FOREIGN LAW IN FEDERAL TRIAL COURTS: ANALYSIS OF CHALLENGES AND GUIDELINES FOR REMEDY

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ABSTRACT

Federal courts are required to apply the laws of foreign countries in a variety of different cases which range in complexity. The Supreme Court has urged federal courts to treat the determination of foreign law as similar to the determination of domestic state law. And yet, judges receive no specialized training in how to determine foreign law and the resources for conducting independent research on foreign law are not as extensive as those available for researching domestic law. In this article, I review the methods used by federal district courts to ascertain foreign law and determine that judges have largely not conducted independent research when resolving questions of foreign law. Instead, these courts have relied on partisan expert testimony. Although the failure to conduct independent research indicates that federal courts are not treating foreign and domestic law similarly, I argue that this not problematic because foreign law falls into a separate third category that requires courts to use procedure for both questions of fact and law, including relying on expert testimony. The reliance on expert testimony carries the potential for bias since such experts serve as part of a party's case team. I suggest four overlooked resources—similar to those adopted by other countries—that judges can implement to reduce the effects of such bias by making the process for engaging with the foreign legal issues easier and more efficient.

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INTRODUCTION

Federal courts must interpret and apply the law of foreign countries in a broad range of cases.[1] In one case, a judge may be required to determine whether a foreign arbitral award or judgment should be enforced,[2] in another, whether foreign law prevents a party from complying with the court's discovery orders,[3] or whether a child was taken into the United States in violation of another parent's foreign custody rights;[4] to name a few of the numerous unpredictable scenarios requiring the application of foreign law.

The laws of foreign countries, however, are often steeped in legal traditions that can make the application of a particular law or legal principle difficult without additional context.[5] The complexity of unraveling this context is compounded by the pressure trial courts face to manage their dockets efficiently and expeditiously. Most judges in the United States, however, have little training in the laws and legal systems of other countries.[6] Courts tasked with determining foreign law do not have a centralized source or database to assist with routine applications of foreign law and are unable to certify foreign law questions to the courts of those countries for guidance,[7] as federal courts are permitted to do when encountering unresolved questions

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[1] *See* Loren Turner, *Buried Treasure: Excavating Foreign Law from Civil Pleadings Filed in U.S. Federal Courts*, 47 INT'L. J. LEGAL INFO. 22, 25–33 (2019) (cataloguing various case types involving determinations of foreign law); Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 888–93 (2011). *See generally* JUSTICE BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015) (discussing various contexts requiring U.S. courts to consider decisions of foreign courts, including the Hague Convention on Child Abduction).

[2] *See, e.g.*, Balkan Energy Ltd. v. Republic of Ghana, 302 F. Supp. 3d 144, 146–47 (D.D.C. 2018) (seeking enforcement of foreign arbitral award); LMS Commodities DMCC v. Libyan Foreign Bank, No. 1:18-CV-679-RP, 2019 WL 1925499, at *1 (W.D. Tex. Apr. 30, 2019) (seeking enforcement of foreign judgment).

[3] *See, e.g.*, Behrens v. Arconic, Inc., No. CV 19-2664, 2019 WL 7049946, at *1 (E.D. Pa. Dec. 20, 2019) (defendants claimed French blocking statute prevented compliance with discovery order).

[4] *See, e.g.*, Nowlan v. Nowlan, 543 F. Supp. 3d 324, 329, 339–42 (W.D. Va. 2021) (whether respondent's removal of child from Canada violated petitioner's rights under Canadian custody law).

[5] *See* Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 38–39 (1997); Wilson, *supra* note 1, at 911; Pierre Legrand, *Proof of Foreign Law in U.S. Courts: A Critique of Epistemic Hubris*, 8 J. COMPAR. L. 343, 344–46, 348, 353, 380 (2013).

[6] Wilson, *supra* note 1, at 890; Adler, *supra* note 5, at 38–39.

[7] *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1875 (2018); Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT'L L. & POL. 1111, 1135–36 (2013).

of state law.

In federal court, the application of foreign law is governed by Federal Rule of Civil Procedure ("Fed. R. Civ. P." or "FRCP") 44.1, which gives judges great flexibility in determining the substance of a foreign law and its applicability to a case. 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.[8] In *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, 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.[9] Although *Animal Science* 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.[10] 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.'"[11]

When courts adjudicate disputes, they are required to make choices about how to allocate scarce time and resources to resolve the myriad matters before them. Even with the Supreme Court's gloss on FRCP 44.1, practical challenges have hindered federal trial courts' attempts to determine foreign law in the same manner as domestic law. As I show in this article, federal trial courts mostly rely on expert reports when determining foreign law and seldom conduct independent research. This article provides a snapshot of how federal trial courts have approached foreign law determinations in recent years and identifies resources and strategies that can assist federal courts in making these determinations.

In Part I of this article, I chart the history of FRCP 44.1 and its role in moving federal courts away from the common law approach of treating foreign law issues as questions of fact. I argue that although the rule sought to make the determination of foreign law an issue of law, it did not do so completely, since the determination of foreign law necessarily falls into a third "in-between" category and requires judges to use procedures for resolving both questions of fact and law.

I share the results of my analysis of 100 decisions where district court judges have determined foreign law in the three years since the *Animal Science* decision. My findings reveal that the vast majority of these courts did not conduct independent research to ascertain foreign law and relied

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[8] *Animal Sci.*, 138 S. Ct. at 1869, 1875.

[9] *See id.* at 1869.

[10] *Id.* at 1873.

[11] *Id.* (quoting 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2444 (3d ed. 2008)).

mostly on party-submitted experts and evidence to determine foreign law.

In Part III, I analyze the reasons why federal judges might not conduct independent research into foreign law. After interviewing the librarians of each circuit, I found several common challenges that decreased the likelihood of independent research, including a lack of translation mechanisms and access to comprehensive databases on foreign law. In addition to the practical difficulties of researching foreign law, I also explore a jurisprudential objection to conducting independent research. Although some judges consider it antithetical to the adversarial system for judges to independently research foreign law, I argue that independent research into foreign law does not undermine adversarial values. In fact, the American system has come to recognize a more active judicial role as compatible with the adversarial system.

In Part IV, I recommend several practices to make the process of determining foreign law more efficient, cost-effective, and less partisan. As I show, some of these recommendations are based on the practices of foreign jurisdictions. These four proposals include: the use of court-appointed experts and special masters; outreach to and reliance on the Law Library of Congress ("LLOC"); increasing informal consultations between U.S. and foreign judges; and improvements to the process of taking expert testimony at hearings and receiving written expert declarations and reports. Although these practices have not been extensively used in U.S. courts, their increased adoption can help make the process of determining foreign law more accurate and efficient.

I. AN OVERVIEW OF THE DETERMINATION OF FOREIGN LAW IN U.S. FEDERAL COURTS

In this section, I map the history of foreign law determinations in federal courts and provide context for understanding how FRCP 44.1 was applied prior to the *Animal Science* decision. FRCP 44.1 made the determination of foreign law a question of law but did not expressly obligate courts to independently research the issue. The rule's oft-critiqued silence on whether courts are obligated to independently research foreign law was intentional and motivated by the drafters' hopeful prediction that the grant of wide discretion to consider any number of sources when determining foreign law would encourage independent research by the courts.[12] The drafters' predictions did not come to fruition, and most judges instead relied on party-submitted experts when determining foreign law.[13] I also address the most

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[12] FED. R. CIV. P. 44.1 advisory committee's note to 1966 amendment ("In further recognition of the peculiar nature of the issue of foreign law, the new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found.").

[13] *See* Stephen L. Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMPAR. L. 97, 109

common critique of judicial practice for determining foreign law—that judges ought not rely on expert testimony—and argue that it fails to account for the fact that determinations of foreign law are determinations falling into a third category and involve procedure typically used for resolving both questions of fact and law.

A. History of FRCP 44.1 and the Fact-Based Approach

Prior to the adoption of FRCP 44.1 in 1966, the determination of foreign law was treated as an issue of fact, similar to the approach taken by other common law countries.[14] This practice was borrowed from the English common law system and dates back to shortly after the establishment of the federal judiciary.[15] When the determination of foreign law was treated as an issue of fact, the party seeking its application carried the burden of pleading and proving it,[16] judges were not permitted to independently research foreign law,[17] and the determination of foreign law was sometimes left to the jury not a judge.[18] In common law countries today, foreign law is still treated as a question of fact.[19] Practice, however, has evolved and, while the primary responsibility for proving foreign law remains on the party asserting it, the judge assumes responsibility for determining it instead of a jury.[20]

In civil law countries, the determination of foreign law was historically an issue of law, with the court assuming primary responsibility for its determination.[21] In theory, civil law countries embrace the principle of *iura novit curia*, or "the court knows the law," as applying to the ascertainment of both domestic and foreign law.[22] This court-centric model demands that judges actively ascertain any foreign law issues they encounter, regardless of

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(1981).

