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

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

Professor Matthew J. Wilson<sup>1</sup>

## I. 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 the 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 2007,<sup>2</sup> or the Japanese tsunami in March 2011 that crippled manufacturers around the world after they were unable to readily obtain valuable parts manufactured in Japan.<sup>3</sup>

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

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<sup>2</sup> International Monetary Fund, *Global Financial Stability Report: Containing Systemic Risks and Restoring Financial Soundness*, Chp. 1 (April 28, 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).

<sup>3</sup> Isabel Reynolds and Hyunjoo Jin, *Global Manufacturer Wrestle With Japan Supply Gaps* (Mar. 18, 2011), available at <http://www.reuters.com/article/2011/03/18/japan-supplychain> idUSL3E7EIOAR20110318.

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 a court exercises jurisdiction over tortious conduct committed overseas. There are even domestic statutes that expressly incorporate the laws of foreign sovereigns.<sup>4</sup>

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.<sup>5</sup> If a national 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.<sup>6</sup> 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, “domestic courts are increasingly called upon to decide cases that involve cross-border issues and require the determination and application of foreign law.”<sup>7</sup> Global commerce depends upon 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 the interests of another sovereign. Also, the resolution of a foreign law claims in a national courts is generally consistent with comity and amicable commercial relations among nations. It is akin to recognizing the legitimacy and application of the foreign state’s law.

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<sup>4</sup> See e.g. Tariff Act of 1930, 19 U.S.C. 1527(a) (2011) (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 any country, dependency, province, or subdivision of government”).

<sup>5</sup> See Restatement of Law (Third), Foreign Relations of the United States, §§ 401-404, 421-423 (1987). The Restatement of Foreign Relations of the United States lists the primary bases for prescriptive jurisdiction including: (i) territoriality (conduct that takes places 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’ territory); (iv) nationality, domicile, or resident (jurisdiction over the activities, interests, status, or relations of its nationals outside its territory or those present within the territory); (v) protection (jurisdiction over certain conduct outside its territory by non-nationals that is directed against the security of the state); and (vi) universal crimes (jurisdiction over a limited class of other state interests such as those of universal concern such as piracy, slave trade, and genocide). *Id.*; see also generally Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Judicial Conflict*, 57 Am. J. Comp. L 631 (2009).

<sup>6</sup> See Carolyn B. Lamm & K. Elizabeth Tang, *Rule 44.1 and Proof of Foreign Law in Federal Court*, 30 Litigation 31, 32 (Fall 2003).

<sup>7</sup> New York State Unified Court System, *First of its Kind Memorandum of Understanding Signed Between U.S. State Court and Australian Court* (Oct. 28, 2010), available at [http://www.courts.state.ny.us/press/pr2010\\_14.shtml](http://www.courts.state.ny.us/press/pr2010_14.shtml).

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.<sup>8</sup> 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. Alternatively, said parties may choose only to apply foreign law 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.<sup>9</sup> In other cases though, international contracts may be silent on choice-of-law issues. In cases involving such silence or when international dealings involve non-contractual matters (*e.g.* torts, intellectual property, employment law, property, etc.), the parties must rely on choice-of-law rules in the forum handling the lawsuit.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> Although many courts employing modern choice-of-law rules tend to favor the selection of their own forum's law,<sup>13</sup> they continue to apply foreign law to resolve conflicts arising out of contractual relationships, tortious conduct, employment matters, intellectual property rights, treaties, domestic statutes incorporating foreign law, as well as other legal foundations.<sup>14</sup>

In the United States, courts are presumed competent to apply foreign law.<sup>15</sup> Many are hesitant to delve into territory comprised of unfamiliar legal rules and norms

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<sup>8</sup> 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.

<sup>9</sup> See Teitz, *supra* n. 8, at 100.

<sup>10</sup> See John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 Tul. Mar. L. J. 179 (Fall 1984).

<sup>11</sup> See Jacques Delisle & Elizabeth Trujillo, *Private International Law: Consumer Protection in Transnational Contexts*, 58 Am. J. Comp. L. 135, 144-147 (2010) (noting 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).

<sup>12</sup> See Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 Brooklyn L. Rev. 1095, 1098 (Summer 2010).

<sup>13</sup> 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 (Fall 2005).

<sup>14</sup> See generally Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 Const. Commentary 59, 61-63 (2009).

<sup>15</sup> See Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 Mich. J. Int'l L. 37, 38 (1997).

however.<sup>16</sup> Most judges have neither intensively studied nor practiced foreign law, so 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 less comfortable looking at the 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.<sup>17</sup> 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. Often times, 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 and 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 and 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. The legal practitioners or professors serving as foreign law experts are paid for their testimony, so 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.

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 society, 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.

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<sup>16</sup> See *id.* at 38.

<sup>17</sup> New York State Unified Court System, *supra* note 7.

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, Part II of this Article examines 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 of this Article 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. Innovative and enhanced techniques can not only help courts streamline the process of determining foreign law, but can also help increase the accuracy of doing so.

## II. 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 typically handled by federal courts, however, based on the diversity of the parties or desire of parties engaged in foreign commerce to resolve their disputes in a federal forum.<sup>18</sup> Claims based on foreign law may also find their way into federal court pursuant to supplemental jurisdiction.<sup>19</sup> Federal court diversity jurisdiction promotes global commerce by theoretically providing an impartial forum comparatively isolated from potential local biases.<sup>20</sup> As such, lawsuits filed in state courts that involve foreign parties or foreign law are often removed to federal courts.<sup>21</sup> Because of the tendency of foreign law issues to gravitate towards 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 tool and techniques to more efficiently and accurately determine foreign law made herein apply equally to U.S. state courts.

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<sup>18</sup> See Andrew W. Davis, *Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation*, 89 Minn. L. Rev. 1464 (2005).

<sup>19</sup> 28 U.S.C. §1367. A court can properly exercise supplemental jurisdiction a foreign law claims so long as said claims derive from a “common nucleus of operative fact” with a claim over which the federal court has original jurisdiction so that said claims form part of the same case or controversy. *Id.*; *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

<sup>20</sup> See Victor E. Flango, *Litigant Choice Between Federal and State Courts*, 46 S.C. L. Rev. 961, 966 (1995); see also generally Kimberly A. Moore, *Xenophobia in American Courts*, 97 N.W. U.L. Rev. 1497, 1503 (2003).

<sup>21</sup> See Jeffrey M. Jensen, *Development in the Law: Transnational Litigation: VI Personal Jurisdiction in Federal Courts Over International E-Commerce Cases*, 46 Loy. L.A. L. Rev. 1508, 1510 (2007).

## A. 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.<sup>22</sup> Federal courts are quite capable of applying foreign law,<sup>23</sup> and have routinely applied the law of other sovereigns. In fact, U.S. courts have evaluated and applied foreign law for over a century.<sup>24</sup> The application of foreign law has 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.<sup>25</sup> U.S. federal courts typically recognize and enforce such clauses based on existing law and the mutual intent of the parties.<sup>26</sup> 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,<sup>27</sup> tort law,<sup>28</sup> employment law,<sup>29</sup> conversion law,<sup>30</sup>

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<sup>22</sup> See *Day and Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (looking to Texas choice-of-law rules to determine whether Cambodian law formed the basis of the substantive wrongful death claim).

<sup>23</sup> See *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 920 (9<sup>th</sup> Cir. 2009); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345 (8<sup>th</sup> Cir. 1983); see also generally *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7<sup>th</sup> Cir. 2009).

