

DEMYSTIFYING THE DETERMINATION OF FOREIGN LAW IN U.S. COURTS: OPENING THE DOOR TO A GREATER GLOBAL UNDERSTANDING

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INTRODUCTION

The global influences that pervade the typical modern-day existence are sweeping both in scope and function. Products and services provided by organizations and individuals from different parts of the world are everywhere. Take the United States for example: automobiles and electronics on U.S. streets are designed and manufactured in Asia; gasoline stations sell gasoline exported from the Middle East and South America; stores sell clothing sewn in China, Southeast Asia, and Europe; grocery stores stock food and fruit shipped in from Africa and South America; financial services affecting U.S. interests are rendered in Tokyo, Hong Kong, London, and elsewhere; and a number of entities even provide customer service from call centers in India. Similarly, the list of foreign products and services available to domestic consumers in most countries is seemingly endless. This global reality has advanced further due to the explosion of electronic commerce. In cyberspace, a cross-border transaction is no further than one click away and really no more difficult than conducting a transaction with a cross-town entity. In recent years, the interconnected nature of the global economy has been highlighted by various events including the transnational fallout from the U.S. housing market subprime mortgage debacle in 2007¹ and the Japanese tsunami in March 2011

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1. INT'L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: CONTAINING SYSTEMIC RISKS AND RESTORING FINANCIAL SOUNDNESS 1 (2008), available at <http://www.imf.org/external/pubs/ft/gfsr/2008/01/pdf/text.pdf> (observing that the "crisis that originated in a small segment of the U.S. mortgage market has spread to broader cross-border credit and funding markets" and put pressure on funding channels and trade linkages).

that crippled manufacturers around the world after they were unable to readily obtain valuable parts manufactured in Japan.²

With the proliferation of globalization and international commercial interaction, an increasing number of entities have entered into contractual relationships or faced legal issues that transcend ordinary domestic norms. Activities or relationships that traverse international boundaries can give rise to a host of legal uncertainties, starting with the governing law. In fact, many situations arise in which the laws of multiple nations can govern the same conduct or relationships. For example, the laws of several nations might apply when a party ships goods that are damaged en route from Europe to the United States on a Swedish ship, owned and operated by a Panamanian corporation, due to negligent repairs to the ship in South Korea. Other situations may compel domestic courts to interpret and apply the laws of another sovereign or “foreign law,” such as when a commercial contract contains a stipulation about the application of foreign law or when a court exercises jurisdiction over tortious conduct committed overseas. There are even domestic statutes that expressly incorporate the laws of foreign sovereigns.³

The increasing interaction among parties from different countries in both conventional and cyber settings has naturally resulted in more civil disputes on an international scale. In resolving such disputes, it is generally accepted that a nation may prescribe law and adjudicate disputes involving the conduct of: (i) anyone acting within its territory; (ii) its citizens, regardless of the location of their conduct; (iii) non-nationals acting outside of its borders if such conduct has significant and intended effects within the nation; (iv) those threatening its sovereignty or security; and (v) those engaging in universal crime such as genocide.⁴ If a national

2. Isabel Reynolds & Hyunjoo Jin, *Global Manufacturers Wrestle with Japan Supply Gaps*, REUTERS, Mar. 18, 2011, <http://www.reuters.com/article/2011/03/18/japan-supplychain-idUKL3E7EI0AR20110318>.

3. See, e.g., Tariff Act of 1930 § 527, 19 U.S.C. § 1527(a) (2006) (prohibiting 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”).

4. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404, 421, 423 (1987). The Restatement (Third) of Foreign Relations lists the primary bases for prescriptive jurisdiction including: (i) territoriality (conduct that takes place within a state’s territory, either wholly or in substantial part, as well as the status of persons or interest of things within its territory); (ii) effects (jurisdiction with respect to activity outside the state but having or intended to have substantial effect within the state’s territory); (iii) nationality, domicile, or residence (jurisdiction over the activities, interests, status, or relations of its nationals outside its territory or those present within the territory); (iv) protection (jurisdiction over certain conduct outside its territory by non-nationals that is directed against the security of the state); and (v) universal crimes (jurisdiction over a limited class of other state

court exercises jurisdiction over a dispute, it must then determine which substantive law applies.

Without question, the application of a certain body of substantive law in a lawsuit can be outcome determinative.⁵ Accordingly, it is important to correctly determine the applicable substantive law. National courts and arbitration bodies frequently find it necessary to apply foreign law due to the explosion of international disputes. In the words of Jonathan Lippman, Chief Judge of the New York State Court of Appeals, “[D]omestic courts are increasingly called upon to decide cases that involve cross-border issues and require the determination and application of foreign law.”⁶ Global commerce depends on a stable, predictable, and fair system of dispute resolution. The proper functioning of private international law in a domestic system is based on the appropriate application of law. In fact, a national court’s adjudication of a foreign law claim can provide such stability and fairness. Moreover, adjudication of substantive foreign law claims in domestic courts is possible without infringing on the interests of another sovereign. Also, the resolution of foreign law claims in national courts is generally consistent with comity and amicable commercial relations between nations. It is akin to recognizing the legitimacy and application of the foreign state’s law.

The application of foreign law is generally based on mutual agreement or domestic rules. In international contractual settings, parties typically negotiate for the laws of a certain jurisdiction to govern their relationship and may even designate a specific court to handle any future disputes.⁷ Predetermination of the applicable law not only molds conduct, but it also can reduce or eliminate the uncertainties associated with the underlying transaction. In the case of the United States, domestic and foreign parties may elect to explicitly stipulate to the use of foreign law in U.S. courts.⁸ Alternatively, said parties may choose only to apply foreign law

interests such as those of universal concern such as piracy, slave trade, and genocide). *Id.* §§ 401–04, 421–23; *see also* Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Judicial Conflict*, 57 AM. J. COMP. L. 631 (2009).

5. *See* Carolyn B. Lamm & K. Elizabeth Tang, *Rule 44.1 and Proof of Foreign Law in Federal Court*, LITIGATION, Fall 2003, at 31, 32.

6. Press Release, N.Y. State Unified Court Sys., First of Its Kind Memorandum of Understanding Signed Between U.S. State Court and Australian Court (Oct. 28, 2010), http://www.courts.state.ny.us/press/pr2010_14.shtml.

7. *See* Louise Ellen Teitz, *The Use of Evidence in Admiralty Proceedings*, 34 J. MAR. L. & COM. 97, 100 (2003). In some cases, the parties will select diverging governing law and jurisdiction for dispute resolution. *See, e.g.,* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (upholding an agreement containing an arbitration clause that selected Paris, France as the forum for dispute resolution and Illinois state law as governing the agreement).

8. *See* *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006).

without designating an exclusive forum and essentially end up in a U.S. court having jurisdiction over the parties. If the transactions underlying the international contract have some relationship to the law of the selected forum, then courts will typically honor such an agreement.⁹ In other cases, though, international contracts may be silent on choice-of-law issues. In cases involving such silence or when international dealings involve noncontractual matters (for example, torts, intellectual property, employment law, or property), the parties must rely on choice-of-law rules in the forum handling the lawsuit.¹⁰ If a lawsuit is filed in either U.S. federal or state court, a variety of different tests have arisen to facilitate a choice-of-law determination.¹¹ These tests can result in the application of foreign law in U.S. court as a court does not need to decide a legal issue, claim, or dispute according to its own law.

U.S. courts commonly encounter claims and issues that are governed by the laws of another sovereign either by virtue of mutual agreement or choice-of-law rules.¹² Although many courts employing modern choice-of-law rules tend to favor the selection of their own forum's law,¹³ they continue to apply foreign law to resolve conflicts arising out of contractual relationships, tortious conduct, employment matters, intellectual property rights, treaties, and domestic statutes incorporating foreign law, as well as other legal foundations.¹⁴

In the United States, courts are presumed competent to apply foreign law.¹⁵ However, many are hesitant to delve into territory comprised of unfamiliar legal rules and norms.¹⁶ Most judges have neither intensively studied nor practiced foreign law; thus, their expertise in the law of another country is much lower in comparison with domestic law. Moreover, adjudicators trained in common law jurisprudence are likely to be less comfortable looking at the

9. See Teitz, *supra* note 7, at 100.

10. See generally John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 TUL. MAR. L.J. 179 (1984).

11. The choice-of-law tests employed in the United States for contracts, torts, and consumer transactions include the *lexi loci delicti*, the more significant relationship test as detailed in the Restatement (Second) of Conflicts of Law, the governmental interest test, and others. Jacques deLisle & Elizabeth Trujillo, *Private International Law: Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135, 144–47 (2010).

12. See Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095, 1098 (2010).

13. See 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, 1163 (2005).

14. See, e.g., Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 61–63 (2009).

15. See Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 38 (1997).

16. See *id.*

application of law formulated in a civil law system. In light of these challenges, U.S. judges who are not trained in or familiar with foreign law systems may fear that cases involving foreign law are extraordinarily difficult and time consuming to resolve.¹⁷ Based on such fear, the judges may directly or indirectly look for ways to dismiss cases involving foreign law on the grounds that the forum selected by the plaintiff is inconvenient or otherwise unsuitable. Oftentimes, these fears and resulting dismissals are not justified.

When U.S. federal and state courts face cases involving foreign law, they have a broad range of tools available to compensate for actual or perceived fear of inadequacy. Courts can turn to expert witnesses who have studied or practiced the foreign law for guidance and direction. They may also rely on English-language or translated books, treatises, statutes, cases, legal aids, and online legal materials to determine the applicable foreign law.

Serious concerns, however, can arise when the litigants or legal materials available to the court paint conflicting pictures of the relevant foreign law. U.S. courts have a keen recognition that foreign law needs to be precisely applied and that a mistaken application could influence the final outcome of the lawsuit. Unlike purely domestic cases, a court might be hesitant to rely on its own resources to resolve the conflict. Attempting to capitalize on such hesitation, a litigant seeking to avoid the use of foreign law may purposefully seek to “muddy the waters” by painting an overly complicated picture of foreign law, even if the law is simple and fairly straightforward. The litigant’s primary goal is frustrating the court to the point of dismissal or resignation to domestic law. In addition, some courts and academics have openly questioned the reliability of expert testimony on foreign law.¹⁸ The legal practitioners or professors serving as foreign-law experts are paid for their testimony, and, consequently, their neutrality has been questioned on the premise that a litigant would never select an expert absent a willingness to advance interpretations only consistent with said litigant’s position.¹⁹

In light of these concerns and the continuing hesitation to apply foreign law, there must be additional ways for U.S. courts to accurately determine foreign law. In fact, given the proliferation of international commercial disputes and integration of our global

17. Press Release, N.Y. State Unified Court Sys., *supra* note 6.

18. *See* *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010) (“Trying to establish foreign law through experts’ declarations . . . adds an adversary’s spin, which the court then must discount.”).

19. *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495–96 (7th Cir. 2009) (“But the lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by the client.”).

society, the number of disputes involving foreign law should continue to rise. Court systems and parties alike benefit from the fair, objective, and expert resolution of questions of foreign law. Accordingly, it is time for U.S. court systems to explore more precise, efficient, and effective ways of determining and applying foreign law. In the U.S. context, federal and state courts also need to improve predictability and promote efficiency in private international litigation by willingly adjudicating cases involving foreign law, instead of seeking to avoid such cases. 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.

This Article explores the tools currently available to U.S. courts to determine foreign law. In addition to taking better advantage of all of these tools, U.S. court systems should seriously consider adopting innovative mechanisms to ensure the fair, objective, and expert application of foreign law. This Article explores the availability and advisability of such mechanisms, including the possibility of directly soliciting the assistance of foreign courts and governments when serious doubts arise or there are unsettled questions of foreign law. In examining these important issues, Parts I and II examine the application of foreign law and techniques currently available to U.S. courts to determine foreign law. Part III assesses the shortcomings of these techniques and related concerns addressed by judges and observers. Part IV then sets forth the argument that now is the time to seek out and implement more effective techniques and tools to determine foreign law in U.S. courts. It is important for U.S. courts to avoid unnecessarily shying away from the application of foreign law, particularly given the increasing prevalence of global interaction. The remaining Parts of this Article show that innovative and enhanced techniques may not only help courts streamline the process of determining foreign law, but may also help increase the accuracy of doing so.

I. APPLICATION OF FOREIGN LAW IN THE UNITED STATES

U.S. federal and state courts regularly apply the law of other sovereigns. Most lawsuits in the United States that involve foreign law are handled by federal courts, based on the diversity of the parties or desire of parties engaged in foreign commerce to resolve their disputes in a federal forum.²⁰ Claims based on foreign law may also find their way into federal court pursuant to supplemental jurisdiction.²¹ Federal court diversity jurisdiction promotes global

20. See generally Andrew W. Davis, *Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation*, 89 MINN. L. REV. 1464 (2005).

21. 28 U.S.C. § 1367 (2006). A court can properly exercise supplemental jurisdiction over foreign law claims so long as said claims derive from a "common nucleus of operative fact" with a claim over which the federal court

commerce by theoretically providing an impartial forum comparatively isolated from potential local biases.²² As such, lawsuits filed in state courts that involve foreign parties or foreign law are often removed to federal courts.²³ Because of the tendency of foreign law issues to gravitate toward federal court, this Article focuses primarily on the U.S. federal court system. However, where appropriate, references are made to state court procedure. Also, the suggested tools and techniques made herein to more efficiently and accurately determine foreign law apply equally to U.S. state courts.

II. APPLICATION OF FOREIGN LAW IN U.S. COURTS IS COMMON AND MUCH EASIER IN THIS AGE OF GLOBALISM AND TECHNOLOGY

U.S. federal courts have long had the authority to resolve disputes that require the application of substantive foreign law. If state conflict-of-laws rules require the application of foreign law, then the federal courts must apply it.²⁴ Federal courts are quite capable of applying foreign law²⁵ and have routinely applied the law of other sovereigns. In fact, U.S. courts have evaluated and applied foreign law for over a century.²⁶ The application of foreign law has

has original jurisdiction so that said claims form part of the same case or controversy. § 1367(a); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

22. See Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 966 (1995); see also Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1503 (2003).

23. See Jeffrey M. Jensen, *Development in the Law: Transnational Litigation: VI. Personal Jurisdiction in Federal Courts Over International E-Commerce Cases*, 40 LOY. L.A. L. REV. 1507, 1510 (2007).

24. See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4–5 (1975) (looking to Texas choice-of-law rules to determine whether Cambodian law formed the basis of a substantive wrongful death claim).

25. See *Applied Med. Distribution Corp. v. Surgical Co. BV*, 587 F.3d 909, 920 (9th Cir. 2009); *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345 (8th Cir. 1983).