[14] Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1250–52 (2011).

[15] 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, 617–19, 649, 674–75, 680 (1967) (citing Talbot v. Seeman, 5 U.S. 1, 12 (1801) ("Foreign laws must be proved as facts.")).

[16] Michalski, *supra* note 14, at 1250–52.

[17] *See* Sass, *supra* note 13, at 109 ("[T]he 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.").

[18] Miller, *supra* note 15, at 623.

[19] *See* Michalski, *supra* note 14, at 1207, 1251–52.

[20] Yuko Nishitani, *General Report*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE? 3, 18 (2017).

[21] Michalski, *supra* note 14, 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, 1474–87 (2012).

[22] Nishitani, *supra* note 20, at 17.

any deficiencies in briefing or evidence brought before them.

FRCP 44.1 brought American practice closer to the court-centric models adopted by civil law countries. Prior to the rule's adoption, the system for proving foreign law in the United States was needlessly complicated, requiring the parties to jump through procedural hoops in order to introduce evidence as to the content of foreign law.[23] The change from a fact-based system to a law-based system also meant that parties no longer had to plead foreign law as a fact in their complaint or meet any of the pleading standards.[24] The text of FRCP 44.1 relaxed the procedures for proving foreign law in court and permitted judges to rely on "any relevant material or source, including testimony" even if "not submitted by a party or admissible under Rule 43."[25] Treating foreign law as a question of law also has an important implication for the appellate review process: these questions are now reviewed under the *de novo* standard and appellate courts can consider sources that the district court did not.[26]

Despite the characterization of 44.1 as a question of law, litigants and judges still questioned whether the court had a duty to independently research and determine foreign law anytime the issue was raised. FRCP 44.1 is silent on whether a court is obligated to research and determine foreign law on its own when the parties fail to provide the court with sufficient evidence.[27] Scholars have observed, and lamented, inconsistent approaches taken by the circuit courts of appeals as to where the obligation to research the contents of foreign law lies.[28]

44.1's silence on the burden of researching foreign law was intentional and had two goals.[29] First, the committee sought to avoid overstepping the Supreme Court's procedural rule making authority.[30] This is because the

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[23] *See* Miller, *supra* note 15, at 621–31.

[24] Alejandro J. García, Note, Lex Incognita *No Longer: Making Foreign Law Less Foreign to Federal Courts*, 108 GEO. L.J. 1027, 1035 (2020).

[25] Miller, *supra* note 15, at 617 n.5. FRCP 44.1 was later amended to clarify that material need not be admissible under the Federal Rules of Evidence, not specifically Rule 43.

[26] *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1868 (2018); *In re* Tyson, 433 B.R. 68, 78 (Bankr. 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)) (internal quotations omitted).

[27] Miller, *supra* note 15, at 695.

[28] *See, e.g.*, García, *supra* note 24, at 1036–51 (observing that the Ninth and Seventh Circuits have taken a permissive approach that places the primary burden for researching foreign law on the court, whereas the Fourth, Fifth, and Third Circuits have placed the primary burden for proving foreign law on the parties); *see also* Louise Ellen Teitz, *Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation*, 45 N.Y.U. J. INT'L L. & POL. 1081, 1088–93 (2013).

[29] Miller, *supra* note 15, at 695.

[30] *Id.* (noting that the Rules Enabling Act permits the Supreme Court to make procedural

question of whether a court is obligated to establish foreign law is partly a choice of law question,[31] and partly a question of where the evidentiary burden of proof lies.[32]

The drafters of FRCP 44.1 had a second reason for the ambiguity as to where the burden lies for proving foreign law. The drafters wanted to leave the matter for judicial development because they optimistically thought the additional freedom and extensive discretion granted to courts to consider foreign law materials would empower courts to conduct their own research into foreign law, making the issue a rare occurrence.[33] Despite this broad grant of discretion, however, judges primarily relied on party-appointed experts to resolve foreign law issues.[34]

B. Dominant Critique of Federal Court Determinations of Foreign Law

Scholars and judges have debated the appropriate method for determining foreign law.[35] In particular, there is an ongoing debate about the propriety of relying on party-submitted experts and their reports.[36] Those critical of the use of party-submitted experts argue that when determining domestic law, experts are not permitted to invade the province of the court by testifying on issues of law.[37] On the other side of the coin, some scholars have argued that context is crucial.[38] They argue that it is dangerous to forgo expert advice and

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rules and that choice of law rules were considered to be substantive matters, not procedural); Rudolf B. Schlesinger, *Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 19–20 (1973).

[31] Choice of law questions are considered substantive and not procedural questions. *See* Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941).

[32] *See* Miller, *supra* note 15, at 632, 695. The reason why this obligation is partly a choice of law question is because where there is uncertainty about which country's laws govern a case, a court must determine whether there is a conflict between the laws of the foreign country and the forum country. To determine if there is a conflict, the court must determine what the substantive law of the foreign country is. Teitz, *supra* note 28, at 1085. If there is a conflict, then a court will apply one of several tests to determine which country's laws will govern the matter. Miller, *supra* note 15, at 695–96. In these circumstances, the determination of foreign law is part of a larger choice of law inquiry.

[33] Miller, *supra* note 15, at 695; *see also* FED. R. CIV. P. 44.1 advisory committee's note to 1966 amendment ("The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.").

[34] Wilson, *supra* note 1, at 902.

[35] *See* Legrand, *supra* note 5, at 352–53; Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMPAR. L. 581, 585 (1995); Miller, *supra* note 15, at 629–30.

[36] *See, e.g.*, García, *supra* note 24, at 1037–41.

[37] *Id.* at 1029.

[38] Legrand, *supra* note 5, at 343–44.

rely solely on independent research consisting of primary source materials and academic articles because a generalist judge may miss the mark by failing to take note of the most up to date precedent and how foreign law is actually practiced.[39]

This debate came to the fore in the Seventh Circuit's decision in *Bodum USA, Inc. v. La Cafetiere, Inc.*,[40] where a panel of the court comprised of Judge Easterbrook, Judge Posner, and Judge Wood were called on to determine whether the district court erred in its interpretation of French law for a central issue in the case. Judge Posner became the most vocal critic of the reliance on experts in determining foreign law, arguing that such reliance is inappropriate "spoon feed[ing]" and that judges should instead conduct their own foreign law research.[41] Judge Easterbrook was not quite as critical of the reliance on experts but did underscore that judges should engage with primary source materials on foreign law.[42] Judge Wood disagreed with her colleagues, noting that 44.1 establishes no "hierarchy for sources of foreign law" and concluded that foreign legal experts could be used responsibly by the parties to provide a fair and accurate picture of foreign law.[43] She noted that courts have the authority to vet foreign legal experts and the opinions they give pursuant to Federal Rule of Evidence ("Fed. R. Evid." or "FRE") 702.[44]

C. Foreign Law as a Third Category or "Tertium Genus"

Scholars studying foreign law interpretation in the context of multiple legal regimes have long observed that foreign law is a third category, in between law and fact.[45] Although FRCP 44.1 designates foreign law as a question of law, courts still use procedural elements of fact finding to assist in ascertaining foreign law. This includes the requirement of proper notice of the foreign law issue, reliance on party-submitted experts (experts are not normally permitted to opine on questions of law and their opinions can only be used for questions of fact), and requiring the parties to produce evidence as to the content of foreign law. This is also evidenced by some courts' use of FRE 706 to appoint independent experts to assist with the determination

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[39] *Id.* at 343–44, 349–50.

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

[41] *Id.* at 631–33 (Posner, J., concurring).

[42] *Id.* at 629 (majority opinion) ("Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case. Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.").

[43] *Id.* at 638 (Wood, J., concurring).

[44] *Id.* at 639.