<sup>24</sup> See generally *Nashua Sav. Bank v. Anglo-American Land, Mortgage & Agency Co.*, 189 U.S. 221, 228-229 (1903) (discussing the methods of proving foreign law in U.S. courts, including through experts); *Ennis v. Smith*, 55 U.S. 400, 426 (1853) (accepting French Civil Code into evidence); *APL Co. PTE. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 957 (9<sup>th</sup> Cir. 2009) (ordering the application of Singapore law); *Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co.*, 296 F.3d 58, 64 (1<sup>st</sup> 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. Import & Export Corp.*, 161 F.3d 314, 319 (5<sup>th</sup> 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, 279 (2<sup>d</sup> 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 Services (BASEL) v. Security Forwarders, Inc.*, 752 F.2d 483, 485-87 (9<sup>th</sup> Cir. 1985) (applying U.K. lien law); *CYBERSitter LLC v. People's Republic of China*, 2010 WL 4909958, at \*8 (C.D. Cal. 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).

<sup>25</sup> See Hague Conference on Private International Law, *Feasibility Study on Choice of Law in International Contracts*, Prel. Doc. No. 22 A (March 2007), available at [http://www.hcch.net/upload/wop/genaff\\_pd22a2007e.pdf](http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf); see also Yeazell, *supra* n. 14, at 61-62.

<sup>26</sup> See Yeazell, *supra* n. 14, at 61-62.

<sup>27</sup> *Lesley v. Spike TV*, 241 Fed. Appx. 357, 358 (9<sup>th</sup> Cir. 2007) (applying Japanese contract law); *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*, 475 F.3d 783, 790-98 (6<sup>th</sup> 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).

<sup>28</sup> *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1234 (3<sup>d</sup> Cir. 1995) (Indian tort law).

<sup>29</sup> *Curtis v. Harris Winston, Inc.*, 653 F.Supp. 1504, 1509 (applying claim against a U.S. company for violation of Venezuelan statutory employment law)

<sup>30</sup> *Trans Container Services (BASEL) A.G.*, 752 F.2d 483, 486 (9<sup>th</sup> Cir. 1985) (English conversion law).

trademark law,<sup>31</sup> securities law,<sup>32</sup> family law,<sup>33</sup> bankruptcy law,<sup>34</sup> intestacy law,<sup>35</sup> copyright law,<sup>36</sup> admiralty law,<sup>37</sup> and various other areas.<sup>38</sup> To apply foreign law, it is not necessary for courts to master foreign law. In fact, in this age of global commerce, it is not incredibly difficult for federal courts to apply foreign law. Conversely, 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.<sup>39</sup> 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.”<sup>40</sup> The Internet also provides easier access to sources of law that were not previously readily-available to the courts or general public.<sup>41</sup> Many governmental and intergovernmental entities now have their own open-access websites complete with English language translations of statutes, regulations, and even court decisions.<sup>42</sup> There has also been recognition and push for greater and free access to electronic materials on foreign law.<sup>43</sup>

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<sup>31</sup> *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (Japanese trademark law).

<sup>32</sup> *Batchelder v. Nobuhiko Kawamoto*, 147 F.3d 915, 920-22 (9th Cir. 1998) (Japanese securities law in relation to American Depository Receipt holders’ rights).

<sup>33</sup> *Kaho v. Ilchert*, 765 F.2d 877, 883 (9th Cir. 1985) (Tongan family law).

<sup>34</sup> *In re Condor Ins., Ltd.*, 601 F.3d 319, 328-29 (5th Cir. 2010) (Nevis bankruptcy law); *Otte v. Tokyo Shibaura Elec. Co.*, 1977 WL 1440, at \*2, 4 (S.D.N.Y. 1977) (adjudicating several Japanese law claims in a bankruptcy proceeding).

<sup>35</sup> *Akazawa v. Link New Tech. Int’l, Inc.*, 520 F.3d 1354, 1358 (Fed. Cir. 2008) (Japanese intestacy law).

<sup>36</sup> *Armstrong v. Virgin Records, Ltd.*, 91 F. Supp. 2d 628, 637 (S.D.N.Y. 2000) (foreign copyright law); *Toho Co., Ltd. v. Priority Records, LLC*, 2002 WL 33840993, at \*5 (C.D. Cal. 2002) (applying Japanese copyright law).

<sup>37</sup> *See generally Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580 (2d Cir. 2005) (applying Korean law in admiralty suit).

<sup>38</sup> *Republic of Ecuador v. Chevrontexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007); *see also Raising and Determining Issue of Foreign Law Under Rule 44.1 of Federal Rules of Civil Procedure*, 62 A.L.R. Fed. 52 (2009).

<sup>39</sup> *Bodum U.S.A., Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628 (7<sup>th</sup> 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 (Spring 2001); *see also Gross v. British Broadcasting System*, 386 F.3d 224, 234 (2d Cir. 2004) (asserting that the law of the United Kingdom is amenable to application in the United States).

<sup>40</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 628.

<sup>41</sup> *See generally* Hague Conference on Private International Law, *Accessing the Content of Foreign Law: Compilation of Responses to the Questionnaire of October 2008 for the Meeting of Experts on Global Co-operation on the Provision of Online Legal Information on National Laws*, Prel. Doc. No 11 C of March 2009, available at <http://www.hcch.net/upload/wop/genaff2009pd11c.pdf>.

<sup>42</sup> Teitz, *supra* n. 8, at 112.

<sup>43</sup> Hague Conference on Private International Law, *Accessing the Content of Foreign Law and the Need for the Development of a Global Instrument in this Area – a Possible Way Ahead*, Prel. Doc. No. 11A of March 2009, available at [http://www.hcch.net/upload/wop/genaff\\_pd11a2009e.pdf](http://www.hcch.net/upload/wop/genaff_pd11a2009e.pdf).

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.<sup>44</sup> Many of these resources are available both in print and online through governmental, private business, legal, and academic websites.<sup>45</sup> Judgments of Supreme Court of Japan are even posted online in English.<sup>46</sup> 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, including in commercial disputes, criminal cases, and immigration proceedings.<sup>47</sup> 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.

## **B. 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.<sup>48</sup> 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.<sup>49</sup> Opposition to applying foreign law is seen in the form of liberal *forum non conveniens* dismissals, using domestic law if the litigants don't raise or sufficiently brief foreign law issues, or leaning heavily towards domestic law when conducting a choice-of-law analysis.<sup>50</sup>

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<sup>44</sup> See, e.g., *Sunstar*, 586 F.3d at 495 (seeking guidance from Japanese Trademark Law textbook authored by American law professor).

<sup>45</sup> Although too long to list, several illustrative examples of English-language resources on Japanese law includes: Ministry of Justice of Japan, Japanese Law Translation website, available at <http://www.japaneselawtranslation.go.jp/>; Financial Services Agency of Japan, <http://www.fsa.go.jp/en/policy/fiel/index.html>; Harvard Law School Collection of Internet Resources, [http://www.law.harvard.edu/library/research/guides/int\\_foreign/web-resources/foreign-law\\_i\\_j.html#Japan](http://www.law.harvard.edu/library/research/guides/int_foreign/web-resources/foreign-law_i_j.html#Japan); University of Washington School of Law – Japanese Legal Research, <http://lib.law.washington.edu/eald/jlr/jres.html>; Washburn U. School of Law - Japanese Law Resource Page, <http://www.washlaw.edu/forint/asia/japan.html>; DOING BUSINESS IN JAPAN (Matthew Bender 2010); Hiroshi Oda, *JAPANESE LAW* (Oxford University Press 2009);

<sup>46</sup> Supreme Court of Japan website, available at <http://www.courts.go.jp/english/>.

<sup>47</sup> See, e.g., *Sunstar*, 586 F.3d at 498-99 (parties translated the relevant portions of Japanese trademark statute as there is no official English translation of Japanese laws); see also *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334 n.2 (9th Cir. 1985) (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 Mfg. v. CFMT, Inc.*, No. 3:00-cv-01879-CRB, related to the meaning of certain Japanese words and phrases at the heart of a patent infringement dispute.

<sup>48</sup> Judge Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581 (1995).

<sup>49</sup> Heiser, *supra* n. 13, at 1189-90.

<sup>50</sup> See also Miner, *supra* n. 48 at 583; Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 Ariz. J. Int'l & Comp. Law 223, 267-270 (1995); see also *Lien Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1001 (9<sup>th</sup> Cir. 2006).

