

IMPROVING THE PROCESS: TRANSNATIONAL
LITIGATION AND THE APPLICATION OF
PRIVATE FOREIGN LAW IN U.S. COURTS

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INTRODUCTION	1112
I. MISGUIDED ATTACKS ON THE USE OF FOREIGN LAW	1116
A. <i>Confusion Arises From the Use of Foreign Law to Interpret Domestic Law</i>	1117
B. <i>No Justifiable Concerns When Applying Foreign Law to Relationships or Disputes Governed by Foreign Law</i>	1118
1. <i>Application of Foreign Law in International Commerce and Private Contexts</i>	1118
2. <i>Beneficial to Consider Foreign Law when Interpreting Treaties</i>	1120
II. CURRENT APPLICATION OF FOREIGN LAW IN U.S. COURTS	1120
A. <i>Procedural Tools and Requirements</i>	1122
1. <i>Adequate Notice Must Be Provided</i>	1123
2. <i>Treatment as a Question of Law</i>	1125
3. <i>Court May Rely on “Any” Relevant Materials When Determining Foreign Law</i>	1127
a. <i>Methods of Proof by Litigants</i>	1127
b. <i>Independent Research by the Court</i>	1129
B. <i>Resolving Conflicting Pictures of Foreign Law</i> ...	1131
III. POTENTIAL METHODS OF IMPROVEMENT	1133
A. <i>Innovative New Tools and Procedures Can Alleviate Concerns and Improve Current Procedures</i>	1134
1. <i>Party Stipulation</i>	1134

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2.	<i>Transnational Certification</i>	1135
a.	Informal certification system: New York and New South Wales model ..	1137
b.	Mirroring the U.S. state-federal model certification system	1139
c.	Other forms of judicial cooperation	1140
3.	<i>Establishment of a Foreign Law Institute or Comparative Law Center</i>	1142
B.	<i>Improving Existing Procedures: Legal Counsel, Experts, and the Court</i>	1143
1.	<i>Room for Improvement from Legal Counsel</i> ..	1143
2.	<i>Improvements Involving Expert Witnesses</i> ...	1145
3.	<i>Additional Efforts from the Courts</i>	1147
IV.	CONCLUSION	1149

INTRODUCTION

Traditional and alternative dispute resolution systems often deal with transnational disputes that involve parties from diverse countries or activities that transcend borders. As global interaction and interdependency have intensified over the past several decades, “foreign law”¹ has assumed a greater role with respect to individuals, corporations, and other organizations engaged in transnational relationships, international commerce, foreign travel, and other cross-border activities. Individuals traveling, living, or working abroad are potentially subject to foreign laws. Entities engaged in cross-border activities encounter laws, regulations, and even industry customs that extend beyond geographical limitations and familiar norms. In many situations, the laws of multiple nations can even concurrently govern relationships or impact the same conduct. With this proliferation of global interaction, civil law-

1. For purposes of this paper, “foreign law” refers to the laws of a separate sovereign nation, or the laws of an identifiable group of sovereign nations that have a common legal system or set of rules (*e.g.*, the European Union) unless otherwise specified. It is important not to conflate “foreign law” with the concept of “international law” as the two terms are not the same. International law governs the relationships between or among nation-states that have expressly or tacitly consented to be bound by it. Treaties and customs are primary sources of international law. *See* Frederic L. Kirgis, *Is Foreign Law International Law?* ASIL INSIGHTS (Oct. 31, 2005), <http://www.asil.org/insights051031.cfm>.

suits and arbitrations involving transnational disputes are not uncommon.

Not only does the law governing a transaction or relationship shape conduct, but it can also reduce or eliminate associated uncertainties. In the context of transnational commerce, the parties structure their transactions around a specific substantive law and may even purposefully avoid laws that are inappropriate for their relationship.² Failure to apply the applicable foreign law can disrupt relationships and harm international exchange. Conversely, the proper application of foreign law has the potential to discourage forum shopping, promote regulatory competition, and preserve the comparative regulatory advantage of foreign jurisdictions.³ In the case of a dispute, the applicable law is critical and directly affects how litigants will present and defend against relevant claims. In essence, the choice of law can be outcome determinative, particularly when foreign law varies from domestic law. As such, it is imperative that courts and arbitrators recognize and correctly apply foreign law when expressly or implicitly relied upon by the parties.⁴ In such cases, adjudicative bodies and legal practitioners alike consequently have heightened responsibilities in determining and correctly proving the substance of foreign law.

Global commerce hinges on a predictable and fair system of laws, legal norms, and dispute resolution. To resolve uncertainties and avoid potential legal challenges, individuals and organizations engaged in international business often turn to private contracts in an effort to control, shape, and stabilize behavior. Many cross-border agreements contain a choice-of-law clause pursuant to which the parties have mutually selected the application of a specific sovereign.⁵ In the absence

2. Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 807–08 (2006).

3. See *id.* at 808–15 (discussing arguments that the proper application of foreign law renders benefits over *lex fori*).

4. See Carolyn B. Lamm & K. Elizabeth Tang, *Rule 44.1 and Proof of Foreign Law in Federal Court*, 30 LITIGATION 31, 32 (2003) (noting two cases in which the interpretation of a foreign law was outcome determinative).

5. Courts generally honor choice-of-law clauses based on existing law and the parties' mutual intent so long as the transaction underlying the transnational agreement has some relationship with the law of the selected forum.

of such an agreement, there are no international treaties that dictate when domestic courts must apply foreign law or specify how to determine the substance of such law. As such, domestic choice-of-law rules serve as the default mechanism in selecting and determining the applicable law,⁶ and can result in the application of foreign law.

Nearly every legal system in the world is equipped with tools to apply foreign law when appropriate. The U.S. federal and state legal systems are no different—every jurisdiction maintains procedural tools and presumed competency to ascertain and apply foreign law. Although forums resolving cross-border disputes have diversified, U.S. courts often take the lead in resolving transnational disputes. In fact, the United States has often been called a “forum shopper’s delight” and “magnet forum” that “attracts the aggrieved and injured of the world.”⁷ This reality combined with large number of commercial arbitrations conducted in the United States, the proliferation of foreign judgment enforcement actions, and an increasing number of criminal prosecutions pursued under the Foreign Corrupt Practices Act⁸ mean that U.S. courts and

6. See generally John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 TUL. MAR. L.J. 179 (1984). In the absence of an agreement governing an international dispute, the resolution body handling the dispute must first look to domestic choice-of-law rules in the forum. A variety of tests govern the choice-of-law determination depending on the jurisdiction, including the *lexi loci delicti* test, the more significant relationship test delineated in the Restatement (Second) of Conflicts of Law, the governmental interest test, and others. Jacques deLisle & Elizabeth Trujillo, *Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135, 144–47 (2010). The application of any of these tests can result in the application of foreign law.

7. Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 32–33 (2011) (citations omitted). Foreign plaintiffs might prefer to adjudicate a transnational case in U.S. court due to the availability of jury trials, liberal pretrial discovery, contingency fee representation, choice-of-law rules that favor the application of pro-plaintiff domestic law, substantially higher damage awards, and relatively prompt trials. Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1177 (2005). At the same time, however, there does appear to be an emerging tendency of international actors to prefer non-U.S. forums and apply non-U.S. law to disputes involving U.S. companies. Quintanilla & Whytock, *supra*, at 33–34.

8. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m, 78dd-1 (2011) (FCPA) is a well-established U.S. federal law which affects every

arbitrators are likely to increasingly face issues involving foreign law.⁹ Due to the current and anticipated stream of foreign law issues in U.S. courts and arbitrations,¹⁰ it is necessary to explore additional ways to ensure accuracy and improve current procedures in applying foreign law. At the same time, it is also important to understand the issues and concerns underlying the application of foreign law in U.S. courts. In recent years, foreign law has increasingly gained greater public attention and political discourse has progressively focused on the use of foreign law by U.S. courts. Some of this attention has been politically charged and quite unfavorable. In fact, policy-makers across the United States have advocated measures that would prohibit courts from using or relying on foreign law in certain instances.¹¹ In many respects, much of the negative sentiment towards foreign law has been misdirected, resulting in public confusion. Accordingly, an examination of the boundaries of the ongoing debate is necessary to clarify those areas in which foreign law can and should be applied without issue.

To accomplish the above objectives, this article focuses on the legal requirements, practical aspects, and possible improvements of proving the law of a foreign country in U.S. courts.¹² Before delving into these areas though, it is worth-

American company conducting business outside the United States. It makes it a crime for any U.S. citizen, business entity, and employee of a business entity to offer or provide, directly or indirectly through a third party, anything of value to a foreign governmental official and other political figures with the corrupt intent to gain an unfair advantage or influence an award or continuation of business. A person cannot be guilty of violating the FCPA if the payment was *lawful* under foreign law. *United States v. Kozeny*, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008). To the extent that this affirmative defense is raised, it necessarily requires a court to conduct an in-depth examination of foreign law.

9. See Quintanilla & Whytock, *supra* note 7, at 37–40; Peter F. Vaira, *Proving Foreign Law in Federal Court and Commercial Arbitrations*, LEGAL INTELLIGENCE, July 12, 2011 (discussing the cases in which foreign law may be applied).

10. See Quintanilla & Whytock, *supra* note 7, at 34, 37 (describing these trends).

11. See Aaron Fellmeth, *International Law and Foreign Laws in the U.S. State Legislatures*, ASIL INSIGHTS, May 26, 2011, <http://www.asil.org/pdfs/insights/insight110526.pdf>.