26. See generally *Nashua Sav. Bank v. Anglo-Am. Land, Mortg. & Agency Co.*, 189 U.S. 221, 227–29 (1903) (discussing methods of proving foreign law in U.S. courts, including through experts); *Ennis v. Smith*, 55 U.S. 400, 426 (1852) (accepting French Civil Code into evidence); *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 957 (9th Cir. 2009) (ordering the application of Singapore law); *Cambridge Literary Props., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co.*, 295 F.3d 59, 64 (1st Cir. 2002) (observing that U.S. district court may apply U.S. copyright law, German contract law, and Austrian inheritance law in a single lawsuit to resolve all of the issues in the case); *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 161 F.3d 314, 319 (5th Cir. 1998) (analyzing expert testimony and conducting court's own research to determine corporate status under Chinese law); *Indasu Int'l, C.A. v. Citibank, N.A.*, 861 F.2d 375, 379–80 (2d Cir. 1988) (determining Ecuadorian law based on the relevant civil code and then applying the code provisions to determine duties of U.S. guarantor and Panamanian corporation); *Trans Container Servs. (BASEL) A.G. v. Sec. Forwarders, Inc.*, 752 F.2d 483, 485–87 (9th Cir. 1985) (applying U.K.

become even more common with the expansion of global commerce and trade. Private parties in international commerce regularly insert choice-of-law clauses into their contracts, specifying the application of the law of sovereigns other than the United States.²⁷ U.S. federal courts typically recognize and enforce such clauses based on existing law and the mutual intent of the parties.²⁸ Moreover, federal courts have adjudicated foreign law claims in a wide variety of contexts. By way of illustration, courts have ascertained and applied foreign law in diverse matters involving contract law,²⁹ tort law,³⁰ employment law,³¹ conversion law,³² trademark law,³³ securities law,³⁴ family law,³⁵ bankruptcy law,³⁶ intestacy law,³⁷ copyright law,³⁸ admiralty law,³⁹ and various other

lien law); *CYBERSitter, LLC v. People's Republic of China*, No. CV 10-38-JST (SHx), 2010 WL 4909958, at *8 (C.D. Cal. Nov. 18, 2010) (acknowledging ability to interpret foreign claims, including claims for copyright infringement under Japanese, Chinese, and Taiwanese law); *The Atlanta*, 82 F. Supp. 218, 235–37 (S.D. Ga. 1948) (applying Commercial Code of Panama).

27. See HAGUE CONFERENCE ON PRIVATE INT'L LAW, FEASIBILITY STUDY ON THE CHOICE OF LAW IN INTERNATIONAL CONTRACTS 5 (2007), available at http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf; see also Yeazell, *supra* note 14, at 61–62.

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

29. *Lesley v. Spike TV*, 241 Fed. App'x. 357, 358 (9th Cir. 2007) (applying Japanese contract law); *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, 790–98 (6th Cir. 2007) (addressing a breach of contract claim based on Japanese law in a consolidated proceeding together with trade secret misappropriation and tortious interference with contracts based on Michigan law).

30. *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1234 (3d Cir. 1995) (applying Indian tort law).

31. *Curtis v. Harry Winston, Inc.*, 653 F. Supp. 1504, 1509 (S.D.N.Y. 1987) (applying claim against a U.S. company for violation of Venezuelan statutory employment law).

32. *Trans Container Servs. (BASEL) A.G. v. Sec. Forwarders, Inc.*, 752 F.2d 483, 486 (9th Cir. 1985) (applying English conversion law).

33. *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (applying Japanese trademark law).

34. *Batchelder v. Kawamoto*, 147 F.3d 915, 920–22 (9th Cir. 1998) (considering Japanese securities law in relation to American Depository Receipt holders' rights).

35. *Kaho v. Ilchert*, 765 F.2d 877, 883 (9th Cir. 1985) (applying Tongan family law).

36. *In re Condor Ins., Ltd.*, 601 F.3d 319, 328–29 (5th Cir. 2010) (applying Nevis bankruptcy law); *Otte v. Tokyo Shibaura Elec. Co.*, No. 74 Civ. 3732 (CMM), 1977 WL 1440, at *2 (S.D.N.Y. June 22, 1977) (adjudicating several Japanese law claims in a bankruptcy proceeding).

37. *Akazawa v. Link New Tech. Int'l, Inc.*, 520 F.3d 1354, 1358 (Fed. Cir. 2008) (applying Japanese intestacy law).

38. *Toho Co. v. Priority Records, LLC*, No. CV01-04744SVW(RZX), 2002 WL 33840993, at *5 (C.D. Cal. Mar. 27, 2002) (applying Japanese copyright law); *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 637 (S.D.N.Y. 2000) (applying foreign copyright law).

areas.⁴⁰ To apply foreign law, it is not necessary for courts to master foreign law. In this age of global commerce, it is not incredibly difficult for federal courts to apply foreign law. In fact, it is much easier now than ever before given the availability of expert witnesses as well as burgeoning print and electronic materials covering foreign law.

In the modern era, foreign law and legal systems have become much easier to research and understand, particularly with countries commonly engaged in international commerce.⁴¹ As the U.S. Court of Appeals for the Seventh Circuit emphasized in a 2010 decision, the law of most nations that “engage in extensive international commerce is widely available in English.”⁴² The Internet also provides wider access to sources of law that were not previously readily available to either the courts or general public.⁴³ Many governmental and intergovernmental entities now have their own open-access websites complete with English language translations of statutes, regulations, and even court decisions.⁴⁴ There has also been recognition and push for greater and freer access to electronic materials on foreign law.⁴⁵

Japan is a prime illustration on the availability of materials. English-language materials about Japanese law are available in various formats including articles, treatises, and law school casebooks.⁴⁶ Many of these resources are available both in print and

39. See generally *Rationis Enters. Inc. v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580 (2d Cir. 2005) (applying Korean law in admiralty suit).

40. *Republic of Ecuador v. Chevrontexaco Corp.*, 499 F. Supp. 2d 452, 460 (S.D.N.Y. 2007); see also Annotation, *Raising and Determining Issue of Foreign Law Under Rule 44.1 of Federal Rules of Civil Procedure*, 62 A.L.R. Fed. 521, § 7 (1983).

41. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010); Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U. L. REV. 591, 628 (2001); see also *Gross v. British Broad. Corp.*, 386 F.3d 224, 234 (2d Cir. 2004) (asserting that the law of the United Kingdom is amenable to application in the United States).

42. *Bodum USA, Inc.*, 621 F.3d at 628.

43. See generally HAGUE CONFERENCE ON PRIVATE INT’L LAW PERMANENT BUREAU, ACCESSING THE CONTENT OF FOREIGN LAW: COMPILATION OF RESPONSES TO THE QUESTIONNAIRE OF OCTOBER 2008 FOR THE MEETING OF EXPERTS ON GLOBAL CO-OPERATION ON THE PROVISION OF ONLINE LEGAL INFORMATION ON NATIONAL LAWS (2009), available at <http://www.hcch.net/upload/wop/genaff2009pd11c.pdf>.

44. Teitz, *supra* note 7, at 112.

45. HAGUE CONFERENCE ON PRIVATE INT’L LAW, ACCESSING THE CONTENT OF FOREIGN LAW AND THE NEED FOR THE DEVELOPMENT OF A GLOBAL INSTRUMENT IN THIS AREA—A POSSIBLE WAY AHEAD 3–8 (2009), available at http://www.hcch.net/upload/wop/genaff_pd11a2009e.pdf.

46. See, e.g., *Sunstar, Inc., v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009) (seeking guidance from Japanese Trademark Law textbook authored by American law professor).

online through governmental, private business, legal, and academic websites.⁴⁷ Judgments of the Supreme Court of Japan are even posted online in English.⁴⁸ Other relevant non-English legal resources can typically be translated for use by the court. In fact, U.S. federal courts can, and often do, refer to translated materials, in cases such as commercial disputes, criminal cases, and immigration proceedings.⁴⁹ Although these materials may still need further explanation regarding their context, the availability of materials enhances a court's ability to independently confirm the scope and nature of foreign law.

III. RELUCTANCE OF U.S. COURTS TO READILY APPLY FOREIGN LAW STILL PERSISTS

Despite the ready accessibility of foreign law materials and expertise, U.S. courts may still struggle with the application of foreign law. Although foreign law issues are becoming more prevalent, some courts have been accused of "ducking and running" when faced with foreign law issues.⁵⁰ Some U.S. judges express discomfort with investigating and applying foreign law and typically discount any duty to handle transnational litigation based on the premise of global responsibility.⁵¹ Opposition to applying foreign

47. Although too long to list, several illustrative examples of English-language resources on Japanese law include the following: *DOING BUSINESS IN JAPAN* (Matthew Bender rev. ed. 2011); HIROSHI ODA, *JAPANESE LAW* (Oxford University Press 2d ed. 2009); *Financial Instruments and Exchange Act*, FIN. SERVS. AGENCY OF JAPAN, <http://www.fsa.go.jp/en/policy/fiel/index.html> (last visited Nov. 6, 2011); Rob Britt, *Japanese Legal Research at the University of Washington*, GALLAGHER LAW LIBR., <http://lib.law.washington.edu/eald/jlr/jres.html> (last visited Nov. 6, 2011); *Foreign law: I, J*, HARV. LAW SCH. LIBR., http://www.law.harvard.edu/library/research/guides/int_foreign/web-resources/foreign-law_i_j.html#Japan (last visited Nov. 6, 2011) (providing hyperlinks to sources on Japanese law under the heading "Japan"); *Japan*, WASHBURN UNIV. SCH. OF LAW, <http://www.washlaw.edu/forint/asia/japan.html> (last visited Nov. 6, 2011); *Japanese Law Translation*, MINISTRY OF JUSTICE OF JAPAN, <http://www.japaneselawtranslation.go.jp/> (last visited Nov. 6, 2011).

48. SUPREME COURT OF JAPAN, <http://www.courts.go.jp/english/> (last visited Nov. 6, 2011).

49. *See, e.g., Sunstar, Inc.*, 586 F.3d at 498–99 (describing how parties translated the relevant portions of Japanese trademark statute as there is no official English translation of Japanese laws); *see also Tchacos Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334 n.2 (9th Cir. 1985) (noting that the court accepted translation of Iranian Temporary Director Act provided by defendant's expert). By way of example, I have offered in-court testimony to the U.S. District Court for the Northern District of California in *Dainippon Screen Manufacturing Co. v. CFMT, Inc.*, No. C96-3296, 1997 U.S. Dist. LEXIS 4363 (N.D. Cal. Feb 21, 1997), related to the meaning of certain Japanese words and phrases at the heart of a patent infringement dispute.

50. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 581 (1995).

51. Heiser, *supra* note 13, at 1189–90.

law is seen in the form of liberal forum non conveniens dismissals, using domestic law if the litigants do not raise or sufficiently brief foreign law issues, or leaning heavily toward domestic law when conducting a choice-of-law analysis.⁵²

There is a plethora of reasons underlying the tendency to sidestep foreign law, apart from justifiable refusals based on public policy grounds. First, unlike the process of interpreting and applying domestic law, U.S. judges dealing with foreign law generally cannot draw on a lifetime of experience.⁵³ In comparison with their American law training, U.S. judges receive limited training in applying foreign law. State court judges are typically not formally trained in applying foreign law, and newly appointed federal judges only receive basic instruction from the U.S. States Judicial Conference about dealing with foreign law issues.⁵⁴ In general, American legal education fails to systemically equip future judges and attorneys to conduct research on foreign law.⁵⁵ In fact, judges and their law clerks may receive only limited exposure to international law or transnational legal matters during their law school studies, unless they have made it a point to specialize in these areas. Although law students should devote more time to the study of comparative and foreign law,⁵⁶ U.S. law schools generally offer courses on international, comparative, and foreign law only on an “elective” basis. Moreover, these courses typically are not emphasized by most academic administrators.

Second, judges perceive that foreign law may be difficult to ascertain. Beyond the limited foreign law offerings on LexisNexis and Westlaw, there is no central legal database that provides comprehensive materials on the law of all countries.⁵⁷ Although Westlaw and LexisNexis maintain separate legal databases for some

52. See Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225, 267–70 (1995); Miner, *supra* note 50, at 582–83; see also Lien Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1001 (9th Cir. 2006).

53. Cheng, *supra* note 12, at 1099.

54. William Ewald, *The Complexity of Sources of Trans-national Law: United States Report*, 58 AM. J. COMP. L. (SUPPLEMENT) 59, 65 (2010).

55. *Id.*

56. Justice Sandra Day O'Connor has noted that U.S. lawyers and law students need to study foreign law because of its application in domestic courts and the possibility of borrowing beneficial ideas from foreign law and the enhancement of cross-border cooperation. Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2, 2.

57. Silke Sahl, *Finding Books and Articles on International and Foreign Law*, COLUMBIA UNIV. L. SCH., http://library.law.columbia.edu/guides/Finding_Books_and_Articles_on_International_and_Foreign_Law (last updated Apr. 2011) (“There are many ways to find information about law review and journal articles related to foreign and international law. Unfortunately, there is no one single, comprehensive database.”).

foreign countries, these require separate contracts and additional charges.⁵⁸ More significantly, even if judges and attorneys could access these or other foreign law databases, any foreign language materials would likely be incomprehensible absent translation.

Third, some courts may perceive foreign law as a “mystery” that will be time intensive to discern and difficult to analyze.⁵⁹ Pertinent statutory and case materials may originate in another language and could encompass a different legal tradition. As such, there is a fear of the unknown posed by ascertaining and applying foreign law.⁶⁰ Accordingly, courts are increasingly receptive to motions to dismiss based on forum non conveniens grounds when dealing with international cases that involve foreign law.⁶¹ With a motion to dismiss based on forum non conveniens, the “need to apply foreign law” factor is commonly raised as an argument in favor of dismissal. Although the U.S. Supreme Court has noted that the need to apply foreign law “alone is not sufficient to warrant dismissal when a balancing of all relevant factors shows that the plaintiff’s chosen forum is appropriate,”⁶² some courts continue to give undue weight to this factor.⁶³ In fact, some have argued that the forum non conveniens doctrine, as formulated by the U.S. Supreme Court, actually encourages dismissal.⁶⁴ Without question, the ability to discover and apply foreign law is much less difficult today than it was when the U.S. Supreme Court set forth its standard in *Piper Aircraft Co. v. Reyno*⁶⁵ nearly thirty years ago. Accordingly, dated concerns about foreign law now lend false support to forum non conveniens dismissal based on false assumptions.⁶⁶

Fourth, some courts have been slow to embrace anything foreign. Some have overtly demonstrated their aversion to foreign

58. LexisNexis and Westlaw do maintain databases of foreign law. However, these databases are operated in foreign languages and cannot be accessed without a separate (and often expensive) subscription.