[45] *See* Sass, *supra* note 13, at 98; Shaheeza Lalani, *Establishing the Content of Foreign Law: A Comparative Study*, 20 MAASTRICHT J. EUR. & COMPAR. L. 75, 83–85 (2013).

of foreign law.[46]

Even in civil law countries, where the court is primarily responsible for researching foreign law independently, the determination of foreign law is treated differently from other questions of law.[47] The rules of practice envision that the court and the parties will share responsibility for the determination of foreign law.[48] Courts in Germany, Switzerland, the Netherlands, and other civil law countries often require the parties to be involved in producing expert testimony, statutes, and other evidence to assist the court in ascertaining foreign law.[49] In limited situations, when a court in a civil law country is unable to ascertain the contents of foreign law, that court is permitted to apply forum law.[50]

Judges in countries where foreign law is treated as a fact issue also routinely tend to treat foreign law more like a mixed third category.[51] In countries like England and Australia, courts have adopted procedures usually reserved for determinations of law.[52] These include reliance on expert testimony, requiring a judge and not a jury to determine foreign law, increased appellate scrutiny similar to the scrutiny accorded to questions of law, and the ability for appellate courts to receive evidence on foreign law after the trial court has ruled.[53]

Globally, these practices evidence that the determination of foreign law is a hybrid question which resists strict categorization. Thinking of the determination of foreign law as a mixed question of law and fact may be helpful when assessing what tools a court can and should use to ascertain foreign law in an efficient manner. Even in the context of pure questions of law, judges routinely consider arguments and case law presented by the parties. Thus, expert testimony is not objectionable in the context of determining foreign law solely because it is the province of the court to determine questions of law.

II. METHODS USED TO DETERMINE FOREIGN LAW SINCE *ANIMAL SCIENCE*

Recent scholarship on FRCP 44.1 has tended to focus on critiquing the

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[46] *See infra* Part IV.A.

[47] Nishitani, *supra* note 20 at 17.

[48] *Id*. 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).

[49] *Id*. at 17 ("In Germany and Switzerland, the parties incur the obligation . . . to cooperate with the court.").

[50] *Id*. at 34.

[51] *See* James McComish, *Pleading and Proving Foreign Law in Australia*, 31 MELB. U. L. REV. 400, 415 (2007).

[52] *See id*. at 415–16.

[53] *See id*.; Lalani, *supra* note 45, at 84–85.

vagueness of the rule and the tendency of some federal courts to dismiss foreign law claims or apply forum law in cases where foreign law is not adequately proven.[54] Recent scholarship has also focused on the theoretical question of whether judges ought to apply the laws of foreign countries that are labeled illiberal or authoritarian in nature.[55] Although some scholars have sought to analyze the methods that federal judges use to determine foreign law in specific contexts, including in determining Chinese law[56] and in the context of discovery and *forum non conveniens*,[57] none have recently[58] sought to analyze a broad spectrum of cases to assess the extent that trial courts have engaged in independent study or research of foreign law.

There has not been any large-scale study of what methods district courts have recently employed to determine foreign law and no analysis of how often federal trial courts conduct independent research to ascertain foreign law. In this section, I will analyze how federal trial courts have ascertained foreign law for the three-year period following the Supreme Court's decision in *Animal Science*.[59] As my analysis of the data shows, courts tend to rely on the litigants to present evidence of the contents of foreign law through expert declarations and through submissions of translated cases and statutes. Some courts do engage in independent research, but they are in the minority.

A. Methodology

In order to capture as many of cases as possible where courts determined foreign law, I ran searches on Westlaw Edge and Bloomberg Dockets, filtering for only federal trial court cases between June 14, 2018, and June 14, 2021.[60]

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[54] *See, e.g.*, Matthew J. Ahn, Note, *44.1 Luftballons: The Communication Breakdown of Foreign Law in the Federal Courts*, 89 N.Y.U. L. REV. 1343, 1374–75 (2014); Teitz, *supra* note 28, at 1093; García, *supra* note 24, at 1030.

[55] *See, e.g.*, Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685, 1685 (2020).

[56] *See, e.g.*, Aurora Bewicke, *The Court's Duty to Conduct Independent Research into Chinese Law: A Look at Federal Rule of Civil Procedure 44.1 and Beyond*, 1 CHINESE L. & POL'Y REV. 97, 97 (2005).

[57] *See, e.g.*, Vivian Grosswald Curran, *Federal Rule 44.1: Foreign Law in U.S. Courts Today*, 30 MINN. J. INT'L L. 231, 231 (2021).

[58] *See* Sass, *supra* note 13, at 109–10.

[59] Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1875 (2018).

[60] The searches include:

- "44.1" or "foreign law";
    - I also ran similar searches for Federal Rule of Criminal Procedure 26.1 which is exactly the same as the civil rule, but there were no decisions where the court determined foreign law in a criminal case despite the fact that the issue was raised in multiple criminal cases.
- cases citing to *Animal Science*, filtered by jurisdiction and date;

After identifying suitable cases, I reviewed the docket for each case and relevant entries made by judges and the parties to assess how judges determined foreign law, what resources they relied on, and what materials were available to them in making their decision. I analyzed only those cases where the district court actually ascertained foreign law. I did not include cases where there was no foreign law determination because the court applied forum law, where the matter was briefed by the parties but the court had not yet issued a decision determining foreign law, where the court declined to determine foreign law due to insufficient briefing by the parties, where the parties abandoned their foreign law claims or waived them due to insufficient notice, or where the court presumed foreign law to be the same as forum law (but did not actually examine the foreign law). I did include cases where the court examined the foreign country's law and determined that it was the same as forum law.

While this study aims to include as many cases as possible, it is not comprehensive and cannot be comprehensive. This is because there is no easy way to catalogue every single case where a court ascertains the laws of another country. Some courts will cite specifically to FRCP 44.1 when ascertaining foreign law, but some courts do not.

I focused on district courts because they are better able to take expert testimony and create a record and have greater flexibility in directing the parties to assist them in providing evidence of foreign law. As the Second Circuit noted in a recent decision on FRCP 44.1, the ascertainment of foreign law, although a legal determination, "frequently calls for fact-like procedures that a district court is better situated to implement."[61]

B. Results of Analysis

The results of my analysis are as follows. There were 100 cases where district courts determined the laws of foreign countries between June 14, 2018, and June 14, 2021. The districts most frequently encountering issues of foreign law were those in New York, California, and the District of Columbia.[62] There were fourteen cases decided in the second half of 2018, thirty-seven in 2019, thirty-seven in 2020, and twelve in the first half of 2021.

- cases citing to the FRCP 44.1, filtered by jurisdiction and date; and
- "federal rule! of civil procedure 44.1" OR "federal rule! of civil procedure rule 44.1" OR "Fed. R. Civ. Pro. 44.1" OR "Fed. R. Civ. P. 44.1" OR "FRCP 44.1" OR "Rule 44.1" NOT "PCT Rule 44.1" NOT "Criminal Rule 44.1".
    - To develop this search string, I relied on Turner, *supra* note 1, at 45–50 (describing available methods for finding and organizing foreign law litigated in U.S. federal courts).

[61] Bugliotti v. Republic of Argentina, 952 F.3d 410, 414 (2d Cir. 2020).

[62] A chart showing the frequency with which certain courts determined foreign law is attached *infra* Appendix, Attachment A.

The foreign countries whose laws were most frequently examined included: the United Kingdom, Italy, Canada, France, India, Peru, China, and Germany. Procedurally, the majority of the decisions addressed motions to dismiss (forty) or motions for summary judgment (twenty-four).[63]

Within the subset of 100 cases, I analyzed the methods courts used to determine foreign law. The results are as follows:

Cases	Evidence Relied on and Other Case Events
1	Court-appointed expert/special master
17	Independent research[64] ⇒ 11 courts stated they conducted independent research ⇒ 6 courts appeared to have conducted independent research
73	Party-submitted briefing or other evidence, including foreign cases, statutes, or treatises, but not expert reports
79	Party-submitted expert reports[65] ⇒ From both parties: 45 of 81 (57%) ⇒ From only one party: 36 of 81 (44%)
20	Case law from other U.S. courts interpreting the same foreign law

[63] The remainder of the cases surveyed included: Rule 52(a) decisions after a bench trial, decisions on motions to compel, decisions on motions for the application and determination of foreign law, petitions for habeas relief, and motions to quash/seal.

[64] In approximately eleven of the cases where the court conducted independent research, the court specifically stated that it conducted independent research. In the remaining six cases, I inferred that the court conducted independent research by examining the language of the opinion and sources relied on in the court's decision and comparing them with all resources submitted by parties on the docket (including exhibits, expert reports, and briefing). It is possible that there are cases where judges conducted independent research to confirm the submissions of the parties but did not otherwise reference or incorporate their findings or independent research in the opinion. This is likely not a prevalent occurrence because the language of the decisions examined often referred specifically to party submissions or expert testimony when indicating the reasons for a judge's decision. Additionally, case law on foreign law submissions often includes language indicating that judges are free to conduct independent research and many opinions cite this language when conducting independent research.

[65] There were two cases where the docket reflected that one or more of the parties had submitted an expert report, but the court's ultimate decision did not reference or explicitly did not rely on the expert report. In those instances where it was clear that the court's decision did not rely on the expert opinion, I noted that an expert report was presented to the court but not relied on. This accounts for the difference between the number of cases where an expert report was relied on (79) as opposed to the number of cases where a party expert report was filed on the docket (81).

