor used by some to oppose the practice.[72]

A. *Existing Hague Conference Mechanisms*

The Hague Conference has already incorporated limited methods for ascertaining foreign law into several recent treaties. Many of these existing Hague Conference mechanisms could be expanded to address a broader range of foreign law questions. Recent Hague conventions in both the fields of legal cooperation (such as the Hague Evidence Convention)[73] and child protection (such as the 1980 Child Abduction Convention),[74] set up administrative entities called Central Authorities,[75] with a structure that provides for direct coopera-

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> Some experts voiced concerns over the judicial network and thought that the independence of judges may be jeopardised if judges in different States were to exchange information on specific cases. A few experts expressed concerns with regard to the confidentiality of the information exchanged between judges concerning specific cases. A few experts thought it was for the Central Authorities to act as a link between the judges of different judiciaries in such situations. In this respect, a number of experts emphasised that judges would respect the principles of judicial independence and impartiality and protect confidential information.

72. For an example of such a critique, see discussion of *Bodum*, *supra* Part III.C.2.

73. Hague Evidence Convention, *supra* note 14.

74. Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670 [hereinafter Hague Convention on Child Abduction]; Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, *done* Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter Hague Convention on Child Protection]; Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, *done* Nov. 23, 2007, 47 I.L.M. 257 [hereinafter Hague Convention on Maintenance].

75. Hague Evidence Convention, *supra* note 14, art. 2 ("A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law. Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.");

tion between either the courts or Central Authorities in different jurisdictions in order to facilitate the operation of the conventions. These models of direct communication could be employed as part of a binding instrument on foreign law.

It is certainly possible to conceive of a model that would provide for Central Authorities determining foreign law. One can then explore different variations of how the Central Authority might obtain the answers to foreign law questions. One variation could have the Central Authority in the "Requested State" ask its judiciary to answer the questions submitted by a Requesting State. A limited version of this mechanism can be seen in the 1980 Child Abduction Convention. Article 15 of the Convention allows the court or administrative agency in the Contracting State that is being asked to return a child to ask the applicant (here the "left-behind" parent) to obtain an opinion from the authorities of the state of the child's habitual residence on whether they deem the child wrongfully removed or retained as defined by Article 3 of the Convention.[76] Although the authorities in the Requested State do not have an affirmative obligation to issue such an opinion, the Central Authorities of the respective Contracting States have an obligation to assist the applicant's efforts to obtain the opinion "so far as practicable."[77]

Another variation of the Central Authority model could have the Central Authority of the Requested State forward

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Hague Convention on Child Abduction, *supra* note 74, art. 6 ("A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers.").

76. Hague Convention on Child Abduction, *supra* note 74, art. 15 ("The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.").

77. *See* Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, *in* ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (1980) 426, 463 (1982), *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=2779 (describing Central Authorities' obligations).

questions to private or government-funded institutes,[78] bar associations (such as the ABA), or academics. All of these options have been considered, but questions of cost, reliability, liability, and conflict of interests remain. Binding versions of this model have not found consensus among the Hague Member States.

The 1980 Hague Child Abduction Convention offers several further examples of mechanisms that assist in resolving questions of foreign law or could be expanded to do so. Some of the mechanisms are obligatory and set out in the Convention, such as the creation of a Central Authority discussed above, which "shall co-operate with" the Central Authorities of other Contracting States.[79] A second mechanism that helps determine foreign law is the process of direct judicial cooperation, which although not explicitly mandated by the 1980 Convention, has been fostered through a network of international judges[80] and by new guidelines for direct judicial communication.[81] Not all Contracting States have designated judges to the Network or participate in direct communication. Some countries have voiced due process concerns when communications relate to specific cases. While the actual process of direct judicial communication is not mandatory, there is perhaps an implied reciprocal obligation. The result of the communication is also not "binding," which might need to be reconsidered if one were to use the direct judicial communication model to determine foreign law more generally.

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78. The Swiss Institute of Comparative Law in Lausanne is a government institution. Max Planck Institutes in several locations in Germany are part of a publicly-funded, independent, non-governmental and non-profit association of German research institutes.

79. Hague Convention on Child Abduction, *supra* note 74, art. 7 ("Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.").

80. *International Hague Network of Judges*, HAGUE CONFERENCE ON PRIVATE INT'L LAW (Jan. 2013), http://www.hcch.net/upload/haguenetwork.pdf.

81. Permanent Bureau of the Hague Conference on Private Int'l Law, *Emerging Guidance Regarding the Development of the International Hague Network of Judges and General Principles for Judicial Communications, Including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, Within the Context of the International Hague Network of Judges*, HAGUE CONFERENCE ON PRIVATE INT'L LAW (July 2012), http://www.hcch.net/upload/wop/abduct2011pd03ae.pdf.

