Proof of Foreign Law

A Guide for Judges

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Contents

I. Introduction

Questions of foreign law arise in a broad range of cases. The determination and application of foreign law is governed by Federal Rule of Civil Procedure (FRCP) 44.1 and Federal Rule of Criminal Procedure 26.1. The text of FRCP 44.1 provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.[1]

This guide provides an overview of foreign law issues in the federal courts, including procedural strategies, and examines the approach of state courts and non-U.S. judiciaries. The final section of this guide discusses helpful research resources.

II. A Brief History

A. Pre-Rule 44.1

Prior to the adoption of FRCP 44.1 in 1966, the determination of foreign law was treated as an issue of fact, a practice borrowed from England and similar to the approach taken by other common law countries.[2] The party seeking to apply foreign law carried the burden of pleading and proof,[3] judges were not permitted to conduct independent foreign law research,[4] and the determination of foreign law was sometimes left to the jury.[5] This process was complicated, requiring parties to jump through procedural hoops.[6]

B. Supreme Court Guidance

The 1966 amendments to the Federal Rules of Civil Procedure introduced Rule 44.1: the determination of foreign law was designated a question of law. Parties no longer had to plead foreign law as a fact in the complaint.[7] The procedures for proving foreign law in court were relaxed, permitting judges to rely on "any relevant material or source, including testimony" even if "not submitted by a party or admissible

1. Fed. R. Civ. P. 44.1.

2. Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 Buff. L. Rev. 1207, 1250-52 (2011); Arthur R. Miller, *Federal Rule 44.1 and the Fact Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 649 (1967) (citing *Talbot v. Seeman*, 5 U.S. 1, 12 (1801)("Foreign laws must be proved as facts.").

3. Michalski, *supra* note 2, at 1250–52.

4. *See* Stephen L. Sass, *Foreign Law in Federal Courts*, 29 Am. J. Comp. L. 97, 109 (1981). (noting "the judge could not avail himself of his eventual knowledge of foreign law any more than of his personal knowledge of facts, nor was he allowed to engage in his own research of that law any more than of the relevant facts.").

5. Miller, *supra* note 2, at 623.

6. Miller, *supra* note 2, at 621–24; 625–31.

7. Alejandro J. Garcia, *Lex Incognita No Longer: Making Foreign Law Less Foreign to Federal Courts*, 108 Geo. L.J. 1027, 1035 (2020).

under Rule 43."[8] Treating foreign law as a question of law had an important implication for the appellate process by allowing de novo review and consideration of sources that the district court did not address.[9]

The Supreme Court interpreted Rule 44.1 for the first time in 2018, more than fifty years after its promulgation, when it examined the level of deference district courts should accord to foreign government submissions about foreign law.[10] The Court held that a foreign government's submission regarding the interpretation of its own laws, though persuasive and due "respectful consideration," is not binding on a federal court.[11] Although the *Animal Science* decision focused on the issue of deference, the Court also provided helpful guidance on the contours of Rule 44.1, noting that it gives courts freedom to examine a range of sources when making a ruling on foreign law. The rule's "obvious" purpose was to make "the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.'"[12]

A 'Third Category'?

Judges and scholars have observed that foreign law is sometimes treated as a third category, in between law and fact.[13] Although FRCP 44.1 designates foreign law as a question of law, courts still use procedural elements of fact finding: requiring proper notice of the foreign law issue, expecting parties to produce evidence as to its content, and, in some cases, relying on experts (something typically permitted only for questions of fact). Some judges, however, have criticized suggestions that the determination of foreign law is in any way fact based, arguing that this obscures the court's duty to settle questions of law.[14]

III. Context: Legal Issues that Generate Foreign Law Questions

Foreign law questions arise in a range of circumstances and at almost any stage of litigation.

A. Choice of Law

Cases involving choice of law require the court to determine, as a threshold matter, that foreign law differs from forum (domestic) law. The party requesting the application of foreign law provides the court

8. Miller, *supra* note 2, at 617 n. 5. FRCP 44.1 was later amended to clarify that foreign law material need not be admissible under the rules of evidence, and not Rule 43.

9. *See Animal Sci. Products, Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1868 (2018); *In re Tyson*, 433 B.R. 68, 78 (S.D.N.Y. 2010); *In re Tyson*, 433 B.R. 68, 78 (S.D.N.Y. 2010) ("'[A]ppellate courts, as well as trial courts, may find and apply foreign law'") (quoting *Itar–Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir.1998)).

10. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018).

11. *See Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869 (2018).

12. *Id*. at 1873.

13. *See* Sass, *supra* note 4, at 98; Shaheeza Lalani, *Establishing the Context of Foreign Law: A Comparative Study*, 20 Maastricht J. Eur. & Comp. L. 75, 83–85 (2013).

14. *See* Judge Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 Am. J. Comp. L. 581 (1995) (disagreeing that determination of foreign law is mixed question of law and fact noting "the decision [is] purely one of law. Because I have this view, I think that it becomes the duty of the court to find and apply the relevant foreign law as soon as it becomes apparent to the court that foreign law governs."); *de Fontbrune v. Wofsy*, 838 F.3d 992, 998 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Nov. 14, 2016) ("The application of Rule 44.1 has also been beset by semantic sloppiness. Courts continue to refer to the 'burden of proving foreign law.'").

with documents or other evidence demonstrating the content of foreign law and how it differs from forum law.[15] A court may also examine the issue on its own and conduct independent research to assess whether a conflict exists between forum and foreign law.[16] If the court determines that foreign law provides for a different outcome than forum law, it will apply the appropriate conflict of laws test to assess which law should govern the dispute.

State courts apply one of seven different conflicts of law tests; depending on whether the underlying action is contract or tort based.[17]

B. Contractual Clauses

In some cases, parties to a contractual agreement specify that the law of a certain country or state governs the interpretation of the contract as well as related disputes. Generally, courts will enforce choice of law clauses in contracts so long as a party provides sufficient notice of its intent to rely on foreign law.[18] In diversity suits, the forum's choice of law rules govern the enforceability of a contractual clause specifying applicable law.[19] In federal question cases, courts follow the Second Restatement on Conflict of Laws.[20]

C. Enforcing Foreign Judgments and Arbitral Awards

When asked to enforce a foreign judgment or arbitral award, courts are required to determine foreign law. A court's first step is to decide whether to recognize the judgment or award. This requires a determination that the underlying judgment is final, enforceable, and was rendered fairly and in a manner consistent with due process.[21] To make this finding, the U.S. court must examine the foreign country's legal system, including its court procedures. [22]

15. *See e.g., Chin-Teh Hsu v. New Mighty U.S. Tr.*, CV 10-1743 (JEB), 2020 WL 588322 (D.D.C. Feb. 6, 2020) (determining Taiwanese law as part of choice of law analysis relying on party submissions and expert reports but ultimately concluding that DC law applies); *Valle v. Powertech Indus. Co.*, 381 F. Supp. 3d 151, 160 (D. Mass. 2019) (finding no conflict between forum and foreign law on basis of party submissions); *Clarke v. Marriott Int'l, Inc.*, 403 F. Supp. 3d 474, 483 (D.V.I. 2019) (relying on party submissions to find conflict existed between Virgin Islands and St. Kitts).

16. *See Pascarella v. Sandals Resort Int'l, Ltd.*, No. 19 CIV. 2543 (AT), 2020 WL 1048943, at *5 (S.D.N.Y. Mar. 4, 2020) (conducting independent research to confirm that no conflict exists between Bahamian and New York law and applying New York law).

17. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 Am. J. Comp. L. 235, 259 Table (2020) (providing table of choice of law methodology employed by each state in tort and contract cases).

18. *Cargill, Inc. v. Charles Kowsky Res., Inc.*, 949 F.2d 51, 55 (2d Cir. 1991) (noting "even when the parties include a choice-of-law clause in their contract, their conduct during litigation may indicate assent to the application of another state's law."); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006) (holding that "under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision *as construed under the law specified in the agreement's choice-of-law provision.*").

19. *Finvest Cap. Fund, Inc. v. Solid Box, LLC*, No. CV2006296ESMAH, 2021 WL 1153113, at *3 (D.N.J. Mar. 26, 2021) (noting that forum choice of law rules govern decision of whether the parties' choice of law clause is enforceable for diversity suit).

20. *See S2 Yachts, Inc. v. ERH Marine Corp.*, 427 F. Supp. 3d 934, 941 (W.D. Mich. 2019) (noting that restatement applies in federal question cases and noting that Michigan also follows the restatement and enforces parties' contractual choice of forum and governing law clauses), *aff'd*, 855 F. App'x 273 (6th Cir. 2021); see also *In re Sterba*, 852 F.3d 1175, 1179 (9th Cir. 2017); *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 570 (6th Cir. 2001).

21. *See e.g., de Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019) (determining that French judgment was not enforceable); *Banca di Credito Cooperativo di Civitanova Marche e Montecosaro Soc. Cooperativa v. Small ex rel. Mengoni*, 18-CV-11399 (JPO), 2019 WL 6915729 (S.D.N.Y. Dec. 19, 2019) (determining that Italian judgment was not enforceable in Italy and thus could not be recognized); *LMS Commodities DMCC v. Libyan For. Bank*, 1:18-CV-679-RP, 2019 WL 1925499 (W.D. Tex. Apr. 30, 2019) (determining that Tunisian court order was not a final or conclusive judgment and could not be enforced).

22. *See e.g.*, *Entes Indus. Plants, Constr. and Erection Contracting Co. Inc. v. Kyrgyz Republic*, CV 18-2228 (RC), 2020 WL 1935554 (D.D.C. Apr. 22, 2020) (examining law of Kyrgyzstan in deciding to enforce arbitral award); *Banca di Credito Cooperativo di Civitanova Marche e Montecosaro Soc. Cooperativa v. Small ex rel. Mengoni*, 18-CV-11399 (JPO), 2019 WL 6915729 (S.D.N.Y. Dec. 19, 2019) (examining law of Italy in deciding not to enforce Italian bankruptcy judgment).

i. Recognition and enforcement of foreign judgments in federal courts

1. Federal question cases

When there is no applicable statute, federal common law applies to the recognition and enforcement of foreign judgments in federal question cases, including maritime. Courts apply the standard articulated by the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895):[23] a judgment can be recognized when:

> there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.[24]

Hilton required courts to examine comity, due process, and reciprocity in deciding whether to recognize a foreign judgment.[25] The reciprocity element has since been abandoned by many courts[26] and the focus is due process.