There are a plethora of reasons underlying the tendency to sidestep foreign law, apart from justifiable refusals based on public policy grounds. Unlike the process of interpreting and applying of domestic law, U.S. judges dealing with foreign law generally cannot draw on a lifetime of experience.<sup>51</sup> 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.<sup>52</sup> In general, American legal education fails to systemically equip future judges and attorneys to conduct research on foreign law.<sup>53</sup> 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,<sup>54</sup> 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 Lexis-Nexis and Westlaw, there is no central legal database that provides comprehensive materials on the law of all countries. Although Westlaw and Lexis-Nexis maintain separate legal databases for some foreign countries, these require separate contracts and additional charges.<sup>55</sup> Even 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.<sup>56</sup> 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.<sup>57</sup> Accordingly, courts are increasingly receptive to motions to dismiss based on *forum non conveniens* grounds when dealing with international cases that involve foreign law.<sup>58</sup>

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<sup>51</sup> Cheng, *supra* n. 12, at 1099.

<sup>52</sup> William Ewald, *Comparative Law and Unification of Laws: Complexity of Sources of Transnational Law: United States Report*, 58 Am. J. Comp. L. 59, 65 (2010).

<sup>53</sup> *Id.*

<sup>54</sup> 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 Lawyers Must Learn About Foreign Law*, 45 Fed. Law, No. 8, 20 (September 1998).

<sup>55</sup> Lexis-Nexis 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.

<sup>56</sup> See generally *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995).

<sup>57</sup> Miner, *supra* n. 48 at 582.

<sup>58</sup> See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B. Coll. 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 generally 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

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,”<sup>59</sup> some courts continue to give undue weight to this factor.<sup>60</sup> In fact, some have argued that the *forum non conveniens* doctrine, as formulated by the U.S. Supreme Court, actually encourages dismissal.<sup>61</sup> 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 Company v. Reyno*<sup>62</sup> nearly thirty years ago. Accordingly, dated concerns about foreign law now lend false support to *forum non conveniens* dismissal based on false assumptions.<sup>63</sup>

Fourth, some courts have been slow to embrace anything foreign. Some have overtly demonstrated their aversion to foreign related matters.<sup>64</sup> Others have quickly dismissed or transferred cases in a more reserved fashion. 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.<sup>65</sup>

Finally, the pressure for increased training of the judiciary or reform of the system to address foreign law claims is relatively low due the comparatively large number of domestic cases handled by federal and state courts.<sup>66</sup> For example, U.S. state courts handle about forty million cases annually and federal courts handle about 300,000 cases.<sup>67</sup> 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,

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*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.

<sup>59</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 n.29 (1981).

<sup>60</sup> See Derr, *supra* n. 58 at 829.

<sup>61</sup> See Heiser, *supra* n. 13.

<sup>62</sup> 454 U.S. 235 (1981).

<sup>63</sup> Derr, *supra* n. 58 at 829.

<sup>64</sup> *Republic of Bolivia v. Philip Morris Cos., Inc.*, 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. 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!”

<sup>65</sup> See Ewald, *supra* n. 52 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).

<sup>66</sup> *Id.* at 66.

<sup>67</sup> *Id.*

which constantly face foreign legal issues due to their handling of cases involving multinational corporations and foreign matters.

### **C. 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 interpreted incorrectly. In such cases, the stability and certainty required by those engaged in global commerce are potentially undermined. Commercial parties often structure their transactions around a specific substantive law and purposefully avoid laws inappropriate for their transaction.<sup>68</sup> Additionally, the application of foreign law can discourage forum shopping, promote regulatory competition, and preserve the comparative regulatory advantage of foreign jurisdictions.<sup>69</sup> 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.<sup>70</sup> 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.

#### ***1. 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 court with foreign law materials or a court will instruct the parties to present evidence and supporting materials regarding the relevant foreign law at some point before the trial.<sup>71</sup> Naturally, a court may also conduct its own research about such law.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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<sup>68</sup> Giesela Ruhl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 Berkeley J. Int'l L. 801, 808 (2006).

<sup>69</sup> *Id.* at 808-815.

<sup>70</sup> Robertson, *supra* n. 58 at 1130-31.

<sup>71</sup> *See generally Universe Sales Co.*, 182 F.3d at 1038 (instructing the jury on Japanese law).

<sup>72</sup> *See id.*

<sup>73</sup> *See* Sofie Geeroms, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* 123, Oxford University Press (2004).

<sup>74</sup> *See Sunstar*, 586 F.3d. at 494.

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:

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.

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.<sup>75</sup> Rule 44.1 is based upon the belief that determining questions of foreign law is not beyond the capacity of the federal courts.<sup>76</sup> 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.<sup>77</sup> These rules likewise recognize the competency of the state courts to apply foreign law.

Rule 44.1 was implemented in 1966.<sup>78</sup> In effect, this shifted the determination of foreign law from a question of fact to a question of law.<sup>79</sup> 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.<sup>80</sup> This was done pursuant to the rules of evidence via the time-consuming process of soliciting expert witness testimony in open court.<sup>81</sup> Also, because foreign law was considered as a question of fact, it could only be set aside by an appellate court if shown to be clearly erroneous.<sup>82</sup> This cumbersome system was arduous for the parties,<sup>83</sup> and often resulted in imprecise rulings,<sup>84</sup> that were essentially immunized from independent review by the

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<sup>75</sup> 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 (Spring 2010).

<sup>76</sup> *See* MOORE’S FEDERAL PRACTICE §44.1.02 (2010).

<sup>77</sup> Ewald, *supra* n. 52 at 66-67; Geeroms, *supra* n. 73 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); *see also generally* Akande v. Transamerica Airlines, Inc., 2007 Del. Ch. LEXIS 68 (Del. Ch. 2007).

<sup>78</sup> *See* 9 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2441; Lamm & Tang, *supra* n. 6, at 31; Arthur Miller, “Federal Rule 44.1 and the ‘Fact’ Approach to Determining Foreign Law: Death Knell for Die-Hard Doctrine,” 65 Mich. L. Rev. 613 (Feb. 1967).

<sup>79</sup> *See id.*

<sup>80</sup> *See* Ewald, *supra* n. 52 at 66; *see also* Cheng, *supra* n. 12, at 1100-01.

<sup>81</sup> *See id.*

<sup>82</sup> Ewald, *supra* n. 52 at 66.

<sup>83</sup> *See* Brown, *supra* n. 10, at 181.

<sup>84</sup> *See generally* Lamm & Tang, *supra* n. 6, at 31.

appellate courts.<sup>85</sup> With the adoption of Rule 44.1, the determination of foreign law is now a question of law, at least in principle.<sup>86</sup> This means that questions of foreign law are subject to independent judicial investigation, and open for de novo appellate review.<sup>87</sup>

## 2. Court 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.<sup>88</sup> 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.<sup>89</sup> In principle, a judge can consider the testimony of expert witnesses proffered by the litigants, or reports by a court-appointed expert or master, or even research independently obtained from conventional, online, or unconventional resources.<sup>90</sup> In fact, a judge could even consult with foreign scholars or others well-versed in the applicable law on an *ex parte* basis.<sup>91</sup>

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 expert opinion.<sup>92</sup> Conversely, Rule 44.1 contemplates that courts “may” rather than “must” consider expert testimony.<sup>93</sup> Moreover, it is within the court’s discretion to “reject even the uncontradicted conclusions of an expert witness and reach [its] own decisions on the basis of independent examination of foreign legal authorities.”<sup>94</sup>

It is the litigants’ duty to provide the court with materials that help identify issues, ascertain the foreign law, and apply such law.<sup>95</sup> These materials cannot attempt to guide a court on making factual determinations.<sup>96</sup> 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,<sup>97</sup> and have even taken informal materials into account such as a printout from a foreign law firm’s

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<sup>85</sup> The Committee on Int’l Commercial Disputes, *Proof of Foreign Law After Four Decades With Rule 44.1 FRCP and CPLR 4511*, 61 The Record 49 (2006).