34	Hearing on foreign law issue ⇒ Expert testified at hearing in 6 of 34 (17%) hearings
7	Supplemental briefing on foreign law ordered by court

Below, I will provide additional analysis on those cases where trial courts: (1) conducted independent research; (2) held hearings to determine foreign law; (3) relied on opinions by other U.S. courts to determine foreign law; (4) infrequently utilized court-appointed experts; or (5) relied on the parties to provide evidence of foreign law.

1. Independent Research

As indicated above, of the 100 cases surveyed, only seventeen courts conducted independent research. There was not a strong correlation between procedural posture and the type of research conducted.[66] In almost every instance in which a court conducted independent research, the application of foreign law related to a merits issue as opposed to a choice of law issue. There was only one case where a court conducted independent research to resolve a choice of law issue.[67] In *Pascarella v. Sandals Resort*, the parties failed to brief the court on the contents of Bahamian agency law, so the court did its own research to confirm that there were no substantive differences between forum and Bahamian law, and it applied forum law.[68] In all other cases where a court conducted independent research to ascertain foreign law, a merits issue[69] was implicated in the determination of foreign law.

2. Hearings and Expert Testimony

Only thirty-four of the cases analyzed included a hearing where the foreign law issue was discussed and evidence was considered. The subject matter of these cases ranged, but the most common hearings were on extradition

[66] Seven of the independent research cases were decisions on motion to dismiss, five resolved motions for summary judgment, the remainder included motions for default judgment, to seal, to compel, and calling for the application of foreign law to decide an issue.

[67] Pascarella v. Sandals Resort Int'l, Ltd., No. 19 Civ. 2543, 2020 WL 1048943, at *5 (S.D.N.Y. Mar. 4, 2020).

[68] *Id.*

[69] I define merits issue broadly to include all instances where the court applied the foreign law to the facts of the case. For purposes of this article, merits issues include decisions on discovery related matters, including decisions relating to the sealing of documents. The primary purpose of labeling issues as "merits" versus "choice of law" is to make a distinction between the more abbreviated foreign law analysis when resolving choice of law issues, where a court verifies that there is a difference between forum and foreign law before deciding which country's law applies to a case.

proceedings, on the Child Abduction Convention,[70] contract cases,[71] and cases where a party claimed as a defense impossibility of compliance due to foreign law.[72]

A party's expert on foreign law testified at the hearing in only six of the cases where a hearing was held. Five out of six cases where an expert testified involved the application of the Child Abduction Convention.

In the majority of cases where a hearing was held, counsel for the parties discussed the foreign law issue and their experts' reports with the court. Although some cases experienced difficulty in having experts appear in person to testify,[73] in most cases neither party nor the court requested that the experts testify.

3. Reliance on U.S. Case Law Determining Foreign Law

One interesting development is that some courts have relied on decisions by other U.S. courts that have determined the same or similar foreign laws in their ascertainment of foreign law. Nothing in the text of FRCP 44.1 or the *Animal Science* decision prohibits a court from relying on the decisions of other U.S. courts that have interpreted foreign law. Prior to the passage of FRCP 44.1, however, common law in the United States mirrored English common law in prohibiting courts from assigning precedential value to prior U.S. decisions determining foreign law.[74] Courts began to rely on the

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[70] *See, e.g.*, Cocom v. Timofeev et al, No. 2:18-cv-02247, 2019 WL 76773, at *2–4 (D.S.C. Jan. 2, 2019); Leon v. Ruiz, No. 7:19-cv-00293 2020 WL 1227312, at *5 & n.2 (W.D. Tex. Mar. 13, 2020); Chambers v. Russell, No. 1:20-cv-00498, 2020 BL 562742, at *3 n.3 (M.D.N.C. June 16, 2020); Monroy v. de Mendoza, 3:19-CV-1656-B, 2019 WL 7630631, at *9 (N.D. Tex. Sept. 20, 2019) (subsequent history omitted).

[71] *See, e.g.*, Chavarria v. Intergro, Inc., No. 8:17-cv-2229-T-23AEP, 2019 WL 1227773, at *3 (M.D. Fla. Mar. 15, 2019), *aff'd*, 815 F. App'x 375 (11th Cir. 2020); Datto, Inc., v. Moore, No. 8:20-cv-2446-T-33TGW, 2020 WL 7318957, at *2, *4 & n.1, *6–7 (M.D. Fla. Dec. 11, 2020); Finvest Cap. Fund, Inc., v. Solid Box, LLC, No. CV2006296ESMAH, 2021 WL 1153113, at *4 (D.N.J. Mar. 26, 2021).

[72] *See, e.g.*, Wang v. Gen. Motors, LLC, 371 F. Supp. 3d 407, 412, 418–23 (E.D. Mich.), *motion to certify appeal granted*, No. 18-10347, 2019 WL 1950185 (E.D. Mich. May 2, 2019), *leave to appeal denied sub nom. In re* Gen. Motors, LLC, No. 19-0107, 2019 WL 8403402 (6th Cir. Sept. 25, 2019); Kleiman v. Wright, No. 18-80176-CV, 2020 WL 1139067, at *6 (S.D. Fla. Mar. 9, 2020); *In re* Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 and 50 U.S.C. § 1705, 381 F. Supp. 3d 37, 77 (D.D.C.), *aff'd sub nom. In re* Sealed Case, 932 F.3d 915 (D.C. Cir. 2019).

[73] *See, e.g.,* Wye Oak Tech., Inc. v. Republic of Iraq, No. 1:10-cv-01182, 2019 WL 4044046, at *19 (D.D.C. Aug. 27, 2019); Order, *Wye Oak Tech Inc.*, 24 F.4th 686 (D.C. Cir. 2019) (No. 1:10-cv-01182), ECF No. 388 (clarifying that expert witness became unavailable); Parties Joint Notice Concerning Submission of Evidence Pursuant to Stipulations at Trial at 5–7, *Wye Oak Tech, Inc.*, 24 F.4th 686 (D.C. Cir. 2019) (No. 1:10-cv-01182), ECF No. 418 (indicating defendants withdrew foreign law expert after trial).

[74] SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL

decisions of other federal courts just prior to the introduction of FRCP 44.1.[75] This practice is more widely accepted now.[76]

Assigning some precedential weight to decisions of other courts interpreting the same foreign law will likely contribute to consistency in the ascertainment of foreign law across jurisdictions. It also makes sense conceptually since the determination of foreign law is, as mandated by the Federal Rules of Civil Procedure, a legal, not factual, question, and there is usually only one controlling interpretation of a law.

While the practice of relying on other courts' determinations of foreign law is a useful time saving measure, there are some limits to the effectiveness of this approach. First, the facts of a particular case may require a court to assess what the laws were in a foreign country at a different period of time than the relied upon U.S. case law. Second, the interpretation of a foreign country's laws by that country's courts is constantly evolving, particularly in common law countries. When citing exclusively to prior federal decisions interpreting foreign law, a U.S. court may overlook foreign courts' development or refinement of the law that would be helpful in accurately deciding the case.[77]

In twenty cases within the data subset, courts relied on case law from other U.S. federal courts that interpreted the foreign law at issue. In some cases, where courts relied on another court's determination of foreign law, they relied on the rulings of courts deciding related cases (similar parties and causes of action).[78] In most instances, the court conducted independent research or considered other evidence and party submissions and did not rely solely on the case law from other U.S. federal courts to ascertain foreign law.[79] Only one court relied solely on case law from another federal court to

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ANALYSIS 147–48 (2004); Miller, *supra* note 15, at 624.

[75] *See* GEEROMS, *supra* note 74, at 147.

[76] *Id.*

[77] *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1645–47 (2020) (noting that relying on federal precedent to summarize another state's laws can risk creating a "lag between the advancing state law and static federal citations," even in the context of foreign law).

[78] *See, e.g.*, Barry v. Islamic Republic of Iran, 437 F. Supp. 3d 15, 42 (D.D.C. 2020) (citing Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 21 (D.D.C. 2011)); Bathiard v. Islamic Republic of Iran, No. 16-CV-1549, 2020 WL 1975672, at *2 n.2 (D.D.C. Apr. 24, 2020) (citing *Barry*, 437 F. Supp. at 42 and *Estate of Doe*, 808 F. Supp. 2d at 21).