12. The same concepts, ideas, and principles can be applied in arbitration settings as well. Although international arbitral centers have their own

while to break down the opposition to the use and application of foreign law in U.S. courts to gain a better understanding of the attendant issues. Accordingly, Part I of this article examines ongoing debate about the use of foreign law in federal and state courts. Part II provides an overview of the procedural rules and practical aspects of applying foreign law in U.S. courts. The final part of this article focuses on methods of enhancing accuracy and improving the application of foreign law in both federal and state courts.¹³

I. MISGUIDED ATTACKS ON THE USE OF FOREIGN LAW

In reality, the application of foreign law in U.S. courts is rarely controversial in practice outside of the realm of constitutional interpretation.¹⁴ When foreign law governs a particular private relationship or dispute, there should be no major concerns or issues. Most people recognize the necessity and benefit of applying foreign law as well as the role it plays in private law and global interaction.¹⁵ However, political opponents of foreign law often conflate foreign law with interna-

sets of choice-of-law rules, the underlying principles and methods of proof are similar, if not identical, to those used in U.S. courts. *See generally* Vaira, *supra* note 9. As such, many of the ideas and suggestions contained in this Article are equally applicable to international arbitrations.

13. This article focuses on federal courts given that they handle most transnational lawsuits based on diversity of citizenship. Supplemental jurisdiction is another vehicle of entry into federal court. *See* 28 U.S.C. § 1367 (2006). A court may exercise supplemental jurisdiction over foreign law claims if said claims derive from a “common nucleus of operative fact” with a claim over which the federal court has original jurisdiction so that said claims form part of the same case or controversy. *See* *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). However, the principles and suggestions discussed herein apply equally to state courts.

14. *See* Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 61–63 (2009); *see also* Fellmeth, *supra* note 11 (describing part of the controversy surrounding the consideration of foreign law in U.S. courts); Ilya Shapiro, *The Use and Misuses of Foreign Law in U.S. Courts*, CATO AT LIBERTY (May 19, 2010), <http://www.cato-at-liberty.org/the-use-and-misuse-of-foreign-law-in-u-s-courts/> (stating that while most of the time when U.S. courts cite foreign law it is uncontroversial, using foreign law to interpret domestic law is problematic).

15. *See* Michael C. Dorf, *The Use of Foreign Law in American Constitutional Interpretation: A Revealing Colloquy Between Justices Scalia and Breyer*, FINDLAW.COM (Jan. 19, 2005), <http://writ.news.findlaw.com/dorf/20050119.html> (noting that while Justice Scalia objects to use of or reliance upon foreign law in interpreting the U.S. Constitution, he agrees that foreign law is rele-

tional law. They also can confuse the use of foreign law when courts analyze situations affecting domestic constitutional rights and established public policy, with relationships or interactions governed by foreign law as a result of private commercial agreements or conflict of laws rules.

A. *Confusion Arises From the Use of Foreign Law to Interpret Domestic Law*

Although U.S. courts are no strangers to foreign law, foreign law is no stranger to political opposition.¹⁶ Beginning in 2010, U.S. states started proposing bills or state constitutional amendments aimed at restricting the use of foreign law and international law in state courts.¹⁷ By the end of 2012, policymakers in a majority of states had proffered such restrictive legislative measures. Most of these bills have sought to prevent an enforcement authority from applying foreign law if its application would violate an individual's rights under the U.S. Constitution or respective state constitution.¹⁸ Although most of these efforts have been largely unsuccessful, they exemplify misunderstanding and distrust of foreign and international law.¹⁹

Critics assert that the judiciary should neither consider nor cite foreign law in certain circumstances.²⁰ More specifically, the confusion surrounding the application of foreign law stems from the idea that U.S. state and federal courts look to foreign law when interpreting the U.S. Constitution and other domestic laws. Many judges and scholars find value in conducting a comparative analysis of foreign legal determinations, particularly when addressing difficult legal issues that have

vant, if not indispensable, to resolving questions arising out of international contracts, treaties, and cross-border regulations).

16. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005).

17. Fellmeth, *supra* note 11; *see also* Shapiro, *supra* note 14 (offering an argument against U.S. courts relying on foreign law).

18. This includes courts, arbitrators, and other administrative bodies. *See* Bill Raftery, *Bans on Court Use of Sharia/International Law: Introduced in Mississippi and Kentucky, Advancing in Florida & South Dakota, Dying in Virginia*, GAVEL TO GAVEL, Feb. 13, 2012, <http://gaveltogavel.us/site/2012/02/13/bans-on-court-use-of-shariainternational-law-introduced-in-mississippi-and-kentucky-advancing-in-florida-south-dakota-dying-in-virginia/>.

19. *See* Fellmeth, *supra* note 11.

20. *See* Yeazell, *supra* note 14, at 60.

arisen in other jurisdictions. However, if U.S. courts interpret domestic laws based on foreign precedent, the fear is that the American people may be “slowly losing control over the meaning of [their] laws and of [their] Constitution” and that “foreign governments may even begin to dictate what [their] laws and [their] Constitution mean, and what [the] policies in America should be.”²¹ Critics warn of dire consequences when recent foreign and international laws and legal interpretations are used in the analysis of U.S. laws and the original meaning of the U.S. Constitution.²² A clear distinction must be drawn between the use of foreign law in interpreting domestic law and the application of foreign law to relationships or disputes governed by foreign law. This article focuses on the latter.

B. *No Justifiable Concerns When Applying Foreign Law to Relationships or Disputes Governed by Foreign Law*

When U.S. courts encounter relationships or disputes governed by foreign law, there should be no valid concerns. To the contrary, the failure to recognize and apply foreign law in such situations would be counterproductive, and even harmful.

1. *Application of Foreign Law in International Commerce and Private Contexts*

Unquestionably, the use of foreign law in international commerce is acceptable. The widespread scope of global trade and interminable availability of foreign products and services for domestic consumers have given rise to cross-border relationships and related legal issues that encompass foreign law. When private parties have agreed to the application of a certain forum or specific body of foreign law, dispute resolution bodies in the United States will typically recognize the mutual agreement of contractual parties unless the designations con-

21. *Id.* at 60 (citation omitted).

22. *Judicial Reliance on Foreign Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 13–26 (2011) (statement of Andrew M. Grossman, Visiting Fellow, Center for Legal and Judicial Studies, Heritage Foundation) [hereinafter Grossman], available at <http://www.heritage.org/research/testimony/2011/12/judicial-reliance-on-foreign-law>.

travene the public policy of the selected forum.²³ Not only does this facilitate predictability and foster smooth commerce, but it is also generally free from controversy.²⁴ Conversely, the failure to recognize the terms of a freely negotiated arms-length agreement could potentially undermine private interactions, international trade, and even global relations.²⁵

Even when an international contract is not involved or when a contract is silent about the choice-of-law, domestic conflict of laws rules may require the application of foreign law when a dispute erupts between parties engaged in cross-border activities.²⁶ The application of foreign law is generally free from widespread controversy or criticism in private contexts. By way of illustration, if a U.S. tourist vacationing in England slips and injures himself while taking a shower at a U.S.-owned hotel, and then files a lawsuit in a U.S. court upon returning from vacation, traditional choice-of-law rules and methods may dictate the application of foreign law.²⁷ In determining the applicable law, these rules contemplate the location of injurious activity, effect of the conduct, most significant contacts, governmental interests, or other similar factors.²⁸ In such cases, it is counterintuitive that any law other than domestic English law would apply to resolve this dispute. As such, most people do not question the use of foreign law in such instances.

In cases governed by foreign law, it is incumbent upon courts and other dispute resolution bodies to recognize and follow the duty to apply said law. Even if the foreign law is unclear, judges must ascertain and apply the law just as they would in applying domestic law.

23. *E.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (enforcing a choice of forum clause that required litigation in Great Britain, depriving U.S. courts of jurisdiction); *see also* FLA. STAT. § 671.105 (2012); Yeazell, *supra* note 14, at 61–62.

24. *See* Grossman, *supra* note 22 (recognizing the validity of this use of foreign law, even while criticizing other uses).

25. *See M/S Bremen*, 407 U.S. at 1.

26. *See generally* *Grupo Televisa, S.A. v. Telemundo Commc'ns Grp.*, 485 F.3d 1233 (11th Cir. 2007).

27. *E.g.*, *Frummer v. Hilton Hotels Int'l, Inc.*, 304 N.Y.S.2d 335 (N.Y. Sup. Ct. 1969).

28. *See deLisle & Trujillo*, *supra* note 6, at 144–47.

2. *Beneficial to Consider Foreign Law When Interpreting Treaties*

The experiences of other countries can be instructive in other uncontroversial circumstances. Foreign law may be relevant when domestic statutes or a treaty explicitly incorporate foreign law.²⁹ For example, U.S. courts should be able to consider foreign court judgments when interpreting a mutual treaty. With limited exception, the effective application of a treaty requires consistent interpretation among signatories. The United Nations Convention for the International Sale of Goods (“CISG”) is a prime illustration. The CISG is designed to provide a uniform and fair system for contracts involving the cross-border sale of goods. In interpreting the CISG, “regard is to be had to its international character and to the need to promote uniformity in its application. . . .”³⁰ In context, it may be useful for U.S. courts to explore how other signatory countries approach interpretation and application. In fact, to reduce the risk of diverging interpretations of a treaty after protracted negotiations among countries, it is imperative that courts uniformly interpret said treaty.³¹ Similarly, foreign court determinations may constitute a valuable resource for interpreting customary international law or the “law of nations” when applicable.³² Foreign decisions may also be useful when interpreting domestic statutes that expressly incorporate the laws of foreign sovereigns.³³

II. CURRENT APPLICATION OF FOREIGN LAW IN U.S. COURTS

In this age of global commerce, it is not uncommon or impractical for U.S. courts to determine and apply foreign law.

29. *See id.* at 62 (stating that it remains uncontroversial to cite to foreign law when a treaty or a statute explicitly refers to it).

30. United Nations Convention on Contracts for the International Sale of Goods art. 7(1). U.N. Doc. A/Conf. 97/18 (1980).

31. Franco Ferrari, *Have the Dragons of Uniform Sales Law Been Tamed? Ruminations on the CISG's Autonomous Interpretations by Courts*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of His Eightieth Birthday 134, 134–35 (Camilla B. Anderson & Ulrich G. Schroeter eds., 2008).

32. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

33. *See, e.g.*, Tariff Act of 1930 § 527, 19 U.S.C. § 1527(a) (2006) (outlawing the “taking, killing, possession, or exportation to the United States, of any wild mammal or bird . . . in violation of the laws or regulations of such country, dependency, province, or other subdivision of government.”).

They will certainly encounter issues, claims, and defenses that are governed by the laws of another sovereign by virtue of mutual agreement, jurisdictional choice-of-law rules, or other mechanisms.³⁴ Foreign law can be applied to resolve disputes involving commercial matters, harmful conduct, intellectual property rights, employment, and a host of other legal matters.³⁵

U.S. courts are deemed competent and equipped to apply foreign law. They do not have to independently master the law of another sovereign, and can access a host of tools ranging from expert assistance to written materials covering foreign law. At the same time, judges face a host of challenges. They typically are neither familiar with, nor current in, the laws and legal systems of other nations. As judges, they receive little, if any, formal training in foreign or comparative law. Courts have considerable demands on their time that may preclude in-depth research of foreign law. The lack of resources and disparities in language, legal practice, and the different role of judges in foreign countries can pose significant challenges in seeking to accurately apply foreign law, particularly when U.S. courts need to deal with law originating from civil law systems.³⁶ These factors can tempt judges to “duck and run” when presented with issues of foreign law largely due to fear of the unknown and perceived difficulties.³⁷

34. If state conflict-of-laws rules require the application of foreign law, then the federal courts must apply these rules. *See, e.g.*, *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4–5 (1975) (applying Texas choice-of-law rules to find whether Cambodian law would govern the substantive wrongful death claim at issue).

35. *See* Yeazell, *supra* note 14, at 61–62.

36. This is still true today despite the fact that the past two decades have brought considerable convergence between common-law and civil-law systems.

37. *See* 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, 896–99 (2011); *see also* Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 38–40 (1997); Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 584–85 (1995).

A. *Procedural Tools and Requirements*

Despite these obstacles, U.S. courts are fully capable of addressing matters governed by foreign law.³⁸ In fact, they have considered and applied foreign law for centuries. Both the U.S. federal and state systems provide various techniques and tools to overcome such obstacles and accurately ascertain and apply foreign law.³⁹ More specifically, Federal Rule of Civil Procedure 44.1 (“Rule 44.1”) provides a host of options for federal courts and detail the procedural mechanisms available to determine the applicability, substance, and scope of the foreign law.⁴⁰ U.S. states have adopted rules of civil procedure similar to Rule 44.1.⁴¹ These rules are quite flexible and fairly straightforward. They also regulate the identification and determination of the substantive law of another sovereign.

Implemented in 1966, well before the current explosion of global commerce and cross-border interaction,⁴² Rule 44.1 delineates uniform procedures for raising and proving foreign law. It is flexible and relatively informal. It contemplates that

38. See 9 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 44.1.02 (3d ed. 2010) [hereinafter *MOORE’S FEDERAL PRACTICE*] (“Rule 44.1 is based on the belief that determining questions of foreign law, although sometimes difficult, is not ‘beyond the capacity of our courts.’” (citation omitted)); see also *McGee v. Arkel Int’l LLC*, 671 F.3d 539 (5th Cir. 2012) (applying Iraqi law); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 WL 1672493, at *10 (N.D. Cal. May 14, 2012) (applying French law and stating that the general principles of French contract law were clear based on the expert declarations and supporting materials submitted by the litigants).

39. See *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009) (describing the resources available to judges when determining foreign law).

40. The civil rules parallel FED. R. CRIM P. 26.1. See *United States v. Schultz*, 333 F.3d 393, 401 (2d Cir. 2003).

41. Many state jurisdictions have implemented the Uniform Judicial Notice of Foreign Law Act or other rules, which function similarly to Rule 44.1. *E.g.*, MASS. R. CIV. P. 44.1; N.D. R. CIV. P. 44.1; N.Y. C.P.L.R. 4511; see also SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* 123–25 (2004) (noting that most states have adopted the Rule 44.1 approach, but that some still utilize the judicial notice concept or common law method of proving foreign law); Comm. on Int’l Commercial Disputes, *Proof of Foreign Law After Four Decades with Rule 44.1 FRCP and CPLR 4511*, 61 RECORD 49, 50 (2006), available at http://www2.nycbar.org/Publications/record/vol_61_no_1.pdf.

42. 9A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 2441 (3d ed. 2011) [hereinafter *WRIGHT & MILLER*].

foreign law will be established through a cooperative dialogue between counsel and the court.⁴³ More specifically, this rule provides that a party wishing to raise an issue about a foreign country's law must first give notice "by a pleading or other writing."⁴⁴ It further specifies that a court determining foreign law "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."⁴⁵ In essence, Rule 44.1 has three fundamental pillars that involve the adequacy of notice, treatment of questions involving foreign law as law, and available proofs.

1. *Adequate Notice Must Be Provided*

The initial pillar of Rule 44.1 mandates that a party seeking to rely upon foreign law provide reasonable written notice to the court and opposition.⁴⁶ The written notice obligation applies to both claims and defenses. Rule 44.1 contemplates flexibility with respect to the form and timing of the required written notice. The notice requirement does not require a high degree of specificity, rather its function is simply to inform the court and litigants that foreign law governs part or all of the lawsuit. Notice may be given in pleadings, motions, discovery, and even by filing a separate notice or motion to apply foreign law.⁴⁷ It is not necessary to "spell out the precise contents of foreign law."⁴⁸ For example, a litigant's general refer-

43. See *id.* § 2444; see also *IMAF, S.p.A. v. J.C. Penney Co.*, No. 86-CV-9080 (KMW), 1989 WL 54128, at *6-7 (S.D.N.Y. May 15, 1989) (emphasizing that Rule 44.1 is silent on the failure to prove foreign law and directing the parties to supplement their briefs on Italian law).

44. FED. R. CIV. P. 44.1; see also 9 MOORE'S FEDERAL PRACTICE, *supra* note 38, § 44.1.01. When neither party seeks the application of foreign law, most courts will generally apply the law of the forum based on the assumption that the parties have tacitly agreed to the application of the law of the forum. See Symeon C. Symeonides, *Choice of Law in American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 289 (2010).

45. FED. R. CIV. P. 44.1.

46. 1 FEDERAL CIVIL PROCEDURE LITIGATION MANUAL § 44.1.1 (Matthew Bender, 3d ed. 2012) [hereinafter FED. CIV. PROC. LIT. MANUAL].

47. See FED. R. CIV. P. 44.1, Notes of Advisory Committee on Rules.

48. *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 586 (2d Cir. 2005) (quoting WRIGHT & MILLER, *supra* note 42, § 2443).

ences in its complaint to overseas activity that gave rise to certain claims were deemed sufficient.⁴⁹ To avoid any doubt, a party can file a document with the court captioned “*Notice of Intent to Rely Upon Foreign Law*” pursuant to the relevant federal or state rule. Furthermore, the party seeking to rely on foreign law may assert the applicability of multiple bodies of law in the alternative, particularly when the relevant events occurred in multiple foreign jurisdictions.⁵⁰

The timing of the notice must be reasonable so as to avoid unfair surprise.⁵¹ In general, courts have considered the following factors in determining the “reasonableness” of notice: (i) the stage of the case at the time of notice; (ii) the reason proffered for failing to give earlier notice; and (iii) the importance of foreign law to the entire case.⁵² Interests of judicial economy typically favor early notice so that the litigants “may plan and present argument on any issues pertinent to an application of foreign law.”⁵³ Also, a litigant should provide the requisite notice of its intent to rely on foreign law as early as practicable to provide the court with sufficient time to make any required determinations of foreign law.⁵⁴ Absent extenuating circumstances, a party should give such notice before the pretrial conference and seek to ensure that references to the relevant foreign law are incorporated in the pretrial order.⁵⁵ Such notice will provide all stakeholders with “ample opportunity to

49. See *In re Griffin Trading Co.*, 683 F.3d 819, 822–23 (7th Cir. 2012) (finding that a breach of fiduciary duty claim provided adequate notice where it explicitly cited trading activity in London as the precipitating event and pointed to a transfer involving a Netherlands entity that used a German bank as the cause for liability; the court noted that this was enough to put all parties on notice that the transactions might be governed by foreign law).

50. *Rationis Enters.*, 426 F.3d at 585; *Smith v. Carnival Corp.*, 584 F. Supp. 2d 1343, 1349–50 (S.D. Fla. 2008).

51. FED. R. CIV. P. 44.1, Notes of Advisory Committee on Rules; see also *In re Griffin Trading Co.*, 683 F.3d at 822–23.

52. FED. R. CIV. P. 44.1, Notes of Advisory Committee on Rules; see, e.g., *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venez.*, 575 F.3d 491, 497 (5th Cir. 2009); *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 955–56 (9th Cir. 2009); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 WL 1672493, at *10 (N.D. Cal. May 14, 2012).

53. *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001).

54. FED. CIV. PROC. LIT. MANUAL, *supra* note 46, § 44.1.1.

55. *DP Aviation*, 268 F.3d at 848 (citing 9A WRIGHT & MILLER, *supra* note 42, § 2444).

marshal resources pertinent to foreign law, which normally will not be as well known as domestic law to parties and courts.”⁵⁶

At the same time, however, Rule 44.1 contemplates the possibility that questions of foreign law may not become apparent until trial.⁵⁷ By extension, it might be reasonable to raise the issue of foreign law at trial in certain circumstances. Despite the flexibility of the notice requirement, late notice may result in a court’s refusal to apply foreign law in circumstances where it would otherwise apply. Assuming that foreign law governs a dispute, courts theoretically should apply such law regardless of the litigants’ inaction. However, courts generally construe the litigants’ inaction as having waived the right to have foreign law applied to the dispute. If neither party notices its intent to rely upon foreign law, then courts tend to default to the law of the forum.⁵⁸

2. *Treatment as a Question of Law*

The second pillar of Rule 44.1 and similar state rules treats the determination of non-U.S. law as a question of law.⁵⁹ Originally, federal and state courts systems regarded the determination of foreign law as a factual matter and required the presentation of relevant proofs to the fact-finder for final determination. Due to the problems and confusion caused by such treatment,⁶⁰ Rule 44.1 specified that the court (and not

56. *Id.*

57. *In re Griffin Trading Co.*, 683 F.3d 819, 823 (7th Cir. 2012).