<sup>86</sup> 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* n. 8, 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* n. 12, at 1101.

<sup>87</sup> See Cheng, *supra* n. 12, at 1101.

<sup>88</sup> See *Trans Chem. Ltd.*, 978 F. Supp. at 275.

<sup>89</sup> Fed. R. Civ. P. 44.1; see also *Universe Sales Co.*, 182 F.3d at 1038; 9 Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2444 (2008); The Committee on Int’l Commercial Disputes, *supra* n. 85.

<sup>90</sup> The Committee on Int’l Commercial Disputes, *supra* n. 85 at 50.

<sup>91</sup> *Id.*

<sup>92</sup> See *Institut Pasteur v. Simon*, 383 F.Supp.2d 792, 795 n.2 (E.D.Pa. 2005).

<sup>93</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 628.

<sup>94</sup> See *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9<sup>th</sup> Cir. 2002); *HFGL Ltd. v. Alex Lyon & Sons Sales Managers & Auctioneers, Inc.*, 264 F.R.D 146, 148 (D.N.J. 2009); see also Peter D. Trooboff, *Proving Foreign Law*, National Law Journal (Sept. 18, 2006).

<sup>95</sup> See *Miner*, *supra* n. 48 at 585.

<sup>96</sup> See *Trans Chem. Ltd.*, 978 F. Supp. at 275.

<sup>97</sup> *Forzley v. AVCO Corp. Electronics Division*, 826 F.2d 974, 979 (11<sup>th</sup> Cir. 1987).

webpage<sup>98</sup> and a conversation between a law clerk and the Hong Kong Trade Office in New York City.<sup>99</sup> Naturally, however, litigants are best served by presenting concrete proof of foreign law in the most credible form.<sup>100</sup> 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.<sup>101</sup> This flexibility should dissipate any court 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."<sup>102</sup> Not only may a court consider "any materials the parties wish to present," but it may give materials submitted by the parties any probative value that it thinks they deserve.<sup>103</sup> This methodology provides the court with maximum flexibility.<sup>104</sup> 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.<sup>105</sup>

### ***3. 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.<sup>106</sup> This sworn statement is generally accompanied by extracts from relevant foreign codes and statutes.<sup>107</sup> 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 could possibly miss the nuances in the law, fail to appreciate the interaction between law and foreign governmental organizations, or

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<sup>98</sup> *In re Tommy Hilfiger Sec. Litig.*, 2007 U.S. Dist. LEXIS 55088 \*15 (S.D.N.Y. 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. *See* Lamm & Tang, *supra* n. 6, at 35.

<sup>99</sup> *U.S. v. Hing Shair Chan*, 680 F.Supp. 521, 524 (1988).

<sup>100</sup> *See* Lamm & Tang, *supra* n. 6, at 33 (noting that governmental translations of statutes will be the best proof).

<sup>101</sup> *See* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2444 (2008).

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*; *see also HFGL Ltd.*, 264 F.R.D at 148.

<sup>104</sup> *See* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2444 (2008).

<sup>105</sup> *See id.*

<sup>106</sup> *See* Teitz, *supra* n. 8, at 106; *see also Universe Sales Co.*, 182 F.3d at 1037-39 (relying on Japanese attorney to determine claims based on Japanese law); *Batchelder*, 147 F.3d at 921-22 (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). 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 the use of an expert report, pursuant to Federal Rule of Evidence 702, to aid the jury in determining the facts." *HFGL Ltd.*, 264 F.R.D at 148.

<sup>107</sup> *See id.*

erroneously assume that foreign law mirrors U.S. law when it does not.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> Instead of relying on case law or written statutes, Saudi Arabian judges must navigate the Hanbali's school of authoritative scholarly works to identify the spectrum of possible resolutions.<sup>111</sup> 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.<sup>112</sup> In fact, the presentation of foreign law through expert witnesses is typically efficient and sufficient for a court.<sup>113</sup> The use of an expert to provide needed precision on foreign legal issues eliminates the need of the court to start afresh and wade through secondary sources.<sup>114</sup>

In general, Rule 44.1 does not require any special qualifications for foreign law experts.<sup>115</sup> Because the district judge will determine foreign law, the judge essentially serves as the gatekeeper.<sup>116</sup> As such, the Court has significant discretion in sources of consideration.<sup>117</sup> 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."<sup>118</sup> 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 pay deference to materials submitted by foreign practitioners or law professors versed in the applicable foreign law.<sup>119</sup> In

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<sup>108</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 638-39 (Judge Wood concurring).

<sup>109</sup> *Id.* at 639.

<sup>110</sup> *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Corp.*, 866 A.2d 1, 31 (Del. 2005) (considering appeal of a jury verdict for \$416.8 million based on a tort claim under Saudi law known as usurpation or "ghasb").

<sup>111</sup> *Id.*

<sup>112</sup> See generally *Universe Sales Co.*, 182 F.3d at 1037-39; *Batchelder*, 147 F.3d at 921-22; *Transportes Aeros Pegaso v. Bell Helicopter, Inc.*, 623 F.Supp.2d 518, 534 (D.Del. 2009).

<sup>113</sup> Teitz, *supra* n. 8, at 107.

<sup>114</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 639 (Judge Wood concurring).

<sup>115</sup> See Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2444 (2008).

<sup>116</sup> See *id.*

<sup>117</sup> See generally MOORE'S FEDERAL PRACTICE § 44.1.04[2][b] (2010) (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); see also Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2444 (2008).

<sup>118</sup> *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998).

<sup>119</sup> *Northrop Grumman Ship Sys., Inc. v. Min. of Defense of Rep. of Venezuela*, 2010 WL 2682946, \*2-4 (S.D.Miss. 2010) (accepting testimony of a law 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 Electric Industrial Co.*, 505 F Supp 1125, 1173 n.50

proffering expert testimony to a court, 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.”<sup>120</sup> 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 make the process of determining foreign law mirror the method of ascertaining domestic law to the extent possible.<sup>121</sup> 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.<sup>122</sup> 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.<sup>123</sup> In contrast, judges typically do not leave the determination of domestic law to competing experts. 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.

#### ***4. Court May Engage in Independent Research About Foreign Law***

In addition to the litigant’s submissions, a court may also conduct its own research and independently investigate any foreign law issue raised by the parties.<sup>124</sup> If necessary, a court may use articles, treatises, scholarly commentary, and judicial opinions for guidance and affirmation about the correct foreign law interpretation.<sup>125</sup> Many systems have well-developed legal systems with ample primary and secondary resources available in English, both in print and online, from which courts can conduct legal

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(E.D.Pa. 1980) (accepting testimony of law professor specializing in Japanese law who was fluent in Japanese and worked in Japanese law offices for several years).

<sup>120</sup> 21 AM. JUR. PROOF OF FACTS 2d 1 (2010).

<sup>121</sup> See 9 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 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 (Fall 2004).

<sup>122</sup> FED.R.CIV.P. 44.1

<sup>123</sup> See *Curley*, 153 F.3d at 5 (ordering supplemental briefing of Mexican law because district court erroneously applied New York law to claim).

<sup>124</sup> See Fed. R. Civ. P. 44.1; *Universe Sales Co.*, 182 F.3d at 1038; *Trans Chem. Ltd.*, 161 F.3d at 319 (court independently analyzed the Chinese Constitution and Codes in addition to affidavits from three experts).

<sup>125</sup> See *Bodum U.S.A., Inc.*, 621 F.3d at 628; *Sunstar*, 586 F.3d at 495 (looking to treatises, law review articles, and judicial opinions to interpret Japanese trademark law).

research and investigation.<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> Instead, judges heavily lean on expert testimony,<sup>129</sup> or lean towards dismissing a foreign law claim based on *forum non conveniens* or avoiding foreign law altogether.<sup>130</sup> Similarly, state court judges tend to rely heavily on party presentation and generally avoid conducting independent research on foreign law.<sup>131</sup>

### III. 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 in ascertaining and applying foreign law. In fact, it has been postulated that many judges fear the unknown associated with foreign law.<sup>132</sup> 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.<sup>133</sup> Expert affidavits together with accompanying codes, statutes, and regulations are typically sufficient.<sup>134</sup>

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 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.