[79] *See, e.g.*, Deposit Ins. Agency v. Leontiev, No. 17-MC-00414, 2018 WL 3536083, at *9–10 (S.D.N.Y. July 23, 2018) (considering party-submitted expert report in addition to case law from U.S. courts) (citing *In re* Application of Joint Stock Co. Raiffeinsenbank, No. 16-MC-80203-MEJ, 2016 WL 6474224, at *6 (N.D. Cal. Nov. 2, 2016) and *In re* MTS Bank, No. 17-21545-MC, 2017 WL 3155362, at *9 (S.D. Fla. July 25, 2017)); Monroy v. de Mendoza, No. 3:19-CV-1656-B, 2019 WL 7630631, at *1–2, 9 (N.D. Tex. Sept. 20, 2019) (considering party-submitted evidence in addition to case law from U.S. courts) (citing Salguero v. Argueta, 256 F. Supp. 3d 630, 637–38 (E.D.N.C. 2017)); Towada Audio Co., Ltd. v. Aiwa Corp., No.

determine that German law provides an adequate remedy for breach of the implied covenant of good faith and fair dealing in deciding to dismiss a case for *forum non conveniens*.[80]

4. Use of Court-Appointed Experts or Special Masters

A court appointed its own expert/special master to assist with the determination of foreign law in only one case in the subset of cases I analyzed. The Federal Judicial Center ("FJC") has previously observed that court-appointed experts and special masters are used infrequently.[81]

In *Behrens v. Arconic*, the sole case where a court appointed an independent expert and special master to assist with the determination of foreign law, the court tasked a French attorney with examining whether a French blocking statute prohibited the disclosure of documents by a party's French subsidiary.[82] The French blocking statute at issue was alleged to prohibit the communication of information that could harm the sovereignty or interests of France.[83] The court expected the expert to complete her report within sixty days and ultimately decided to adopt the recommendation of the expert/special master giving its reasons for doing so at a hearing and in a related memorandum.[84]

The expert report noted that even though the requested documents were held on a server in New York, the French blocking statute would still apply and recommended the parties use the Hague Convention to obtain the documents.[85] The *Behrens* plaintiffs objected to the report on the basis that

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18-cv-4397, 2019 WL 1200748, at *1 (N.D. Ill. Mar. 14, 2019) (conducting independent research evidence in addition to case law from U.S. courts) (citing UM Corp. v. Tsuburaya Prods. Co., No. CV1503764ABAJWX, 2017 WL 5983762, at *7 (C.D. Cal. Sept. 8, 2017)).

[80] *See* Biotronik, Inc. v. Zurich Ins. PLC Niederlassung Fur Deutschland, No. 3:18-cv-01631, 2020 WL 996599, at *2–5 (D. Or. Feb. 28, 2020) (adopting magistrate judge's report containing citations to other decisions that have determined that Germany provides an adequate alternative forum).

[81] *See* JOE S. CECIL & THOMAS E. WILLGING, FED. JUD. CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 7 (1993); THOMAS E. WILLGING ET AL., FED. JUD. CTR., SPECIAL MASTERS' INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE'S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS 3 (2000).

[82] Behrens v. Arconic, Inc., 487 F. Supp. 3d 283, 300 (E.D. Pa. 2020).

[83] Behrens v. Arconic, Inc., No. Civ. 19-2664, 2019 WL 7049946, at *1 & n.1 (E.D. Pa. Dec. 20, 2019).

[84] Notice re: Expert Witness on French Law at 2, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 86; Order re French Blocking Statute Discovery Dispute, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 164; Memorandum re French Blocking Statute Discovery Dispute, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 163.

[85] Memorandum re French Blocking Statute Discovery Dispute at 4, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 163.

prior U.S. courts had determined that this blocking statute had not been enforced, and thus could not serve as the basis for failing to produce the requested documents.[86] The court noted the plaintiffs' objections but relied on the special master's report to determine that French courts had in recent years enforced the statute by imposing criminal sanctions and rejecting document requests.[87]

As indicated in Part IV, the use of special masters and court-appointed experts can be an efficient and useful means for a court to ascertain the laws of a foreign country, both as they are codified and as they are practiced and enforced.

5. Reliance on Parties for Statutory Materials, Expert Reports, and Other Evidence for Determinations of Foreign Law

In the majority of cases surveyed, judges relied on evidence and expert reports submitted by the parties to ascertain foreign law. In seventy-nine of the 100 cases surveyed, courts relied on expert reports or declarations submitted by the parties. Although these courts mostly did not conduct their own research, many courts frequently analyzed expert reports in depth, reviewed the source material the experts relied on in their reports, and came to an independent determination of the law.[88] In some cases, courts accepted an expert's conclusion without much analysis of the report or the foreign law at issue.[89]

Some scholars and judges find it problematic when judges do not conduct their own independent research to ascertain foreign law.[90] When parties fail to provide sufficient evidence of the foreign law, courts are permitted to research the issue but may also choose to rely on forum law instead.[91] Particularly when foreign law is invoked as a defense and the party invoking it fails to adequately brief the defense, it may be the most sensible solution for a court to refuse to determine foreign law and apply forum law instead.[92]

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[86] *Id*. at 14.

[87] *Id*. at 14–15.

[88] *See, e.g*., Clarke v. Marriott Int'l, Inc., 403 F. Supp. 3d 474, 480–82 (D.V.I. 2019); A.O.A. v. Rennert, 350 F. Supp. 3d 818, 838 (E.D. Mo. 2018); Adria MM Prods., Ltd. v. Worldwide Ent. Grp., No. 17-21603-CIV, 2018 WL 4268886, at *3–5 (S.D. Fla. Sept. 6, 2018).

[89] *See, e.g*., Pandey v. GBGI Ltd., No. SACV 20-01055, 2020 WL 7013997, at *9 (C.D. Cal. Oct. 26, 2020); Valle v. Powertech Indus. Co., 381 F. Supp. 3d 151, 160 & n.4 (D. Mass. 2019), *appeal dismissed* No. 19-2212, 2020 WL 2992495 (1st Cir. 2020).

[90] *See* Teitz, *supra* note 28, at 1092; Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring); Miner, *supra* note 35, at 585.

[91] *See, e.g*., Mulugeta v. Ademachew, 407 F. Supp. 3d 569, 588–89 (E.D. Va. 2019), *appeal dismissed* No. 19-2401, 2020 WL 3053145 (4th Cir. 2020); Pomerantz v. Int'l Hotel Co., 359 F. Supp. 3d 570, 578 (N.D. Ill. 2019).

[92] *See In re* Skat Tax Refund Scheme Litig., 356 F. Supp. 3d 300, 315–16 (S.D.N.Y.

For example, in *In re Skat Tax Refund Scheme Litigation*, the court refused to dismiss a case that defendants claimed was prohibited by the "revenue rule," which prohibits foreign sovereigns from attempting to enforce their tax laws in U.S. courts.[93] The court determined that the action was not one for enforcement of Danish tax law, but rather a garden variety fraud case.[94] The court noted that defendants failed to present sufficient evidence that Danish tax law would be enforced in the action, noting that while FRCP 44.1 permits the court to engage in its own research, the court "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."[95]

Where an issue of foreign law is outcome determinative, however, requiring the parties to submit supplemental briefing and evidence is an efficient way for the court to ascertain foreign law. Although judges are permitted to order the parties to provide supplemental briefing on an issue of foreign law, only seven courts ordered the parties in the case to file supplemental briefing.[96]

Finally, although the protection of the adversarial process is often said to be a reason to resist the active involvement of a judge in conducting independent research or appointing an independent expert, in many cases judges do not have the benefit of expert reports from both parties to a dispute.[97] There were only forty-six cases where parties on both sides of the dispute submitted expert reports. In thirty-six cases, only one side (either a plaintiff or defendant) submitted an expert report for the court's consideration.

III. DIFFICULTIES IN ASCERTAINING FOREIGN LAW

As indicated in Part II, federal judges only rarely conduct independent research when ascertaining foreign law, preferring instead to rely on briefing and expert declarations submitted by the parties.[98] The reasons for this are complicated. In this section, I share the results of interviews with circuit librarians on the resources available to federal judges. These interviews revealed several common challenges facing judges seeking to conduct independent research into foreign law and help to explain the scarcity of

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2019).

[93] *Id*. at 307, 319.

[94] *Id*. at 318.

[95] *Id*. at 316.

[96] *See, e.g*., Giha v. Sessions, No. 1:16-cv-00893, 2018 WL 4735726, at *1 (E.D. Cal. Sept. 28, 2018), *aff'd sub nom*. Giha v. Garland, 12 F.4th 922 (9th Cir. 2021).

[97] *See, e.g*., IAL Logistics India Ltd. v. William Sheppee (USA) Ltd., No. 5:18-cv-2864, 2019 WL 2925083, at *4–5 (N.D. Ohio July 8, 2019).

[98] *See* Jia, *supra* note 55, at 1705–06.

opinions in which judges conducted independent research.