59. See generally *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995).

60. Miner, *supra* note 50, at 582.

61. See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV., 1081, 1089–92 (2010) (noting that there has recently been a 400% increase in transnational forum non conveniens challenges and that courts have dismissed approximately half of the cases in which forum non conveniens has been an issue); see also Emily J. Derr, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 824 (2008). When faced with a motion to dismiss for forum non conveniens, federal judges must determine that an adequate alternative forum exists in which the case could be heard, and then that private and public interest factors favor dismissal in favor of said forum. *Id.*

62. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981).

63. See Derr, *supra* note 61, at 829.

64. See Heiser, *supra* note 13, at 1178.

65. 454 U.S. 235.

66. Derr, *supra* note 61, at 829.

related matters.⁶⁷ Others have quickly dismissed or transferred cases in a more reserved fashion.⁶⁸ Even the treatment of international treaties has been spotty. Although the U.S. Constitution specifies that treaties are the “supreme law of the land,” the U.S. State Department’s publication of treaties is seriously lacking.⁶⁹

Finally, the pressure for increased training of the judiciary or reform of the system to address foreign law claims is relatively low due to the comparatively large number of domestic cases handled by federal and state courts.⁷⁰ For example, U.S. state courts handle about forty million cases annually, and federal courts handle about three hundred thousand cases.⁷¹ Only a fraction of these cases involve the direct application of foreign law. However, this is of little or no consequence to private litigants embroiled in cross-border disputes or courts that handle a large number of transnational disputes. In fact, there are certain courts, such as the U.S. District Court for the Southern District of New York, which constantly face foreign legal issues due to their handling of cases involving multinational corporations and foreign matters.

IV. CURRENT TECHNIQUES AND TOOLS FOR EMBRACING AND APPLYING FOREIGN LAW IN U.S. FEDERAL COURTS

The reasons underlying judicial aversion to foreign law are overblown. Courts have a litany of resources, techniques, and tools to draw upon when faced with issues of foreign law. Taking full advantage of these tools is important because there are negative consequences when foreign law is not applied or is interpreted incorrectly. In such cases, the stability and certainty required by

67. *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999), demonstrates this aversion through humor. Judge Kent, writing for the court, *sua sponte* transferred a case the government of Bolivia had originally brought in Brazoria County, Texas, to the federal district court in Washington, D.C. *Id.* Judge Kent noted that:

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

Id.

68. *See, e.g.*, *Blueye Navigation, Inc. v. Den Norske Bank*, 658 N.Y.S.2d 9, 10 (N.Y. App. Div. 1997) (holding that the action was governed by English law and should be dismissed).

69. *See* Ewald, *supra* note 54, at 65 (noting that the official treaties website has been under construction for fifteen years and is marked with warnings about its lack of completeness).

70. *Id.* at 66.

71. *Id.*

those engaged in global commerce are potentially undermined.⁷² Commercial parties often structure their transactions around a specific substantive law and purposefully avoid laws inappropriate for their transaction.⁷³ Additionally, the application of foreign law can discourage forum shopping, promote regulatory competition, and preserve the comparative regulatory advantage of foreign jurisdictions.⁷⁴ If cases involving foreign law are quickly dismissed, not only will the immediate litigants potentially be prejudiced, but at least one commentator has noted that “ad hoc efforts” to limit court access to parties involved in a transnational dispute could lead to retaliatory legislation in foreign countries aimed at making foreign courts more hospitable for significant claims against U.S. defendants.⁷⁵ Accordingly, it is time for U.S. courts to embrace foreign law when appropriate and explore ways to improve upon the current system and techniques for addressing foreign law.

A. Current Procedures Support and Facilitate the Application of Foreign Law

Procedurally, the application of foreign law is uncomplicated. Once it has been established, through notice or hearing, that foreign law will apply, parties may present the court with foreign law materials or the court will instruct the parties to present evidence and supporting materials regarding the relevant foreign law at some point before the trial.⁷⁶ Naturally, a court may also conduct its own research about such law.⁷⁷ The court will then determine the meaning of the foreign law and instruct the jury on such meaning—just as it would do in the case of domestic law.⁷⁸ However, evaluating other legal systems can present some challenges. As such, the U.S. federal court system presents various techniques and tools to overcome such challenges. Many U.S. state jurisdictions provide similarly broad tools and resources.⁷⁹

In the context of federal court proceedings, Federal Rule of Civil Procedure 44.1 (“Rule 44.1”) provides procedural guidance for the application of foreign law in federal court. Rule 44.1 states that:

72. See Robertson, *supra* note 61, at 1081–85.

73. Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 808 (2006).

74. *Id.* at 808–15.

75. Robertson, *supra* note 61, at 1127–28, 1130–31.

76. See, e.g., *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (instructing the jury on Japanese law).

77. See *id.*

78. See SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* 123 (Oxford University Press 2004).

79. See *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009).

[a] party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.⁸⁰

Rule 44.1 is a broad, straightforward rule that has presented few practical difficulties in its application. In essence, it provides federal courts with a uniform mechanism for adjudicating foreign law claims when a party provides notice of its desire to apply foreign law.⁸¹ Rule 44.1 is based on the belief that determining questions of foreign law is not beyond the capacity of the federal courts.⁸² Of note, many U.S. states have implemented the Uniform Judicial Notice of Foreign Law Act or other rules, which function similarly to Rule 44.1.⁸³ These rules likewise recognize the competency of the state courts to apply foreign law.

Rule 44.1 was implemented in 1966.⁸⁴ In effect, this shifted the determination of foreign law from a question of fact to a question of law.⁸⁵ When U.S. courts treated foreign law as a question of fact prior to the adoption of Rule 44.1, the jury needed to decide foreign law based on competing proofs presented by the parties at trial.⁸⁶ This was done pursuant to the rules of evidence via the time-consuming process of soliciting expert witness testimony in open court.⁸⁷ Also, because foreign law was considered a question of fact, it could only be set aside by an appellate court if shown to be clearly

80. 9 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 44.1.01 (3d ed. 2010).

81. 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).

82. See MOORE ET AL., *supra* note 80, ¶ 44.1.02.

83. GEEROMS, *supra* note 78, at 123–25 (noting that most state jurisdictions have adopted the Rule 44.1 approach, although some still use the judicial notice concept or adhere to the common law method of proving foreign law); Ewald, *supra* note 54, at 66–67; see also Akande v. Transamerica Airlines, Inc., No. 1039-VCP, 2007 Del. Ch. LEXIS 68, at *20–34 (Del. Ch. May 25, 2007).

84. See Lamm & Tang, *supra* note 5, at 31; Arthur Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617 (1967); 9A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 2441 (3d ed. 2011) [hereinafter WRIGHT & MILLER].

85. See WRIGHT & MILLER, *supra* note 84; Lamm & Tang, *supra* note 5, at 31; Miller, *supra* note 84.

86. See Ewald, *supra* note 54, at 66; see also Cheng, *supra* note 12, at 1100–01.

87. See Ewald, *supra* note 54, at 66; see also Cheng, *supra* note 12, at 1100–01.

erroneous.⁸⁸ This cumbersome system was arduous for the parties⁸⁹ and often resulted in imprecise rulings⁹⁰ that were essentially immunized from independent review by the appellate courts.⁹¹ With the adoption of Rule 44.1, the determination of foreign law is now a question of law, at least in principle.⁹² This means that questions of foreign law are subject to independent judicial investigation, and open for de novo appellate review.⁹³

B. Courts May Use Any Relevant Material to Determine Foreign Law

Pursuant to Rule 44.1, federal courts may consider “any” material relevant to foreign law that the parties wish to present.⁹⁴ Upon notice of a foreign law issue, courts may look to any material or resource, whether from counsel or identified by the court’s own research, and whether admissible or inadmissible at trial.⁹⁵ In principle, a judge can consider the testimony of expert witnesses proffered by the litigants, reports by a court-appointed expert or master, and even research independently obtained from conventional, online, or unconventional resources.⁹⁶ In fact, a judge could even consult with foreign scholars or others well-versed in the applicable law on an ex parte basis.⁹⁷

Although judges most often rely on experts hired by the parties for information on foreign law, they are not required to base their determination of foreign law on an expert opinion.⁹⁸ Additionally, Rule 44.1 contemplates that courts “may” rather than “must” consider expert testimony.⁹⁹ Moreover, it is within the court’s discretion to “reject even the uncontradicted conclusions of an expert

88. See Ewald, *supra* note 54, at 66.

89. See Brown, *supra* note 10, at 181.

90. See Lamm & Tang, *supra* note 5, at 31.

91. 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.

92. From a practical, evidentiary standpoint, a good case can be made that foreign law is often proved in federal court like a “fact.” Teitz, *supra* note 7, at 99. “For example, despite defining foreign law to be a question of law, federal courts have effectively held that a failure to provide sufficient evidence of foreign law remains a valid ground for dismissal.” Cheng, *supra* note 12, at 1101.

93. See Cheng, *supra* note 12, at 1101.

94. See *Trans Chem. Ltd. v. China Nat’l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997), *aff’d*, 161 F.3d 314 (5th Cir. 1998).

95. FED. R. CIV. P. 44.1; see also *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999); *WRIGHT & MILLER*, *supra* note 84, § 2444; Comm. on Int’l Commercial Disputes, *supra* note 91, at 51.

96. Comm. on Int’l Commercial Disputes, *supra* note 91, at 50.

97. *Id.*

98. *Institut Pasteur v. Simon*, 383 F. Supp. 2d 792, 795 n.2 (E.D. Pa. 2005).

99. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010).

witness and reach [its] own decisions on the basis of independent examination of foreign legal authorities.”¹⁰⁰

It is the litigants’ duty to provide the court with materials that help identify issues, ascertain the foreign law, and apply such law.¹⁰¹ These materials cannot attempt to guide a court on making factual determinations.¹⁰² Materials demonstrating the applicable foreign law do not need to be sworn, verified, or presented in any specific form. In fact, courts have considered unauthenticated copies and translations of foreign law,¹⁰³ and have even taken informal materials into account such as a printout from a foreign law firm’s webpage¹⁰⁴ and a conversation between a law clerk and the Hong Kong Trade Office in New York City.¹⁰⁵ Naturally, however, litigants are best served by presenting concrete proof of foreign law in the most credible form.¹⁰⁶ In weighing proofs of foreign law, courts will afford the most credibility to verifiable proofs.

The requirements associated with Rule 44.1 were deliberately left flexible and informal so that counsel and the court could have a cooperative dialogue regarding the determination of foreign law.¹⁰⁷ This flexibility should dissipate any court’s inhibition about considering a wide variety of materials related to the application of foreign law. In essence, a court’s freedom of inquiry is not “encumbered by any restraint on its research or by rules of admissibility.”¹⁰⁸ Not only may a court consider “any material the parties wish to present,” but it may give materials submitted by the parties any probative value that the court thinks they deserve.¹⁰⁹

100. See *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2002); *HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 264 F.R.D. 146, 148 (D.N.J. 2009); see also Peter D. Trooboff, *Proving Foreign Law*, NAT’L L.J. (Sept. 18, 2006), available at <http://www.cov.com/files/Publication/166005e7-7c83-43b0-97fc-2d727f4e53cf/Presentation/PublicationAttachment/e1c9224b-4ae7-43b7-8d19-317c1ba3beef/674.pdf>.

101. See *Miner*, *supra* note 50, at 585.

102. See *Trans Chem. Ltd. v. China Nat’l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997), *aff’d*, 161 F.3d 314 (5th Cir. 1998).

103. *Forzley v. AVCO Corp. Elec. Div.*, 826 F.2d 974, 979 n.7 (11th Cir. 1987).

104. *In re Tommy Hilfiger Sec. Litig.*, No. 04-civ-7678, 2007 U.S. Dist. LEXIS 55088, at *15 (S.D.N.Y. July 20, 2007). It should be noted, however, that courts are often “reluctant to rely on sources such as newspapers, websites, or even statements issued by the U.S. Department of State” regarding foreign law. *Lamm & Tang*, *supra* note 5, at 35.

105. *United States v. Hing Shair Chan*, 680 F. Supp. 521, 524 (E.D.N.Y. 1988).

106. See *Lamm & Tang*, *supra* note 5, at 33 (noting that governmental translations of statutes will be the best proof).

107. See *WRIGHT & MILLER*, *supra* note 84, § 2444.

108. See *id.*

109. See *id.*; see also *HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 264 F.R.D. 146, 148–49 (D.N.J. 2009).

This methodology provides the court with maximum flexibility.¹¹⁰ In sum, the flexible procedures in Rule 44.1 combined with the ease of communicating about foreign law and expanded learning opportunities about foreign legal systems signify that the application of foreign law should not be an obstacle.¹¹¹

C. Expert Testimony is the Primary Method of Establishing Foreign Law

In practice, the primary method used to establish foreign law is through an affidavit or declaration submitted by foreign-law experts hired by the litigants.¹¹² This sworn statement is generally accompanied by extracts from relevant foreign codes and statutes.¹¹³ The value of expert testimony on foreign law is enhanced because the expert can provide the court with information about the sources of law, hierarchy of law, legal interpretation, and other matters not readily ascertainable or necessarily apparent on the face of foreign legal materials. Without assistance from someone intimately familiar with foreign law, an American judge might miss the nuances in the law, fail to appreciate the interaction between law and foreign governmental organizations, or erroneously assume that foreign law mirrors U.S. law when it does not.¹¹⁴ There are many times when testimony from an acknowledged expert in foreign law will be helpful, or even necessary, to ensure that the U.S. judge understands the full context of a foreign law or legal principle.¹¹⁵ In some instances, expert testimony may be the only way to establish foreign law. For example, in Saudi Arabia where Islamic law is applied, judicial decisions are generally neither published nor open for public inspection.¹¹⁶ Instead of relying on case law or written

110. See WRIGHT & MILLER, *supra* note 84, § 2444.

111. See *id.*

112. See Teitz, *supra* note 7, at 107; see also *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1037–39 (9th Cir. 1999) (relying on Japanese attorney to determine claims based on Japanese law); *Batchelder v. Kawamoto*, 147 F.3d 915, 921–22 (9th Cir. 1998) (utilizing expert declarations of Japanese and U.S. attorneys and law professors to determine Japanese securities law); *Curley v. AMR Corp.*, 153 F.3d 5, 16 (2d Cir. 1998) (relying on affidavit of attorney licensed to practice in Mexico to determine Mexican tort law claims). Of note, an expert report submitted by litigants pursuant to Rule 44.1 to assist a court “in its determination of foreign law is entirely different from use of an expert report, pursuant to Rule 702, Fed.R.Evid., to aid the jury in determining the facts.” *HFGL Ltd.*, 264 F.R.D at 149 (quoting *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 177 F.R.D 245, 264 (D.N.J. 1997)).