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<sup>126</sup> See, e.g., *Sunstar*, 586 F.3d at 495 (seeking guidance from Japanese Trademark Law textbook authored by American law professor).

<sup>127</sup> See *id.* at 498-99 (parties translated the relevant portions of Japanese trademark statute as there is no official English translation of Japanese laws); *Tchacos Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334 n.2 (9th Cir. 1985) (court accepted translation of Iranian Temporary Director Act provided by defendant's expert).

<sup>128</sup> See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 Duke L.J. 1263, 1304 (2007); see also Teitz, *supra* n. 8, at 98.

<sup>129</sup> See Cheng, *supra* n. 12, at 1101.

<sup>130</sup> Cheng, *supra* n. 128 at 1304.

<sup>131</sup> See Cheng, *supra* n. 12, at 1101.

<sup>132</sup> See Miner, *supra* n. 48 at 581.

<sup>133</sup> See *id.* at 586-87 (discussing various cases in which foreign law was successfully applied).

<sup>134</sup> Miner, *supra* n. 48 at 586-87.

There is no universally accepted solution to the dilemma of unclear or indeterminable foreign law.<sup>135</sup> In some cases, a court might require supplemental briefing by the parties or independently appoint an expert on foreign law.<sup>136</sup> Alternatively, the judge might give up and simply decide to either apply domestic law or dismiss the case altogether.<sup>137</sup> These two options are undesirable as they potentially ignore the express intent underlying the litigant's commercial relationship, contravene applicable choice-of-law rules, or even prejudices the litigant's rights. For example, if a court automatically defaults to domestic law and thereby applies incorrect legal principles, this choice could likely determine 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.<sup>138</sup> 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 section looks at shortcomings of the current system and serves as a springboard for discussing possible improvements.

#### **A. POTENTIAL PROBLEMS WITH OVER-RELIANCE ON PAID EXPERTS**

Experts play an invaluable role in helping courts understand, analyze, and apply foreign law. Trying to establish foreign law through expert testimony can be an expensive proposition however.<sup>139</sup> An over-reliance on private experts also can pose a myriad of dangers as well. Dependence on foreign law experts pivots on their reliability.<sup>140</sup> 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.<sup>141</sup> Charges of lack of objectivity or bias can easily arise.<sup>142</sup> 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

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<sup>135</sup> Ewald, *supra* n. 52 at 65-67.

<sup>136</sup> See generally *Servo Kinetics, Inc.*, 475 F.3d at 790; *Curley*, 153 F.3d at 5; *Itar-Tass Russian News Agency*, 153 F.3d at 82.

<sup>137</sup> Ewald, *supra* n. 52 at 67; Teitz, *supra* n. 8, at 98. For example, in *Lou v. Otis Elevator*, the state court decided to instruct the jury pursuant to Massachusetts law because it was unable to confidently determine the applicable Chinese law. 933 N.E.2d 140 (Mass.App.Ct. 2010).

<sup>138</sup> Teitz, *supra* n. 8, at 98.

<sup>139</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 629.

<sup>140</sup> See The Committee on Int'l Commercial Disputes, *supra* n. 85 at 49.

<sup>141</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 629.

<sup>142</sup> See generally *Kinjo v. Champion Shipping AS*, 2010 U.S. Dist. LEXIS 78558 \*11 (accusing expert on foreign law as being biased and having a personal interest in the proceedings).

side, conceal doubts, overstate the strong, and downplay the weak aspects of the case.<sup>143</sup> 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.” In *Sunstar, Inc. v. Alberto-Culver Co.*,<sup>144</sup> Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit writing for the court noted that articles, treatises, and judicial opinions on foreign law are “superior sources”<sup>145</sup> 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.”<sup>146</sup> Judge Posner maintains that relying on “paid witnesses to spoon feed judges” can only be justified in cases where foreign law comes from a country with an obscure or poorly developed legal system.<sup>147</sup> In such cases, a judge could be hindered from securing ample secondary materials from which she can determine the law.<sup>148</sup>

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.<sup>149</sup> 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.<sup>150</sup> The prospect that the court can appoint its own expert witness also functions as a deterrent against subjective testimony or games.<sup>151</sup> Moreover, courts have the authority to sanction parties or their counsel for acting in bad faith or breaching applicable disciplinary codes.<sup>152</sup> If the testifying expert is a U.S.-barred attorney, 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 country.<sup>153</sup> Finally, private considerations such as

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<sup>143</sup> Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 *Duke J. Comp. & Int’l L.* 61, 64 (2003).

<sup>144</sup> 586 F.3d 487 (7<sup>th</sup> Cir. 2009).

<sup>145</sup> *Sunstar, Inc.*, 586 F.3d at 495.

<sup>146</sup> *Id.* at 495.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Miner, *supra* n. 48 at 588 (comparing the use of foreign law experts to judicial acceptance of experts testifying on scientific and other related matters).

<sup>150</sup> The Committee on Int’l Commercial Disputes, *supra* n. 85 at 53 (quoting 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.

<sup>151</sup> See Federal Rule of Evidence 706, Notes of Advisory Committee on Rules (2011) (stating that “[T]he 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”).

<sup>152</sup> Teitz, *supra* n. 8, at 111.

<sup>153</sup> *Id.*

the maintenance of credibility or an unblemished reputation compel experts to provide accurate testimony and credible supporting materials to the court<sup>154</sup>

If competing experts fail to provide a clear or uniform view of foreign law through their submissions, however, a court may still 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 be faced with 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 disputes 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.”<sup>155</sup> 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 slow to embrace the application of foreign law.

## **B. 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,<sup>156</sup> 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

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<sup>154</sup> *Id.*

<sup>155</sup> New York State Unified Court System, *supra* note 7.

<sup>156</sup> *Sunstar, Inc.*, 586 F.3d at 495.

law.<sup>157</sup> 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 given plain meaning to statutory provision and then equating the statutory with certain domestic terms and concepts.<sup>158</sup> Although this uncomplicated path may be accurate, particularly if the foreign law is modeled after U.S. law,<sup>159</sup> 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 often can 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 has not been specified, either party may terminate the relationship at any time and the employment relationship will expire 2-weeks from the notice.<sup>160</sup> Quite similar to U.S. law, there is no express limitation on an employer's ability to terminate an employee absent an agreement otherwise.<sup>161</sup> Conversely, Japan's Labor Standards Law stipulates that an employer may terminate an employee, but only upon 30-days advance notice or 30-days worth of wages in lieu of such notice.<sup>162</sup> 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,<sup>163</sup> its

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<sup>157</sup> The Committee on Int'l Commercial Disputes, *supra* n. 85 at 51 (quoting Judge Milton Pollack of the Southern District of New York).

<sup>158</sup> Keller, *supra* n. 121 at 171; Adler, *supra* n. 15, at 39.

<sup>159</sup> 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 ("Securities Act") and the U.S. Securities Exchange Act of 1934 ("Exchange Act"). 3-8 DOING BUSINESS IN JAPAN § 8.01 (Matthew Bender 2010)

<sup>160</sup> Civil Code of Japan [Minpo], Article 627(1).

<sup>161</sup> See Ryuichi Yamakawa, *Labor Reform Law in Japan: A Response to Recent Socio-Economic Changes*, 49 Am. J. Comp. L. 627, 645 (Fall 2001).

<sup>162</sup> Labor Standards Law of Japan, Article 20.

<sup>163</sup> 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

courts have severely curtailed the right of employers to terminate employees at will through the judicial doctrine of abusive dismissal.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup>

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.<sup>167</sup> The foreign legal systems of commercially 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. 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.