58. *See, e.g., DP Aviation*, 268 F.3d at 845 (affirming the denial of a request to apply English law because defendant did not raise the issue until after trial); *Clarkson Co. v. Shaheen*, 660 F.2d 506, 512 n.4 (2d Cir. 1981) (affirming application of New York law where none of the parties asserted that Canadian law should apply).

59. A majority of state jurisdictions have adopted rules identical or similar to Rule 44.1, classifying the determination of foreign law as a question of law to be decided by the court. *Vaira, supra* note 9.

60. *See In re Griffin Trading Co.*, 683 F.3d at 819 (holding that the district court abused its discretion by requiring the parties to raise the applicability of foreign law, rather than considering it *sua sponte*). In sum, when foreign law was treated as proof of fact, a party seeking to apply foreign law had to plead such law “thereby creating issues to be researched that might never arise. . . .” *Comm. on Int’l Commercial Disputes, supra* note 41, at 50. Also, the parties were limited by the rules of evidence, “thus increasing the costs and difficulties of proof, [and] summary judgment [was] denied when the

the jury) should determine the foreign law. Consequently, trial courts may freely use summary judgment when applicable.⁶¹ Moreover, appellate courts are not limited to a “clearly erroneous” review standard and may review foreign law determinations on a *de novo* basis.⁶² This also empowers appellate courts to independently research, assess, and apply the foreign law at issue.

By explicitly specifying that foreign law is a matter of law, the Rule 44.1 drafters intended to make the process of applying foreign law in a transnational lawsuit mirror the process in a purely domestic suit.⁶³ Identical to a domestic lawsuit, the court will determine the substance of the foreign law and instruct the fact-finder about the law accordingly.⁶⁴ Because foreign law may be novel to the court, the judge may need some additional assistance. Foreign-law experts can help reduce the time necessary to research and interpret foreign law by providing fundamental information about the law. This can be done through expert written submissions, or the court may entertain live expert witness testimony.⁶⁵ In contrast, judges typi-

parties dispute[d] the content of foreign law, even though the judge [could determine the applicable foreign law].” *Id.* Moreover, “appellate review [was] limited by the ‘clearly erroneous’ standard, largely immunizing district court determinations from independent [appellate] review” *Id.*

61. *See, e.g., Fogerty v. Condor Guaranty, Inc. (In re Condor Ins. Ltd.)*, 2012 Bankr. LEXIS 2099 (Bankr. S.D. Miss. May 10, 2012) (entering summary judgment based on Nevis law).

62. *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) (noting that the court of appeals may consider material not considered in the lower court based on its ability to conduct *de novo* review).

63. *See* 9A WRIGHT & MILLER, *supra* note 42, § 2441 (noting that Rule 44.1 was intended to reject treatment of foreign law as a question of fact); *see also* ID Sec. Sys. Can., Inc. v. Checkpoint Sys., Inc., 198 F. Supp. 2d 598, 623 (E.D. Pa. 2002) (citing 9A WRIGHT & MILLER, *supra* note 42); Doug M. Keller, *Interpreting Foreign Law Through an Erie Lens: A Critical Look at United States v. McNab*, 40 TEX. INT’L L.J. 157, 169 (2004) (citing 9A WRIGHT & MILLER, *supra* note 42).

64. *See* Leane Capps Medford & Worthy Walker, *Determination of Foreign Law Under Federal Rule 44.1*, DALLAS BAR ASSOCIATION HEADNOTES 11, Oct. 2008, available at http://www2.dallasbar.org/members/headnotes_showarticle.asp?article_id=1491 (emphasizing the autonomy of the court in determining the content of foreign law); *see also* GEEROMS, *supra* note 41, at 123 (noting that Rule 44.1 does away with the common law approach whereby parties were required to prove the content of foreign law).

65. FED. R. CIV. P. 44.1 (“[T]he court may consider any relevant material or source, including testimony”).

cally do not leave the determination of domestic law to competing experts.⁶⁶ Rather, taking into account the briefs and other proofs of law presented by the parties, the judges and court clerks independently investigate domestic law issues raised by the parties and then render a conclusion of law without the assistance of experts.

3. *Court May Rely on “Any” Relevant Materials When Determining Foreign Law*

The final pillar of Rule 44.1 allows courts to consider “any” and all materials that might enable the court to ascertain foreign law.⁶⁷ In essence, this means that a court may look to any material or resource regardless of its potential admissibility and source of origin.⁶⁸ Rule 44.1 does not specify that one source of proof is better than another. This determination is left to the discretion of the court. Litigants may provide or the court itself may research foreign law materials. Consistent with the provisions of Rule 44.1, the court will instruct the parties to present proof of the pertinent foreign law at some point before trial. If the court recognizes its own unfamiliarity of the foreign law, it will (and likely should) direct the parties to thoroughly brief the relevant issues.⁶⁹

a. *Methods of Proof by Litigants*

In practice, foreign law is typically argued and briefed like domestic law. Litigants may prove the relevant law by supplying a copy of the applicable statutes, regulations, judicial decisions, and administrative materials. Materials establishing the

66. *E.g.*, *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 62–65 (S.D.N.Y. 2001).

67. FED. R. CIV. P. 44.1; *see, e.g.*, *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338 (11th Cir. 2011) (determining Columbian law by considering an affidavit of a former Justice of the Supreme Court of Colombia); *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (considering the declaration of a Japanese attorney); *Trans Chem. Ltd. v. China Nat’l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) (describing the range of materials to which a court can look).

68. *See* FED. R. CIV. P. 44.1; *see also Universe Sales Co.*, 182 F.3d at 1038; 9A WRIGHT & MILLER, *supra* note 42, § 2444; Comm. on Int’l Commercial Disputes, *supra* note 41, at 51.

69. *E.g.*, *Mackley v. Sullivan & Liapakis, P.C.*, No. 98-CIV-8460(SWK), 2001 WL 1658188, at *1 (S.D.N.Y. Dec. 27, 2001).

relevant foreign law need not be sworn, verified, or presented in any specific form. Naturally, courts will be most receptive to objective and verified submissions of foreign law however. Providing proof of the foreign law is one thing, but demonstrating how it is administered within a foreign country is a different proposition.

To ensure that the court completely understands the correct interpretation and application of foreign law, litigants typically enlist experts to provide valuable insight into the meaning, weight, and relevance of each proffered source of foreign law.⁷⁰ Experts can also explain special nuances and other matters not readily ascertainable from the face of the materials themselves. Many times, expert testimony may be the only efficient way to establish foreign law given linguistic, cultural, and other hurdles. Expert testimony and other resources may assist the court in determining the law, but they cannot help in determining facts.⁷¹

Expert testimony typically takes the form of affidavits or declarations accompanied by extracts of foreign legal materials. There are no special qualifications for an expert witness testifying about foreign law.⁷² Testimony from individuals knowledgeable about the foreign law at issue will generally suffice.⁷³ Accordingly, litigants often tender expert opinions from

70. See Vaira, *supra* note 9 (quoting the statement of a federal district judge in Massachusetts that, “[i]t appears fairly universal that written or oral expert testimony accompanied by foreign legal material is the basic method by which foreign law is proved.”); see, e.g., *Universe Sales Co.*, 182 F.3d at 1038; *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 WL 1672493, at *10–11 (N.D. Cal. May 14, 2012); *Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron, Inc.*, 623 F. Supp. 2d 518, 534 (D. Del. 2009); *Wheelings v. Seatrade Groningen, BV*, 516 F. Supp. 2d 488, 499 (E.D. Pa. 2007).

71. *HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 264 F.R.D. 146, 148 (D.N.J. 2009); *Trans Chem. Ltd.*, 978 F. Supp. at 275.

72. See 9A WRIGHT & MILLER, *supra* note 42, § 2444.

73. See, e.g., *Marsoner v. United States*, 40 F.3d 959, 964 (9th Cir. 1994) (deeming sufficient affidavits from two individuals with strong credentials in international law and Austrian banking law); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venez.*, No. 1:02cv785WJG-JMR, 2010 WL 2682946, at *2–4 (S.D. Miss. July 2, 2010) (accepting testimony of a licensed Venezuelan lawyer who had a history of teaching and publishing materials on Venezuelan law); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1173 (E.D. Pa. 1980) (utilizing testimony of a law

law professors, retired judges, legal professionals, licensed practitioners, and even industry experts. When considering accuracy, it is often thought that the best method of proof comes from licensed practitioners or law professors who can certify the law and testify as to its application.⁷⁴ However, an expert affidavit or declaration does not need to come from an attorney admitted to practice in the country whose law is at issue. The court essentially weighs the credibility of all expert submissions and provides deference to them accordingly.

Reliance on expert testimony is comparatively efficient and eliminates the need for the court to expend valuable time and resources wading through secondary sources.⁷⁵ Expert testimony can enable the court to more easily identify, ascertain, and apply foreign law.⁷⁶ It can also narrow the scope of the court's investigation considerably by identifying and detailing the relevant foreign law. Additionally, expert testimony may help judges avoid giving traditional domestic-based plain meanings to concepts of foreign law that might be construed or applied otherwise in the home country.⁷⁷

b. Independent Research by the Court

To accurately determine foreign law, the court may additionally rely on its own research using conventional, unconven-

professor specializing in Japanese law who spoke Japanese and had legal work experience in Japan).