113. See Teitz, *supra* note 7, at 106.

114. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 638–39 (7th Cir. 2010) (Wood, J., concurring).

115. *Id.* at 639.

116. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.*, 866 A.2d 1, 29 (Del. 2005) (considering appeal of a jury verdict for \$416.8 million based on a tort claim under Saudi law known as usurpation or “ghashb”).

statutes, Saudi Arabian judges must navigate the Hanbali's school of authoritative scholarly works to identify the spectrum of possible resolutions.¹¹⁷ For a judge unfamiliar with Saudi Arabian law, expert testimony is particularly crucial to correctly identifying and deciphering the law.

Based on these reasons and the judicial time saved by relying on experts for guidance and direction, foreign law expert declarations have been, and will likely continue to be, the basic mode of proving foreign law.¹¹⁸ In fact, the presentation of foreign law through expert witnesses is typically efficient and sufficient for a court.¹¹⁹ The use of an expert to provide needed precision on foreign legal issues eliminates the need for the court to start afresh and wade through secondary sources.¹²⁰

In general, Rule 44.1 does not require any special qualifications for foreign-law experts.¹²¹ Because the district judge will determine foreign law, the judge essentially serves as the gatekeeper.¹²² As such, the court has significant discretion in the sources it considers.¹²³ As explained by the U.S. Court of Appeals for the Second Circuit, "it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed."¹²⁴ An expert witness' actual knowledge will determine the weight that the judge awards to the testimony of said expert. If an expert's knowledge about foreign law is reliable and exceeds that of the judge, the court will likely carefully consider any submissions from said expert. Typically, courts will give deference to materials submitted by foreign practitioners or law professors versed in the applicable foreign law.¹²⁵ In proffering expert testimony to a court,

117. *Id.* at 31.

118. *See generally* Universe Sales Co. v. Silver Castle, Ltd., 182 F.3d 1036, 1037–39 (9th Cir. 1999); Batchelder v. Kawamoto, 147 F.3d 915, 921–22 (9th Cir. 1998); Transportes Aeros Pegaso v. Bell Helicopter Textron Inc., 623 F. Supp. 2d 518, 534 (D. Del. 2009).

119. Teitz, *supra* note 7, at 107.

120. Bodum USA, Inc. v. La Cafetière, Inc., 621 F.3d 624, 639 (7th Cir. 2010).

121. *See* WRIGHT & MILLER, *supra* note 84, § 2444.

122. *See id.*

123. *See id.*; *see generally* MOORE, *supra* note 80, § 44.1.04(2)(b) (noting that there are no special qualifications for foreign-law experts, and such experts need not even be admitted to practice law in the country about whose law they testify).

124. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 92 (2d Cir. 1998) (citing Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)).

125. Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venez., No. 1:02cv785WJG-JMR, 2010 WL 2682946, *2–4 (S.D. Miss. July 2, 2010) (accepting testimony of a lawyer who was licensed to practice law in Venezuela, had published numerous legal articles involving Venezuela, and had taught courses in international and comparative law); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1173 n.50 (E.D. Pa. 1980)

it is crucial for litigants to utilize someone who can amply communicate the substance and nuances associated with foreign law. In fact, “the best source of foreign law is said to be an expert who has studied the foreign law, has practiced law in the country of its origin, and can translate and interpret it in the idiom of the American attorney.”¹²⁶ At the same time, courts will likely discount self-serving affidavits and will be more receptive to considering objective explanations of the pertinent law.

In principle, the determination of foreign law does not stray too far from the process of determining domestic law. In fact, the adoption of Rule 44.1 was designed—to the extent possible—to make the process of determining foreign law mirror the method of ascertaining domestic law.¹²⁷ More specifically, the litigants research and present the relevant law to the court for consideration. Identical to domestic practice, the court then has the task of determining the relevant law. At this point, the process may slightly diverge in that the court may need some additional assistance. Foreign-law experts can help streamline the time necessary to research and interpret foreign law by providing fundamental information. This can be done solely through written submissions, or the court may entertain live expert witness testimony.¹²⁸ If necessary, the court may also compel the parties to present additional materials or information about foreign law at the risk of dismissal or other negative consequence.¹²⁹ In contrast, judges typically do not leave the determination of domestic law to competing experts.¹³⁰ 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.

(accepting testimony of law professor specializing in Japanese law who was fluent in Japanese and worked in Japanese law offices for several years).

126. C.C. Bjorklund, *Law of Foreign Jurisdiction*, in 21 AM. JUR. PROOF OF FACTS 2D 1, § 13 n.25 (2010) (citing Benjamin Busch, *Outline on How to Find, Plead, and Prove Foreign Law in U.S. Courts with Sources and Materials*, 2 INT’L LAW. 437, 439 (1968)).

127. See WRIGHT & MILLER, *supra* note 84, § 2441; see also *ID Sec. Sys. Can., Inc. v. Checkpoint Sys.*, 198 F. Supp. 2d 598, 623 (E.D. Pa. 2002); 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).

128. FED. R. CIV. P. 44.1.

129. See *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).

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

D. Courts May Engage in Independent Research About Foreign Law

In addition to the litigants' submissions, a court may also conduct its own research and independently investigate any foreign-law issue raised by the parties.¹³¹ If necessary, a court may use articles, treatises, scholarly commentary, and judicial opinions for guidance and affirmation about the correct foreign-law interpretation.¹³² Many nations have well-developed legal systems with ample primary and secondary resources in English, available both in print and online, from which courts can conduct legal research and investigation.¹³³ If materials are unavailable in English, translation is certainly possible. In fact, U.S. courts can, and often do, refer to translated materials, including in commercial disputes, criminal cases, and immigration issues.¹³⁴ Independent research enables judges to fill gaps or doubts left by the parties' submissions. It also allows them to confirm the accuracy of presented materials.

In reality, many federal judges still remain reluctant to actively investigate foreign-law issues.¹³⁵ Instead, judges heavily lean on expert testimony,¹³⁶ or lean toward dismissing a foreign-law claim based on forum non conveniens or avoiding foreign law altogether.¹³⁷ Similarly, state court judges tend to "rely heavily on party

131. See FED. R. CIV. P. 44.1; *Universe Sales Co. v. Silver Castle Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999); *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 278–84 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998) (noting that the court independently analyzed the Chinese Constitution and Codes in addition to affidavits from three experts).

132. See *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010); *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009) (looking to treatises, law review articles, and judicial opinions to interpret Japanese trademark law).

133. See, e.g., *Sunstar*, 586 F.3d at 495 (seeking guidance from a Japanese Trademark Law textbook authored by an American law professor).

134. See *id.* at 497–98 (citing both parties' translations of the relevant portions of Japanese trademark statute as there is no official English translation of Japanese laws); *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334 n.2 (9th Cir. 1985) (accepting the translation of Iranian Temporary Director Act provided by defendant's expert).

135. See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1304 (2007) (explaining that courts "have tended . . . to find ways to avoid the foreign law issue altogether"); see also Teitz, *supra* note 7, at 97–98 (noting that federal courts have demonstrated a "reluctance to address the content of foreign law").

136. Cheng, *supra* note 12, at 1101.

137. Cheng, *supra* note 135, at 1304 (noting that courts find ways to avoid foreign law altogether); see also Heiser, *supra* note 13, at 1176–77 (noting that courts sometimes dismiss foreign law claims on the basis of forum non conveniens).

presentation” and generally avoid conducting independent research on foreign law.¹³⁸

V. SHORTCOMINGS OF TECHNIQUES AND TOOLS USED TO DETERMINE FOREIGN LAW

The primary challenge that courts face when dealing with foreign law is ensuring its correct application. Obtaining precise information about foreign law furthers the goals of justice and fairness. A related challenge is finding sufficient comfort with the testimony and sources of law either presented by the litigants or located by the court’s research. In any legal system, courts may struggle to ascertain and apply foreign law. In fact, it has been postulated that many judges fear the unknown associated with foreign law.¹³⁹ However, in most cases, litigants present foreign law in a complete and fair manner, thereby enabling courts to wrap their arms around the relevant law.¹⁴⁰ Expert affidavits, together with accompanying codes, statutes, and regulations, are typically sufficient.¹⁴¹

In contrast, if a court cannot determine foreign law to its satisfaction based on available techniques and tools, then it faces the prospect of incorrectly applying the law. This poses a substantial risk and potentially prejudices the litigants’ interests and rights. Moreover, the frustration associated with the inability to readily determine the applicable legal principles may cause judges to shy away from the future handling of foreign law.

There is no universally accepted solution to the dilemma of unclear or indeterminable foreign law.¹⁴² In some cases, a court might require supplemental briefing by the parties or independently appoint an expert on foreign law.¹⁴³ Alternatively, the judge might give up and simply decide to either apply domestic law or dismiss the case altogether.¹⁴⁴ These two options are undesirable as they potentially ignore the express intent underlying the litigants’ commercial relationship, contravene applicable choice-of-law rules, or even prejudice the litigants’ rights. For example, if a court

138. Cheng, *supra* note 12, at 1101.

139. See Miner, *supra* note 50, at 581.

140. See *id.* at 586–87 (discussing various cases in which foreign law was successfully applied).

141. *Id.* at 588.

142. Ewald, *supra* note 54, at 67.

143. See, e.g., *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, 790 (6th Cir. 2007); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88 (2d Cir. 1998); *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998).

144. Ewald, *supra* note 54, at 67; Teitz, *supra* note 7, at 98. For example, in *Lou v. Otis Elevator Co.*, 933 N.E.2d 140 (Mass. App. Ct. 2010), the state court decided to instruct the jury pursuant to Massachusetts law because it was unable to confidently determine the applicable Chinese law. *Id.* at 144.

automatically defaults to domestic law and thereby applies incorrect legal principles, this choice could likely determine the outcome of the lawsuit.

While the current techniques and tools available to U.S. judges to address foreign-law issues are largely unrestricted, they are neither perfect nor complete. In fact, despite the expanded options available to judges since the adoption of Rule 44.1 five decades ago, U.S. courts “have been slow to apply foreign law.”¹⁴⁵ This begs the question of whether the available techniques and tools have contributed to U.S. courts’ relative reluctance to embrace the application of foreign law. With the current caseload involving foreign law and prospect for growth, now is the time to re-examine the current system and consider potential improvements to the process of determining and applying foreign law. Courts and litigants alike stand to benefit from enhancements. The following Part looks at shortcomings of the current system and serves as a springboard for discussing possible improvements.

VI. POTENTIAL PROBLEMS WITH OVER-RELIANCE ON PAID EXPERTS

Experts play an invaluable role in helping courts understand, analyze, and apply foreign law. However, trying to establish foreign law through expert testimony can be an expensive proposition.¹⁴⁶ An over-reliance on private experts can pose a myriad of dangers as well. Dependence on foreign-law experts pivots on their reliability.¹⁴⁷ If an expert is not objective or reliable, then a court must turn to other sources to determine foreign law.

When courts rely heavily on foreign-law experts hired by the parties, it adds an adversarial spin to the proceedings.¹⁴⁸ Charges of lack of objectivity or bias can easily arise.¹⁴⁹ One expert witness hired to participate in a transnational lawsuit noted his difficulty in resisting the “subtle temptation” to join his client’s team, take his client’s side, conceal doubts, overstate the strong, and downplay the weak aspects of the case.¹⁵⁰ In my own personal involvement with transnational litigation, I have similarly witnessed these temptations. Others have gone further in characterizing foreign-law experts as partisan “guns for hire.”¹⁵¹ In *Sunstar, Inc. v. Alberto-*

145. Teitz, *supra* note 7, at 97.

146. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010).

147. Comm. on Int’l Commercial Disputes, *supra* note 91, at 49.

148. *Bodum USA, Inc.*, 621 F.3d at 629.

149. See *Kinjo v. Champion Shipping AS*, No. CIV. 2:09-CV-03603 FCD/DAD, 2010 U.S. Dist LEXIS 78558, at *11 (E.D. Cal. Aug. 4, 2010) (accusing expert on foreign law of being biased and having a personal interest in the proceedings).

150. Hein Kötz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT’L L. 61, 64 (2003).

151. Comm. on Int’l Commercial Disputes, *supra* note 91, at 52.

Culver Co.,¹⁵² Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit noted that articles, treatises, and judicial opinions on foreign law are “superior sources”¹⁵³ when examining foreign law because the practitioners or professors serving as foreign-law experts are “paid for their testimony” and selected 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.”¹⁵⁴ Judge Posner maintained that relying on “paid witnesses to spoon feed judges” can only be justified in cases in which foreign law comes from a country with an obscure or poorly developed legal system.¹⁵⁵ In such cases, a judge could be hindered from securing ample secondary materials from which she can determine the law.¹⁵⁶

Expert testimony should not be automatically discounted on grounds of bias, and Judge Posner’s view of foreign-law expert testimony can be challenged as extreme. Experts are an integral part of the U.S. litigation system in many respects, and judges function as gatekeepers in deciding whether to accept or discount an expert’s particular testimony.¹⁵⁷ Knowledge that courts will screen and weigh a foreign-law expert’s testimony actually encourages experts and litigants to produce reliable assistance to the court, or risk defeat due to the lack of usable expert testimony.¹⁵⁸ The prospect that the court can appoint its own expert witness also functions as a deterrent against subjective testimony or games.¹⁵⁹ Moreover, courts have the authority to sanction parties or their counsel for acting in bad faith or breaching applicable disciplinary codes.¹⁶⁰ If the testifying expert is a member of a U.S. bar, the court’s power to discipline or sanction the expert further encourages objectivity. When foreign lawyers testify as foreign-law experts, their conduct may also be governed by the professional codes of conduct and ethical obligations in their respective countries.¹⁶¹

152. 586 F.3d 487 (7th Cir. 2009).

153. *Id.* at 495.

154. *Id.* at 495–96.

155. *Id.* at 496.

156. *Id.*

157. Miner, *supra* note 50, at 588 (comparing the use of foreign-law experts to judicial acceptance of experts testifying on scientific and other related matters).

158. Comm. on Int’l Commercial Disputes, *supra* note 91, at 53 (discussing statements of Judge Helen Freedman of the New York State Supreme Court). This is consistent with my own personal experience serving as an expert witness as well.