#### **IV. 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.<sup>168</sup> 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, however, the federal and state judiciaries should take a serious look at 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.

##### **A. ASSISTANCE FROM THE COURTS OF OTHER COUNTRIES**

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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.

<sup>164</sup> Yamakawa, *supra* n. 161 at 627; Hiroya Nakakubo, *Similarities and Differences Between Labor Contracts and Civil and Commercial Contracts: Japan Report*, available at <http://www.dirittodellavoro.it/public/current/miscellanea/atti/israele/0049-j~1.pdf>. Of note,

<sup>165</sup> Yamakawa, *supra* n. 161 at 645.

<sup>166</sup> *Id.*

<sup>167</sup> See The Committee on Int'l Commercial Disputes, *supra* n. 85 at 49.

<sup>168</sup> Teitz, *supra* n. 8, at 98.

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."<sup>169</sup> 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 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.<sup>170</sup> Although relatively foreign to the United States, the idea of creating a formal system of international mutual assistance to facilitate legal guidance through multilateral treaties<sup>171</sup> or bilateral agreements is not completely new, at least in Europe.<sup>172</sup> 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.

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<sup>169</sup> *Bodum U.S.A., Inc.*, 621 F.3d at 630.

<sup>170</sup> See Cheng, *supra* n. 12, at 1108.

<sup>171</sup> 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* n. 73 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. Law Lib. 145 (1980).

<sup>172</sup> Geeroms, *supra* n. 73 at 153-160, Oxford University Press (2004) (discussing bilateral agreements between countries aimed at facilitating judicial assistance the exchange of information regarding foreign law).

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 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.

## 1. 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 fear 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.<sup>173</sup> Uncertainties regarding the applicable state law may arise in such cases. After the U.S. Supreme Court decided *Erie Railroad Co. v. Tompkins*,<sup>174</sup> federal courts did their best to “predict” how the respective state courts would decide a novel or unclear question of state law.<sup>175</sup> Predictions carry the inherent risk that the court will incorrectly resolve an important matter of law however.<sup>176</sup> 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 from common resources including reporters, digests, and

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<sup>173</sup> John C. Reitz, *American Law in a time of Global Interdependence: U.S. National Reports to the XVITH International Congress of Comparative Law: Section IV: Standing to Raise Constitutional Issues*, 50 Am. J. Comp. L. 437, 440 (2002).

<sup>174</sup> 304 U.S. 64 (1938).

<sup>175</sup> John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 764 (Feb. 2008).

<sup>176</sup> *Id.*

electronic 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.<sup>177</sup> In the 1970s, state certification laws started spreading across the U.S.<sup>178</sup> At present, nearly every state affords discretion to their highest court to assist federal courts that face undecided questions of state law by accepting certified questions.<sup>179</sup> Certification procedures vary depending on the jurisdiction.<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup>

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 exist.<sup>183</sup> 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.<sup>184</sup> Once the state’s highest court provides guidance, the federal courts are bound to follow such guidance.<sup>185</sup> 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 result or rely on an assumption contrary to how a state’s highest court would determine the matter in question.<sup>186</sup> Additionally, as explained by the U.S. Supreme Court, the certification procedure “allows a federal court

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<sup>177</sup> Keller, *supra* n. 121 at 178.

<sup>178</sup> See Preis, *supra* n. 175 at 764.

<sup>179</sup> *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).

<sup>180</sup> Keller, *supra* n. 121 at 178.

<sup>181</sup> See Nash, *supra* n. 179 at 1694.

<sup>182</sup> See *id.*, 88 Cornell L. Rev. at 1691-1694 (noting that the court retains discretion whether to invoke certification).

<sup>183</sup> Preis, *supra* n. 175 at 765. For example, under Article VI, §6(9) of the Constitution of New York, the state high court is permitted to accept certified questions only from the Second U.S. Circuit Court of Appeals and the highest courts in other American states.

<sup>184</sup> See generally *Briefing.com v. Jones*, 126 P.3d 928, 929 (Wyo. 2006) (describing requirements for federal court certifying question about State of Wyoming’s recognition of trade secrets law).

<sup>185</sup> Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 Cornell L. Rev. 1672, 1694 (2003).

<sup>186</sup> Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of Insular Cases*, 77 U. Chi. L. Rev. 781, 842 (Spring 2010).

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."<sup>187</sup> 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.

## **2. THE TIMING IS RIGHT TO EXPAND CERTIFICATION TO FOREIGN LAW ISSUES FACING U.S. COURTS**

Recent cross-border interaction among the 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.<sup>188</sup> However, petitioning a foreign court either formally or informally for assistance on a particularly difficult or ambiguous question of foreign law makes fundamental 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.<sup>189</sup> Recently, there has been movement towards 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.

### ***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.<sup>190</sup> 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 towards greater cross-border cooperation in the form of a procedure similar to certification.<sup>191</sup> Not only should the New York state judiciary continue along its current path towards greater international cooperation, but other U.S. court systems should seriously examine following its lead.

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<sup>187</sup> *Arizonans for Official English v Arizona*, 520 U.S. 43, 76 (1997).

<sup>188</sup> Keller, *supra* n. 121 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.* However, this waiting game is inefficient and potentially detrimental to the litigants and the court.

<sup>189</sup> See Cheng, *supra* n. 12, at 1106.

<sup>190</sup> New York State Unified Court System, *supra* note 7.

<sup>191</sup> *Id.*

On October 28, 2010, the Chief Judge of the New York State Court of Appeals, Jonathan Lippman, and then-Chief Justice of the Supreme Court of New South Wales (“NSW”), James Spigelman, signed a bilateral memorandum of understanding (“MOU”) establishing a system for reciprocal cooperation and consultation between their respective judicial systems.<sup>192</sup> 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.<sup>193</sup> 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 exchange.<sup>194</sup>

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. Chief Justice Spigelman of the NSW Supreme Court mentioned that having each party fly legal experts to Australia to provide dueling versions of 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.<sup>195</sup> Using the new system, Australia could receive a totally neutral analysis of New York law “rendered by judges who will not have a ‘horse in the race’ of the Australian litigation in question.”<sup>196</sup> In effect, this cooperative arrangement gives the New York Court of Appeals greater insight about the meaning and typical application of law in New South Wales.<sup>197</sup> 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.<sup>198</sup>

Parties to legal proceedings involving foreign law are entitled to correct and authoritative applications of law. According to the New York and NSW courts systems, the new procedures established based on their MOU will enable that objective to be attained.<sup>199</sup> Moreover, Chief Judge Lippman expressed his hope that this cooperative judicial arrangement is merely the first step in greater collaboration among New York

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<sup>192</sup> *Id.* Chief Justice Spigelman retired on May 31, 2011, after serving 13 years as chief justice. *NSW Chief Justice Spigelman Resigns*, *The Age* (Mar. 18, 2011), available at <http://news.theage.com.au/breaking-news-national/nsw-chief-justice-spigelman-resigns-20110318-1c04q.html>.

<sup>193</sup> New York State Unified Court System, *supra* note 7. 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. *Memorandum of Understanding Between the Supreme Court of Singapore and the Supreme Court of New South Wales on References of Questions of Law*, Supreme Court of New South Wales (Sept. 14, 2010), available at [http://www.ipc.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/6a64691105a54031ca25688000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument](http://www.ipc.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca25688000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument).

<sup>194</sup> New York State Unified Court System, *supra* note 7; *see also* Joel Stashenko, *N.Y. Judges to Exchange Views With New South Wales High Court*, *New York Law Journal* (Nov. 1, 2010), available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202474180646&slreturn=1&hbxlogin=1>.

<sup>195</sup> Stashenko, *supra* n. 194.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (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).