2. Diversity cases

The enforcement of foreign judgments in diversity cases is governed by state law. Most states have enacted either the 1964 Revised Uniform Enforcement of Foreign Judgements Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act.[27] These statutes are similar and require judges to determine that the foreign judgment is final, conclusive, and enforceable in the country where rendered. There are also various discretionary and nondiscretionary factors that judges must assess, including whether the foreign court was impartial, accorded due process, had personal jurisdiction over the defendant, provided the defendant sufficient notice, and rendered a judgement consistent with state public policy and U.S. constitutional principles.

Some states require reciprocity: the foreign country whose judgement is to be recognized must also recognize U.S. court judgments.

ii. Foreign arbitral awards

The recognition of foreign arbitration agreements is governed by the Federal Arbitration Act (FAA). Chapters two and three serve as the implementing legislation for two treaties the United States has ratified — The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Panama Convention).

23. Ronald A. Brand, Recognition and Enforcement of Foreign Judgments 3-4 (Federal Judicial Center 2012).

24. *Hilton v. Guyot*, 159 U.S. 113, 202–03, 16 S. Ct. 139, 158, 40 L. Ed. 95 (1895).

25. Brand, *supra* note 23, at 3–4.

26. *Id*. at 4; *see also Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32 (D.D.C. 2007) ("Reciprocity of recognition was once considered a requirement of the *Hilton* standard, but most jurisdictions have abandoned it.").

27. Brand, *supra* note 23, at 5–8.

There is a strong presumption in favor of enforcement of foreign arbitral awards, and only a few discretionary grounds for non-enforcement.[28] These grounds include: incapacity of the parties or invalidity of the agreement; notice and presentation of a party's case; differences beyond the scope of the submission to arbitration; composition of the tribunal or arbitral procedure; award not yet binding or set aside by a competent authority; subject matter not capable of settlement by arbitration; or public policy.[29]

Federal courts deciding these cases often determine foreign law when deciding whether to enforce an award. This is because the law of the arbitral seat or the law selected by the parties (which may be foreign law) governs the grounds for nonenforcement.[30]

D. 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Child Abduction Convention")

The Child Abduction Convention was implemented into federal law by the International Child Abduction Remedies Act, 22 U.S.C. §§ 9001 et seq. Courts must determine whether a child was wrongfully removed from their place of habitual residence and whether the child should be returned.[31] In a typical child abduction case, a parent has removed a child from another country, and the parent who remains in the foreign country initiates a proceeding in the United States requesting the return of the removed child.[32]

During these proceedings, judges determine what custody rights the petitioner and the respondent have under the laws of the child's habitual residence. The U.S. court is not determining which respondent should have custody, but merely assessing foreign law (including foreign court orders, caselaw, and statutes) to determine which parties had custody rights and whether the removal of the child violated those rights.[33] Removal is considered wrongful where it is in breach of the petitioner's custody rights under foreign law and the petitioner was exercising those custody rights at the time of the removal.[34]

E. Extradition and Habeas Petitions Resisting Extradition

Federal courts have jurisdiction over international extradition proceedings where there is a treaty between the United States and the foreign government requesting extradition.[35] The court looks to the extradition treaty in force between the two countries to determine whether the underlying offense is included.[36] The court may also examine foreign law for guidance as to whether the underlying offense is time barred[37] or, in some cases, whether the offense charged is a crime in both countries, a principle known as "dual criminality."[38]

28. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (recognizing the "emphatic federal policy in favor of arbitral dispute resolution").

29. *See* S.I. Strong, International Commercial Arbitration 73–85 (Federal Judicial Center 2012).

30. *Id.*

31. *See* James D. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges, Second Edition ix (Federal Judicial Center 2015).

32. *Id.*

33. *Id.*

34. *See e.g.*, *Leon v. Ruiz*, MO:19-CV-00293-RCG, 2020 WL 1227312, at *3 (W.D. Tex. Mar. 13, 2020) (applying law of Mexico and determining that petitioner was exercising custody rights at time of removal).

35. 18 U.S.C. § 3184; *see also* Garbolino, *supra* note 31, at 3.

36. Ronald J. Hedges, International Extradition: A Guide for Judges 10 (Federal Judicial Center 2014).

37. *Cornea v. U.S. Atty. Gen.*, 771 Fed. Appx. 944 (11th Cir. 2019) (determining that underlying offense was not barred under Greek law where government presented evidence that Greek authorities had tolled statute of limitations by serving detainee's mother).

38. Hedges, *supra* note 36, at 10–11.

F. Impossibility Defense

Federal courts must determine foreign law when a party claims that a foreign law makes it impossible to comply with a court order. This defense arises in a range of circumstances, but most often in the discovery context when a party claims the production of documents or evidence violates a foreign blocking statute and will result in criminal sanctions or penalties abroad.[39]

G. Federal Law Expressly Incorporates Foreign Law

Several federal statutes incorporate foreign law by reference, including but not limited to: the Foreign Corrupt Practices Act (providing for civil and criminal penalties for bribing foreign officials but recognizing a defense if the payment is lawful in the foreign country);[40] the Lacey Act Amendments of 1981 (imposing civil and criminal penalties for importing fish, plants, or wildlife taken in violation of foreign law);[41] the Tariff Act of 1930 (prohibiting the import of wild animals and birds in violation of foreign law);[42] Title VII of the 1964 Civil Rights Act contains an exception for employers with foreign offices where compliance with the Act would violate foreign law;[43] as well as U.S. Patent Laws (encouraging harmonization with patent laws of other countries).[44]

H. Discovery and Service

Federal law permits petitions for discovery to assist foreign tribunals pursuant to 28 U.S.C. § 1782. A party requesting discovery pursuant to this statute must prove that the evidence will be used abroad in a foreign proceeding. The court must look to foreign law to decide whether the foreign tribunal will accept the requested discovery and whether the requested discovery will be used in a "foreign proceeding."[45] The court must also look to a foreign country's service of process laws when determining whether a foreign party has been served appropriately.[46]

I. Foreign Sovereign Immunities Act

Cases that involve the Foreign Sovereign Immunities Act (FSIA) frequently implicate foreign law issues. For example, courts look to foreign law to decide whether a government entity has waived immunity by engaging in a specified act or business contract or whether a person or entity had authority to waive the

39. *See In re Avandia Mktg., Sales Practices and Products Liab. Litig.*, 07-MD-01871, 2020 WL 5358287 (E.D. Pa. Sept. 3, 2020) (denying party's motion to quash determining that disclosure of redacted documents would not violate EU law); *State St. Corp. v. Stati*, CV 19-MC-91107-LTS, 2020 WL 8839775, at *10 (D. Mass. Nov. 16, 2020) (determining that documents could be produced without violating UK banking privacy laws), *report and recommendation adopted*, CV 20-12052-LTS, 2021 WL 1010697 (D. Mass. Feb. 25, 2021).

40. 15 USC § 78dd-1 et seq.

41. 16 USC § 3372(2)(A) and (2)(B)(i).

42. 19 USC § 1527.

43. 42 U.S.C. § 2000e-1(b).

44. *See* Loren Turner, *Buried Treasure: Excavating Foreign Law from Civil Pleadings Filed in U.S. Federal Courts*, 47 Int'l J. Legal Info. 22, 31 (2019).

45. *See e.g.*, *In re Noguer*, 18-MC-498 (JMF), 2019 WL 1034190, at *5 (S.D.N.Y. Mar. 5, 2019) (denying motion for a stay of a granted §1782 petition pending appeal determining that Andorran law permitted use of discovery during proceedings).

46. *See Densys Ltd. v. 3Shape Trios A/S,* 336 F.R.D. 126 (W.D. Tex. 2020) (determining that service by mail was permitted under Danish law); *Nuevos Destinos, LLC v. Peck*, 3:19-CV-00045, 2019 WL 6481441 (D.N.D. Dec. 2, 2019) (determining that service was not effected properly under Peruvian law).

foreign country's sovereign immunity. To do so, a court must look to foreign law to see if the underlying agreement was valid under that country's law.[47]

J. Forum Non Conveniens

Forum non conveniens is a discretionary doctrine that permits federal courts to dismiss a case for lack of jurisdiction where the court believes that the case would be better suited for resolution in a foreign tribunal.[48] *Forum non conveniens* dismissals are common in cases that feature foreign plaintiffs, a harm that occurs on foreign soil, or the application of foreign law.[49] A court must look to the law of the foreign country to assess whether that country affords the parties an adequate alternative forum.[50]

IV. Recurring Legal and Procedural Issues

A. Notice Requirement

FRCP 44.1 states that notice must be given but provides no deadline on the timing of the notice. The advisory committee's notes explain that this ambiguity is to account for situations where the foreign law issue is not apparent until just before trial.[51] Some courts have required notice be given no later than the pretrial conference so that the foreign law issue can be incorporated into the pretrial order.[52]

When considering whether a party has given reasonable notice, courts look to the factors articulated in the advisory committee's notes to FRCP 44.1 and assess (1) the stage of the case when notice was given (2) the reason proffered for failure to give earlier notice (3) the importance of the foreign law issue to the case.[53]

47. *See e.g., Sequeira v. Republic of Nicaragua*, CV134332DMGFFMX, 2018 WL 6267835 (C.D. Cal. Aug. 24, 2018) (determining that Nicaragua did not waive sovereign immunity because underlying agreement was void since it did not comply with Nicaraguan law), *aff'd*, 791 Fed. Appx. 681 (9th Cir. 2020)(unpublished), *cert. denied*, 20-117, 2020 WL 5883367 (U.S. Oct. 5, 2020); *see also CapitalKeys, LLC v. Democratic Republic of Congo*, 15-CV-2079 (KBJ), 2021 WL 2255362, at *21 (D.D.C. June 3, 2021) (determining that outgoing head of Congo bank did not waive bank's sovereign immunity because he lacked actual authority to bind bank pursuant to Congo law).

48. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

49. *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 391-92 (2017).

50. *See e.g., Maui Jim, Inc. v. SmartBuy Guru Enterprises*, 386 F. Supp. 3d 926, 954 (N.D. Ill. 2019), *reconsideration denied*, 459 F. Supp. 3d 1058 (N.D. Ill. 2020) (determining that a European Union member state would provide an available and adequate alternative forum); *see also Hersh v. CKE Restaurants Holdings, Inc.*, 403 F. Supp. 3d 755, 761 (E.D. Mo. 2019) (determining that Jordan was available and adequate alternative forum for resolution of negligence cause of action); *Prevent USA Corp. v. Volkswagen AG*, 19-CV-13400, 2021 WL 1087661 (E.D. Mich. Mar. 22, 2021) (determining that Germany was adequate alternative forum).

51. Fed. R. Civ. P. 44.1 advisory committee's note to 1964 amendment ("The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable."); *see also Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 496–97 (5th Cir. 2009) (noting that while 18 month delay was lengthy, district court abused discretion by relying solely on length of delay to determine that notice was unreasonable noting that "Rule 44.1 is intended to prevent 'unfair surprise,' not to impose any specific time limit.").

52. *See DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001) (noting "Absent extenuating circumstances, notice of issues of foreign law that reasonably would be expected to be part of the proceedings should be provided in the pretrial conference and contentions about applicability of foreign law should be incorporated in the pretrial order.).

53. *See APL Co. Pte. v. UK Aerosols Ltd.*, 582 F.3d 947, 955 (9th Cir. 2009) (citing FRCP 44.1 advisory committee's note).

i. Stage of the case

Because there is no hard deadline, courts typically assess this factor on a case-by-case basis. If foreign law is mentioned in the pleadings, it is deemed sufficient notice. In one case, the Second Circuit found that alternatively pleading choice of law issues was sufficient notice of intent to invoke foreign law.[54] Some courts have required that foreign law be presented at the pretrial conference;[55] others have ruled that notice provided after the close of discovery is permissible only if justification is provided.[56]

ii. Justifications for delay

The reason offered for the delay is important. If a party does not have a reasonable explanation for delayed notice, the court is not likely to excuse the lack of notice.[57] The Ninth Circuit ruled that a delay in giving notice is reasonable if foreign law was not previously an issue in dispute but the party raising foreign law had reserved the right to raise it if it did become an issue.[58]

iii. Importance to case

Courts consider two points for the third factor. First, if the delay is significant, the foreign law issue must be crucial to the case.[59] Second, if the foreign law issue is important but was raised in an untimely manner, courts will consider the degree of prejudice to the other party.[60]

B. Burden of Proof

FRCP 44.1 is silent as to a court's role when the parties fail to provide sufficient evidence concerning foreign law.[61] In most circuits, courts confronted with inadequate briefing of the foreign law issue will adopt a presumption that foreign law is the same as forum law and apply forum law.[62] Although some scholars have taken issue with this practice, courts applying this presumption tend to do so where the

54. *Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 586 (2d Cir. 2005) ("We therefore recognize alternative pleading of choice of law issues as satisfying the notice requirements of Rule 44.1.").

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

56. *See Azarax, Inc. v. Syverson*, 990 F.3d 648, 653 (8th Cir. 2021) (determining that district court did not abuse discretion by finding that Azarax did not provide timely notice where Azarax raised issue for first time after close of discovery in response to defendant's motion for summary judgment); *Whirlpool Fin. Corp. v. Sevaux*, 96 F.3d 216, 221 (7th Cir. 1996) (noting that defendant "made no effort to argue from Venezuelan law until after summary judgment had been rendered against him").

57. *See e.g., DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 849 (9th Cir. 2001) ("No extenuating circumstances were presented by SIADS to show that prior notice was impracticable or that the need for notice was not reasonably foreseeable.").

58. *APL Co. Pte. v. UK Aerosols Ltd.*, 582 F.3d 947, 956 (9th Cir. 2009) ("there was no need for APL to give notice that it would specifically invoke Singapore law as to attorneys' fees until that became an issue before the court. The parties were on notice that Singapore law might be invoked, and APL gave more specific notice when the post-judgment issue came before the court.").

59. *See Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 497 (5th Cir. 2009) (determining that district court abused discretion by determining that notice was not timely given where party opposing application of foreign law was not prejudiced and application of Venezuelan law was crucial to the case as a whole).

60. *See McKay v. Tracor, Inc.*, No. CV-03-BE-0590-W, 2007 WL 9711952, at *5 (N.D. Ala. Oct. 26, 2007) (noting that the fact that "the application of Japanese law would have an important effect on the resolution of this case" is "far outweighed by the substantial prejudice to the Plaintiff that would be caused by applying Japanese law at this late stage of the case").

61. Miller, *supra* note 2, at 695.

62. *See Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 218 (3d Cir. 2006) ("The parties, therefore, carry the burden of proving foreign law; where they do not do so, we 'will ordinarily apply the forum's law.'"); *Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476, 481 (4th Cir. 2009); *McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 546 (5th Cir. 2012).

party seeking to apply foreign law has failed to adequately argue which foreign law applies and its consequences for the case.[63]

In the Seventh Circuit, which has been most critical of the application of this presumption,[64] courts are encouraged to conduct independent research into foreign law. However, no duty is imposed on district courts to "remedy the deficienc[ies]" in the parties' briefing and many ultimately decide the case in accordance with forum law.[65]

In an early case, the Ninth Circuit was also critical of this presumption, calling it "semantic sloppiness" for courts to refer to the "burden of proving foreign law" since the determination of foreign law is an issue of law, and not fact. The Ninth Circuit panel observed that the continued use of language referring to proof of law had created confusion amongst district courts in whether it is appropriate for them to consider foreign legal materials outside the pleadings to rule on a motion to dismiss since courts may not ordinarily consider facts not mentioned in the pleadings.[66] In *de Fontbrune*, the Court examined whether the district court was permitted to review legal sources outside of the pleadings in ruling on a 12(b)(6) motion implicating foreign law. The Ninth Circuit emphatically noted that FRCP 44.1 "authorizes courts to conduct independent research outside the parties' submissions in determining foreign law."[67]

In 2018, however, the Ninth Circuit clarified this position, ruling that while courts are permitted to conduct such research independently at any stage, they are under no obligation to do so. When confronted with the related issue of whether parties have a duty to provide the court with sufficient materials for determining foreign law, the Ninth Circuit followed the path of most other circuits and affirmed that the burden remains with the proponent of foreign law.[68] In *G&G*, the Ninth Circuit admonished a party that raised a foreign law issue but did not provide the trial court with sufficient briefing or evidence:

> At no point, we stress, did G&G attempt to explain why it could not have presented these experts, legal theories, and citations to Italian law to the district court. The reason is simple: G&G could have. Instead, G&G attempts to use Rule of Civil Procedure 44.1—which treats an issue of foreign law as a question of law, *see* Fed. R. Civ. P. 44.1—as a permission slip for unlimited do-overs. The rule does not extend that far. We decline to consider G&G's untimely and undeveloped arguments.[69]

The Ninth Circuit affirmed that trial court and decided that courts have no independent obligation to conduct independent research into foreign law.

Some courts have concluded that because foreign law issues are questions of law, the ultimate "responsibility for correctly identifying and applying foreign law [lies] . . . with the court."[70] Other courts have gone in the opposite direction, deciding that while 44.1 "provides courts with broad authority to

63. *See e.g., Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1321 (11th Cir. 2004) (applying forum law where the party requesting application of foreign law failed to brief the court on the contents of the foreign law and had instead filed summary judgment motion applying forum law).

64. *See Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185, 1193 (7th Cir. 1985) (noting that district court did not "fully me[e]t its duty to ascertain foreign law under Rule 44.1, although we recognize that investigating Spanish law on the relevant issue presents no simple task. Nothing in Rule 44.1 strictly requires a district judge to engage in private research. . . Under these circumstances, however, it would have been appropriate for the court to demand a more "complete presentation by counsel" on the issue") (internal citations omitted).

65. *See e.g., Leibovitch v. Syrian Arab Republic*, 25 F. Supp. 3d 1071, 1081 (N.D. Ill. 2014) (citing *Twohy v. First Natl. Bank of Chicago*, 758 F.2d 1185, 1193 (7th Cir.1985)).

66. *de Fontbrune v. Wofsy*, 838 F.3d 992, 998 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Nov. 14, 2016).

67. *Id*. at 999.

68. *See G & G Prods. LLC v. Rusic*, 902 F.3d 940, 946 (9th Cir. 2018).

69. *Id*. at 946.

70. *Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co., Ltd.*, 426 F.3d 580, 586 (2d Cir. 2005).

conduct their own independent research to determine foreign law [it] imposes no duty upon them to do so."[71] In practice, the burden of researching foreign law is often a "cooperative venture requiring an open and unstructured dialogue among all concerned."[72] Federal courts are responsible for making the ultimate determination when presented with a question of foreign law, but to do so, "litigants must raise the question in the first instance."[73] Courts may deem the foreign law question waived and apply domestic law when the litigants fail to raise the specific legal issues or when they fail to provide the district court with the information needed to determine foreign law.[74] This rule is in line with the approach taken in the domestic choice-of-law context, which permits application of forum law where the parties do not raise a choice of law issue.[75] It is also consistent with the advisory committee's note that courts are free to insist on a complete presentation of the issue by the litigants.[76]

C. Foreign Government Submissions and Statements

In *Animal Science*, the Supreme Court addressed the weight that should be given to a foreign government's official statement regarding the meaning and interpretation of its law, particularly when that statement is submitted in the context of a case.[77] The district court denied the defendants' (Chinese corporations) motion to dismiss a price fixing case, rejecting their argument (also raised by China's Ministry of Commerce in an amicus brief) that the defendants were not fixing pricing but merely complying with a mandatory regulatory pricing regime. The Second Circuit reversed the district court, holding that the district court should have deferred to the Chinese government's submission as to the state of its own law. The Supreme Court reversed noting that while such submissions should be accorded "respectful consideration" a district court was not bound to adopt a foreign government's declaration of its law or afford it conclusive effect. A district court has the authority to consider those submissions as it would submissions by the executive branch in a domestic law case.[78]

D. Unsettled Foreign Law

Courts may encounter a case where the applicable foreign law is unsettled. There is no procedural mechanism for a U.S. court to certify a question of law for resolution by a foreign court, similar to the practice

71. *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2006) (quoting *Bel–Ray v. Chemrite Ltd.*, 181 F.3d 435, 440 (3d Cir.1999)).