159. See FED. R. EVID. 706 advisory committee’s note (“The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.”).

160. Teitz, *supra* note 7, at 111.

161. *Id.*

Finally, private considerations such as the maintenance of credibility or an unblemished reputation compel experts to provide accurate testimony and credible supporting materials to the court.¹⁶²

If competing experts fail to provide a clear or uniform view of foreign law through their submissions, however, a court may experience difficulty determining the substance or scope of the applicable foreign law. The information and interpretations provided by party-hired experts may clash, thereby leaving a court with the difficult task of parsing out the undisputed matters of law and those matters disputed in a “battle of the experts.” If a court is unfamiliar with the foreign law in question, it will then face the task of making determinations about unfamiliar provisions of foreign law. This process can potentially be difficult and time consuming.

Another concern in assessing foreign law is a litigant’s capacity to purposefully confuse the court. For example, if a defendant wants to convince a court that a claim or lawsuit should be dismissed based on forum non conveniens grounds, it may strategically seek to present convoluted materials, conflicting translations of statutory provisions, or contradictory case law. Even if the law is relatively simple and straightforward, a litigant may attempt to paint a picture of confusion by seeking out an expert that will directly contradict the foreign law as explained by the opposing party. Even if a party does not purposefully attempt to confuse the court, it might happen anyway. In fact, a certain degree of confusion may be inevitable. By analogy, if a judge were to ask five American lawyers about their interpretation of a particular area of U.S. law, these lawyers might provide several different answers. This is true in foreign settings as well. Because foreign law may be difficult to apply in certain instances, particularly when the judge is bombarded with different interpretations of the law, a court may be forced to spend time parsing out the applicable law stipulated by the parties and then deciding the scope and nature of the dispute’s legal provisions on its own.

Finally, the “traditional mechanisms for determining questions of foreign law by means of expert evidence have been shown on many occasions to be costly, prone to delays and other difficulties, and, most significantly, just plain wrong too often.”¹⁶³ Courts are particularly sensitive to costs and delays. More than anything, however, courts strive for accuracy and justice. Without confidence in the correctness of foreign law as presented by expert witnesses, judges will continue to struggle with and be slow to embrace the application of foreign law.

162. *Id.*

163. N.Y. State Unified Court Sys., *supra* note 6.

VII. PROBLEMATIC ISSUES WITH RELYING HEAVILY ON INDEPENDENT RESEARCH BY THE COURTS

Although Judge Posner opined that articles, treatises, and judicial opinions on foreign law are “superior sources” in comparison with expert testimony,¹⁶⁴ there are several challenges associated with a court conducting independent legal research. First, some judges maintain that they do not have time to locate, decipher, or decode foreign law.¹⁶⁵ If a court must start from scratch in ascertaining foreign law and related issues, this will unnecessarily cause the courts to expend extra time and resources researching an unfamiliar area. Courts can streamline the process of determining foreign law considerably by turning to academics, practitioners, and others well-versed in the relevant foreign law for guidance and direction.

Additionally, when U.S. judges actually resort to independent research, they encounter the risk of mistakenly interpreting foreign law as being very similar to domestic law, and thereby give meanings to foreign provisions that may not exist. In essence, a judge could easily interpret a foreign statute by giving “plain meaning” to a statutory provision and then equating the statutory provision with certain domestic terms and concepts.¹⁶⁶ Although this uncomplicated path may be accurate, particularly if the foreign law is modeled after U.S. law,¹⁶⁷ it may not be correct in many instances.

U.S. judges are best served by considering all available resources, including expert testimony, as foreign law can often carry special nuances, meanings, and interpretations. For example, if a U.S. court were faced with interpreting Japanese law based on a wrongful termination claim brought by an American employee of a global Japanese company, the court would focus its inquiry on the relevant Japanese statutory law and employment contract, if any. The Civil Code of Japan specifies that when the employment term

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

165. *Comm. on Int'l Commercial Disputes*, *supra* note 91, at 51 (quoting Judge Milton Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 471 (1978)).

166. *See Keller*, *supra* note 127, at 171 (quoting Adler, *supra* note 15, at 39).

167. Some provisions of foreign law are modeled after U.S. law. In such instances, a court may benefit from looking to domestic legal principles. One illustration is the similarity between U.S. and Japanese securities law. Current Japanese securities laws were enacted in 1948 and modeled on the U.S. Securities Act of 1933, 15 U.S.C. section 77(a) et seq. (2006), (“Securities Act”) and the U.S. Securities Exchange Act of 1934, 15 U.S.C. section 78(a) et seq. (2006), (“Exchange Act”). MITSURU MISAWA, CURRENT BUSINESS AND LEGAL ISSUES IN JAPAN’S BANKING AND FINANCE INDUSTRY 1 (World Scientific Publishing Co. Pte. Ltd., 2d ed. 2011), *available at* http://www.worldscibooks.com/etextbook/7535/7535_chap01.pdf; *see also Outline of the Financial Instruments and Exchange Act*, 3-8 DOING BUSINESS IN JAPAN § 8.01 (Matthew Bender rev. ed. 2011).

has not been specified, either party may terminate the relationship at any time and the employment relationship will expire two weeks from the notice.¹⁶⁸ Quite similar to U.S. law, there is no express limitation on an employer's ability to terminate an employee absent an agreement otherwise.¹⁶⁹ Conversely, Japan's Labor Standards Law stipulates that an employer may terminate an employee but only upon thirty-days advance notice or thirty-days worth of wages in lieu of such notice.¹⁷⁰ If a U.S. judge were faced with these two statutory provisions, some minor confusion may arise regarding the employment termination date due to the apparent statutory conflict described above. However, there would be little doubt about an employer's ability to terminate the employee absent an agreement to the contrary. In reality, though, these statutory provisions only provide half of the story. In fact, despite Japan's civil law tradition,¹⁷¹ its courts have severely curtailed the right of employers to terminate employees at will through the judicial doctrine of abusive dismissal.¹⁷² Pursuant to Japanese case law, an employer may not discharge a single employee or even multiple employees in the context of economic necessity without reasonable cause.¹⁷³ In essence, before an employer can terminate the employment of one or more employees in accordance with the relevant statutory provisions, the courts have mandated certain steps that, if not taken, will constitute an actionable abuse of right.¹⁷⁴

U.S. courts can also encounter difficulties when attempting to conduct independent legal research in some lesser-developed countries. Often times, the relevant law may be difficult to readily ascertain from statutes, judicial decisions, or other objectively verifiable documents.¹⁷⁵ The foreign legal systems of commercially

168. MINPŌ [MINPŌ] [CIV. C.] art. 627, para. 1 (Japan).

169. See Ryuichi Yamakawa, *Labor Law Reform in Japan: A Response to Recent Socio-Economic Changes*, 49 AM. J. COMP. L. 627, 645 (2001).

170. Roudou kijunhou [Labor Standards Act] No. 49 art. 20 (Japan).

171. As a civil law country, Japan does not have a strict doctrine of stare decisis. In principle, the judiciary applies the statutory law to the dispute at issue and may render a decision without analyzing and synthesizing past judicial decisions. All judgments issued by Japanese courts bind only the parties to each respective action and inferior courts, if any, where that specific action was reviewed. While higher court decisions may be influential on other lower courts, such decisions are technically not binding with respect to future cases. This doctrine applies to all Japanese courts, including the Supreme Court. See generally CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN* 187 (2d rev. ed. 2008).

172. Yamakawa, *supra* note 169, at 645; Hiroya Nakakubo, *Similarities and Differences Between Labor Contracts and Civil and Commercial Contracts: Japan Report*, ITALIAN LAB. LAW ONLINE, 2, <http://www.dirittodellavoro.it/public/current/miscellanea/atti/israele/0049-j~1.pdf> (last visited Nov. 6, 2011).

173. Yamakawa, *supra* note 169, at 645.

174. *Id.*

175. See Comm. on Int'l Commercial Disputes, *supra* note 91, at 49.

advanced countries such as England or Japan are easier to independently research, particularly in comparison with the legal systems in more obscure countries around the globe.¹⁷⁶ Also, due to inadequate resources or scarcity of commercial dealings, the laws of many lesser-developed nations may not be available in English and would require substantial translation.

VIII. NOW IS THE TIME TO SEEK OUT AND IMPLEMENT MORE EFFECTIVE TECHNIQUES AND TOOLS TO DETERMINE FOREIGN LAW

U.S. courts need to embrace the application of foreign law when appropriate. As issues involving foreign law continue to proliferate, courts should not have a “duck and run” attitude. They have an obligation to apply the appropriate law correctly regardless of whether it is domestic or foreign, and the U.S. judicial system must be sensitive to an intertwined world with varying legal systems and cultures.¹⁷⁷ In principle, the tools and procedural mechanisms are already in place for courts to accurately apply foreign law despite the shortcomings described above. In addition to the techniques and methods currently utilized by American courts, the federal and state judiciaries should seriously consider expanding the tools available to judges. When applying foreign law, courts require assurance that they have reliable sources of competent expertise. Additional strides can be made in this area, not only so that courts are more comfortable in ascertaining and applying foreign law, but also such that they more willingly embrace the task at hand.

IX. ASSISTANCE FROM THE COURTS OF OTHER COUNTRIES

Instead of questioning expert testimony or leaving confusing questions of foreign law to independent legal research, U.S. courts should seriously consider ways of approaching foreign courts or governments for guidance on complex or ambiguous matters of foreign law. Naturally, a sovereign entity’s interpretation of its own law is extremely persuasive. A foreign court’s understanding of its own country’s law is “more likely to be accurate than are the warring declarations of paid experts.”¹⁷⁸ To increase the accuracy of foreign law determinations and further reduce the possibility of biased expert testimony, the federal and state judiciaries should explore exchanges with foreign courts, possibly along the lines of the “certification” system used by the federal courts with respect to state law issues. In essence, if a U.S. court encounters a difficult or novel question of foreign law or an ambiguous statutory provision subject to substantial dispute among the litigants, then such court could

176. *See id.*

177. Teitz, *supra* note 7, at 98.

178. *Bodum USA, Inc., v. La Cafetière, Inc.*, 621 F.3d 624, 630–31 (7th Cir. 2010).

obtain clarification by petitioning the top court of the respective country for an answer.

On a conceptual level, the idea of seeking guidance from the top courts of other nations is both prudent and judicious.¹⁷⁹ Although relatively foreign to the United States, the idea of creating a formal system of international mutual assistance to facilitate legal guidance through multilateral treaties¹⁸⁰ or bilateral agreements is not completely new, at least not in Europe.¹⁸¹ In principle, a “certification-like” procedure could eliminate uncertainty for a judge and save litigants substantial resources that would otherwise be exhausted in arguing about specific points of foreign law. It could also serve as a deterrent for parties seeking to confuse the court or provide overly subjective expert testimony and materials.

On a practical level though, many logistical issues would need to be resolved before foreign law questions could be “certified” to a foreign court. Among other things, countries willing to participate in a bilateral or multilateral exchange of legal information would need to determine exactly when questions of foreign law could be certified, who would respond to such questions, the appropriate form of response, the time frame for response, and various other logistical issues. For such a system to succeed, judicial economy, speed, and ease of use would be key. Excessive formalities could undermine the system and unnecessarily dissuade use of the certification mechanism. In addition, given the time and resources necessary to respond to legal questions, it would be undesirable to “certify” all questions of foreign law to a foreign court. Instead, some limitations would likely have to be placed on the scope of acceptable questions.

In assessing the effect that such an international certification system would have on the present arsenal of tools available to U.S. judges to ascertain and apply foreign law, it is clear that these should remain fully intact and taken advantage of whenever possible. Litigants should still have the opportunity to present expert testimony to the court, and the court should have the option

179. See Cheng, *supra* note 12, at 1108.

180. This is evidenced by the European Convention on Information on Foreign Law, also known as the “London Convention,” that was prepared by the Council of Europe and signed in London in 1968. See John C. L. Dixon, *Proof of Foreign Law: The Impact of the London Convention*, 46 INT’L & COMP. L.Q. 151, 155 (1997). The 1968 London Convention was designed so that contracting states could establish systems to request and supply information about their respective civil and commercial law, judicial organization, and civil procedure. *Id.*; GEEROMS, *supra* note 78, at 137. The Convention provides a formal mechanism for the courts of one member state to obtain information regarding foreign law from another member state. Raphael Perl, *European Convention on Information on Foreign Law*, 8 INT’L J. L. LIB. 145, 145 (1980).

181. GEEROMS, *supra* note 78, at 153, 157, 160 (discussing bilateral agreements between countries aimed at facilitating the exchange of information regarding foreign law).

to consider any other resources or materials including statutes, case reporters, scholarly commentary, textbooks, articles, online materials, interviews, or other informally obtained materials. Also, it would be important that the opinions rendered by the foreign court not constitute binding precedent for future matters handled by that court or judicial system.

Fundamentally, a foreign court's guidance could enhance objectivity, fairness, and legal certainty in U.S. legal proceedings when the content of foreign law is unclear. It could also help improve the efficiency of applying foreign law for both the parties and courts. An additional benefit of seeking guidance from foreign courts is that an underlying bilateral or multilateral agreement would likely be necessary to facilitate judicial exchange. Pursuant to such agreements, foreign courts could also benefit from receiving guidance on relevant U.S. law. This would serve the interests of U.S. jurisdictions in having their law accurately applied in courts overseas. It would also help ensure the certainty and predictability needed for global commerce and cross-border interaction.

X. CERTIFICATION SYSTEM AS A MODEL FOR CASES APPLYING FOREIGN LAW

The concepts and principles underlying the certification model used by U.S. federal and state courts could help enhance certainty, deter potential concerns about biased expert testimony, and alleviate fears regarding the application of foreign law if applied to the process of determining foreign law in U.S. courts. Federal courts must often interpret state law based on choice of law rules or claims that state law violates federal law.¹⁸² Uncertainties regarding the applicable state law may arise in such cases. After the U.S. Supreme Court decided *Erie Railroad Co. v. Tompkins*,¹⁸³ federal courts did their best to "predict" how the respective state courts would decide a novel or unclear question of state law.¹⁸⁴ However, predictions carry the inherent risk that the court will incorrectly resolve an important matter of law.¹⁸⁵ In fact, federal courts may occasionally reach mistaken conclusions despite the fact that the state and federal courts share a common legal culture. Judges and attorneys functioning in both systems have a common point of reference with fundamental principles of law learned at common law schools from standard textbooks, hornbooks, treatises, and other materials. Legal practitioners are also trained to research with common resources including reporters, digests, and electronic

182. John C. Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. (SUPPLEMENT) 437, 440 (2002).

183. 304 U.S. 64 (1938).