The direct judicial communication model could also be implemented in a more limited way, and with varying degrees of formality, such as informal memoranda of understanding. For existing examples, one can look at the Memorandum of Understanding between the court in New South Wales and the New York state courts,[82] or the Memorandum of Understanding between the Supreme Courts of New South Wales and Singapore.[83] In the New York situation, to avoid any prohibition on advisory opinions and other related problems, the judges who answer questions about New York law do so voluntarily, and their informal opinions do not appear to be binding on the judges or the parties.[84] Figures are not available on how broadly this Memorandum of Understanding has been used; indeed, it is not clear if court systems or individual judges are under a duty to disclose their participation. This makes it difficult to collect empirical data on the frequency of its use, whether or not the requesting court actually uses the decision obtained, how long the process takes, and other details.[85]

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82. Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law, *supra* note 67.

83. Memorandum of Understanding Between the Supreme Court of Singapore and the Supreme Court of New South Wales on References of Questions of Law (Sept. 14, 2010), *available at* http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation/SCO2_agreement_singapore.html.

84. Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law, *supra* note 67, art. 1 ("If a substantial legal issue in proceedings before one Court is governed by the law of the other Court, each Party shall give consideration, in accordance with its Rules and procedures, to taking steps to have any such contested issue of law referred to the Party of the governing law for an answer to be provided in accordance with the procedures of the requested jurisdiction.")

85. Perhaps another variation in U.S. practice is either the state to state certification process, mentioned earlier, under the Uniform Certifications on Questions of Law Act or where a federal court may certify an unclear issue of state law to the state's highest court. In the United States, some Circuits are very enthusiastic proponents of this mechanism. *See generally* JONA GOLDSCHMIDT, AM. JUDICATURE SOC'Y, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE (1995) (describing certification as "the procedure by which a court (usually federal), when faced with an issue of unclear state law, can request a decision on the point from that state's supreme court.").

B. *Current Work of the Hague Conference*

Work in further developing and refining legal and judicial cooperation in connection with the 1980 Hague Child Abduction Convention and other Hague Conventions continues. These refinements may overlap or an incidental aspect may result in the improvement of determinations of foreign law. Special Commissions on the operation and practices under the various Hague Conventions are held every 3–5 years, and focus in part on ways to make the Conventions operate more efficiently and effectively. These aspects may involve better judicial and administrative cooperation and better understanding the law of other Contracting States. These recommendations may incidentally improve the determination of foreign law more generally.

The Hague Conference considered the need for further work, organizing several meetings and undertaking questionnaires and studies to determine possible paths for future global efforts. Potential solutions range from a binding instrument to an online portal for information to a network of experts and institutions.[86] There has been a lack of consensus by Member countries on both the need and the means for further work. Currently the Hague Conference is monitoring developments in this field but is not actively preparing or consulting on a possible instrument, binding or otherwise.[87]

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86. *See* Permanent Bureau, Hague Conference on Private Int'l Law, *supra* note 10, ¶ 10 (discussing a new Hague convention consisting of three parts).

87. *See* COUNCIL ON GENERAL AFFAIRS AND POLICY, HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, ¶ 13 (Apr. 5–7, 2011), *available at* http://www.hcch.net/upload/wop/genaff_concl2011e.pdf ("The Council noted the further work undertaken by the Permanent Bureau in this area. The Council decided that the Permanent Bureau should continue monitoring developments but not at this point take any further steps in this area, and to revisit the issue at its next meeting."); COUNCIL ON GENERAL AFFAIRS AND POLICY, HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE COUNCIL OF GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, ¶ 15 (Apr. 17–20, 2012), *available at* http://www.hcch.net/upload/wop/gap2012concl_en.pdf ("The Council took note of the Conclusions and Recommendations of the European Commission—Hague Conference Joint Conference on Access to Foreign Law in Civil and Commercial Matters held in Brussels, Belgium in February 2012. The Council decided that the Permanent Bureau should

The inability to obtain a consensus may reflect in part the philosophical divide between the common and civil law traditions. At an earlier point, the United States indicated that it would support a nonbinding pilot project that would begin by looking only at the determination of questions of foreign law that involved existing Hague Conventions and their application. The United States discussed informally whether it might be possible to use networks of lawyers, such as the American Bar Association, and whether there might be a way to use the Federal Judicial Center or some other body or academic institution as a clearinghouse and screening center. Further work on the foreign law project was curtailed in 2011 due to lack of consensus to devote resources to the foreign law project.

V. Conclusion

In 1923, describing the difficulty of determining the law of Puerto Rico, Justice Holmes said:

> When we contemplate such a system from outside it seems a wall of stone, every part even with all others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books.[88]

This lament sounds strangely contemporary and similar to those of judges today, both here and abroad, who are aware of the "faux amis" and the need for fuller contextual analysis when applying foreign law. Much has changed, even since Federal Rule 44.1 was added in 1966, with the increased presence of foreign parties and foreign law in U.S. courts. While foreign law is more accessible and practitioners with foreign experience are more common, the importance of foreign law will certainly continue to grow as globalization continues. And the solution needs to be global as well.

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continue monitoring developments but not take any further steps in this area at this point.").

88. Diaz v. Gonzalez, 261 U.S. 102, 105 (1923).