72. *G and G Productions LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018).

73. *Id*. at 949.

74. *Id*. at 950. ("There is nothing 'cooperative' about simply invoking foreign law and expecting a court to decide every legal permutation, including ones that the parties failed to raise.").

75. *See e.g., Sel. Ins. Co. of S.C. v. Target Corp.*, 845 F.3d 263, 266 (7th Cir. 2016), *as amended* (Jan. 25, 2017) (applying forum law where no party raised choice of law issue).

76. Fed. R. Civ. P. 44.1 advisory committee's note to 1964 amendment; *see also See Banque Libanaise Pour Le Com. v. Khreich*, 915 F.2d 1000, 1007 (5th Cir. 1990) ("It was the Bank's burden to provide the legal pigment and then paint the district court a clear portrait of the relevant Abu Dhabi law. The Bank failed to provide a pallet, a painter with a usable brush, and paint possessing distinct visibility. The resultant picture contains neither abstract nor realistic exposition. Given this state of the art, the district court was well within its discretionary realm to refuse to accept this virtually barren canvas when it was within the Bank's power to present a canvas upon which it had etched a clear and visible statement of the applicable Abu Dhabi law."); *In re Skat Tax Refund Scheme Litig.*, 356 F. Supp. 3d 300, 315–16 (S.D.N.Y. 2019) ("With respect to issues of foreign law properly noticed under Rule 44.1, the responsibility correctly to identify and apply relevant provisions of foreign law is that of the Court. And while the Court is free to 'engage in its own research and consider any relevant material thus found,' it is not required, and does not propose, to do the defendants' homework for them and scour Danish tax law for a provision that may or may not entitle defendants to a dismissal on this motion.").

77. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018).

78. *Id*. at 1874.

used for unresolved issues of state law in domestic litigation.[79] Some scholars have suggested that district courts possess the power to permit non-binding certification to foreign courts for their views on an unsettled foreign law issue and suggest that local rules be amended to permit this practice.[80] Federal courts have developed multiple approaches to resolving unsettled foreign law questions, depending on the type of case and question presented.

Federal courts hearing diversity disputes treat the question of unsettled foreign law as they do questions of conflict of laws:[81] they look to forum law.[82] This requires a federal court to look to state law and assess how courts in the forum state resolve unsettled foreign law questions.[83] In many states, when foreign law is unsettled, courts apply state law pursuant to a presumption that forum and foreign law are similar.[84]

Federal question suits are treated differently because courts are bound to apply foreign law pursuant to a federal statute or treaty and there is usually no threshold conflict or choice of law question.[85] Courts must assess how the foreign court will rule on the foreign law issue.[86] When a choice of law determination in a federal question case arises, courts rely on the Second Restatement.[87] The exception is maritime torts cases with transnational elements which use a choice-of-law method developed by the Supreme Court in *Lauritzen v. Larsen,* 345 U.S. 571 (1953).[88]

There are three additional scenarios where courts may decline to determine unsettled foreign law. First, some courts have declined to exercise supplemental jurisdiction over claims involving foreign law, invoking 28 U.S.C. 1367(c)(1) which permits courts to decline supplemental jurisdiction if "the claim

79. *See Terra Firma Invs. (GP) 2 Ltd. v. Citigroup Inc.*, 716 F.3d 296, 301 (2d Cir. 2013) (Lohier, J., concurring) ("When faced with difficult questions of state law, we have a well-developed, successful system of certifying the question to state courts that promotes the development of state decisional law by state courts and strongly reflects principles of comity and federalism . . . In the context of cross-border commercial disputes, there is every reason to develop a similar formal certification process pursuant to which federal courts may certify an unsettled and important question of foreign law to the courts of a foreign country."); *see also* section VII.A.ii for a more complete discussion of the approaches taken by some states to permit certification of unresolved foreign law questions to the courts of foreign countries.

80. Michael J. Wishnie, Oona A. Hathaway, *Asking for Directions: The Case for Federal Courts to Use Certification Across Borders*, 125 Yale L.J. Forum 156, 160 (2015) (noting that "[n]othing prevents a federal court from amending its local rules to permit certification to foreign or international courts. And even in the absence of a local rule, courts in an appropriate case may exercise their authority under the All Writs Act or pursuant to their inherent judicial powers simply to *ask* a foreign or international court whether it will accept a certified question. In other words, U.S. courts already have the power to request the views of a foreign or international court, either regarding a dispositive point of law in a U.S. case or even in the broader, consultative manner envisioned by Justice Breyer.").

81. *See Klaxon Co. v. Stentor Electric Mfg. Co.,* 313 U.S. 487, 496 (1941).

82. Restatement (Second) of Conflict of Laws § 136 (1971) ("The local law of the forum determines the effect of a party's failure to provide information as to the content of the applicable foreign law in situations where, under the choice-of-law rules of the forum, foreign law governs one or more aspects of the case.").

83. *Anglo Am. Ins. Grp., P.L.C. v. CalFed, Inc.*, 899 F. Supp. 1070, 1077 (S.D.N.Y. 1995) (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1003 (2d Cir. 1989)).

84. *Freedman v. magicJack Vocaltec Ltd.*, 963 F.3d 1125, 1136 (11th Cir. 2020) ("where a foreign law applies, but is not fully settled or addressed, courts generally apply the law of the forum state"); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1001 (9th Cir. 2006) (applying California law and noting "the law of the forum determines the standards of proof of the content of foreign law, as well as the effect of a party's failure to show the content of foreign law."); *Rogers v. Grimaldi*, 875 F.2d 994, 1003 (2d Cir. 1989) ("We believe that New York courts would, as a matter of substantive interpretation, presume that the unsettled common law of another state would resemble New York's but that they would examine the law of the other jurisdiction and that of other states, as well as their own, in making an ultimate determination as to the likely future content of the other jurisdiction's law.").

85. *See Garcia v. Pinelo*, 808 F.3d 1158, 1163 (7th Cir. 2015) (observing distinction between cases involving choice of law analysis versus cases where federal courts must determine the content of foreign law noting that while "parties can waive a choice-of-law argument . . . the court has an independent responsibility to ascertain the content of any given law.").

86. *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 460 (S.D.N.Y. 2007) ("Where the law is unsettled or unclear, an American court must determine how a court in Ecuador would rule on the law upon which the defendant seeks to rely."), *aff'd*, 296 F. App'x 124 (2d Cir. 2008); *Nineveh Invs. Ltd. v. United States*, No. CV 16-1068, 2019 WL 3816834, at *5 (E.D. Pa. Aug. 14, 2019) (same).

87. *See* Christopher A. Whytock, *Myth of Mess — International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719, 728 (2009).

88. *Id.*

raises a novel or complex issue of State law." If the foreign law claim raises "novel or complex issues," courts interpret state law to include foreign states and decline jurisdiction citing comity concerns.[89]

In other cases, the application of a novel or unsettled question of foreign law is one of the factors courts consider when determining whether to grant a motion to dismiss on the basis of *forum non conveniens*.[90] The Supreme Court has clarified that "this factor alone is not sufficient to warrant dismissal when a balancing of all relevant factors shows that the plaintiff's chosen forum is appropriate."[91] Many appellate courts have ruled that it is an abuse of discretion to dismiss for *forum non conveniens* based solely on the application of foreign law.[92]

Finally, in the context of cases involving the threat of antisuit injunctions in the United States and abroad, federal district courts have the discretion to stay a pending action while awaiting the results of a special proceeding in a foreign court. The proceedings in the foreign court will typically determine if that country's laws prevent a party from prosecuting an action in the United States. In those instances, federal courts may decline to resolve the foreign law issue while awaiting the outcome of the special proceeding.[93]

E. Timing for Resolution of Foreign Law Issue

Prior to the enactment of FRCP 44.1, some courts were reluctant to resolve foreign law issues at the summary judgment stage if there were competing expert declarations or evidence of foreign law. This competing evidence was deemed a genuine issue of material fact.[94] After the passage of FRCP 44.1, discrepancies in the evidence presented as to foreign law no longer created an issue of fact. If a court concludes that the evidence presented by the parties at the summary judgment stage is insufficient, it may order supplemental briefing or schedule a hearing for additional evidence and expert testimony.[95]

A similar issue has arisen more recently at the motion to dismiss stage, with judges debating whether FRCP 44.1 permits a court to consider evidence outside the pleadings and conduct independent research.[96] The Ninth, Eleventh, and Seventh Circuit courts of appeal all concluded that it is proper to

89. *Glob. Digital Media, LLC v. Plitt*, No. SACV131691DOCANX, 2014 WL 12579789, at *2–3 (C.D. Cal. Mar. 27, 2014) (cataloguing cases where courts have declined supplemental jurisdiction over foreign law claims due to novel or undeveloped foreign law).

90. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n. 6 (1981) (noting that one of the public interest factors pointing towards dismissal being appropriate is "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law.").