184. John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 764 (2008).

185. *Id.*

legal databases. Accordingly, federal judges possess the requisite legal skills to confidently research and determine the law in any American jurisdiction. In reality, however, federal judges may still reach incorrect conclusions regarding the applicable state law.

To reduce uncertainty, federal courts adjudicating questions of state law may seek guidance and direction from the state judiciary by “certifying” a question of undecided or uncertain state law to the highest state court for an authoritative ruling.¹⁸⁶ In the 1970s, state certification laws started spreading across the United States.¹⁸⁷ At present, nearly every state affords discretion to its highest court to assist federal courts that face undecided questions of state law by accepting certified questions.¹⁸⁸ Certification procedures vary depending on the jurisdiction.¹⁸⁹ In general, however, certification is typically reserved for novel or unsettled questions of law. It does not involve findings of fact but rather applies only to questions of law.¹⁹⁰ A federal court may decide *sua sponte* to seek certification from a state court, or the parties may request that the federal court invoke certification.¹⁹¹

Assuming that the state legal system permits certification, the typical certification statute allows the state’s highest court to return answers to the federal court if such answers will be issue determinative and no controlling appellate decision, constitutional provision, or statute exists.¹⁹² Procedurally, state courts generally require the certifying court to provide a statement of facts relevant to the certified questions and describe the nature of the controversy in which the questions arose.¹⁹³ Once the state’s highest court provides guidance, the federal court is bound to follow such guidance.¹⁹⁴ In essence, this technique is employed to reduce the uncertainty and assist in the application of law that is somewhat “foreign” to the federal court.

The certification procedure facilitates judicial cooperation and obviates the danger that a federal court will reach an incorrect

186. Keller, *supra* note 127, at 178.

187. See Preis, *supra* note 184, at 764.

188. *Id.* at 764–65; Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 (2003).

189. Keller, *supra* note 127, at 178.

190. See Nash, *supra* note 188, at 1694.

191. See *id.* at 1690–93 (noting that the court retains discretion whether to invoke certification).

192. Preis, *supra* note 184, at 765. For example, under article VI, section 3(b)(9) of the New York Constitution, the state high court is permitted to accept certified questions only from the Supreme Court of the United States, any U.S. Court of Appeals, and the highest courts in other American states. N.Y. CONST. art. VI, § 3(b)(9).

193. See *generally* Briefing.com v. Jones, 126 P.3d 928, 929 (Wyo. 2006) (describing the requirements for federal courts certifying questions about Wyoming’s recognition of trade secrets law).

194. Nash, *supra* note 188, at 1695.

result or rely on an assumption contrary to how a state's highest court would determine the matter in question.¹⁹⁵ Additionally, as explained by the U.S. Supreme Court, the certification procedure "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."¹⁹⁶ A federal court judge can rely on her own knowledge and experience ascertaining, determining, and interpreting most state law questions. To help interpret the law, she can also draw upon the adversary process, as the lawyers for each party will perform the necessary research and present materials about the applicable law. Notwithstanding, there are times when a federal court judge needs to acquire clarification on unsettled or important matters of law and has the tools available to do so through the certification procedure.

XI. THE TIMING IS RIGHT TO EXPAND CERTIFICATION TO FOREIGN LAW ISSUES FACING U.S. COURTS

Recent cross-border interaction among judiciaries together with the continued integration of economies across the globe presents a golden opportunity for nations to enter into serious discussions regarding judicial cooperation. At present, there is no formal procedure by which federal courts can certify a difficult question on foreign law to the courts of another nation.¹⁹⁷ However, petitioning a foreign court either formally or informally for assistance on a particularly difficult or ambiguous question of foreign law fundamentally makes sense. Instead of predicting how a foreign court might define or apply the laws of its country, it would be more accurate to ask the foreign court directly.¹⁹⁸ Recently, there has been movement toward formalizing exchange relationships between certain courts. Additionally, U.S. courts have engaged in various international outreach activities that have effectively laid a foundation for more integrated operations, including some type of cross-border certification system.

195. Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781, 842 (2010).

196. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

197. Keller, *supra* note 127, at 178. To the extent that the parties are embroiled in parallel litigation, a U.S. court could wait for a foreign court to rule on the matter at hand. *Id.* at 184. However, this waiting game is inefficient and potentially detrimental to the litigants and the court.

198. See Cheng, *supra* note 12, at 1108.

A. *New York-South Wales Memorandum of Understanding Indicates Potential for Other Agreements*

In an era when collegiality has developed among judges and judicial systems on an international level, mutual cooperation is possible to a degree that was previously unthinkable.¹⁹⁹ Based on improved collegiality together with a desire to increase adjudicative certainty and reduce disputes when difficult questions of foreign law arise, the New York state judiciary has taken the first step among U.S. jurisdictions toward greater cross-border cooperation in the form of a procedure similar to certification.²⁰⁰ Not only should the New York state judiciary continue along its current path toward greater international cooperation, but other U.S. court systems should seriously examine following its lead.

On October 28, 2010, the Chief Judge Jonathan Lippman of the New York State Court of Appeals, and then-Chief Justice James Spigelman of the Supreme Court of New South Wales (“NSW”), signed a bilateral Memorandum of Understanding (“MOU”) establishing a system for reciprocal cooperation and consultation between their respective judicial systems.²⁰¹ Citing the need and value of “trading” judicial expertise to advance the administration of justice internationally and further facilitate cross-border commerce involving New York and Sydney, the court systems executed the first agreement of its kind between a U.S. court and foreign court.²⁰² In principle, the MOU enables judges in both jurisdictions to exchange legal analysis about a substantial legal issue when one court needs to apply the law of the other and the litigants consent to such an exchange.²⁰³

Two of the primary reasons cited for the MOU were the high cost of legal experts and confusion caused by conflicting accounts of foreign law.²⁰⁴ Chief Justice Spigelman mentioned that having each party fly legal experts to Australia to provide dueling versions of

199. N.Y. State Unified Court Sys., *supra* note 6.

200. *Id.*

201. *Id.* Chief Justice Spigelman retired on May 31, 2011, after serving thirteen years as chief justice. *See generally* *NSW Chief Justice Spigelman Resigns*, THE AGE, Mar. 18, 2011, <http://news.theage.com.au/breaking-news-national/nsw-chief-justice-spigelman-resigns-20110318-1c04q.html>.

202. N.Y. State Unified Court Sys., *supra* note 6. The MOU is the second of its kind entered into by the NSW Supreme Court and mirrors the MOU that it entered into with the Supreme Court of Singapore in June 2010. *See generally* *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), [hereinafter *Memorandum of Understanding*] *available at* http://www.ipc.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument.

203. N.Y. State Unified Court Sys., *supra* note 6; *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.

204. *See generally* *Memorandum of Understanding*, *supra* note 202.

New York law simply frustrated the judicial process, as the Australian courts ended up treating matters of law essentially as matters of fact due to the conflicting views presented by the parties.²⁰⁵ Using the new system, Australia could receive an entirely neutral analysis of New York law “rendered by judges who will not have a ‘horse in the race’ of the Australian litigation in question.”²⁰⁶ In effect, this cooperative arrangement gives the New York Court of Appeals greater insight into the meaning and typical application of law in New South Wales.²⁰⁷ Even more significantly, the NSW Supreme Court will have access to more precise guidance about New York law that is frequently called into question, particularly in contract actions.²⁰⁸

Parties to legal proceedings involving foreign law are entitled to correct and authoritative applications of law. According to the New York and NSW court systems, the new procedures established based on their MOU will enable that objective to be attained.²⁰⁹ Moreover, Chief Judge Lippman expressed his hope that this cooperative judicial arrangement is merely the first step in greater collaboration among New York courts and top courts in other foreign countries and will serve as a template for more judicial collaboration on a global basis.²¹⁰

B. International Outreach Activities

In addition to the certification-like procedure involving New York and Australia, other U.S. courts have drawn closer to foreign judiciaries over the years by engaging them in a variety of outreach activities.²¹¹ These activities have laid a strong foundation for discussions between additional court systems regarding judicial exchanges or certification-like arrangements.

In 1993, the U.S. federal judiciary created the Committee on International Judicial Relations (“CIJR”).²¹² At the time, contacts between U.S. and foreign judiciaries were starting to increase on an ad hoc basis and the U.S. federal courts wanted to devise a uniform system to facilitate judicial assistance and exchange among courts

205. Stashenko, *supra* note 203.

206. *Id.*

207. *Id.*

208. *Id.* (stating that although New York court administrators cannot recall a New York Court of Appeals case applying Australian law, New York commercial statutes are frequently subject to interpretation by Australian courts).

209. N.Y. State Unified Court Sys., *supra* note 6.

210. Stashenko, *supra* note 203.

211. See *Taking a Personal Commitment to Justice to the World: An Interview with Judge Charles R. Simpson III*, THIRD BRANCH (U.S. Fed. Courts, D.C.), Dec. 2008, at 1, 10–11, available at <http://www.uscourts.gov/uscourts/news/ttb/archive/2008-12%20Dec.pdf>.

212. *Id.* at 10.

in a more orderly fashion.²¹³ In addition to “rule of law” outreach activities, the CIJR has sought to “coordinate the federal judiciary’s relationship with foreign courts and judges, and with governmental and nongovernmental organizations which work in the legal reform area” over the past two decades.²¹⁴

Many other sources of U.S.-based foundation grants and government funding aimed at “rule of law” programs have also provided opportunities for judicial cooperation and face-to-face interaction among judges.²¹⁵ Foreign judges have similarly recognized the merit of judicial interaction and exchange. For example, judges from European constitutional courts have met every three years since the 1980s, Worldwide Common Law Judiciary Conferences have been held yearly since 1995, and formal transnational organizations of judges have been established in various parts of the world.²¹⁶

More recently, several U.S. federal courts have sought to forge relationships and exchanges with foreign courts. By way of illustration, several U.S. federal courts have developed “sister-court” relationships to foster exchange. In 2010, the U.S. District Court for the Middle District of Florida signed an agreement with the Ljubljana District Court in Slovenia with the intent of exchanging ideas and sharing innovations.²¹⁷ In addition, U.S. judges have met with international counterparts either in the United States or overseas on numerous occasions. For example, I personally helped

213. *Id.*

214. *Id.* By way of illustration, one of the CIJR’s activities is coordinating the participation of federal courts with the Open World Program, operated by the Center for Russian Leadership Development at the Library of Congress. D. Brooks Smith, *Promoting the Rule of Law and Respecting the Separation of Powers: The Legitimate Role of the American Judiciary Abroad*, 7 AVE MARIA L. REV. 1, 18 (2008). As part of the Open World Program, over 250 Russian judges have traveled to Washington, D.C., for a two-day general overview of the American judiciary and then for eight days of meetings with local judges. *Id.* This is just one example of the various exchange programs offered by the CIJR and others.

215. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 503 (2005); *U.S. Federal Judge Discusses Judicial Administration and Ensuring “Speedy” Justice*, EMBASSY OF THE U.S. IN MALTA (Apr. 6, 2011), <http://malta.usembassy.gov/en-04062011.html>.

216. Berman, *supra* note 215, at 503–04.

217. *Sister Court in Slovenia*, THIRD BRANCH (U.S. Fed. Courts, D.C.), Nov. 2010, available at http://www.uscourts.gov/News/TheThirdBranch/10-11-01/Sister_Court_in_Slovenia.aspx. Other U.S. federal courts have also entered into sister-city relationships including: the U.S. District Court for the Western District of Kentucky with the District Court of Pula, Croatia; the U.S. District Court for the Western District of Washington with the Primorsky Kray Region Russian Federation Court; the U.S. Bankruptcy Court for the Middle District of Tennessee with the Commercial Court of Zagreb, Croatia; and the U.S. District Court for the District of Minnesota with the Court of Appeals, Kirovohrad Region, Ukraine. *Id.*

host part of U.S. Supreme Court Justice Stephen Breyer's visit to Japan in connection with a delegation sent to Tokyo by the American Bar Association's International Division. The goal of Justice Breyer's trip was to promote the "exchange of ideas on the practice of law and on cross-border legal issues and to establish relationships with a view toward cooperation."²¹⁸ This is simply one of many examples, as other U.S. judges have been constantly reaching out to judicial counterparts across the world.²¹⁹ Additionally, various aid agencies, NGOs, and U.S. law schools have convened informal meetings, seminars, and conferences in the United States involving foreign judges.²²⁰

These outreach activities and interaction opportunities mean that the relationships among courts have become more cordial and cooperative. Such efforts help judges understand that they function as part of a common transnational enterprise. Also, a good number of members of foreign judiciaries and legal communities have been exposed to the U.S. legal system through a growing number of LL.M. programs, visiting scholar opportunities, and other exchanges at U.S. law schools.

On a global scale, members of the judiciary around the world have already started sharing information and exchanging ideas on many levels. One prime example is regular judicial conferences. In Asia, chief justices in the region regularly gather at the Conference of Chief Justices of Asia and the Pacific.²²¹ At this conference,

218. See Temple Law School Co-sponsors Visit of ABA International Division Delegation, Which Will Include Justice Stephen Breyer: Two International Law Seminars, TEMPLE UNIV. (July 9, 2008), <http://www.tuj.ac.jp/newsite/main/law/news/event20080709.html>.

219. See Berman, *supra* note 215, at 503 (noting that not only have U.S. Supreme Court Justices personally met with top jurists in France, Germany, England, India, and the European Court of Justice ("ECJ") but that members of the ECJ have visited the U.S. Supreme Court several times as well); Tori Richards, 'Tough Guy' Judge Leads Judicial Reform Overseas, AOL NEWS (Aug. 16, 2010), <http://www.aolnews.com/2010/08/16/tough-guy-us-judge-leads-judicial-reform-overseas/> (describing efforts of U.S. District Judge David O. Carter to reach out to judges and attorneys around the world).