Part of the reason for the hesitance to conduct independent research is that it is resource intensive and time consuming. Judges might also decline to conduct independent research because they believe that it is antithetical to the adversarial system. I argue that judges should not decline to conduct research out of concern for violating adversarial norms, since independent research on legal issues is a central feature of our legal system.

A. Library Resources Available to Federal Judges

Federal judges have access to unique resources in determining foreign law. Each of the federal circuits has a library (many with satellite branches) that serves their district and appellate courts.[99] To assess whether federal trial judges have access to sufficient resources to ascertain the laws of foreign countries, I conducted informal interviews with librarians from each circuit.[100] In these interviews, I asked circuit librarians to give a general overview of resources available to judges and their law clerks, provide an overview of any training given to judges and their clerks, report on the overall frequency that they have received questions on issues of foreign law, describe any mechanisms for translating foreign legal materials in a language other than English, and describe any collaboration with the libraries of other institutions.

The results of these interviews revealed that, while judges have extensive resources available to them when seeking specific documents, federal judges who attempt independent research when determining foreign law face several common difficulties.

1. Resources Available

Circuit librarians reported that judges had access to both online databases and physical library holdings on foreign law, including subscriptions to databases containing both case law and statutes as well as secondary sources

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[99] *See, e.g.*, *Research and Library Services*, U.S. CT. OF APPEALS FOR THE SECOND CIR., https://www.ca2.uscourts.gov/library/research_services.html [https://perma.cc/QVZ2-2J5Q].

[100] I conducted interviews with librarians from each circuit other than the Federal Circuit and the D.C. Circuit. Telephone Interview with Lisa White, First Cir. Libr. (Jan. 7, 2021); Telephone Interview with Julie Jones, Second Cir. Libr. (Jan. 11, 2021); Telephone Interview with Michael Hayes, Third Cir. Libr. (Jan. 12, 2021); Telephone Interview with Suzanne Corriell, Fourth Cir. Libr. (Jan. 11, 2021); Telephone Interview with Sue Creech, Fifth Cir. Libr. (Jan. 13, 2021); Telephone Interview with Stephanie Woebkenberg, Sixth Cir. Libr. (Jan. 12, 2021); Telephone Interview with John Klaus, Seventh Cir. Libr. (Jan. 12, 2021); Telephone Interview with Eric Brust, Eighth Cir. Libr. (Jan. 13, 2021); Telephone Interview with Christina Luini & Shannon Lashbrook, Ninth Cir. Librs. (Jan. 13, 2021); Telephone Interview with Helane Davis & Emily Marcum, Tenth Cir. Librs. (Jan. 13, 2021); Telephone Interview with Elaine Fenton, Eleventh Cir. Libr. (Jan. 12, 2021); Telephone Interview with Mark Plotkin, Eleventh Cir. Libr. (Jan. 13, 2021).

describing foreign law. Several of the circuit libraries developed research guides to provide judges and law clerks with a starting point for gathering resources on the laws of a foreign country. Additionally, in some circuits, there are supplemental foreign law holdings to address issues that come up more often regionally.[101] Each circuit's librarians reported collaborating extensively with the librarians of other circuits. Many of the librarians also reported having developed strong relationships with the librarians of local law schools and universities. Librarians stated that email lists developed by international law librarian associations were useful for obtaining materials from other institutions in an informal and cost-effective manner. Using these resources, circuit librarians reported that they were usually able to obtain specific foreign law materials.

2. Common Challenges

Although circuit librarians reported success obtaining specifically requested foreign materials, they noted that budget constraints limited access to research databases that allow judges to research or explore an area of foreign law in the same manner that they would domestic law. Tight budgets are a result of the infrequent nature of foreign law questions in each individual circuit[102] and the difficulty with anticipating which country's laws would require such a resource. Librarians reported having mixed levels of success contacting the Law Library of Congress, indicating that informal connections with colleagues at the LLOC increased the likelihood of receiving a helpful and time sensitive response. Librarians also noted that no specialized training was made available to judges or law clerks seeking to research foreign law. Finally, no formal system existed for translating relevant foreign law materials, with judges relying informally on language expertise of law clerks and court personnel.

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[101] Telephone Interview with Lisa White, First Cir. Libr. (Jan. 7, 2021) (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 in part on Spain's); Telephone Interview with Sue Creech, Fifth Cir. Libr. (Jan. 13, 2021) (translated statutory codes from countries in South America and the French Civil Code); Telephone Interview with Christina Luini & Shannon Lashbrook, Ninth Cir. Librs. (Jan. 13, 2021) (several holdings for Pacific Island nations); Telephone Interview with Helane Davis, Tenth Cir. Libr. (Jan. 13, 2021) (additional materials on Indigenous American tribal law); Telephone Interview with John Klaus, Seventh Cir. Libr. (Jan. 12, 2021) (additional materials on Indigenous American tribal law).

[102] The circuit law librarians consistently reported that they do not often encounter requests for foreign legal research. The reported frequency included ranges from one to two requests per year in one circuit to a maximum of four to five requests per year in others, with an average number of requests of two to three per year. These reported ranges appear to correlate with the number of total cases determining foreign law each year (about thirty to thirty-five) that were analyzed in this article's data set.

B. Impediments to Independent Research

1. Practical Challenges

In addition to the challenges noted by circuit librarians, conducting research into the laws of a foreign country is difficult for several reasons. First, lawyers in the U.S. are not typically trained in the legal systems of other countries.[103] To ascertain foreign law, it is often not sufficient for a researcher to merely translate a foreign statute and conduct a plain meaning interpretation of it its terms.[104] A researcher must have knowledge of the foreign country's legal system and the acceptable methods of legal interpretation.[105] For example, when interpreting a statute, some courts make use of U.S. rules of statutory interpretation instead of relying on the rules of statutory construction and interpretation adopted by the foreign country whose laws are at issue.[106]

Second, foreign legal materials are often in a different language which can make exploratory research to better understand an area of law or to distinguish cases cited by the parties difficult and time intensive, if not impossible. As indicated by the circuit librarians, no formal system exists for translating foreign documents and judges often rely on informal translation mechanisms, including language skills of law clerks and court personnel. Practically, this means that an individual doing research on the laws of foreign countries is limited to sources available in the languages that he or she understands.

Finally, foreign legal materials are not consistently accessible for all countries and for all areas of law. The laws of many developed countries are available online, but for some countries, legal materials that have been translated may be sparse or out of date. When adjudicating an area of foreign law, the costs of accessing certain foreign law materials might be outweighed by competing interests in a case, including the desire to quickly resolve a matter.

These factors make independent research into the laws of foreign countries particularly difficult for trial judges who face significant pressure to render decisions in cases expeditiously.

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[103] Curran, *supra* note 57, at 266; Wilson, *supra* note 1, at 890.

[104] There are instances where the application of foreign law is straightforward and can be done based on a translated statute, but often context is helpful for understanding the application and scope of a foreign law.

[105] *See* Adler, *supra* note 5, at 38–39.

[106] Curran, *supra* note 57, at 265–66 (describing case where district judge applied U.S. principles of statutory construction to interpret a German statute, even though Germany has an elaborate and codified system for statutory construction).

2. Adversarial Values and Independent Research

The traditional American/English view of the judge as passive moderator may also discourage courts from conducting independent research.[107] Some judges may be applying American fact resolution principles that the court's role is only to adjudicate material presented and issues raised by the litigants. But I argue that, as in other contexts, the Rules of Civil Procedure call for "active involvement of [the] neutral arbiter. . . ."[108] Indeed, the Rules of Civil Procedure changed more than a half century ago to make it the American view that foreign law is no longer a question of fact, and independent research is therefore appropriate in ascertaining it as a question of law, within the province of the judge.[109]

Within the American common law system, there are two dominant and conflicting approaches to the proper role that a court should take in adjudicating a dispute between the parties.[110] The first approach is one of strict adherence to adversarial norms and requires that litigants control the course of the lawsuit and determine the nature of the questions presented to the court.[111] The second approach places responsibility on the court for deciding cases in accordance with the law and posits that this responsibility is not altered if the parties fail to identify an issue.[112] Judges committed to the first approach are less likely to conduct independent research.[113] Judges committed to the second approach are more likely to conduct independent research.[114]

The key elements of an adversarial system include a neutral and dispassionate decision maker, party presentation of evidence, and a highly structured system of procedure governing the litigation.[115] But there are disagreements about how a neutral and dispassionate decisionmaker should

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[107] *See* Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1306 (2007); Joseph A. Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51, 74 (1988); State v. Holmes, 315 N.W.2d 703, 707 (Wis. 1982) (considering defendants' challenge to circuit courts' authority to raise issue of constitutionality of statute *sua sponte*). *See generally* Marvin E. Frankel, *Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

[108] *See Chief Justice's Year-End Report on the Federal Judiciary*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [https://perma.cc/5AFB-8NBU].