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

92. *See Shi v. New Mighty U.S. Tr.*, 918 F.3d 944, 953 (D.C. Cir.), *cert. denied*, 140 S. Ct. 435, 205 L. Ed. 2d 263 (2019) (noting "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.' . . . U.S. courts regularly apply foreign law when conflict of laws principles demand it.") (internal citations omitted); *Rivendell Forest Prod., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994 (10th Cir. 1993) ("Thus, we hold that even if foreign law applies, a district court would abuse its discretion if the record does not contain substantial reasons, other than the choice-of-law issue, why the foreign forum is more convenient."); *R. Maganlal & Co. v. M.G. Chem. Co.*, 942 F.2d 164, 169 (2d Cir. 1991) ("Moreover, it is well-established that the need to apply foreign law is not alone sufficient to dismiss under the doctrine of forum non conveniens.").

93. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 939 (D.C. Cir. 1984) (noting that "district court would have discretion to stay the action pending a special proceeding in the foreign court brought for the limited purpose of resolving that issue [whether foreign law forbids a foreign national from prosecuting a United States antitrust action], if the status of the foreign law were unclear.").

94. *See* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 2444 Proof of Foreign Law, Third Edition 9A.

95. See *id.* (noting that "[i]f the proof before the district court on a summary judgment motion is not harmonious or is unpersuasive or inconclusive, the court should request a further showing by counsel, or engage in its own research, or direct that a hearing be held, with or without oral testimony, to resolve the issue. A combination of these courses will ensure as detailed a foreign-law presentation as might be anticipated at a full trial on the merits").

96. *See de Fontbrune v. Wofsy*, 838 F.3d 992, 998 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Nov. 14, 2016) (referring to lower court decisions treating motions to dismiss based on foreign law as motions for summary judgment).

determine foreign law at the motion to dismiss stage.[97] In *de Fontbrune v. Wofsy*, the Ninth Circuit clarified that because foreign law interpretation and determination is a question of law, "independent judicial research does not implicate the judicial notice and ex parte issues spawned by independent factual research undertaken by a court," even at the pleading stage.[98]

V. Foreign Law Issues on Appeal

A. Standards of Review

Appeals courts apply a de novo standard when reviewing a district court's determination of foreign law.[99] This applies to all determinations relating to the meaning and application of a foreign law.

Although acknowledged as a gray area by two circuits,[100] when reviewing whether notice of a foreign law issue was timely, appellate courts apply the more permissive abuse of discretion standard.[101]

B. Independent Research or Remand

Appeals courts can independently research and determine foreign law and can require the parties to submit additional briefing.[102] Or, they may remand to the district court for further proceedings, recognizing that foreign "legal determinations frequently call for fact-like procedures that a district court is better situated to implement."[103]

97. *Id.*; *see also Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011); *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985).

98. *de Fontbrune v. Wofsy,* 838 F.3d at 999.

99. *Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1868 (2018).

100. *Rienzi & Sons, Inc. v. Puglisi*, 638 F. App'x 87, 89–90 (2d Cir. 2016) (acknowledging uncertainty in proper standard to be applied to timely notice claims but determining that district court neither erred nor abused discretion); *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 849 n.21 (9th Cir. 2001) (determining that district court neither erred nor abused discretion so as to satisfy either standard).

101. See *Rationis Enterprises Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 585 (2d Cir. 2005) ("The District Court's determination regarding what constitutes 'reasonable . . . notice' under Rule 44.1 and waiver of the foreign law issue falls within the discretionary powers of the District Court to supervise litigation."); *see also Azarax, Inc. v. Syverson*, 990 F.3d 648, 653 (8th Cir. 2021) (reviewing for abuse of discretion); *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 849 (9th Cir. 2001) (same); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 496 (5th Cir. 2009) (same).

102. *See Curley v. AMR Corp.*, 153 F.3d 5, 12–13 (2d Cir. 1998) (ordering parties to brief Mexican law and noting "we manifested our agreement with the concept that appellate courts, as well as trial courts, may find and apply foreign law."); *see also Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 497 (7th Cir. 2009) (determining Japanese trademark law); *McGee v. Arkel Int'l, LLC*, 671 F.3d 539, 547 (5th Cir. 2012) (independently researching and determining Iraqi law).

103. *Bugliotti v. Republic of Argentina*, 952 F.3d 410, 413 (2d Cir. 2020) ("While we undoubtedly have discretion to decide this question of Argentine law in the first instance and would not be limited to the record created in the district court were we to do so . . . we conclude that the circumstances of this case call for a different allocation of judicial resources."); *see also Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 431 (10th Cir. 2006) ("We recognize that we have some discretion to decide to determine ourselves what Swiss law provides. . . But the better practice is to remand to district court to permit the parties to present the applicable law and perhaps to develop further any facts that may be relevant under that law.") ; *SEC v. Dunlap,* 253 F.3d 768, 777 (4th Cir.2001) (remanding for foreign law determination); *Banque Paribas v. Hamilton Indus. Int'l, Inc.,* 767 F.2d 380, 386 (7th Cir.1985) (same).

VI. Evidence of Foreign Law

A. No Limitations on Types of Evidence

Judges can rely on almost any material when determining foreign law and have wide discretion to decide the weight and probative value of the materials.[104] Typically, they rely on party supplied evidence and often use primary foreign law materials, including statutes, regulations, and where appropriate, caselaw.[105] Courts also rely on treatises and other secondary sources providing an overview of the application of a particular foreign law.[106]

B. Independent Research, Supplemental Briefing, and Hearings

FRCP 44.1 contemplates that courts will take an active role in determining foreign law either by requiring the parties to submit additional evidence or by conducting independent research. Independent research on foreign law can be done at any stage, including on appeal.[107] Courts that pursue independent research have no obligation to notify the parties,[108] but many courts state that they have conducted independent research in their written opinions determining foreign law.[109]

The advisory committee notes specify that courts are permitted to require the parties to make a full presentation on foreign law by ordering supplemental briefing or scheduling a hearing on the foreign law issues.[110] In fact, many trial and appellate courts do require parties to submit supplemental briefing

104. *See* Wright & Miller, *supra* note 94 (noting the "trial judge is free to accept [evidence of foreign law] and to give them whatever probative value he or she thinks they deserve.").

105. *Chavarria v. Intergro, Inc.*, 8:17-CV-2229-T-23AEP, 2019 WL 1227773, at *3 (M.D. Fla. Mar. 15, 2019) (reviewing provisions of Honduran civil code), *aff'd*, 815 Fed. Appx. 375 (11th Cir. 2020); *Leon v. Ruiz*, Docket No. 7:19-CV-00293 (W.D. Tex. Dec 19, 2019) (reviewing Mexican statutes); *Chambers v. Russell*, Docket No. 1:20-CV-00498 (M.D.N.C. Jun 05, 2020) (reviewing Jamaican statute); *M.A. Mobile Ltd. v. Indian Inst. of Tech. Kharagpur*, 400 F. Supp. 3d 867 (N.D. Cal. 2019) (reviewing Indian caselaw).

106. *See Finvest Capital Fund, Inc., Pl., v. Solid Box, Llc, Ahmet Sutcu, Abdurrahman Sutcu and Huzeyfe Sutcu*, CV2006296ESMAH, 2021 WL 1153113 (D.N.J. Mar. 26, 2021) (relying on treatise on Canadian contract law); *Adria MM Prods., Ltd. v. Worldwide Entm't Grp., Inc.*, No. 17-CV-21603-CIV, ECF No. 156 (S.D. Fla. Sep. 6, 2018) (relying on treatise to determine Croatian trademark law); *see also Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J. concurring) (noting "judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases, all in . . . to provide neutral illumination of issues of foreign law.").

107. *See Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 639 (7th Cir. 2010) (Wood, J. concurring) (noting that the "written sources cited by both of my colleagues throw useful light on the problem before us in this case, and both were well within their rights to conduct independent research and to rely on those sources.").

108. Wright & Miller, *supra* note 94 (noting that as with researching domestic law, "the Advisory Committee's Note negates the existence of a duty" to notify the parties of independent research into foreign law); *de Fontbrune v. Wofsy*, 838 F.3d 992, 999–1000 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Nov. 14, 2016) ("Importantly, because foreign law interpretation and determination is a question of law, independent judicial research does not implicate the judicial notice and ex parte issues spawned by independent factual research undertaken by a court").

109. *See e.g., Pascarella v. Sandals Resort Intl., Ltd.*, 19 CIV. 2543 (AT), 2020 WL 1048943, at *5 (S.D.N.Y. Mar. 4, 2020) ("the Court's research confirms that on the key issue in this action—which is one of agency law, as will be seen—there is no conflict between New York and Bahamian law"); *IAL Logistics India Ltd. v. William Sheppee (USA) Ltd.*, 5:18-CV-2864, 2019 WL 2925083, at *5 n.5 (N.D. Ohio July 8, 2019) ("As suspected, the Court's rudimentary search on the internet quickly revealed a case from the Supreme Court of India."); *Luxottica Group S.p.A. v. Partnerships and Unincorporated Associations Identified on Sched. "A"*, 391 F. Supp. 3d 816, 826 (N.D. Ill. 2019), *reconsideration denied in part*, 18 CV 2188, 2019 WL 2357011 (N.D. Ill. June 4, 2019) ("Plaintiffs do not contest the validity of Article 277, and the court's independent research has confirmed its text"); *Finvest Capital Fund, Inc. v. Solid Box, LLC*, CV2006296ESMAH, 2021 WL 1153113, at *4 (D.N.J. Mar. 26, 2021) ("For purposes of this Opinion, the Court considered Ontario law presented by Finvest and conducted its own research and examined treatises and case law where the Court finds that Finvest's legal support is insufficient.").