74. See *Vaira*, *supra* note 9 (referring to Edward Cahn, former Chief Judge for the Eastern District of Pennsylvania, as stating in essence that, "the best method of proof is the testimony of attorneys who are licensed and practice in the country or law professors who teach the law in question to certify the law and to testify as to its application.").

75. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 639 (7th Cir. 2010) (Wood, J., concurring).

76. See 9A *WRIGHT & MILLER*, *supra* note 42, § 2444; *Miner*, *supra* note 37, at 588 (noting that affidavits from experts are often sufficient to resolve questions of foreign law). In fact, courts have considered a wide range of informal or unauthenticated materials, including unofficial foreign law translations, a printout from a foreign law firm's webpage, and a conversation between a law clerk and the Hong Kong Trade Office in New York City. *Wilson*, *supra* note 37, at 903.

77. See *Wilson*, *supra* note 37, at 913–14 (giving the example of Japanese employment law, in which case law interpretations have deviated substantially from code provisions); see also *Adler*, *supra* note 37, at 39–40 (noting that U.S. judges often give "naïve 'plain' meanings to foreign provisions").

tional, or online resources for guidance and affirmation.⁷⁸ More than ever before, locating primary foreign law source has become simpler as many governments and international organizations have posted vital materials on the Internet.⁷⁹ Many of these resources have been translated into English, particularly in countries active in international commerce.⁸⁰ If materials are unavailable in English, translation is certainly possible.⁸¹

Independent research may enable the court to resolve doubts and confirm the accuracy of materials submitted by the parties. Courts may reference scholarly articles, treatises, administrative guidance, legal commentary, judicial opinions, and even unconventional materials.⁸² By way of illustration, in ascertaining the relevant Chinese law in one recent case, the U.S. District Court for the Eastern District of New York analyzed Chinese regulations, oral directives, reports, charter documents, public statements made by the Chinese government to the World Trade Organization, and governmental state-

78. FED. R. CIV. P. 44.1; *see, e.g.*, *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999); *HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 264 F.R.D. 146, 148 (D.N.J. 2009).

79. *See* Teresa C. Stanton, *Finding Foreign Law: It's Not Just for the Experts*, 16 PERSP: TEACHING LEGAL RESEARCH & WRITING 37 (2007).

80. The Internet also provides wider access to sources of law that were not previously readily available to either the courts or general public. *See generally* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACCESSING THE CONTENT OF FOREIGN LAW (Preliminary Doc. No. 11, 2009), *available at* <http://www.hcch.net/upload/wop/genaff2009pd11c.pdf>; *see also* *Bodum USA, Inc.*, 621 F.3d at 628 (“[T]he law of most nations that engage in extensive international commerce, is widely available in English”). Naturally, it can be more difficult to access laws and other legal materials in countries which are not as engaged in international commerce as other nations, however, the availability of materials has increased in these countries as well.

81. In fact, U.S. courts can, and often do, refer to translated materials, including in commercial disputes, criminal cases, and immigration issues *See, e.g.*, *Bodum USA, Inc.*, 621 F.3d at 628; *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 497–98 (7th Cir. 2009) (citing both parties’ translations of the relevant portions of a Japanese trademark statute as there is no official English translation of Japanese laws); *Tchacos Co. v. Rockwell Int’l Corp.*, 766 F.2d 1333, 1334 (9th Cir. 1985) (accepting the translation of the Iranian Temporary Director Act provided by defendant’s expert).

82. *See, e.g.*, *Bodum USA, Inc.*, 621 F.3d at 628; *Sunstar, Inc.*, 586 F.3d at 495 (considering treatises, law review articles, and judicial opinions to interpret Japanese law).

ments made to the United States government.⁸³ Moreover, reports from special masters, materials acquired from third parties, or any other materials fall within the permissible scope of the applicable rules.⁸⁴ Courts may even independently consult with individuals who are well-versed in the applicable law.⁸⁵

B. *Resolving Conflicting Pictures of Foreign Law*

The primary challenge faced by courts when applying non-U.S. law is ensuring its correct application. Because Rule 44.1 specifies that a court “may” consider any material (as opposed to “must” consider), the court has broad discretion in considering foreign law materials or testimony.⁸⁶ A judge may consider the parties’ submissions, such as the testimony of party-hired experts, excerpts of legal materials, and legal translations. Typically, litigants and their experts present reliable testimony and foreign law materials that are sufficient for the court’s purposes. If a court feels that the expert testimony and supporting submissions are reliable, then it will seriously consider such submissions. Conversely, to the extent that a party expert submits self-serving affidavits, the court will discount such materials accordingly. Due to the discretion afforded the courts, a judge may reject foreign law materials and conclusions of an expert witness even if such offerings have not been refuted.⁸⁷ In essence, “it is not the credibility of the experts

83. *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738(BMC)(JO), 2012 U.S. Dist. LEXIS 16475, at *10 (E.D.N.Y. 2012).

84. A court may also appoint a special master or special expert—although this does raise concerns about whether courts will give undue deference to their own appointees.

85. Pursuant to FED. R. CIV. P. 44.1 and its state equivalents, courts have the discretion to independently conduct research, including consultations with knowledgeable experts, scholars, or even other judges. *See also* HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 264 F.R.D. 146, 148 (D.N.J. 2009).

86. 9A WRIGHT & MILLER, *supra* note 42, § 2444; *see also* HFGL Ltd., 264 F.R.D. at 149.

87. *See Bodum USA, Inc.*, 621 F.3d at 628 (preferring readily available, objective, English-language descriptions of French law over a party expert’s summary judgment declaration); *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2002) (indicating that although expert testimony may be useful in determining foreign law, federal judges may reject the conclusions of expert witnesses, even if the expert witnesses are not contradicted); *Institut Pasteur v. Simon*, 383 F. Supp. 2d 792, 795 n.2 (E.D. Pa. 2005) (noting that although expert testimony on foreign law is frequently helpful, American federal

that is at issue, it is the persuasive force of the opinions they expressed” with respect to the foreign law.⁸⁸

Some courts have questioned the overall objectivity and reliability of party-hired expert testimony in general because these experts are paid to testify about foreign law in a manner consistent with the view of the litigant that hired them.⁸⁹ The concern with paid experts stems from partisanship or potential bias. If an expert does not agree with a litigant’s position, then the likelihood that such expert will be retained is nonexistent. Accordingly, these courts have expressed a preference for objective written materials from nonpartisan sources as their preferred method of proof of foreign law. Regardless of these overall concerns, current procedures generally equip the court to accurately ascertain foreign law. Courts need not “uncritically accept” expert testimony and may reexamine materials presented by the litigants in partisan fashion.⁹⁰ Identical to evaluating domestic law, courts have the power and ability to weigh sources and gauge the reliability of party submissions. Naturally, courts will afford the most credibility to verifiable and concrete proofs.⁹¹ Conversely, questionable or inadequate materials may be disregarded.⁹²

Serious concerns may develop, however, when foreign law is unclear or the parties have painted conflicting pictures of the relevant foreign law. Not only can the imprecise application of foreign law alter the outcome of a lawsuit and

courts are not legally required to base their opinions on expert opinion with respect to foreign law).

88. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998).

89. *See Bodum USA, Inc.*, 621 F.3d at 628 (opining that “trying to establish foreign law through experts’ declarations . . . adds an adversary’s spin, which the court then must discount.”); *see also Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009) (indicating a preference for written source materials).

90. *See Estate of Botvin v. Islamic Republic of Iran*, No. 05-CV-220(RCL), 2012 U.S. Dist. LEXIS 91575 (D.D.C. July 3, 2012) (emphasizing the Advisory Committee’s Notes about FED. R. Crv. P. 44.1).

91. *See Lamm & Tang, supra* note 4, at 33 (noting the necessity of strong, credible proof of foreign law, particularly authenticated copies of foreign law).

92. *See Lucas v. Hertz Corp.*, 578 F. Supp. 2d 991 (N.D. Cal. 2012) (holding that a foreign law argument was unsupported because it was based on non-expert testimony and documents of questionable accuracy).

prejudice the parties, but it can also result in a costly and time-consuming appeal. Courts are typically aware of these potential negative consequences. Unlike purely domestic cases in which courts can adeptly parse through inconsistent explanations of law using their own research, resources, and understanding, a court may be comparatively hesitant to rely on its own knowledge and research to resolve a transnational dispute involving foreign law. Taking advantage of such hesitancy, a litigant may purposefully seek to confuse matters by frustrating the court with conflicting materials so that the court will apply domestic law or dismiss the case based on *forum non conveniens* grounds.⁹³ Even if the foreign law is relatively straightforward, litigants may exaggerate and paint an overly complicated picture of the law.

To reduce these concerns and enhance justice, federal and state judiciaries and policymakers should explore better methods to accurately determine foreign law. Individual litigants and society as a whole will benefit from the fair, objective, and expert resolution of questions of foreign law arising from cross-border interaction. Although the current methods and tools available to address foreign-law issues are largely unrestricted, they are neither perfect nor complete. Accordingly, it is time for U.S. court systems to explore more precise, efficient, and effective ways of determining and applying foreign law.

Improvements to current methods can decrease the hesitancy of courts to tackle complex issues related to foreign law. By willingly adjudicating cases involving foreign law, federal and state courts alike can also improve predictability and promote efficiency in private international litigation. Through the reliable and efficient application of foreign law, U.S. courts can persuade other nations to do the same by virtue of their example.