[109] *See supra* note 12 and accompanying text.

[110] *See* Cheng, *supra* note 107, at 1306; Colquitt, *supra* note 107, at 74; *Holmes*, 315 N.W.2d at 707.

[111] *Holmes*, 315 N.W.2d at 707.

[112] *Id*.

[113] Cheng, *supra* note 107, at 1306.

[114] *Id*.

[115] *See* Stephan Landsman, *A Brief Survey on the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714–17 (1983).

exercise his or her powers to decide a dispute. Our system requires that judges must not play a part in independently investigating facts as is done in inquisitorial systems.[116] But our system has not historically and does not currently prohibit active judicial involvement in all cases.[117] In the face of increasing caseloads and in the name of efficiency, the American common law system of justice has increasingly embraced a more active role for judges in managing the resolution of a dispute.[118]

In the context of determining foreign law, there are three reasons why active participation in determining foreign law does not violate adversarial norms. First, judges are typically generalists and ascertaining foreign law typically requires specialized knowledge or language skills. The fact that parties prescreen and compensate expert witnesses to provide a particular opinion means that conflicting and partisan testimony is often inevitable.[119] A generalist judge with no background in the foreign law at issue must conduct independent research or engage a neutral third party to determine which interpretation of the law to privilege.

Second, there is usually a right or wrong answer as to what the foreign law at issue is and how the law is usually applied in the country of origin.[120] If a court incorrectly determines a foreign law, it can have implications for how that law is determined in subsequent cases and more broadly affect the reputation of the judiciary both domestically and abroad.

Finally, and most importantly, foreign law is no longer a question of fact but one of law after the introduction of FRCP 44.1. A trend among some courts continues to treat the determination of foreign law as a question of fact, even in light of the change of its status by the federal rules in 1966.[121] This trend is at least partly attributable to ossification,[122] and partly because

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[116] *See id*. at 715–16.

[117] *See* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 670–71 (2010).

[118] *See id*. at 670–72 (observing that, over course of thirty years following 1983, the federal rules of procedure have been amended to require judges to actively manage cases); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) (observing that the increasing trend of judges serving as case managers working to settle cases at early stages in the litigation may be subverting the norm of the detached adjudicator).

[119] Cheng, *supra* note 107, at 1281.

[120] Although foreign law, much like domestic law, can be unsettled, cases implicating unsettled foreign law are often dismissed at an early stage for *forum non conveniens*. *See*, *e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251 (1981) ("As we stated in *Gilbert*, the public interest factors point towards dismissal where the court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.'") (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947)).

[121] Doug M. Keller, *Interpreting Foreign Law Through an* Erie *Lens: A Critical Look at* United States v. McNab, 40 TEX. INT'L L.J. 157, 169 (2004); Teitz, *supra* note 28, at 1093; Ahn, *supra* note 54, at 1374–75.

[122] Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 958–59, 965–67 (2017)

the determination of foreign law across countries is a tertium genus—a mixed question of law and fact—calling for fact like procedures when it is a question of law, and law-like procedures when it is a question of fact.[123] While judicial research of questions of fact is controversial and remains the topic of scholarly discussion, judicial research of law is not similarly controversial.[124] Judges are bound to get the law right even when the parties agree to a different interpretation, particularly when the court's judgment will affect other cases or "reinforce error already prevalent in the system."[125]

Independent research into foreign law should be encouraged because such independent research does not violate adversarial norms and furthers the Supreme Court's guidance that the determination of foreign law be treated as similarly as possible to the determination of domestic law.[126] Nonetheless, curtailing discretion as to when it is appropriate to conduct this independent research and when it is appropriate to play a more passive role will likely not make the determination of foreign law better, easier, or more efficient and may threaten judicial independence.[127] Discretion is necessary because foreign law comes up in a multitude of different circumstances; courts must have the flexibility to assume, if necessary, a more active role—such as when the parties invoke foreign law as a delay tactic to lengthen a non-meritorious

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(describing process of ossification as a doctrinal trend in the context of transnational cases involving the use of multi-factorial tests wherein different judges rely on language from prior judicial opinions when information costs are high and ultimately results in dictum ossifying "until it becomes law in the form of a string citation").

[123] *See* Sass, *supra* note 13, at 98; Michalski, *supra* note 14, at 1207–10; McComish, *supra* note 51, at 415 (discussing determination of foreign law in Australia). *But see* Miner, *supra* note 35, at 584 (disagreeing with characterization and viewing decision as "purely one of law").

[124] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 478, at 3 & n.10 (2017) (noting that Model Rule 2.9(C) does not prohibit legal research, "independent investigation of the law has always been permitted," and that judges are "experts on matters of law who are charged with the duty of declaring what the law is") (quoting CHARLES G. GEYH, JAMES J. ALFINI, STEVEN LUBET & JEFFREY M. SHAMAN, JUDICIAL CONDUCT AND ETHICS, § 5.04, at 5–25 (5th ed. 2013)); Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095, 1097 (2010) ("The process of finding law operates in sharp contrast. Judges determine the law. They are supposed to know the law, and in many instances, judges independently research relevant law and legal theory, unencumbered by any rules of proof.").

[125] United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (noting that although the party presentation rule is an important feature of our adversary system, judges can correct blatant errors of law *sua sponte*).

[126] *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018).

[127] *See* Cheng, *supra* note 107, at 1313–14 (noting that affirmative duties "are difficult to enforce, and measuring conscientiousness and zeal is nearly impossible, particularly when the amount of useful research that a judge can do varies from case to case" and arguing that imposing rules governing judicial behavior may raise judicial independence and separation of powers concerns if they go too far).

dispute—or a more passive role when the parties have presented helpful evidence and further research is unnecessary.

FRCP 44.1 was enacted to provide federal courts considerable latitude when determining foreign law.[128] The Advisory Committee notes make clear that the rule was formulated in a manner intended to reduce "undesirable rigidity" by granting courts significant discretion regarding what materials to consider, including the prerogative to engage in research *sua sponte*.[129] This grant of discretion may lead to inconsistency at times, as all grants of discretion are liable to do, but a measure of latitude is a necessary feature in making complex determinations. Even more important, providing judges with additional resources and raising awareness of how existing tools and procedures can be leveraged to ascertain another country's laws can lead to more accurate foreign law determinations.

C. General Conclusions

Although many courts lean heavily on their circuit's libraries when conducting research, due to overburdened dockets, it is possible that many judges do not reach out for assistance due to time constraints. Because of the difficulties in researching foreign law, particularly when one lacks training in that country's underlying legal system and does not understand the language, the reliance by courts on party-submitted expert opinions is understandable.

Although independent research is a valuable tool for judges seeking to accurately determine law, judges who choose to rely on experts can still actively engage in the resolution of the foreign legal issue. In the next section, I provide four solutions for judges who lack the time or resources to conduct independent research.

IV. TOOLS AND STRATEGIES TO ASSIST JUDGES WITH DETERMINING FOREIGN LAW

As indicated in Part II, when judges determine the laws of foreign countries, they seldom conduct their own research and the majority appear to rely on expert reports, briefs, and evidence submissions by the parties. Some scholars and judges believe that it is problematic for judges to rely on expert reports to determine foreign law because party-selected experts are "hired guns" who will present a skewed version of the law to suit their client's argument.[130] Others suggest that expert reports are a helpful starting point, as

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[128] Miller, *supra* note 15, at 695.

[129] FED. R. CIV. P. 44.1 advisory committee's note to 1966 amendment.

[130] *See, e.g.*, Sunstar, Inc. v. Alberto-Culver Co., 586 F.3d 487, 495–96 (7th Cir. 2009) ("But the lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their

most judges do not have the time to identify appropriate foreign law resources.[131]

I propose four solutions to the problem of overreliance on partisan experts. First, courts should increasingly require the use of court-appointed experts or special masters, in addition to or in lieu of party-submitted experts. Second, courts can make use of the resources of the Law Library of Congress to obtain foreign legal materials and authoritative summaries of foreign law. The use of court-appointed experts and the Law Library of Congress reduces the potential for bias attendant with relying on experts paid for by the parties to a dispute. Third, courts should consider informal consultations with foreign judges as a way to better understand the legal system of foreign countries. Finally, courts can implement several minor practices that can make the process of taking testimony from partisan expert witnesses, both oral and written, more efficient, cost effective, and accurate.

These proposals are borrowed from the practices of both common and civil law countries and reflect a global trend towards more active involvement of judges in regulating the testimony of experts in order to obtain more accurate and unbiased testimony.