110. Fed. R. Civ. P. 44.1 advisory committee's note to 1964 amendment ("the court is free to insist on a complete presentation by counsel").

on foreign law whether or not the issue was raised by the parties.[111] And, some courts hold hearings on the foreign law at issue to get a better understanding of the evidence, including permitting foreign legal experts to testify.[112]

C. Experts & Special Masters

Judges often rely on experts to assist with the determination of foreign law.[113] Most frequently, these experts are retained by the parties, as with fact experts. However, in some cases courts have independently appointed experts and/or special masters to assist.[114]

The practice of relying on party-appointed experts has been critiqued by some judges as "spoon feed[ing]"[115] and as inappropriate because expert witness testimony is not ordinarily permitted on issues of law.[116] Judges are not required to strike the testimony of a foreign law expert who offers legal conclusions. The primary purpose of a foreign law expert is to aid the court in determining the content of foreign law and not to provide an opinion on the application of that foreign law to the facts of the case.[117]

Because the legal determination will be made by the court,[118] foreign law experts do not need to meet specific qualification criteria. However, courts sometimes will weigh the qualifications of expert witnesses when determining whether to rely on their assertions regarding the status of foreign law.[119]

Some courts have chosen to appoint special masters to assist with the determination of foreign law. In *Behrens v. Arconic*,[120] the district court judge appointed an expert, a partner at a Paris law firm and former member of the French Constitutional Court, to serve as a special master and to determine whether a French blocking statute prevented the defendant from complying with plaintiffs' requests

111. *Kashef v. BNP Paribas SA*, 442 F. Supp. 3d 809 (S.D.N.Y. 2020) (ordering the parties to submit supplemental briefing on Swiss law); *Entes Indus. Plants, Constr. and Erection Contracting Co. Inc. v. Kyrgyz Republic*, CV 18-2228 ECF No.27-28 (D.D.C. Apr. 22, 2020) (examining supplemental briefing the court ordered the parties to submit); *Giha v. Sessions*, 1:16-CV-00893-EPG ECF No. 55 (E.D. Cal. Sept. 28, 2018) (ordering parties to submit supplemental briefing on foreign law); *G and G Productions LLC v. Rusic*, 902 F.3d 940, 954 (9th Cir. 2018) ("On remand, G&G and Rusic must heed our instruction to properly brief the district court on the meaning of any Italian law used to support their legal arguments. This means providing the court with copies of Italian legal authorities and English translations, and as appropriate, scholarly treatises, declarations by qualified experts (if desired by the court or parties), or other relevant materials").

112. *See e.g., Behrens v. Arconic, Inc.*, CV 19-2664, 2019 WL 7049946 (E.D. Pa. Dec. 20, 2019); *De Lucia v. Marina Castillo*, 3:19-CV-7 (CDL), 2019 WL 1905158 (M.D. Ga. Apr. 29, 2019) (relying on testimony of Italian foreign law expert that testified at hearing); *Beard v. Beard*, Docket No. 4:19-CV-00356 (S.D. Iowa Nov 01, 2019) (petitioner's expert, Canadian attorney, testified at hearing on Canadian law); *W. African Ventures Ltd. v. Ranger Offshore, Inc.*, 4:17-CV-00548, 2020 WL 1898344 (S.D. Tex. Feb. 5, 2020) (plaintiff's expert testified at bench trial and submitted declaration on English law).

113. *See e.g., Kleiman v. Wright*, 18-80176-CV, 2020 WL 1139067, at *6 (S.D. Fla. Mar. 9, 2020) (relying on expert declaration to determine Australian law); *Saada v. Golan*, 18-CV-5292(AMD)(LB), 2019 WL 1317868 (E.D.N.Y. Mar. 22, 2019) (relying on expert declaration to determine Italian law).

114. *See e.g., Behrens v. Arconic, Inc.*, CV 19-2664, 2019 WL 7049946 (E.D. Pa. Dec. 20, 2019) (appointing special master to assist with determination of French law).

115. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).

116. *See Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009) (noting "When a court in one U.S. state applies the law of another state, or when a federal court applies state law, the court does not permit expert testimony on the meaning of the 'foreign' law, even if it is the law of Louisiana, which is based to a significant degree on the French Civil Code.").

117. Wright & Miller, *supra* note 94 at § 2444.

118. *See* Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 Am. J. Comp. L. Supp. 213, 221 (2014).

119. *See e.g., IAL Logistics India Ltd. v. William Sheppee (USA) Ltd.*, 5:18-CV-2864, 2019 WL 2925083, at *5 (N.D. Ohio July 8, 2019) (noting "although there is no reason to disbelieve that JTI is an attorney in India, it would have been more convincing had a certificate of good standing, or its equivalent, been submitted. Second, even assuming, as the Court does for purposes of this ruling, that JTI is an attorney in good standing in India, the declaration does not supply any reason for this Court to assign *expert* credentials to this declarant; it does not even indicate how long JTI has been practicing law in India, much less reveal any special area of practice that might confer expert status.").

120. *Behrens v. Arconic, Inc.*, CV 19-2664, ECF No. 163 (E.D. Pa. Dec. 20, 2019).

for production of documents.[121] The parties were jointly responsible for compensating the special master and the court set forth procedures for parties to submit questions to guide her final report and recommendation.[122]

The practice of appointing a special master or independent expert to assist the court with determining foreign law is relatively rare.[123] Courts that have appointed special masters or experts have typically done so when the parties presented opposing expert opinions as to the foreign law at issue and its application.[124] A court is still required to determine foreign law and is not permitted to simply defer to the appointed expert's opinion. In one case, the court appointed an independent expert to supplement the two expert reports submitted by the parties and ultimately disagreed with the reports of all of three.[125] The court instead analyzed the foreign law issue itself; it reviewed recent case law from France to determine how a French court would interpret a contract between the parties when determining ownership of a patent.[126]

In Practice

In most cases, the court will involve the parties in the process of identifying an expert, requiring them to meet, confer and select mutually agreeable candidates.[127] For example, in deciding a contract dispute on a motion for summary judgment, some claims were based on state law and some on foreign law. Neither side employed a foreign law expert. The court required each party to submit a notice proposing no more than two special master candidates and explaining why each candidate was qualified.[128] Parties were permitted to interview their adversary's candidates and pose objections to their appointment.[129] In the end, the court appointed a special master who was versed in German and U.S. law.[130]

121. *Id.*

122. *Id.* at ECF No. 86, No. 163 at 3-4.

123. Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 Brooklyn L. Rev. 1095, 1106 (Summer 2010); *see also Monolithic Power Sys., Inc. v. O2 Micro Intern. Ltd.*, 558 F.3d 1341, 1346 (Fed. Cir. 2009) ("district courts rarely make Rule 706 appointments").

124. *See Shire Dev. Inc. v. Cadila Healthcare Ltd.*, CIV.A. 10-581 KAJ, 2012 WL 5331564, at *1 (D. Del. Oct. 19, 2012) ("Because the parties presented diametrically opposed expert reports on this difficult question, I appointed, in consultation with the parties, a neutral expert, Justice B. N. Srikrishna, former Justice of the Supreme Court of India, to opine on the issue."); *Implamed-Implantes Especializados, Comercio, Importacao E Exportacao Ltda. v. Zimmer, Inc.*, 06-21444, 2007 WL 9703128 (S.D. Fla. May 25, 2007*); Fin. One Pub. Co. Ltd. v. Lehman Bros. Spec. Financing, Inc.*, 215 F. Supp. 2d 395 (S.D.N.Y. 2002), *aff'd in part rev'd in part*, 414 F.3d 325 (2d Cir. 2005) (noting in order appointing special master that both parties' "esteemed experts have argued their respective positions cogently" which "presents the court with a quandary: whom to believe?"); *Carbotrade S.p.A. v. Bureau Veritas*, 92 CIV. 1459 (JGK), 1998 WL 397847, at *2 (S.D.N.Y. July 16, 1998).

125. *Institut Pasteur v. Simon*, 383 F. Supp. 2d 792, 794 (E.D. Pa. 2005).

126. *Id.* at 799.

127. *See Bouchillon v. SAME Deutz-Fahr, Group*, 1:14-CV-00135 No. 188 (N.D. Miss. June 17, 2016); *Shire Dev. Inc. v. Cadila Healthcare Ltd.*, CIV.A. 10-581 KAJ, 2012 WL 5331564, at *1 (D. Del. Oct. 19, 2012); *Implamed-Implantes Especializados, Comercio, Importacao E Exportacao Ltda. v. Zimmer, Inc.*, 06-21444, 2007 WL 9703128 (S.D. Fla. May 25, 2007); *Fin. One Pub. Co. Ltd. v. Lehman Bros. Spec. Financing, Inc.*, 215 F. Supp. 2d 395 (S.D.N.Y. 2002).

128. *See Bouchillon v. SAME Deutz-Fahr, Group*, Case No. 1:14-CV-00135, ECF No. 163 (N.D. Miss. 2017).

129. *Id.*

130. *See Bouchillon v. SAME Deutz-Fahr, Group*, 268 F. Supp. 3d 890, 906 (N.D. Miss. 2017).

D. U.S. Caselaw on Foreign Law

Courts may rely on decisions by other U.S. courts that have determined the same or similar foreign laws.[131] Prior to the passage of FRCP 44.1, when common law in the United States mirrored English common law, this was not permitted.[132] However, nothing in the text of FRCP 44.1 or the Supreme Court's guidance in the *Animal Science*[133] prohibits this practice and it is now accepted.[134]

This practice may be employed in the context of related cases (similar or the same parties, facts, or causes of action).[135] And, it may be supplemented by independent research or review of party submissions.[136]

While relying on another court's determination of foreign law can save time, there are caveats to this practice. Laws change and the facts of a particular case may require a different foreign law determination than that made by the prior court. The interpretation of a foreign country's laws by its courts also evolves, particularly in common law countries. These possibilities should be considered before adopting the foreign law interpretation of another U.S. court.[137]

VII. Comparative Approaches

A. State Courts: Practice and Procedure

i. State court approaches to determining foreign law

Most state statutes addressing the determination of foreign law are based on the Uniform Judicial Notice of Foreign Law Act of 1936 and the Uniform Interstate and International Procedure Act of 1962.[138] Both uniform statutes require that the determination of foreign law be made by the court, and not a jury.[139] Today, only two states continue to treat the determination of foreign law as a question of fact.[140]

131. *See Biotronik, Inc. v. Zurich Ins. PLC Niederlassung Fur Deutschland*, 3:18-CV-01631-SB, 2020 WL 996599, at *2 (D. Or. Feb. 28, 2020); *Towada Audio Co., Ltd. v. Aiwa Corp.*, 18-CV-4397, 2019 WL 1200748 (N.D. Ill. Mar. 14, 2019); *Luxottica Group S.p.A. v. Partnerships and Unincorporated Associations Identified on Sched. "A"*, 391 F. Supp. 3d 816, 826 (N.D. Ill. 2019), *reconsideration denied in part*, 18 CV 2188, 2019 WL 2357011 (N.D. Ill. June 4, 2019); *de Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019); *Monroy v. de Mendoza*, 3:19-CV-1656-B, 2019 WL 7630631 (N.D. Tex. Sept. 20, 2019), *report and recommendation adopted*, 3:19-CV-1656-B, 2019 WL 5204832 (N.D. Tex. Oct. 16, 2019), *vacated in part*, 3:19-CV-1656-B, 2019 WL 9047217 (N.D. Tex. Nov. 4, 2019); *Barry v. Islamic Republic of Iran*, 437 F. Supp. 3d 15 (D.D.C. 2020).