III. POTENTIAL METHODS OF IMPROVEMENT

To avoid the negative consequences that arise when foreign law is incorrectly interpreted or applied, it is important that the legal system take advantage of the diverse tools and flexibility afforded through Rule 44.1. It is also essential to ex-

93. Wilson, *supra* note 37, at 891, 911.

plore additional ways to facilitate the accurate exchange of information regarding foreign law. The current system has a host of benefits. In the true spirit of an adversarial legal system, all litigants can present materials on the substantive foreign law and its application. Judges have the discretion to rely on or reject such materials. The court's field of vision is not restricted to the materials formally presented by the parties, and the court may independently conduct its own research, enlist its own expert, appoint a special master, or utilize any available mechanism.⁹⁴ This broad authority provides the court with an unlimited number of tools with which to correctly ascertain foreign law. In theory, such flexibility should enable the courts to easily determine foreign law. In reality, however, the process could be much smoother, particularly when the foreign law is unclear or the litigation becomes a "battle of the experts." This section describes several avenues for potential improvement.

A. *Innovative New Tools and Procedures Can Alleviate Concerns and Improve Current Procedures*

Given that courts may consider any materials and resources when determining foreign law, courts and policymakers should give serious consideration to additional tools that would streamline and enhance accuracy of the process. Additional resources could help reduce the questionability of expert testimony and eliminate confusing questions of foreign law that can arise when conducting independent research.

1. *Party Stipulation*

Although an agreement between the parties post-dispute may be difficult to reach, the court might mandate that the parties consult and stipulate to the aspects of foreign law upon which they can agree. If this is done early in the litigation or arbitration process, the parties can streamline the process by narrowing down their disputes and contentions with respect to the substance of foreign law. Alternatively, the parties might mutually agree to the application of the *lex fori* even though they previously agreed to the application of another sovereign body of law. In particular, this may be appropriate if the do-

94. 9A WRIGHT & MILLER, *supra* note 42, § 2444.

mestic law mirrors foreign law in substance and effect. To the extent that domestic and foreign law are consistent, it would be easier and less expensive to proceed under the domestic law. No difficulty should arise if the choice of law is expressly agreed upon once the parties are engaged in a lawsuit or arbitration.

2. *Transnational Certification*

The process of applying foreign law in U.S. courts can be improved by looking to foreign governments and courts for guidance on complex matters and issues of foreign law.⁹⁵ The creation of a transnational “certification” procedure, either on a formal or informal basis, can clarify uncertain issues of foreign law and also potentially compel parties to provide a comprehensive and accurate picture of the relevant law. While informal cross-border judicial exchanges have recently emerged, there is currently no formal procedure by which state or federal courts can officially certify a critical question on foreign law to the courts of another nation. Existing bilateral or multilateral judicial cooperative arrangements typically focus on mutual recognition of judgments, requests to the competent authority of another state to collaborate in criminal investigations, or assistance with procedural matters such as obtaining written evidence, taking oral testimony, or conducting investigations in criminal and civil proceedings.⁹⁶ Certification arrangements in civil matters would constitute another positive step towards simplifying complex issues of foreign law as well as enhancing accuracy, objectivity, efficiency, and fairness in U.S. court proceedings.

The opportunity to directly seek guidance from foreign courts instead of speculating would provide invaluable assistance. This cross-border procedure would not only assist foreign courts seeking to apply U.S. law, but it would also benefit U.S. entities litigating overseas as it would increase the likelihood of U.S. law being applied accurately. This transnational certification procedure would facilitate the certainty and pre-

95. Wilson, *supra* note 37, at 914–23.

96. See, e.g., Government Offices of Sweden, *Judicial Cooperation in Civil and Commercial Matters* (Apr. 1, 2013, 3:22 PM), <http://www.government.se/sb/d/2710/a/15215> (describing such a cooperative arrangement).

dictability needed for global commerce and cross-border interaction.

Although various logistical issues pose a significant challenge to a transnational certification system, seeking ways to facilitate mutual consultations among judicial systems is sensible.⁹⁷ There should be no monopoly on accuracy or wisdom. If U.S. courts were able to certify particularly difficult or unclear questions of foreign law to a court or governmental official, they could receive an authoritative and objective response that is relatively free from any fear of bias. Naturally, an authorized official from a foreign country could provide unbiased information that constitutes a current and accurate interpretation of said sovereign's law. This information would potentially eliminate doubts about the accuracy of party submissions and expert testimony. The probability for biased expert testimony would decrease as well.

In light of increasing global integration and various international outreach activities by the U.S. judiciary, the timing is right for expanding cross-border cooperation and interaction among judiciaries.⁹⁸ Relationships have developed over the past several decades among judicial systems making information exchanges in civil cases possible on a level never seen before. Judges increasingly appreciate that they function within a common transnational system. Cooperative activities including international educational exchanges, "sister-court" relationships, judicial outreach activities, international judicial conferences, informal meetings, seminars, and similar opportunities for transnational judicial interaction have furthered cordial relationships. Interaction during cross-border criminal cases has done the same.

97. See Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095, 1108 (2010) (discussing how gathering information about foreign law is "sensible").

98. Wilson, *supra* note 37, at 918. Challenges that transcend borders—such as internet crime and organized criminal activities—also give rise to the need for greater cross-border judicial collaboration on an international scale.

a. *Informal certification system: New York and New South Wales model*

These activities have also laid a strong foundation for certification-like arrangements. The relationship between the court systems of New York and New South Wales, Australia (NSW) is a prime example. In 2010, the New York state judiciary entered into an informal certification procedure with the NSW courts in the form of a bilateral Memorandum of Understanding (MOU) that contemplates reciprocal cooperation and consultation between their respective judicial systems to enable the parties to obtain correct and authoritative applications of law.⁹⁹ As the first agreement of its kind between a U.S. and foreign judicial system, this MOU was also designed to combat the high cost of legal experts and reduce the confusion caused by conflicting accounts of foreign law.¹⁰⁰ In principle, with the litigants' consent, the MOU allows both jurisdictions to exchange analysis about a contested dispositive legal issue.¹⁰¹

The path to a successful transnational certification system involves finding the time and resources to answer legal questions received from foreign courts. Court systems in the United States and other countries are often overburdened with their own civil caseloads. Adding another dimension of legal review to the mix could overwhelm some courts. However, courts might look to emeritus or retired judges for spe-

99. Press Release, New York State Unified Court System, First of Its Kind Memorandum of Understanding Signed Between U.S. State Court and Australian Court (Oct. 28, 2010), *available at* http://www.courts.state.ny.us/press/pr2010_14.shtml; *see also* Wilson, *supra* note 37, at 919–21.

100. The NSW Supreme Court also entered into a similar arrangement with the Supreme Court of Singapore in 2010. *See* 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.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/529. New South Wales also entered into cooperative agreements with the High People's Court of Guangdong Province, High People's Court of Hubei Province, and High People's Court of Shanghai in 2011. *See* SUPREME COURT OF NEW SOUTH WALES, *International Judicial Co-Operation*, http://www.supremecourt.lawlink.nsw.gov.au/supremecourt/sco2_internationaljudicialcooperation.html?s=1001 (last visited May 18, 2013).

101. New York State Unified Court System, *supra* note 99; *see also* Joel Stashenko, *N.Y. Judges to Exchange Views with New South Wales High Court*, N.Y. L.J., Nov. 1, 2010, at 1.

cial assistance. They might also tap into other competent court officials. Many countries maintain a Central Authority that could provide accurate information regarding their domestic law. Alternatively, court systems could rely on current judges who are interested in international cooperation and who are willing to volunteer their time and expertise. By way of illustration, the New York State court system is relying upon volunteer judges to operate their informal certification system with New South Wales. New York has staffed its "certification" board with one volunteer judge from the New York Court of Appeals and one volunteer judge from each appellate division.¹⁰² With an eye towards enhancing accuracy and promoting comity, a panel of three judges functioning as referees will consider any certified questions about New York law submitted by NSW courts and provide a report prepared outside of work hours.¹⁰³

In their capacity as volunteer referees, the New York judges will separate into panels of three to informally consider questions about New York law posed by the Australian court, and then provide the requesting foreign court with an unofficial, nonbinding pronouncement on the state of the relevant law.¹⁰⁴ With respect to questions of Australian law that arise in New York courts, the NSW Supreme Court intends to provide similar assistance on a reciprocal basis. The information exchanged between the courts should help judges untangle complex or unclear questions of law. At the same time, this information should not unnecessarily cause problems in the respective forums. Because the volunteer New York judges act outside of the scope of their official duties, their unofficial interpretations will neither have any precedential authority in New York, nor be considered official declarations of New York law.¹⁰⁵ Also, the NSW Supreme Court will have the discretion to adopt, modify, or reject the report in whole or in part.¹⁰⁶

102. New York State Unified Court System, *supra* note 99.

103. *Id.*

104. Stashenko, *supra* note 101. The NY–NSW quasi-certification arrangement is informal in nature due to constitutional limitations in New York restricting certification only to the U.S. Court of Appeals for the Second Circuit. The goal underlying the MOU is possibly seeking a constitutional amendment to enable New York judges to officially accept certified questions from NSW courts and those of other nations. *Id.*

105. New York State Unified Court System, *supra* note 99.

106. *Id.*

b. *Mirroring the U.S. state-federal model certification system*

A transnational certification system created on a bilateral or multilateral basis could be flexibly crafted along the lines of the certification system used by U.S. federal courts. In the United States, federal courts are often required to interpret and apply state law. In so doing, uncertainties can arise due to unsettled law, contradictory opinions, or complex issues.¹⁰⁷ Despite sharing a common legal culture with state courts, a federal court's predictions about state law may still result in an incorrect application of law and require subsequent correction by state courts.¹⁰⁸ Accordingly, when handling complex issues involving state law, a federal court may seek guidance from the highest state court by "certifying" a question of undecided or uncertain state law.¹⁰⁹ In seeking clarification of state law, a federal court can then render a judgment in accordance with correctly interpreted state law once the state court returns an answer to the certified question.¹¹⁰

In the domestic U.S. context, certification is generally limited to novel or uncertain questions of law, and may be requested by the parties or the court.¹¹¹ It is typically based on a certification statute, which expressly permits the state's highest court to respond to a certified question so long as the answer will be issue-determinative and no controlling appellate decision, constitutional provision, or statute exists.¹¹² The federal court is generally bound to follow the state's answer to a certi-

107. Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 238 (2005/06).

108. Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673-74 (2003). Although federal judges are fully capable of determining state law, they are often faced with inconclusive authority, inconsistent rulings, or novel issues. *See generally* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723 (2008).

109. Glassman, *supra* note 107, at 249 ("Certification procedures are a matter of state law."). Almost all states allow their highest court to accept certified questions. *See* Preis, *supra* note 108, at 764-65.

110. Nash, *supra* note 108, at 1674.

111. *See id.* at 1690-94.

112. Preis, *supra* note 108, at 765. An overwhelming majority of states have a certification procedure. However, these procedures diverge as to which courts may certify which questions at which stage of the proceeding to which court. Glassman, *supra* note 107, at 249-50.

fied question.¹¹³ This useful process can reduce uncertainty, increase accuracy, cut costs, reduce delays, and facilitate the acquisition of an authoritative response.¹¹⁴

c. *Other forms of judicial cooperation*

To make certification possible in an international context, the United States could initially negotiate formal bilateral agreements with other countries—first with close trading partners—that would permit their respective courts to exchange information. Alternatively, courts could enter into more informal arrangements or understandings with foreign courts to exchange information when difficult and dispositive issues of foreign law arise. Pursuant to a formal agreement or informal arrangement, if a U.S. domestic court were to encounter a complex or novel question of the foreign law that would be dispositive to a certain civil case, then that court could seek clarification of the foreign law at issue by petitioning a court or governmental agency designated by the respective country. In principle, a “certification-like” procedure could offer a judge certainty when interpreting foreign law and potentially reduce arguments among litigants about specific points of foreign law. The availability of this procedure would encourage the parties to present objective foreign law materials and expert testimony. Knowing that cross-border certification is an option, it would also deter litigants from purposefully complicating issues of non-U.S. law.

Cooperation with foreign courts is certainly feasible in today’s global world. The idea of creating a formal system of cross-border judicial exchanges has been utilized in Europe and other areas through multilateral treaties or bilateral agree-

113. Nash, *supra* note 108, at 1695 (noting that modern courts typically agree that they are bound to follow certified answers from state courts, and base this belief on *Erie* and its progeny).

114. *Id.* at 1674. Despite initial resistance, the idea of certification has increased in popularity and use. *Id.* At the same time, however, some critics have argued that certification is unnecessary in the U.S. federal-state context due to the similarity of laws and ability of federal judges to readily determine state law. See generally Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157 (2003); Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009).

ments.¹¹⁵ To create a successful “certification” system involving foreign courts, the courts would need to determine (i) what issues of foreign law are appropriate for referral, (ii) which entity will respond to certified issues, (iii) the appropriate time frame for response, and (iv) the form of response. From a logistical standpoint, the system must be quick and easy to use. A point person or designated agency should be able to receive “certified questions” and expeditiously facilitate processing. Too many certified questions could overwhelm courts and hamper efforts for a quick turnaround, so limitations similar to those in the U.S. domestic certification system would be useful. The likelihood of success increases if priorities are examined and boundaries drawn.

Even more significantly, the courts must determine how much weight to afford information received from a foreign court. When a reliable source from another sovereign provides information about its own law, the recipient court should provide great deference to such information. Consistent with the U.S. court system’s adversarial traditions, the parties should also be allowed to fully present any and all materials to the court about foreign law and its proper interpretation, including expert testimony and written materials in response to any answer to the certified question. This will ensure balance and facilitate accuracy.

Moreover, while an answer provided by a foreign court is useful and may be persuasive in future litigation, it should not constitute binding precedent for future matters handled by the requesting court or judicial system. Foreign law and legal interpretation may change over time. Because every dispute is different, an advisory opinion issued for purposes of litigation in a foreign jurisdiction may not be applicable in a future domestic case. Finally, because the opinion or information would constitute an advisory opinion or be discounted due to the absence of the doctrine of *stare decisis*, many legal systems would

115. GEEROMS, *supra* note 41, at 153–60 (reviewing bilateral agreements designed to enable the exchange of information about foreign law). The European Convention on Information on Foreign Law or “London Convention” is another prime example. Signed in 1968, it allows signatory states to seek and provide information about their respective civil and commercial law and procedures. See Barry J. Rodger & Juliette Van Doorn, *Proof of Foreign Law: The Impact of the London Convention*, 46 INT’L & COMP. L.Q. 151, 155 (1997).

not recognize such materials as binding. Accordingly, an international certification system would likely be most effective if the exchange of information did not give rise to any binding obligation.

3. *Establishment of a Foreign Law Institute or Comparative Law Center*

Given the increasing role that foreign law is playing in U.S. courts, the time is ripe for an entity or organization to establish a foreign law institute or comparative law center for use by federal and state courts. The creation of a credible and nonpartisan comparative center from which the U.S. courts could draw foreign law materials, translations, research, and even opinions would potentially simplify and help reduce uncertainty in determining foreign law in U.S. court proceedings. It would also alleviate many of the apprehensions and challenges associated with accurately handling foreign law claims, defenses, and issues.

Concerns about the objectivity of party submissions and expert opinions persist among many U.S. federal and state judges. The cost and time required to thoroughly research foreign law give rise to additional concerns. On a broader scale, it can be difficult for a single judge in the midst of complex litigation not to err on questions of foreign law. To alleviate these concerns and aid in the process, a nonpartisan foreign law institute or comparative law center modeled after those in Europe could provide judges with accurate materials and objective assessments about non-U.S. law. The institute itself could conduct research under the guidance and direction of academics, practitioners, and judges knowledgeable in foreign law and transnational matters. To the extent possible, it could serve as a repository for English-language translations of laws, regulations, and other legal materials. It might even help facilitate translations as well. With sufficient funding, this center could be created as an independent and nonpartisan entity. Alternatively, one or more U.S. law schools might spearhead this worthwhile project,¹¹⁶ or the U.S. Department of Justice

116. The efforts of Pace University provide a good illustration of the ability to create such a center. Striving to develop a center focused on the CISG, Pace Law School's Institute of International Commercial Law has created a database of English language research tools, including annotated transla-

could enhance its international activities and presence by creating a similar center within the organization.

The European model demonstrates that a comparative law center in the United States with sufficient credibility might serve as another objective resource upon which federal and state courts could rely. In France, the French Center of Comparative Law gathers information about unfamiliar foreign laws. In Italy, courts may certify questions of foreign law to a national institute.¹¹⁷ In Germany, the Max Planck Institute for Foreign and International Private Law does the same. The courts in these respective countries have historically used these comparative law centers when faced with difficult questions of foreign law.¹¹⁸

B. *Improving Existing Procedures: Legal Counsel, Experts, and the Court*

Within the context of existing procedures and practices, there is certainly additional room for counsel, experts, and even the court to improve the process of applying foreign law. These actors can work to eliminate inefficiencies and enhance accuracy.

1. *Room for Improvement from Legal Counsel*

Improvement in applying foreign law in U.S. courts lies squarely in the lap of legal counsel. Because foreign law constitutes a question of law—albeit a potentially complicated one due to language, culture, and other barriers—counsel should endeavor to provide the courts with as much information as early in the process as possible.¹¹⁹ Courts would have an over-

tions of cases and judgments from various countries, scholarly writings, and legislative history. See CISG DATABASE, <http://www.cisg.law.pace.edu> (last visited Apr. 1, 2013).

117. See Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1259–60 (2011) (noting that the judge may consult with experts at specialized institutions or rely on information obtained through the Ministry of Justice).

118. See Cheng, *supra* note 97, at 1107–08 (highlighting European countries' use of comparative law centers).

119. The Notes of the Advisory Committee on Rules to Rule 44.1 specify that written notice of the intent to rely on foreign law can be “given outside of and later than the pleadings, provided the notice is reasonable.” FED. R. CIV. P. 44.1, Notes of Advisory Committee on Rules.

whelming burden if they were required to research and determine foreign law without the assistance of the litigants. As such, if necessary, the court may insist that the litigants brief and provide foreign law materials.¹²⁰ The parties should never reach this stage however. By presenting comprehensive source materials and interpretations in an objective manner, the parties can assure and comfort the court. Oftentimes, legal counsel supplies the court with only the bare minimum—an affidavit from a single expert witness with excerpts from limited legal materials. This might be done due to counsel's lack of familiarity with foreign law materials, cost constraints, or even fear of providing the court with too much information. Other times, counsel will attempt to prove foreign law in such a partisan fashion that the court must conduct its own investigation or order further briefing by the litigants in an attempt to correctly decipher the applicable law.¹²¹

Counsel can best serve their client by objectively providing enough information such that the court can accurately determine and apply foreign law. First, because the court may be unfamiliar with the laws of another nation, it is misguided for any party to assume that the court will research the foreign law at issue. Litigants can gain credibility with the court through a comprehensive presentation of the relevant foreign law. Second, effective communication with the court can improve the process. Courts benefit from a clear picture and accurate presentation of foreign law. If it is necessary to explain nuances that are not apparent on the face of statutory materials or translations, counsel should clearly demonstrate the need for an expert to the court. With the distrust of experts demonstrated by some courts, legal counsel should not assume that foreign law experts will receive deference or even consideration despite the common practice of courts over the past fifty years. Experts should survey and possibly include secondary sources that are both in English and the respective native lan-

120. *Id.* (“[T]he court is free to insist on a complete presentation by counsel”); *see also* *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998) (ordering supplemental briefing of Mexican law because district court erroneously applied New York law to claim); *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1366 n.6 (S.D. Fla. 2003) (noting that even though non-U.S. law need not be “proved in an evidentiary sense,” the court may demand complete presentation by the parties).

121. 9A WRIGHT & MILLER, *supra* note 42, § 2444.

guage. Moreover, based on this author's personal experience, courts respond most favorably to experts who have been immersed in foreign law, and those who can interpret and simply convey it in a manner similar to a brief on domestic law.