220. Berman, *supra* note 215, at 504.

221. Robert Nicholson, *Regional Work of the Conference of Chief Justices of the Asia Pacific Region*, INT'L JUD. MONITOR (Jan.-Feb. 2007), http://www.judicialmonitor.org/archive_0207/globaljudicialdialogue.html. First convened in 1985, the Conference of Chief Justices of the Asia Pacific Region meets biennially and includes judges from countries with common law systems (Pakistan, India, Sri Lanka, Bangladesh, Malaysia, Singapore, Hong Kong SAR, the Philippines, Australia, and New Zealand), those with civil law traditions (Japan, Thailand, Indonesia, the Republic of Korea, and Vietnam), and others with diverse legal traditions based on Islamic or Sharia law (Afghanistan, Malaysia, and Indonesia). *Id.* Those attending the Conference are the Chief Justices of the nation states of the Lawasia region, stretching from Afghanistan in the west to Pacific Islands in the east; from Korea in the north to Australia in

esteemed members of the judiciary present discussion papers on topics of interest such as legal reform, judicial education, court management, the relationship between courts and the public, judicial ethics, publication of judicial decisions, court practices, and court security.²²² Ideas for more significant interaction among courts often grow out of conferences and meetings. For example, at a recent conference, the South Korean delegate suggested that the group help foster consideration of agreements related to the recognition of judgments among countries.²²³ Despite the diversity of culture, religion, and law, members of the global judiciary tend to share a common interest in the correct application of law.²²⁴ There are many other similar programs that are geared toward judicial interaction and exchange.²²⁵

Accordingly, the hostilities and distrust that may have once existed between judiciaries has largely subsided. The international judicial community is ready for greater cooperation in handling disputes that arise in the context of transnational litigation. As such, not only is a certification system involving the courts of various nations not out of the question, such a system can become a viable reality assuming the proper procedural steps are taken.

XII. JUDICIAL EXCHANGES ARE PROCEDURALLY POSSIBLE

U.S. courts and litigants involved in disputes involving foreign law stand to benefit from the objectivity, certainty, and accuracy potentially engendered from either a formalized certification system loosely modeled after the relationship between U.S. federal and state courts or a less formal system by which foreign judiciaries exchange information. Court systems could base a more formalized system on bilateral agreements or treaties between sovereigns. Even if such a formalized relationship was not possible, however, an unofficial exchange of ideas could provide a court with an objective and credible source of persuasive authority. Either system would be consistent with current federal procedural rules. Rule 44.1 permits

the south. If a Chief Justice cannot personally attend the Conference, it is customary that another member of the court attend. *Id.*

222. *Id.*

223. *Id.*

224. *See generally id.*

225. The programs operated by the American Society of International Law ("ASIL") are yet another example. *Transnational Judicial Dialogue*, AM. SOC'Y INT'L L., <http://www.asil.org/transnational-judicial-dialogue.cfm> (last visited Nov. 6, 2011). The ASIL strives to foster transnational dialogue on strengthening international judicial cooperation among judges and courts from jurisdictions around the world through formal and informal networks. *Id.* It also facilitates international judicial dialogue on current challenges facing judges and judiciaries through conferences, study tours, exchanges, and other programmatic activity and resources. *Id.*

federal court judges to “consider *any relevant material*,”²²⁶ so even an informal conversation or consultation with a foreign judge would be permissible and potentially helpful. In any event, it could be very helpful to a domestic U.S. court applying foreign law if, upon request or certification, the highest court with conclusive authority in a foreign country could provide clarification and direction about novel, unsettled, or particularly complex legal questions.

A. Formalized System Would Provide Reliable and Stable Sources of Credible Information

One can envision various formal models that would enable certification procedures or exchanges among courts on unsettled, novel, or particularly complex issues of foreign law. Optimally, courts adopt formal judicial exchanges that best suit their respective needs based on principles of comity. At minimum, however, a formal judicial exchange agreement should seek to establish a system that avoids excessive “red tape” or administrative burden, facilitates speedy exchange of information, and encourages quality responses. The exchange agreement should provide for the exchange of legal guidance at no charge to the requesting country. The system should also have a designated contact in the form of a specific court or governmental agency. Designating a local embassy or consulate may be convenient for the certifying country, but it might needlessly create an extra step in the process if intermediaries can be bypassed and requests can be made directly to the responsible court or agency.

In requesting information from a foreign court, any certifying court should be required to provide enough information to facilitate a complete answer by the receiving court, including a description of the nature of the underlying dispute and statement of facts relevant to the questions certified. Also, steps should be taken to ensure that certified questions are artfully presented or that courts can directly correspond to ensure that the questions are sufficiently understood and the right question is answered. As cross-border communication can be problematic, measures should be taken to ensure for smooth transmission of ideas as well as translation of relevant materials.

In establishing an exchange or certification-like system, there are several other fundamental considerations that need to be addressed. First, one factor requiring consideration is whether the litigants need to consent to a foreign court as a prerequisite of certification. Based on the current federal rules, a court theoretically has the authority to consult with any resource, including foreign courts, so proceeding without the litigants’ consent would be consistent with the rules.²²⁷ However, if the litigants

226. FED. R. CIV. P. 44.1 (emphasis added).

227. *See id.*

consented to the certification, it could eliminate future debate and discussion about a particular issue if a litigant did not agree with the result of the certification.

Second, another major consideration is how the certifying court would treat the response from the foreign court. Unlike the federal-state certification system, U.S. courts would not necessarily be bound by the information received from foreign courts or responding agencies. However, they naturally would pay considerable attention to conclusions issued by foreign governmental officials in their official capacities.²²⁸ "Substantial deference" would likely be the appropriate standard as domestic courts are generally not bound by the decisions of foreign courts. Moreover, the advisory nature of an information exchange or certified question indicates that courts should not be bound, but should rather use the information provided as highly persuasive evidence.

Third, another possible concern is whether foreign courts would be deluged and thereby excessively burdened by a constant stream of requests from U.S. courts and vice versa. This scenario is unlikely to emerge with the continued use of experts and widespread availability of materials on foreign law, so U.S. courts should be able to continue ascertaining and determining foreign law in most cases without having to reach out to foreign counterparts. Also, such concerns can be dispelled by limiting the questions that are referable or certifiable to only novel, complex, or unresolved questions of law.

B. Informal System Would Still Supply Objective and Credible Information

If a formalized certification procedure was not possible due to political pressures, logistical issues, or other concerns, there is still considerable merit in exploring and adopting an informal system for the exchange of guidance on foreign law. The New York-NSW MOU is illustrative of the benefits of informal agreements.

At this stage, the relationship between New York and NSW is informal in nature because the New York Constitution permits the state high court to accept certified questions only from the U.S. Circuit Court of Appeals for the Second Circuit and the highest courts of other American states.²²⁹ Chief Judge Lippman plans on pursuing a constitutional amendment to officially formalize the reciprocal exchange arrangement and enable New York judges to officially accept certified questions from NSW courts and those of other nations.²³⁰ In the meantime, the New York Court of Appeals

228. See generally Lamm & Tang, *supra* note 5, at 34 (discussing cases in which courts have deferred to the interpretations of foreign governments, and cases where they have not).

229. Stashenko, *supra* note 203.

230. *Id.*

will operate on an "informal" basis that is similar to decisions rendered by referees.²³¹ On the New York side of this arrangement, one volunteer judge from the New York Court of Appeals and one volunteer judge from each appellate division in the New York state courts will accept and consider any questions from NSW courts regarding New York law.²³² These judges will volunteer their time and not receive monetary compensation for their efforts.²³³ Instead, the panel of judges will prepare a report on New York law on personal time in an effort to promote comity and cooperation between the two nations.²³⁴ Acting as "referees," the volunteer judges will separate into panels of three judges, consider the question of New York law posed by the Australian court, and then provide the requesting foreign court with unofficial, nonbinding pronouncements on New York law.²³⁵ Because the volunteer judges will be acting outside of the scope of their official duties, their unofficial interpretations will not have any precedential authority in New York, and will not be considered official declarations of New York law.²³⁶ Also, the NSW Supreme Court will have the discretion to adopt, modify, or reject the report in whole or in part.²³⁷ 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.²³⁸

XIII. INTERNATIONAL CERTIFICATION OR EXCHANGE SYSTEM HAS ADDITIONAL BENEFITS

In addition to the benefits to judges and litigants described above, a foreign law certification mechanism will advance the interests of international comity and participating nations in the context of transnational litigation. A court handling a foreign law issue can confidently and accurately apply such law. Foreign nations can take comfort in their own law being applied accurately and uniformly in an overseas setting. Also, the courts and litigants may actually conserve precious time and resources by turning to foreign courts for information on their respective laws.

A certification-like procedure geared toward national courts could also be configured to extend to international commercial arbitration proceedings. For example, the European Convention on Information on Foreign Law ("London Convention") has enabled the judiciaries of member states to send requests for information on

231. *Id.*

232. N.Y. State Unified Court Sys., *supra* note 6.

233. *Id.*

234. *Id.*

235. Stashenko, *supra* note 203.

236. N.Y. State Unified Court Sys., *supra* note 6.

237. *Id.*

238. *Id.*

foreign law in civil and commercial fields via a receiving agency specifically designated to receive reply to such requests.²³⁹ Through the Netherlands Arbitration Act of 1986, an arbitral panel may latch onto the London Convention by requesting that a Dutch court intervene in the proceedings and request information on foreign law from a member foreign court.²⁴⁰ Along these lines and in the interests of facilitating global trade and commerce, the United States and other states could carve out room in bilateral judicial agreements to include international commercial arbitration disputes as well.

XIV. INCREASED COURT APPOINTMENT OF FOREIGN-LAW EXPERTS OR GREATER USE OF SPECIAL MASTERS WOULD BE BENEFICIAL

Another promising tactic that could improve current U.S. court practice in determining foreign law would be to increase the use of court-appointed experts. Once a court has reached a point of confusion, the court should give greater consideration to appointing its own foreign law expert. Although U.S. judges currently may appoint experts on foreign law, this tool is rarely used.²⁴¹ Current practice notwithstanding, a knowledgeable and impartial “interpreter” of foreign law who is appointed by the courts, as opposed to experts hired by the litigants, could provide supplemental assistance to a court when close questions of foreign law exist or when the parties seriously disagree about the applicable law. Court-appointed expert testimony would also be worthwhile when party-expert testimony appears tenuous. Particularly in instances of doubt and confusion, the use of a court-appointed expert can help to enhance certainty, promote objectivity, and enable a court to close any gap with respect to the correctness of law.²⁴²

A. *Increased Use of Court-Appointed Experts on Foreign Law*

Although the idea of a court-appointed expert is not novel, this tool has traditionally been underutilized by the courts. Courts began appointing experts in the eighteenth century in response to concerns about party-hired expert witnesses.²⁴³ Over the years, many commentators have called for courts to appoint more expert witnesses.²⁴⁴ At the same time, attorneys have opposed the broad

239. See Perl, *supra* note 180, at 145.

240. See ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 294 (4th ed. 2004).

241. See FED. R. EVID. 706; Cheng, *supra* note 12, at 1106; Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 78–79 (1998).

242. See Miner, *supra* note 50, at 588–89; see also *Byrne v. Cooper*, 523 P.2d 1216, 1220 (Wash. Ct. App. 1974).

243. See Deason, *supra* note 241, at 64–67, 69–72 (1998).

244. See *id.* at 61, 74.

use of court-appointed experts based on the concern that a judge will naturally defer to its own expert on key issues in dispute, thereby depriving them of an opportunity to fully advocate their client's position.²⁴⁵

As procedural rules have evolved, a judge's inherent power to appoint an expert is "virtually unquestioned."²⁴⁶ Rule 706 of the Federal Rules of Evidence ("Rule 706") governs the appointment of experts in federal court. Most U.S. states have similar provisions.²⁴⁷ Rule 706 provides that:

The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.²⁴⁸

Accordingly, the court may independently appoint experts to opine on foreign law.²⁴⁹ Additionally, the litigants may petition the court to appoint an expert, but they typically refrain from doing so due to the uncertainties involved.²⁵⁰

Despite a court's ability to appoint foreign-law experts, most courts tend to be reluctant to do so.²⁵¹ There are a variety of reasons why courts do not appoint experts more often. Well-qualified foreign-law experts can be difficult to find. In fact, the identification and evaluation of potential experts can entail considerable judicial effort.²⁵² The potentially significant costs associated with court-appointed experts might also be problematic. If a court appoints an expert on foreign law, the losing party will not only have to pay its own foreign-law experts, but also faces the specter of paying the fees

245. Rachel Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, TRANSNAT'L DISP. MGMT., June 2007, available at http://www.wilmerhale.com/files/Publication/73eaccae-951d-4dd3-ab8f-24b6b1836dda/Presentation/PublicationAttachment/d6fdcd85-16df-44e7-b064-2764ac647870/expertWitness_tv43article02.pdf; see also Deason, *supra* note 241, at 74.

246. See FED. R. EVID. 706 notes of advisory committee on rules; Deason, *supra* note 241, at 79.

247. See Cheng, *supra* note 135, at 1270, 1303.

248. FED. R. EVID. 706(a).

249. See *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, 790 (6th Cir. 2007) (addressing district court's appointment of a professor to provide information and answer specific questions about Japanese contract law); *Institut Pasteur v. Simon*, 383 F. Supp. 2d 792, 795 n.2 (E.D. Pa. 2005) (addressing court's appointment of an expert on French law); *Carbotrade S.p.A. v. Bureau Veritas*, No. 92 Civ. 1459, 1998 U.S. Dist. LEXIS 10575, at *7 (S.D.N.Y. July 13, 1998) (addressing court's appointment of an expert on Greek law).

250. GEEROMS, *supra* note 78, at 145.

251. See Cheng, *supra* note 12, at 1106; Cheng, *supra* note 135, at 1303.

252. GEEROMS, *supra* note 78, at 145.

of the court-appointed expert as well. Pursuant to Rule 706 and similar state law rules, the litigants must pay any court-appointed expert "in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs."²⁵³ If a litigant does not have substantial resources, this could chill justifiable lawsuits. Additionally, there are legitimate concerns that the adversarial system could be undermined by judges paying undue deference to their appointments. A court-appointed expert "can undercut the adversary system, since judges may be unduly influenced by the person they appoint."²⁵⁴ Even if the litigants' experts have superior qualifications, a court might be susceptible to favoring its own expert's opinion.²⁵⁵ Moreover, when a litigant disagrees with the foreign law interpretation offered by a court-appointed expert, it must carefully consider how best to refute the expert without alienating the judge, who might feel a degree of loyalty toward the appointed expert or believe that the appointed expert is neutral and therefore automatically correct.²⁵⁶

Conversely, there are many benefits to increasing the use of court-appointed expert witnesses. First and foremost, court-appointed experts potentially provide the benefits incumbent with privately hired experts, but without the accompanying concern that the expert is a "hired gun" with her primary loyalty turned toward her client instead of the court. With a court-appointed expert, there is little or no question about bias or lack of objectivity.²⁵⁷ Said expert can also assist the court when the parties' submissions are unclear, inconclusive, or conflicting.²⁵⁸

Another potential benefit relates to stipulations and quick settlements. Persuasive advice submitted by a court-appointed expert may actually prompt the litigants to stipulate to certain matters or quickly settle any foreign law issue.²⁵⁹ Moreover, if a court asks its expert to prepare a report on the relevant foreign law at the initial stages of the litigation and then allows the parties to respond, the parties could then stipulate to those aspects of the law that are not in dispute and subsequently prepare responses to interpretations on which they disagree. The district court in *Servo*

253. FED. R. EVID. 706(b).

254. See Comm. on Int'l Commercial Disputes, *supra* note 91, at 52.

255. *Id.* at 54; see also Cheng, *supra* note 12, at 1106.