132. Sofie Geeroms, Foreign Law in Civil Litigation: A Comparative and Functional Analysis 147-148 (2004); Miller, *supra* note 2, at 624.

133. 138 S. Ct. 1865, 1868 (2018).

134. Geeroms, *supra* note 132, at 147.

135. *See e.g.*, *Barry v. Islamic Republic of Iran*, 437 F. Supp. 3d 15 (D.D.C. 2020); *Bathiard v. Islamic Republic of Iran,* Slip Copy (D.D.C., 2020).

136. See e.g., *Deposit Ins. Agency v. Leontiev*, 17MC00414GBDSN, 2018 WL 3536083 (S.D.N.Y. July 23, 2018) (considering party submitted expert report in addition to caselaw from US courts); *Monroy v. de Mendoza*, 3:19-CV-1656-B, 2019 WL 7630631 (N.D. Tex. Sept. 20, 2019) (considering party submitted evidence in addition to caselaw from US courts), report and recommendation adopted, 3:19-CV-1656-B, 2019 WL 5204832 (N.D. Tex. Oct. 16, 2019), vacated in part, 3:19-CV-1656-B, 2019 WL 9047217 (N.D. Tex. Nov. 4, 2019); *Towada Audio Co., Ltd. v. Aiwa Corp.*, 18-CV-4397, 2019 WL 1200748 (N.D. Ill. Mar. 14, 2019) (conducting independent research evidence in addition to caselaw from US courts).

137. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. Rev. 1619 (2020).

138. Hay, *supra* note 118, at 224.

139. *Id*. at 224–25, 236–240 (table listing statutes on determining foreign law within each state).

140. *Bangaly v. Baggiani*, 20 N.E.3d 42, 82 (Ill. App. 1st Dist. 2014) ("Thus, in Illinois, the laws of foreign countries must be pled and proven as any other fact."); *Pennsylvania Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002) ("Our cases are clear that it is not sufficient to merely plead the applicability of foreign law; it must also be proven."); *See* Hay, *supra* note 118, at 236–240.

ii. Existing state law certification procedures

The United States is not a party to either of the two international conventions that permit national courts to request an official statement from a foreign country regarding its laws.[141] No federal statute explicitly permits or sets forth a procedure for federal courts to certify foreign law questions to foreign courts. However, four state statutes authorize their state supreme court to certify questions of foreign law to the highest courts of other states, tribes, Canada, or Mexico (and their provinces).[142] Although these statutes exist, this author did not find cases citing these statutes to certify foreign law questions.

Future Development?

Some commentators have observed that federal courts may have the power to regulate the certification of foreign law questions to foreign courts by local rule,[143] a practice endorsed by some judges.[144] No court, however, has sought to develop such a certification procedure.

B. Foreign Courts: Practice and Procedure

i. Fact v. law-based approaches and convergence to a hybrid approach

Most foreign courts have adopted procedures similar to those of the United States: the determination of foreign law is a hybrid question of law and fact, regardless of whether it is deemed a question of fact or law. In England and Australia, foreign law remains an issue of fact. However, courts have adopted procedures usually reserved for determinations of law. These include requiring a judge and not a jury to determine foreign law, increased appellate scrutiny comparable to the scrutiny accorded questions of law, and permitting appellate courts to receive evidence on foreign law after the trial court has ruled.[145]

In civil law countries, the determination of foreign law is typically an issue of law, with the court assuming primary responsibility for its determination.[146] In theory, civil law countries embrace the principle of "iura novit curia" or "the court knows the law" for both domestic and foreign law.[147] In practice, however, the rules and procedures followed in many civil law countries contemplate that the court and

141. *See* European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U.N.T.S. 154; Inter–American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O.A.S.T.S. 1439 U.N.T.S. 111.

142. *See e.g.*, Minn. Stat. Ann. § 480.065(3) (permitting certification to "a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state"); *see also* Montana Mont. R. App. P. 15(3) (same); Oklahoma Okla. Stat. Ann. 20 § 1602 (same); West Virginia W. Va. Code § 51-lA-3 (same).

143. *See supra* note 76.

144. *See Terra Firma Invs. (GP) 2 Ltd. v. Citigroup Inc.*, 716 F.3d 296, 301 (2d Cir. 2013) (Lohier, J., concurring); *Fed. Treas. Enter. Sojuzplodoimport v. Spirits Intern. B.V.*, 61 F. Supp. 3d 372, 386 (S.D.N.Y. 2014) ("While I can rely on all available sources, and credit whatever expert testimony I choose, there is one thing I cannot do which would be the most helpful. I cannot certify these unsettled questions of Russian law to the Russian courts."), *aff'd in part, vacated in part, remanded*, 809 F.3d 737 (2d Cir. 2016).

145. *See* James McComish, *Pleading and Proving Foreign Law in Australia*, 31 Melb. U. L. Rev. 400, 415–16 (2007); Lalani, *supra* note 13, at 84–85.

146. Michalski, *supra* note 2, at 1253-61. *See also* Frederick Gaston Hall, Note, *Not Everything Is as Easy as a French Press: The Dangerous Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution*, 43 Geo. J. Int'l L. 1457, 1476–87, 1474–75 (2012).

147. Yuko Nishitani, *General Report*, in Treatment of Foreign Law: Dynamics Towards Convergence? 3, 18 (Yuko Nishitani ed., 2017).

parties share responsibility for the determination of foreign law.[148] For example, courts in Germany, Switzerland, and the Netherlands often require the parties to produce testimony, statutes, and other evidence to assist the court.[149] In limited situations, civil law jurisdictions apply forum law when all strategies for determining foreign law are not successful.[150]

ii. Additional resources relied on by foreign courts

1. Specialized institutes

In Switzerland and the Netherlands, courts frequently task specialized institutes with preparing reports and legal opinions that assist judges and litigants with the foreign law questions. In Switzerland, The Swiss Institute of Comparative Law (SICL) provides information and research on foreign and international law to government agencies and courts.[151] The SICL was created by Swiss federal law to gather information and legal opinions for "tribunals, administrative bodies, lawyers and other interested persons on foreign law."[152]

SICL staff are trained in researching the laws and legal systems of foreign countries, have access to broad resources that assist with foreign law issues, as well as information and contacts to assist with understanding the practical application of foreign legal provisions.[153] The Swiss Supreme Court has recognized the independence and impartiality of the SICL.[154] However, Swiss law does not require courts to adhere to SICL opinions; courts retain the obligation to determine foreign law independently and have discretion to rely on a number of resources.[155]

The Netherlands has a similar institution, the Hague Institute of Private International and Foreign Law (Internationaal Juridisch Instituut or IJI). The IJI was established as private nonprofit institution in 1918 to advise the judiciary, bar, and public notaries on foreign private law.[156] Although the IJI can be hired by attorneys to provide an opinion for litigation, the Institute maintains its mission of providing unbiased opinions on foreign law and requires payment even if it renders an opinion that is inconsistent with the party's interests.[157] Attorneys requesting an IJI option do not have any influence over the drafting of the opinion[158] but they are not obligated to submit an unfavorable opinion to the court.

The Dutch judiciary makes use of IJI opinions, viewing them as "a preliminary aid, even for foreign law where it might not be that difficult to ascertain its substance."[159] Courts treat foreign law issues as a questions of law to be determined by the court on its own initiative. However, due to the costs associated

148. Nishitani, *supra* note 147, at 17–18 (noting that "the 'iura novit curia' principle does not apply as a matter of course, and the task division between the court and the parties is effected in a manner different from domestic law" in most countries).

149. Nishitani, *supra* note 147, at 17–18 (noting that "[i]n Germany and Switzerland, the parties incur the obligation . . . to cooperate with the court").

150. Nishitani, *supra* note 147, at 34.

151. *See* Duncan Alford, *Sejour at the Swiss Institute of Comparative Law*, 33 Int'l J. Legal Info. 65 (2005).

152. Ilaria Pretelli and Shaheeza Lalani, *Switzerland: The Principle Iura Aliena Novit Curia and the Role of Foreign Law Advisory Services in Swiss Judicial Practice*, *in* Treatment of Foreign Law: Dynamics Towards Convergence? 375, 390 (Yuko Nishitani ed., 2017).

153. *Id. at* 390.

154. Pretelli and Lalani, *supra* note 152, at 390; *see also* Legal Opinions, Swiss Institute of Comparative Law, https://www.isdc.ch/en/services/legal-opinions (last visisted May 2, 2021).

155. Pretelli and Lalani, *supra* note 152, at 390.

156. Geeroms, *supra* note 132, at 156; *see also* Telephone Interview with Fieke van Overbeeke, CEO & Legal Counsel for the IJI (May 28, 2021).

157. *See* Telephone interview with Fieke van Overbeeke, *supra* note 156.