Finally, collaboration among the parties would be beneficial as well. When possible, it would be beneficial for the litigants to jointly present legal materials and translations in which they are in agreement to the court. Not only would this streamline the process, but it could also reduce costs for the parties.

2. *Improvements Involving Expert Witnesses*

The use of party-hired foreign law expert witnesses can be adversarial, expensive, and time-consuming. Also, expert witness testimony does not necessarily guarantee accuracy. Some have called the reliability of expert testimony into question on the basis that experts are "hired guns" and therefore incapable of providing objective proof of foreign law.¹²² Because parties select experts based on the "convergence of their views" with their client's litigating position or "their willingness to fall in with the views urged upon them by the client,"¹²³ there is substantial concern about the reliability of this resource. If an expert abandons objectivity and becomes an advocate for the party that hired him, then the usefulness of the testimony is compromised. Additionally, because litigants will generally hire experts with divergent views, their opinions may offset each other leaving the court back where it started.

While the concerns about partisan experts might be warranted in some cases, they can be over-exaggerated. There are mechanisms already in place to guard against expert contami-

122. Committee on International Commercial Disputes, *supra* note 41, at 52; *see also* Bodum USA, Inc. v. La Cafetière, Inc., 621 F.3d 624, 628 (7th Cir. 2010) ("[E]stablish[ing] foreign law through experts' declarations . . . adds an adversary's spin."). In my own litigation experience with transnational matters, I have noticed a tendency of some experts hired by a particular party to succumb to the temptation to join said party's side by downplaying the weak aspects of the case. *See also* Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 64 (Summer 2003) (describing a "substantial difference" between court-appointed and party-appointed experts).

123. Sunstar, Inc. v. Alberto-Culver Co., 586 F.3d 487, 495–96 (7th Cir. 2009).

nation. Moreover, because judges essentially function as gatekeepers, they can reject biased opinions and even sanction parties, their counsel, or some experts for acting in bad faith or breaching applicable disciplinary codes.¹²⁴ Also, judges may not be as easily persuaded as a jury. The prospect of *de novo* appellate review also stands as a deterrent against subjective or inaccurate descriptions of foreign law.¹²⁵ From a practical perspective, both experts and legal counsel face the prospect of damaged credibility in the event that the proffered expert testimony is biased or slanted. As a result, it is in the best interest of experts and litigants to strive to present foreign law in an objective and unbiased manner.

To ensure the objectivity of expert opinions, courts may consider creative uses of existing tools. Courts may concurrently take live testimony from all of the foreign law experts. By exercising its power to request the appearance of partisan experts, a court could ensure the accuracy of expert testimony by having conflicting experts face off against each other during a hearing. This process, known as “hot tubbing” or concurrent evidence, has been embraced by Australian courts.¹²⁶ By compelling all of the experts to simultaneously appear before the court, the experts can discuss the case, ask questions of one another, respond to inquiries from the judge and lawyers, as well as conduct a general dialogue about the correct application of law.¹²⁷ Experts can more effectively respond to contentious points and offer clarifications for the court.¹²⁸ Through the “hot tubbing” approach, the court can find common ground among the parties with respect to the foreign law and narrow the issues in dispute.¹²⁹ This could help ensure the reliability of expert testimony.

If U.S. courts were to exercise more control over the use of experts, the potential for expert bias and legal uncertainty

124. See Wilson, *supra* note 37, at 909–10.

125. Quintanilla & Whytock, *supra* note 7, at 42–43 (2011).

126. See Adam Liptak, *In U.S., Expert Witnesses Are Partisan*, N.Y. TIMES, Aug. 12, 2008, <http://www.nytimes.com/2008/08/12/us/12experts.html>. On a personal level, I have actually participated in expert “hot tubbing” as the court sought to determine the meaning of certain Japanese words at issue in a patent infringement lawsuit.

127. *Id.*

128. See *id.*

129. See *id.*

might also decrease. Following the lead of English courts, U.S. courts might encourage cooperation among experts and even require all experts to sign a statement that their duty is to the court, instead of to the paying litigant.¹³⁰ Additionally, the courts may take advantage of their power to appoint their own foreign law expert. Although courts are typically reluctant to appoint their own experts, the area of foreign law may be well-suited for a greater use of court-appointed neutral experts. If the parties realize that the court may appoint its own expert who is knowledgeable in foreign law, the party-hired experts will have an additional incentive to objectively and accurately present the law.

The use of neutral experts is not free from criticism or concern however. The adversarial ideology underlying the U.S. federal and state courts relies upon the balance struck from party submissions, instead of neutral experts.¹³¹ Neutral experts invite fears that a court will unduly favor the information and positions provided by the expert that it vetted and hired. If the parties are afforded the chance to vigorously cross-examine any court-appointed experts, this could mitigate concern about the court giving undue preference to the opinions of its own appointment. Notwithstanding, there is also the real possibility that foreign law is unsettled or a legitimate disagreement exists with respect to its substance. In such case, the use of neutral experts might not necessarily be the answer.

3. *Additional Efforts from the Courts*

Not only are federal and state courts capable of applying the law of other sovereigns, but they have also done so for well over a century.¹³² Rule 44.1 contemplates that the litigants jointly share the responsibility of cooperating with the court to prove foreign law. Although it does not clearly define the division of labor between the court and litigants, the flexible approach contemplated by Rule 44.1 envisions that courts will independently examine the substance of foreign law, at least

130. *See id.* (describing the English approach).

131. *See* Cheng, *supra* note 97, at 1106 (noting that the “idea of a neutral expert is anathema, whether because it is inconsistent with the adversarial process, or because it smacks too much of judicial abdication.”).

132. Wilson, *supra* note 37, at 893.

to some degree.¹³³ Courts differ about the degree to which they should proactively investigate foreign law however. While some courts affirmatively place the burden on courts to research foreign law,¹³⁴ other courts are less certain about the court's duties and some have even applied the forum law in the event that the parties did not adequately present the foreign law at issue.¹³⁵

Courts should take an active role in investigating and determining foreign law. At minimum, courts have a responsibility together with litigants to ascertain and determine foreign law. Moreover, if the court conducts its own research and relies on sources different from those submitted by the parties, it should provide the parties with an opportunity to address the appropriateness of such decision before making a final deci-

133. 1 FED. CIV. PROC. LIT. MANUAL, *supra* note 46, § 44.1.1 (noting court interpretations of Rule 44.1 as charging trial courts to research the proper interpretation of foreign law even when the litigants do not present sufficient evidence on the issue); *see also* 9A WRIGHT & MILLER, *supra* note 42, § 2444 (“[O]ne of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full evaluation of the available materials. To effectuate this policy, the court is obliged to take an active role in the process of ascertaining foreign law.”).

134. *See, e.g.*, *Tobar v. United States*, 639 F.3d 1191, 1200 (9th Cir. 2011) (vacating and remanding a case because the district court “apparently did not recognize that, in its discretion, it could inquire further into the content of Ecuadorian law”).

135. Other courts have squarely placed the burden of proof on the party seeking to apply foreign law. These courts maintain that the parties have the burden of raising and adequately proving foreign law, and that they have no duty to proactively do so. *See Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) (emphasizing that the court has no duty to independently conduct research); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 205 (1st Cir. 1988); *Comm. Ins. Co. of Newark, N.J. v. Pacific-Peru Constr. Corp.*, 558 F.2d 948, 952 (9th Cir. 1977); *Tokio Marine & Nichido Fire Ins. Co. v. M/V Sophie Rickmers*, No. H-09-886, 2011 U.S. Dist. LEXIS 79522 (S.D. Tex. 2011) (applying forum's law where parties fail to raise an issue of foreign law). Even in jurisdictions where courts place the investigatory burden on the moving party, there seems to be some recognition of an affirmative duty by the courts. Recently, in *McGee v. Arkel Int'l LLC*, 671 F.3d 539, 547 (5th Cir. 2012) (quoting FED. R. CIV. P. 44.1, Notes of Advisory Committee on Rules), the U.S. Circuit Court for the Fifth Circuit asserted that proof of a foreign country's law is a claimant's burden, but also recognized that the court may “engage in its own research on an issue of foreign law,” and such research does not require formal notice to the parties.

sion on the application and interpretation of the law.¹³⁶ The adversarial system could be weakened if a court relies on new sources of foreign law without allowing the parties to provide their interpretation of said materials. By providing this opportunity, the court will have a chance to consider additional information and insights thereby ensuring that it will correctly apply the foreign law at issue.

Courts may also delegate some tasks to special masters familiar with foreign law. If asked, many judges might maintain that they face time restraints in locating, interpreting, and applying non-U.S. law.¹³⁷ Investigation of unfamiliar foreign law requires extra time and additional resources. To overcome this hurdle and facilitate an accurate determination of foreign law, the court might appoint a special master who sits in a quasi-judicial role. Reliance on a special master with expertise in foreign law may help compensate for some judges who are too busy or too inexperienced in foreign law to adjudicate the matter properly.¹³⁸ To ensure fairness, however, the parties should have an opportunity to present their arguments and persuade the master with respect to the substance of foreign law.

IV. CONCLUSION

Foreign law will continue to play a significant role in litigation filed in U.S. federal and state courts. Given the importance of accurately interpreting and applying foreign law, it is essential that U.S. courts have all tools and means possible. Although current rules and procedures provide courts with considerable flexibility and a host of tools to ascertain foreign law, there is significant opportunity for improvements. These include greater cooperation among countries, experts, and all

136. FED. R. CIV. P. 44.1, Notes of Advisory Committee on Rules (“There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely.”).

137. See Comm. on Int’l Commercial Disputes, *supra* note 41, at 51 (quoting Milton Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 471 (1978)).

138. Wilson, *supra* note 37, at 933.

actors in the litigation process. Greater cooperation and enhanced procedures will alleviate fears, facilitate greater accuracy, and help improve fairness.