<sup>199</sup> New York State Unified Court System, *supra* note 7.

courts and top courts in other foreign countries, and will serve as a template for more judicial collaboration on a global basis.<sup>200</sup>

### ***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. 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”).<sup>201</sup> 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 in a more orderly fashion.<sup>202</sup> 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.<sup>203</sup>

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.<sup>204</sup> Foreign judges similarly have 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.<sup>205</sup>

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

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<sup>200</sup> Stashenko, *supra* n. 194.

<sup>201</sup> Third Branch, *Taking a Personal Commitment to Justice to the World* (Dec. 2008), available at [http://www.uscourts.gov/News/TheThirdBranch/08-12-01/Taking\\_a\\_Personal\\_Commitment\\_to\\_Justice\\_to\\_the\\_World.aspx](http://www.uscourts.gov/News/TheThirdBranch/08-12-01/Taking_a_Personal_Commitment_to_Justice_to_the_World.aspx).

<sup>202</sup> *Id.*

<sup>203</sup> *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. Judge D. Brooks Smith, *Promoting the Rule of Law and Respecting Separation of Powers: The Legitimate Role of the American Judiciary Abroad*, 7 Ave Maria L. Rev. 1, 18 (Fall 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.

<sup>204</sup> Paul Schiff Berman, *From International Law to Law and Globalization*, 43 Colum. J. Transnational L. 485, 503 (2005); Embassy of the United States in Malta, *U.S. Federal Judge Discusses Judicial Administration and Ensuring “Speedy” Justice* (April 6, 2011), available at <http://malta.usembassy.gov/en-04062011.html>.

<sup>205</sup> Berman, *supra* n. 204 at 503.

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.<sup>206</sup> 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 in hosting 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."<sup>207</sup> This is simply one of many examples, as other U.S. judges have been constantly reaching out to judicial counterparts across the world.<sup>208</sup> Additionally, various aid agencies, NGOs, and U.S. law schools have convened informal meetings, seminars, and conferences in the United States involving foreign judges.<sup>209</sup>

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 globe 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.<sup>210</sup> At this conference, esteemed

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<sup>206</sup> The Third Branch, *Sister Court in Slovenia* (November 2010), available at [http://www.uscourts.gov/News/TheThirdBranch/10-11-01/Sister\\_Court\\_in\\_Slovenia.aspx](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.*

<sup>207</sup> See Temple Law School co-sponsors visit of ABA International Division delegation, which will include Justice Stephen Breyer: Two International Law Seminars (July 9, 2008), available at <http://www.tuj.ac.jp/newsite/main/law/news/event20080709.html>.

<sup>208</sup> See Tori Richards, 'Tough Guy' Judge Leads Judicial Reform Overseas, AOL News (Aug. 16, 2010), available at <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); Berman, *supra* n. 204 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 also that members of the ECJ have visited the U.S. Supreme Court several times as well).

<sup>209</sup> Berman, *supra* n. 204 at 504.

<sup>210</sup> Robert Nicolson, *Regional Work of the Conference of Chief Justices of the Asia Pacific Region*, American Society of International Law and the International Judicial Academy (Jan/Feb 2007, Volume 2, Issue 1), available at [http://www.judicialmonitor.org/archive\\_0207/globaljudicialdialogue.html](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

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.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup> There are many other similar programs that are similarly geared towards judicial interaction and exchange.<sup>214</sup>

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.

### 3. 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 U.S. federal-state court relationship 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 federal court judges to consider *any relevant materials*,<sup>215</sup> 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 having conclusive authority in a foreign country could provide clarification and direction about novel, unsettled, or particularly complex legal questions.

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the west to Pacific Islands in the east; from Korea in the north to Australia in the south. If a Chief Justice cannot personally attend the Conference, it is customary that another member of the court will attend.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *See generally id.*

<sup>214</sup> The programs operated by the American Society of International Law (“ASIL”) are yet another example. ASIL website, <http://www.asil.org/transnational-judicial-dialogue.cfm> (last accessed on May 14, 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. It also facilitates international judicial dialogue on current challenges facing judges and judiciaries through conferences, study tours, exchanges, and other programmatic activity and resources.

<sup>215</sup> Fed.R.Civ.P. 44.1 (*emphasis added*).

*a. Formalized System Would Provide Reliable and Stable Source 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, encourages quality responses, and is provided 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 with each other 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 as a prerequisite of certification to a foreign court. 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. However, if the litigants 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.<sup>216</sup> “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.

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<sup>216</sup> See generally Lamm & Tang, *supra* n. 6, at 34 (discussing cases where court have deferred to the interpretations of foreign governments, and cases where they have not).

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 from one court to another 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-New South Wales MOU is illustrative of such benefits.

At this stage, the relationship between New York and NSW is informal in nature because the N.Y. 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.<sup>217</sup> 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.<sup>218</sup> In the meantime, the N.Y. Court of Appeals will operate on an “informal” basis that is similar to decisions rendered by referees.<sup>219</sup> On the New York side of this arrangement, one volunteer judge from the N.Y. 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.<sup>220</sup> These judges will volunteer their time and not receive monetary compensation for their efforts.<sup>221</sup> 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.<sup>222</sup> 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, non-binding pronouncements on New York law.<sup>223</sup> 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 as official declarations of New York law.<sup>224</sup> Also, the NSW Supreme Court will have the discretion to adopt, modify, or reject the report in whole or in part.<sup>225</sup> With

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<sup>217</sup> Stashenko, *supra* n. 194.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> New York State Unified Court System, *supra* note 7.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Stashenko, *supra* n. 194.

<sup>224</sup> New York State Unified Court System, *supra* note 7.

<sup>225</sup> *Id.*

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.<sup>226</sup>

#### **4. 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 confidentially and accurately apply such law. Foreign nations can take comfort in its own law is 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 towards 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 foreign law in civil and commercial fields via a receiving agency specifically designated to receive reply to such requests.<sup>227</sup> 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.<sup>228</sup> Along these lines and in the interests of facilitating global trade and commerce, the U.S. and other states could carve out room in bilateral judicial agreements to include international commercial arbitration disputes as well.

#### **B. 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, said 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. 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

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<sup>226</sup> *Id.*

<sup>227</sup> See Perl, *supra* n. 171 at 145.

<sup>228</sup> See Alan Redfern & Martin Hunter, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 294 (4<sup>th</sup> ed. Sweet & Maxwell 2004).

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.<sup>229</sup>

### *1. 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<sup>230</sup> Over the years, many commentators have continued calling for courts to appoint more expert witnesses.<sup>231</sup> At the same time, attorneys have opposed the broad 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 positions.<sup>232</sup>

As procedural rules have evolved, a judge's inherent power to appoint an expert is "virtually unquestioned."<sup>233</sup> Rule 706 of the Federal Rules of Evidence ("Fed. R. Ev. 706") governs the appointment of experts in federal court. Most U.S. states have similar provisions.<sup>234</sup> Fed. R. Ev. 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.

Accordingly, the court may independently appoint experts to opine on foreign law.<sup>235</sup> Additionally, the litigants may petition the court to appoint an expert, but they typically refrain from doing so due to the uncertainties involved.<sup>236</sup>

Despite a court's ability to appoint foreign law experts, most courts tend to be reluctant to do so.<sup>237</sup> 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

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<sup>229</sup> Miner, *supra* n. 48 at 588; *see generally* *Byrne v. Cooper*, 523 P.2d 1216, 1220 (Wash. Ct. App. 1974).

<sup>230</sup> *See* Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 Or. L. Rev. 59, 64-74 (Spring 1998).

<sup>231</sup> *See id.*

<sup>232</sup> *See generally* R.D. Kent, *Expert Witnesses in Arbitration and Litigation Proceedings*, TDM, Vol. 4, Issue 3, pg. 1 (June 2007); *see also* Deason, *supra* n. 230 at 74.

<sup>233</sup> *See* Federal Rule of Evidence 706, Notes of Advisory Committee on Rules (2011); Deason, *supra* n. 230 at 74.

<sup>234</sup> *See* Cheng, *supra* n. 12, at 1106; Cheng, *supra* n. 128 at 1304.