158. *Id.*

159. *See* Geeroms, *supra* note 132, at 156 (citing Dutch court's decision relying on IJI to ascertain Belgian law).

with researching foreign law (either independently or by securing an IJI opinion), Dutch courts will apply Dutch law if the parties refer only to Dutch law in their submissions and pleadings.[160]

2. Court appointed experts

United States courts do not often use court appointed experts.[161] In Germany, however, courts often appoint an expert to prepare a report on foreign law and testify during proceedings.[162] Court-appointed foreign law experts are used in other jurisdictions including Greece, Austria, Switzerland, Italy, the Netherlands,[163] and South Africa.[164]

German judges consult with the parties before selecting an expert. The losing party must pay expert fees as part of the court costs.[165] German courts frequently rely on the Max Planck Institute in Hamburg or other university institutes and appoint researchers or the institute itself as experts.[166] Judges in Germany prefer to rely on experts affiliated with local institutions since they have familiarity with the German legal system and its procedures.[167] In some instances, however, German courts will permit expert opinion from a foreign lawyer if information about local practice is needed, the foreign legal issue is not regulated by statute or caselaw, or the issue is unsettled in the foreign country.[168] Some critics of German practice argue that courts tend to rely on the expert opinions without independently analyzing the opinions of the expert.[169]

160. Aukje Van Hoek, Ian Sumner, and Cathalijne van de Plas, *The Netherlands*, in Cross Border Litigation 395, 400 (Paul Beaumont et al. eds., 2017).

161. *See* Joe S. Cecil & Thomas E. Willging, Court-Appointed Experts: Defining the Role of Experts Appointed under Federal Rule of Evidence 706 (Federal Judicial Center 1993); Geeroms, *supra* note 132, at 145.

162. Oliver Remien, *Germany: Proof of and Information About Foreign Law — Duty to Investigate, Expert Opinions and a Proposal for Europe*, *in* Treatment of Foreign Law: Dynamics Towards Convergence? 183, 195–197 (Yuko Nishitani ed., 2017). Geeroms, *supra* note 132, at 150–51.

163. Nishitani, *supra* note 147, at 24.

164. *See* Richard Frimpong Oppong, *Private International Law Scholarship in Africa (1884–2009)—A Selected Bibliography*, 58 Am. J. Comp. L. 319, 321–22 (2010) (noting that the Institute for Foreign and Comparative Law is a "center of expertise and excellence in the fields of applied private international law, comparative private international law, and foreign law" and on average produces about thirty legal opinions a year for legal professionals and the judiciary).

165. Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 Duke J. Comp. & Int'l L. 61, 64 (2003).

166. Geeroms, *supra* note 132, at 151 (explaining that the Max Planck Institute in Hamburg, The Munich Institute of International and Comparative Law, and the Munich Institute of East European Law are all large providers of legal opinions to German courts).

167. Remien, *supra* note 162, at 197.

168. Geeroms, *supra* note 132, at 152.

169. Remien, *supra* note 162, at 198.

The "Hot Tub" & Other Approaches to Addressing Expert Bias

Some countries have developed solutions to address the potential for expert bias. Judges require experts to sign declarations of loyalty to the court, explicitly indicating that their loyalty does not lie with the party paying their bills.[170] Another mechanism now used by some courts is "hot tubbing," where experts testify concurrently.[171] Australian judges report that the taking of concurrent expert testimony saves substantial court time and costs.[172]

This practice has received attention in the United States and has been used in complex tort, antitrust, patent, and other civil cases.[173] The practice of taking concurrent expert testimony is used most often in non-jury cases.[174] Judges employ hot tubbing to address concerns that "an expert was holding back and not conceding points because of excessive control by counsel."[175] The hot tub method used by U.S. judges tends to be more informal and conversational, with the judge directing the questioning instead of the parties.[176]

VIII. Resources for Judges

A. Circuit Librarians

Circuit librarians have access to library materials as well as contacts with local universities that can facilitate gathering foreign law materials.

B. Law Library of Congress

The Law Library of Congress has an extensive collection of foreign law resources.[177] In addition to country specific research guides, foreign legal gazette collections, and an extensive collection of hard copy materials, the Law Library of Congress offers a foreign law research service. This service has been used by federal agencies (including immigration courts) to assist with the determination of foreign law.[178] The Law Library estimates that the it receives approximately 400–500 requests yearly from the executive

170. Adam Liptak, *In U.S., Expert Witnesses Are Partisan*, NY Times, Aug. 12, 2008, https://www.nytimes.com/2008/08/12/us/12experts.html.

171. Lisa C. Wood, *Experts in the Tub*, 21 Antitrust 95, 94 (2007).

172. Wood, *supra* note 172, at 95–96.

173. *See* Adam E. Butt, *Concurrent Expert Evidence in the United States – Is There a Role for Hot Tubbing?*, Civil Jury Project at NYU School of Law, https://civiljuryproject.law.nyu.edu/concurrent-expert-evidence-in-the-united-states-is-there-a-role-for-hot-tubbing/; Liptak, *supra* note 170; Judge Jack Zouhary, Jumping in - A Different Approach to Expert Evidence, 62 Fed. Law. 22 (2015); Justice Rares, Justice Steven Rares, *Using the "Hot Tub" — How Concurrent Expert Evidence Aids Understanding Issues*, Federal Court of Australia, Oct. 12, 2013, https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20131012.

174. *See* Wood, *supra* note 172, at 97; Butt, *supra* note 173.

175. Wood, *supra* note 172, at 97.

176. *Id*. at 97; *see also* Judge Zouhary, *supra* note 173, at 22 (noting that the court moderated the questioning process based on a set of questions that the judge sent to the parties prior to the hearing).

177. *See* Andrew Winston, Peter Roudik, Barbara Bavis, Donna Sokol, *The Law Library of Congress: A Global Resource for Legal Education*, 67 J. Leg. Educ. 962, 967–69 (2018).

178. *See e.g.*, *Gorsira v. Loy*, 357 F. Supp. 2d 453, 461 (D. Conn. 2005) (noting that BIA relied on a memorandum prepared by the Law Library of Congress, and relying on same memorandum to analyze and determine Guyanese law on legitimation).

and legislative branches of government but fewer than twenty from the judiciary.[179] The Law Library's legal opinion service is able to provide opinions in less than three weeks for requests made by the public and within one to two weeks for legislative and executive branch agencies.[180]

Appeals courts have approved court reliance on Law Library memoranda. In an immigration case, the Ninth Circuit noted that "Library of Congress research deserves considerable evidentiary weight" for matters relating to the application of "unfamiliar, foreign law, particularly unwritten, customary law."[181]

To access the services of the Law Library of Congress, court personnel enlist the assistance of their court's circuit librarian or reach out to the Law Library of Congress directly.

C. Online databases and research guides

i. Online databases

Members of the judiciary have access many relevant resources:

- Heinonline: provides broad access to a range of journal articles addressing many aspects of foreign law. Specifically, the Foreign and International Law Resources Database includes international periodicals, judicial decisions from international tribunals, as well as other resources from specific countries including Australia, Britain, Canada, Germany, France, and South Africa.
- Westlaw: provides access to international law materials and law journals covering Australia, Canada, European union, France, Germany, Hong Kong, Ireland, Israel, Korea, Mexico, Netherlands, new Zealand, Poland, Singapore, Taiwan, and the United Kingdom as well as law journals from around the world.

ii. Circuit specific guides and resources

Circuit librarians have compiled foreign law research guides. Note, these resources may be accessible only when connected to a court server.

- Seventh Circuit: http://lib.circ7.dcn/askbill.html#intl
- Eighth Circuit: http://www.circ8.dcn/library/Pages/InternationalLaw.aspx
- Ninth Circuit: http://web.circ9.dcn/Library/research/Pages/Foreign-International.aspx
- Eleventh Circuit: https://ca11.uscourts.libguides.com/c.php?g=1113140
- Federal Circuit: https://cafc.uscourts.libguides.com/InternationalTrade

Many circuits also have access to resources addressing the laws of frequently cited jurisdictions. For example, the First Circuit library has several compilations on the Spanish civil code to assist with the interpretation of matters in the Commonwealth of Puerto Rico, which has a legal system based partly on Spain law.[182] The Fifth Circuit has access to translated statutory codes from countries in South America

179. Telephone Interview with Peter Roudik, Director for the Global Research Center Law Library of Congress (Nov. 23, 2020). *See also* Law Library of Congress, *Annual Report Fiscal Year 2016* 1, 12 (2016), https://blogs.loc.gov/law/files/2016/12/FY2016-LAW-ANNUAL-REPORT.pdf (reporting 13 inquiries from the judicial branch versus 332 from executive agencies and 433 reports for congress).

180. *See id.*

181. *Dulai v. I.N.S.*, 42 F.3d 1399 (9th Cir. 1994) (citing *Cheung Tai Poon v. INS*, 707 F.2d 258, 259 (6th Cir.1983) (also relying on Library of Congress memorandum relating to Hong Kong laws)).

182. Telephone Interview with Lisa White, Fifth Circuit Librarian (Jan. 7, 2020).

as well as the French Civil Code.[183] The Ninth Circuit has access to materials on pacific island nations.[184] Both the Seventh and Tenth Circuits have access to materials on indigenous American tribal law.[185]

iii. Other foreign law resources

- Global Lex: provides an overview of the legal system of most countries as well as a corresponding bibliography with resources for further review.
- Georgetown Law Foreign Law Guides: provide several foreign and international law research guides, including several that are country or topic specific.
- Law Library of Congress Articles and Published Legal Reports: the Law Library of Congress has many resources for researching foreign law, as described above. Some of the most useful resources are published online are the legal reports it has compiled as well as articles and primers on the laws of foreign countries.

183. Telephone Interview with Sue Creech, Reference & Electronic Resources Librarian, US Courts Library for the First Circuit (Jan. 13, 2020).

184. Telephone Interview with Christina Luini and Shannon Lashbrook, Library and Research Services for the courts of the Ninth Circuit (Jan. 13, 2020).

185. Telephone Interview with Helane Davis, Circuit Librarian for the Tenth Circuit (Jan. 13, 2020); Telephone Interview with John Klaus, Circuit Librarian for the Seventh Circuit (Jan. 15, 2020).

The Federal Judicial Center

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629) on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person and virtual programs, videos and podcasts, publications, curriculum packages for in-district training, and web-based resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.