256. See Kent, *supra* note 245.

257. See Deason, *supra* note 241, at 63.

258. See Teitz, *supra* note 7, at 108. By way of example, in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88 (2d Cir. 1998), the court appointed a law professor as an expert amicus curiae in addition to soliciting supplemental briefs from the parties on questions of Russian law.

259. See Miner, *supra* note 50, at 588 (quoting John R. Schmertz, Jr., *The Establishment of Foreign and International Law in American Courts: A Procedural Overview*, 18 VA. J. INT'L L. 697, 713 (1978)).

*Kinetics, Inc. v. Tokyo Precision Instruments Co.*²⁶⁰ utilized this approach when it appointed a U.S. law professor specializing in comparative and Japanese law to prepare an expert report on the relevant Japanese law. Based on the professor's report, the parties then filed supplemental papers.²⁶¹ This process could narrow the matters in dispute considerably. Not only would this save the court substantial time and effort, but it could also save resources for the parties.

Alternatively, the court could reverse the process by allowing the parties to initially present their submissions on the relevant foreign law provisions. If the submissions are conflicting or confusing interpretations of the foreign law, the court could then summon a qualified expert for another opinion from an objective viewpoint.

In theory, these benefits sound appealing. In reality, these benefits can be obtained and may save time and resources for the court and parties alike. If used correctly, court-appointed experts can objectively assist judges in ascertaining and applying foreign law. However, the noted concerns give pause to court appointment of foreign-law experts. Regardless, several improvements could be made to the use of court-appointed experts to alleviate these concerns. Such improvements could make the use of court-appointed experts more acceptable and frequent.

B. Making It Easier to Find Court-Appointed Experts

Making it easier to locate qualified individuals to opine on foreign law would foster the increased use of court-appointed experts. With a concerted effort, U.S. courts could compile a database of foreign-law experts. This database could be developed through direct applications from foreign-law experts interested in assisting, including legal practitioners, law professors, and others. To expand the expert pool, invitations to participate could also be extended through international and foreign law organizations, comparative law institutes, and law schools. In fact, courts might tap into the membership of the American Society of Comparative Law, the American Foreign Law Association, and others.²⁶²

When considering appointments, individual judges could quickly refer to the database for potential experts. The database could contain full curricula vitae as well as brief summaries of educational background, professional experience, affiliations, and even prior experience serving as a foreign-law expert witness in international litigation or arbitration.²⁶³ This foreign-law expert

260. 475 F.3d. 783, 790 (6th Cir. 2007).

261. *See id.*

262. *See Miner, supra* note 50, at 589.

263. *See id.*

database could also include brief evaluations of those who have served as expert witnesses in past cases. The expert pool could be similar in structure or character to the pools of qualified mediators or arbitrators maintained by alternative dispute resolution organizations. By providing easier access to foreign-law expert witnesses, courts should be more receptive to the idea of appointing foreign-law experts.

U.S. court systems could also seek to tap into well-established comparative law centers overseas for objective guidance. Relationships could be established through formal agreements or informal invitations to provide information in lawsuits involving foreign law. Although judges would need to assess the credibility and thoroughness of the information received, comparative law centers could be a solid source of information. For example, European courts often turn to comparative law centers for guidance on foreign legal issues. French courts have traditionally utilized the French Center of Comparative Law, and German courts have used the Max Planck Institute for Foreign and International Private Law to gather information on unfamiliar foreign laws.²⁶⁴ Although U.S. courts generally do not have a tradition or procedure to consult with private comparative law centers regarding foreign law matters,²⁶⁵ such centers may openly welcome the opportunity to take an active role in transnational disputes litigated in U.S. courts. This may encourage the development of comparative law centers in the United States as well.

C. Compensation of Court-Appointed Experts Should Not Be a Major Obstacle

Although the costs involved with the court appointing an expert may seem significant and duplicative, the costs may be overblown. Pursuant to Rule 706, the court “may appoint expert witnesses of its own selection” and such experts are “entitled to reasonable compensation in whatever sum the court may allow.”²⁶⁶ A court also has significant flexibility as to the payment schedule.²⁶⁷ By involving court-appointed foreign-law experts at an early stage of the litigation, it should be possible for the court to quickly obtain stipulations from the parties regarding certain aspects of the law. This early involvement could help eliminate disputes and economize expended resources. The issues in dispute should be pared down considerably, allowing the parties to focus their efforts and correspondingly reduce the amount of time and money spent on

264. Cheng, *supra* note 12, at 1107–08.

265. *Id.* at 1108.

266. FED. R. EVID. 706(a)–(b).

267. *See id.* at 706(b) (“The compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.”).

their own private foreign-law experts. It could also help level the playing field if one party lacks sufficient funds for a foreign-law expert.²⁶⁸ Even if the use of court-appointed experts is reserved for later in the process and employed only when a close question of law arises, the involvement and related costs associated with said expert could be limited accordingly.

Technology has alleviated some of the fears associated with the cost of hiring foreign-law experts. In many cases, foreign-law experts will reside in distant areas or foreign countries. In the Internet age, the availability of inexpensive and reliable technology facilitates easy and inexpensive communication with the appointed expert. Instead of expensive travel, an expert might appear before the courts and parties using videoconferencing or other no-cost or low-cost Internet technologies to provide for the opportunity to be questioned.

D. Maintaining the Adversarial System Through Innovative Techniques or Increased Use of Special Masters

Determining foreign law should entail an objective and fair process in which the parties can submit any relevant materials to the court. If concerns exist about undermining the adversarial system, a court could alleviate such concerns by allowing the litigants to vigorously cross-examine the court-appointed expert.²⁶⁹ This will enable the litigants to explore all relevant issues and fully present their positions and interpretations for consideration. Another possible method for alleviating concerns is for the court to avoid *ex parte* discussions with any appointed expert.²⁷⁰ Although *ex parte* discussions are not prohibited by Rule 44.1 and, in fact, are consistent with a court's ability to consider any relevant materials on foreign law,²⁷¹ a court could promote an even greater atmosphere of objectivity and fairness by engaging any expert in an open and transparent manner.

The use of a special master versed in the foreign law at issue could also temper concerns that court-appointed experts undermine the adversarial process. Special masters can provide many of the same benefits offered by court-appointed experts.²⁷² Rule 53 of the Federal Rules of Civil Procedure permits a court to refer an issue to a specially appointed master in special circumstances. While the

268. See Teitz, *supra* note 7, at 108.

269. See Comm. on Int'l Commercial Disputes, *supra* note 91, at 54. It should be noted, however, that the absence of *ex parte* discussions reduces the court's flexibility in determining foreign law and is inconsistent with the concept that the judge can utilize any resource with or without notice to the litigants. *Id.* at 54–55.

270. See *id.* at 54.

271. *Id.* at 54–55.

272. See *id.* at 55–56.

danger exists that a judge may unduly defer to a special master's interpretations and findings even if the experts hired by the litigants are more knowledgeable or better qualified,²⁷³ the litigants may have more leeway to persuade the master at a hearing based on her quasi-judicial role and ability to discuss issues with the litigants.²⁷⁴ In contrast, a court-appointed expert typically reaches conclusions independently and can only be challenged by cross-examination.²⁷⁵

Another benefit associated with appointing a special master is specialization.²⁷⁶ In many instances, a special master can bring specialized knowledge to the process and help compensate for a judge inexperienced with foreign law.²⁷⁷ If the special master has integral knowledge of the foreign law at issue, she can efficiently conduct targeted discussions with the parties and their experts. Matters of law can be fleshed out and defined more accurately, thereby allowing any disputes between the parties to be pared down considerably and presented to the court in the form of a special master's report for final determination. In cases of significant dispute between the parties, the master's report could be the best thing available under the circumstances.²⁷⁸

XV. DIFFERENT APPROACHES COULD LEAD TO ADDITIONAL IMPROVEMENTS

In addition to creating certification relationships with foreign courts and increasing the use of court-appointed experts or special masters to resolve unclear or highly contentious interpretations of foreign law, there are several other approaches that courts have tested on an ad hoc basis that might help other U.S. courts accurately and expeditiously ascertain and apply foreign law.

A. *Streamlined Battle of the Experts*

In light of objectivity concerns and confusion caused by conflicting expert opinions, U.S. courts might explore methods of streamlining the "battle of the experts" through an in-court hearing. If conflicting experts appear before a court and each expert is

273. GEEROMS, *supra* note 78, at 145–46.

274. Comm. on Int'l Commercial Disputes, *supra* note 91, at 55.

275. *See id.*

276. *See generally* Henry v. S/S Bermuda Star, 863 F.2d 1225 (5th Cir. 1989) (adopting certain portions of the master's report); Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc., No. 00 Civ. 6739(CBM), 2003 WL 2006598 (S.D.N.Y. May 1, 2003) (adopting special master's report in light of scarcity of materials on Thai law); Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corp., 533 F. Supp. 290 (S.D. Fla. 1982) (noting that the appointment of the master helped facilitate an ultimate decision in the case where the parties' experts conflicted about all material aspects of foreign law).

277. Comm. on Int'l Commercial Disputes, *supra* note 91, at 56.

278. *Id.*

required to succinctly respond to the other expert's points and interpretations, a court can potentially gain a greater understanding of the foreign law and avoid the confusion engendered by affidavits, written declarations, or scripted examinations.²⁷⁹ The process would likely not be time consuming and would enable the court and attorneys to ask follow up questions. Points of dispute could likely be narrowed down as well. As such, a court can obtain a better grasp not only of the substance of the foreign law but also of its intellectual underpinnings and interstices.²⁸⁰ Such an approach would also be consistent with the broad purpose and text of Rule 44.1 and analogous state rules.²⁸¹

When this approach has actually been utilized in litigation and international arbitrations, the adjudicator has found a "jot-for-jot give and take" between the experts to be helpful.²⁸² By way of illustration, in *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co.*,²⁸³ the court appointed its own foreign law expert only after the parties offered irreconcilable opinions on Saudi law. After reviewing all expert reports, the court held an all-day hearing at which the court-appointed and party-hired experts testified and were subject to cross examination.²⁸⁴ Although, in the end, additional costs were incurred, the court hired the expert only after other options had been exhausted.²⁸⁵ Most significantly, the court was able to confidently determine the law correctly and only the losing party bore the cost of the additional expert.²⁸⁶

B. *Invitations to Submit Briefs Amicus Curiae*

Another possible technique to eliminate confusion and ensure the accurate application of foreign law is inviting foreign governments to submit briefs amicus curiae on matters of disputed foreign law.²⁸⁷ In comparison with the cross-border certification

279. *See id.* at 54.

280. *See id.*

281. *See generally* WRIGHT & MILLER, *supra* note 84, § 2444.

282. Comm. on Int'l Commercial Disputes, *supra* note 91, at 54 (noting the personal experiences of John Martin, former judge for the U.S. District for the Southern District of New York, as well as Professor Hans Smit of Columbia University).

283. *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.*, 866 A.2d 1, 31–32 (Del. 2005).

284. *Id.*

285. *Id.*

286. *Id.* at 32; *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co.*, No. 00C-07-161-JRJ, 2003 Del. Super. LEXIS 296, at *1–2 (Del. Super. Ct. Aug. 26, 2003).

287. The concept of amicus curiae participation in civil litigation is long established in common law jurisdictions. Johannes Chan, *Amicus Curiae and Non-Party Intervention*, 27 H.K. L.J. 391, 394 (1997). Amicus curiae briefs likely originated in Rome as a means to aid courts when handling matters involving information outside of their knowledge. Sylvia H. Walbolt & Joseph

system described above, the solicitation of briefs would be much more informal and courts could not rely upon foreign courts or governmental agencies for a response. By analogy, U.S. courts already engage in this process on a domestic scale in certain instances. For example, in *Press v. Quick & Reilly, Inc.*,²⁸⁸ the U.S. Court of Appeals for the Second Circuit asked the Securities and Exchange Commission to submit an amicus curiae brief expressing the Commission's views on the issues set forth in the parties' briefs.²⁸⁹

Another problem with soliciting briefs amicus curiae is potential confusion regarding the actual authority of the submitting authority. From time to time, foreign governmental agencies have submitted amicus briefs on issues pending before U.S. courts; however, it has been unclear whether an amicus represents the official governmental position. For example, in *Allendale Mutual Insurance Co. v. Bull Data Systems*,²⁹⁰ the court found that statements in a brief amicus made by the Commission de Controle des Assurances (France's Insurance Commission) were insufficient because there was no proof that the Commission had authority to speak on behalf of the French state.²⁹¹

CONCLUSION

As the world continues to become more globally interdependent, U.S. courts increasingly face lawsuits and issues involving foreign law. Because the interpretation and application of law is potentially outcome-determinative in any lawsuit, it is important that U.S. courts both embrace foreign law issues and decide them accurately. Current rules provide courts with a litany of tools to ascertain

H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 270 (2003). English courts utilized amicus briefs for similar purposes of providing neutral assistance in resolving issues unfamiliar to the court. *Id.* In the United States, the use of amicus curiae briefs evolved from this original, detached "friend of the court" purpose to that of more direct advocacy. *Id.* at 271. Interested parties such as governmental sectors and private third parties began using amici to advocate their positions when wishing to influence the outcome of private disputes involving larger constitutional and policy issues. *Id.* at 273; see also Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 POL. RES. Q. 55, 58 (2007). The use of amici for such purposes increased in the twentieth century as organizations began utilizing amici to "judicially lobby" for outcomes that aligned with their positions. Walbolt & Lang, *supra*, at 287. Also, governmental parties have long used amicus briefs to argue their positions. *Id.*

288. 218 F.3d 121 (2d Cir. 2000).

289. *Id.* at 126 (seeking insight on the distribution and advisory fee disclosure requirements under Rule 10b-10 under the Securities Exchange Act of 1934).

290. *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993).

291. *Id.* at 431.

foreign law; however, there is room for many improvements ranging from international judicial cooperation to the enhanced use of court-appointed foreign-law experts. These improvements will promote objectivity and foster the fair, efficient, and accurate application of foreign law in domestic courts.