<sup>235</sup> *See* *Servo Kinetics, Inc.*, 475 F.3d. at 790 (appointing professor to provide information and answer specific questions about Japanese contract law); *Institut Pasteur*, 383 F.Supp. 2d at 795 n.2 (court appointing expert on French law); *Carbotrade S.p.A. v. Bureau Veritas*, 1998 U.S. Dist. LEXIS 10575 \*7 (S.D.N.Y. 1998) (appointing expert on Greek law).

<sup>236</sup> Geeroms, *supra* n. 73 at 145.

<sup>237</sup> *See* Cheng, *supra* n. 12, at 1106; Cheng, *supra* n. 128 at 1304.

identification and evaluation of potential experts can entail considerable judicial effort.<sup>238</sup> The potentially significant costs associated with court-appointed experts might be problematic too. 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 of the court-appointed expert as well. Pursuant to Fed. R. Ev. 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.”<sup>239</sup> 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.”<sup>240</sup> Even if the litigants’ experts have superior qualifications, a court might be susceptible to favoring its own expert’s opinion.<sup>241</sup> 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 towards the appointed expert or believe that the appointed expert is neutral and therefore automatically correct.<sup>242</sup>

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 towards her client instead of the court. With a court-appointed expert, there is little or no question about bias or lack of objectivity. Said expert can also assist the court when the parties’ submissions are unclear, inconclusive, or conflicting.<sup>243</sup>

Another potential benefit relates to potential 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.<sup>244</sup> 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 with which it disagrees. The district court in *Servo Kinetics, Inc. v. Tokyo Precision Instruments Co.*<sup>245</sup> utilized this approach when it appointed and asked 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.<sup>246</sup> This process could narrow the matters in dispute

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<sup>238</sup> Geeroms, *supra* n. 73 at 145.

<sup>239</sup> Fed. R. Ev. 706(b).

<sup>240</sup> See The Committee on Int’l Commercial Disputes, *supra* n. 85 at 49.

<sup>241</sup> *Id.* at 54; see also Cheng, *supra* n. 12, at 1106.

<sup>242</sup> See Kent, *supra* n. 232 at 2.

<sup>243</sup> Teitz, *supra* n. 8, at 108. By way of example, in *Itar-Tass Russian News Agency*, 153 F.3d 82, 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.

<sup>244</sup> Miner, *supra* n. 48 at 588 quoting Schmertz, *The Establishment of Foreign & Intl Law in American Courts*, 18 Va. J. Int’l L. 697, 713 (1978).

<sup>245</sup> See *Servo Kinetics, Inc.*, 475 F.3d. at 790.

<sup>246</sup> See *id.*

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 allowing the parties to initially present their submissions on the relevant foreign law provisions. If the submissions presented material 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.

## ***2. 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, American Foreign Law Association, and others.<sup>247</sup>

When considering appointments, individual judges could quickly refer to the database for potential experts. The database could contain full curriculum vitas 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.<sup>248</sup> This foreign law expert 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

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<sup>247</sup> Miner, *supra* n. 48 at 588.

<sup>248</sup> See generally *id.*

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.<sup>249</sup> Although U.S. courts generally do not have a traditional or procedure to consult with private comparative law centers regarding foreign law matters,<sup>250</sup> such centers may openly welcome the opportunity to take an active role in transnational disputes litigated in U.S. courts. This may also encourage the development of comparative law centers in the United States as well.

### ***3. 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 Fed. R. Ev. 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.”<sup>251</sup> A court also has significant flexibility as to the payment schedule.<sup>252</sup> 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 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.<sup>253</sup> 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 previous 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 current 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.

### ***4. 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

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<sup>249</sup> Cheng, *supra* n. 12, at 1107.

<sup>250</sup> *Id.*

<sup>251</sup> Fed. R. Ev. 706(b).

<sup>252</sup> *Id.* (specifying that “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.”)

<sup>253</sup> Teitz, *supra* n. 8, at 107.

undermining the adversarial system, a court could alleviate such concerns by allowing the litigants to vigorously cross-exam the court-appointed expert.<sup>254</sup> 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.<sup>255</sup> 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, 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 as court-appointed experts.<sup>256</sup> 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 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,<sup>257</sup> 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.<sup>258</sup> In contrast, a court-appointed expert typically reaches conclusions independently and can only be challenged by cross-examination.<sup>259</sup>

Another benefit associated with appointing a special master is specialization.<sup>260</sup> In many instances, a special master can bring specialized knowledge to the process and help compensate for a judge inexperienced with foreign law.<sup>261</sup> 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 flushed 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 a special master's report for final determination. In cases of significant dispute among the parties, the master's report could be the best thing available under the circumstances.<sup>262</sup>

### C. DIFFERENT APPROACHES COULD LEAD TO ADDITIONAL IMPROVEMENTS

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<sup>254</sup> See The Committee on Int'l Commercial Disputes, *supra* n. 85 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.

<sup>255</sup> See The Committee on Int'l Commercial Disputes, *supra* n. 85 at 54.

<sup>256</sup> See *id.*

<sup>257</sup> Geeroms, *supra* n. 73 at 146.

<sup>258</sup> The Committee on Int'l Commercial Disputes, *supra* n. 85 at 54.

<sup>259</sup> See *id.*

<sup>260</sup> See generally *Henry v. S/S Bermuda Star*, 863 F.2d 1225 (5th Cir. 1989) (adopting certain portions of the master's report); *Finance One Public Co. Ltd. v. Lehman Brothers Special Financing, Inc.*, 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 Salllvadorena de Calzado, S.A. (Corsal, 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).

<sup>261</sup> The Committee on Int'l Commercial Disputes, *supra* n. 85 at 56.

<sup>262</sup> *Id.*

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.

### ***1. 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 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.<sup>263</sup> 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.<sup>264</sup> Such an approach would also be consistent with the broad purpose and text of Fed. R. Civ. P. 44.1 and analogous state rules.<sup>265</sup>

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.<sup>266</sup> By way of illustration, in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.*,<sup>267</sup> 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.<sup>268</sup> Although additional costs were incurred in the end, the court hired the expert only after other options had been exhausted. Most significantly, the court was able to confidentially determine the law correctly and only the losing party bore the cost of the additional expert.

### ***2. 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.<sup>269</sup> In comparison with the cross-border “certification”

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<sup>263</sup> See *id.* at 54.

<sup>264</sup> See *id.*

<sup>265</sup> See generally Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2444 (2008).

<sup>266</sup> The Committee on Int’l Commercial Disputes, *supra* n. 85 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).

<sup>267</sup> 866 A.2d 1 (Del. 2005).

<sup>268</sup> *Id.* at 30-32.

<sup>269</sup> The concept of amicus curiae participation in civil litigation is long established in common law jurisdictions. Johannes Chan, *Focus on the Ma Case: Amicus Curiae and Non-Party Intervention*, 27 Hong Kong L.J. 391(1997). Amicus curiae briefs likely originated in Rome as a means to aid courts when

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.*, 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.<sup>270</sup>

Another problem with soliciting brief amicus curie 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*, 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.<sup>271</sup>

## V. 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 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.

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handling matters involving information outside of their knowledge. Sylvia H. Walbolt & Joseph H. Lang, Jr., *Article: 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 U.S., the use of amicus curiae briefs evolved from this original detached "friend of the court" purpose, to that of more direct advocacy. *Id.* 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.*; see also Paul M. Collins Jr., *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, Political Research Quarterly, Vol 60, No. 1. 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, 32 Stetson L. Rev. at 272. Also, governmental parties have long used amicus briefs to argue their positions. *Id.* at 272-273.

<sup>270</sup> *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 126 (2d Cir. 2000) (seeking insight on the distribution and advisory fee disclosure requirements under Rule 10b-10 of the Exchange Act of 1934.)

<sup>271</sup> 10 F.3d 425, 431 (7<sup>th</sup> Cir. 1993).