A. Increased Use of Court-Appointed Experts and Special Masters

1. Basics of Proposal

Judges can make use of existing procedural rules to appoint independent experts to obtain nonpartisan guidance on foreign law. FRCP 53 (appointment of special masters) and FRE 706 (court-appointed experts) permit courts to appoint experts or special masters to deal with specific issues in a proceeding and can be used separately or together to appoint foreign law experts to assist in determining foreign law.[132]

The precise procedural mechanism by which a judge may seek nonpartisan advice depends on the nature of the case and the extent of advice sought. The primary difference between FRCP 53 and FRE 706 is that special masters serve in a quasi-judicial role and can conduct hearings and take testimony from witnesses and the parties.[133] Experts appointed solely pursuant to FRE 706 do not have that power and can be required to testify and be deposed.[134]

Within the dataset analyzed in Part II, only one court, *Behrens v. Arconic*,

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views with the litigating position of the client or their willingness to fall in with the views urged upon them by the client. Those are banes of expert testimony."); *see also* Wilson, *supra* note 7, at 1145.

[131] *See, e.g.*, Miner, *supra* note 35, at 588.

[132] FED. R. CIV. P. 53; FED. R. EVID. 706.

[133] *See* CECIL & WILLGING, *supra* note 81, at 72–73.

[134] *Compare* FED. R. EVID. 706(b) *with* FED. R. CIV. P. 53(c).

appointed a special master/expert to determine foreign law.[135] The judge tasked an expert, a partner at a Paris law firm and former member of the French Constitutional Court, with determining whether a French blocking statute prevented the defendant from complying with plaintiffs' requests for production of documents.[136] The parties were jointly responsible for compensating the expert and the court set forth procedures for submitting questions to the expert to guide her final report and recommendation.[137]

Even outside of the subset of cases examined within this article, the practice of appointing a special master or independent expert to assist the court with determining foreign law is relatively rare.[138] Courts appointing an independent expert or master to determine foreign law have typically done so when the parties have each presented diametrically opposing expert opinions as to the foreign law at issue and its application.[139]

In most cases, the court will involve the parties in the decision making process by requiring the parties to meet, confer, and select mutually agreeable candidates for an expert or master.[140] For example, in one case where neither side had employed a foreign law expert, a court required each of the parties to submit a notice suggesting two special master candidates with arguments as to why each candidate was most qualified.[141] This notice required the

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[135] Behrens v. Arconic, Inc., 487 F. Supp. 3d 283, 300 (E.D. Pa. 2020); Notice re: Expert Witness on French Law at 2, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 86; Memorandum re French Blocking Statute Discovery Dispute, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 163.

[136] Memorandum re French Blocking Statute Discovery Dispute, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 163.

[137] Notice re: Expert Witness on French Law at 2, *Behrens*, 487 F. Supp. 3d 283 (E.D. Pa. 2020) (No. Civ. 19-2664), ECF No. 86.

[138] Cheng, *supra* note 124, at 1106; *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").

[139] *See* Shire Dev. Inc. v. Cadila Healthcare Ltd., No. CIV.A. 10-581, 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., No. 06-21444, 2007 WL 9703128, at *3 (S.D. Fla. May 25, 2007); Fin. One Pub. Co. v. Lehman Bros. Spec. Fin., Inc., 215 F. Supp. 2d 395, 402 (S.D.N.Y. 2002), *aff'd in part, rev'd in part & remanded,* 414 F.3d 325 (2d Cir. 2005) (noting in an 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, No. 92 Civ. 1459, 1998 WL 397847, at *2 (S.D.N.Y. July 16, 1998).

[140] *See* Order Appointing Special Master, Bouchillon v. SAME Deutz-Fahr, Group, 268 F. Supp. 3d 890 (N.D. Miss. 2017) (No. 1:14-cv-00135), ECF No. 188; *Shire Dev. Inc.*, 2012 WL 5331564, at *1; *Zimmer, Inc.*, 2007 WL 9703128, at *2 n.3; *Fin. One Pub. Co.*, 215 F. Supp. 2d at 403.

[141] *See* Notice of Appointment of Special Master, *Bouchillon*, 268 F. Supp. 3d 890 (N.D.

candidates to submit to an interview by the adverse party upon request and permitted the parties an opportunity to object to proposed candidates.[142] The court ultimately appointed a special master versed in German and U.S. law to resolve a motion for summary judgment for a contract dispute where some of the claims were based on state law and some on foreign law.[143] Although the practice of appointing an independent expert is rare in the United States, it is common practice in other jurisdictions.

2. Use of Court-Appointed Experts and Special Masters in Civil Law Countries

Federal courts in the United States do not frequently use court-appointed experts.[144] As indicated above, only one court within the subset of cases examined had appointed a special master to determine a foreign law issue.[145] In Germany, however, courts frequently appoint an expert to prepare a report on foreign law or to provide in-court testimony after a report has been prepared.[146] German courts select experts after consulting with the parties and advance the fees for the expert witness, which are eventually paid for by the losing party as court costs.[147]

Courts in Germany frequently rely on the Max Planck Institute in Hamburg or other university institutes for comparative law research and appoint researchers or the institute itself as experts in cases.[148] German courts usually appoint experts affiliated with local institutions since they prefer that an expert have familiarity with the German legal system and its procedures.[149] In some instances, however, German courts will permit an expert opinion from a foreign lawyer where the court requires information about a country's practice or the foreign legal issue is not regulated by statute or case law and is the subject of controversy in the foreign country.[150] The primary critique of court-appointed expert witnesses in Germany is that

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Miss. 2017) (No. 1:14-cv-00135), ECF No. 163.

[142] *Id*.

[143] *See Bouchillon*, 268 F. Supp. 3d at 895, 906.

[144] *See* CECIL & WILLGING, *supra* note 81, at 5; GEEROMS, *supra* note 74, at 145.

[145] Behrens v. Arconic, Inc., 487 F. Supp. 3d 283, 300 (E.D. Pa. 2020).

[146] 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?, *supra* note 20, at 183, 195–97; GEEROMS, *supra* note 74, at 150–51.

[147] Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61, 64 (2003).

[148] GEEROMS, *supra* note 74, 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).

[149] *See* Remien, *supra* note 146, at 197.

[150] *See* GEEROMS, *supra* note 74, at 152.

courts tend to rely on these opinions without independently analyzing or interrogating the opinions of the expert.[151]

The practice of a court appointing an independent expert to opine on foreign law is common in other jurisdictions including Greece, Austria, Switzerland, Italy, the Netherlands,[152] and South Africa.[153] In the Netherlands, just as in Germany, courts appoint experts and request opinions on foreign law from private nonprofit institutes like the Hague Institute of Private International and Foreign Law and from universities, including the T.M.C. Asser Instituut.[154] The Asser Instituut is an interuniversity institute for international law located in The Hague which provides legal advice and opinions on private international and foreign law to Dutch legal professionals and notaries, and the judiciary.[155]

3. Overcoming Challenges to Implementation

Although FRE 706 and FRCP 53 are underutilized resources that can improve the process of determining foreign law, some challenges to the successful implementation of these rules remain. Two studies conducted by the FJC in the 1990s revealed that federal judges are often hesitant to appoint independent experts or special masters.[156] The reasons why courts hesitate to appoint an independent expert include that (1) judges view appointing an expert as an extraordinary activity appropriate only when the adversarial process fails to provide the necessary information; (2) parties do not often suggest the appointment of the expert and do not participate in the selection of the expert; (3) expert compensation can be a tricky process, particularly where one party is indigent; and (4) the need for an independent expert may not be identified until just before trial.[157]

The first, and arguably one of the most fundamental concerns with court-appointed experts is that they might undermine the adversarial process, particularly if a judge unquestioningly adopts the report or recommendation of an independent expert.[158] The fact that a court has appointed an

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[151] Remien, *supra* note 146, at 198.

[152] Nishitani, *supra* note 20, at 24.

[153] *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 produces about thirty legal opinions per year on average for legal professionals and the judiciary).

[154] GEEROMS, *supra* note 74, at 156.

[155] *About the Asser Institute*, ASSER INST. CTR. FOR INT'L & EUR. L., https://www.asser.nl/about-the-institute/ [https://perma.cc/Y68U-JUNT].

[156] *See* CECIL & WILLGING, *supra* note 81, at 4–5; WILLGING ET AL., *supra* note 81, at 76.

[157] CECIL & WILLGING *supra* note 81, at 5.

[158] The danger that a court will rely on an expert report without sufficient analysis of the

independent expert does not necessarily mean that the court will blindly defer to its expert's opinion. In one case where a court appointed an independent expert in addition to the two expert reports submitted by the parties, the court disagreed with the reports of all three, including the court-appointed "independent" expert.[159] The court instead analyzed the foreign law issue itself and reviewed intervening case law from France to determine how a French court would analyze a contract between the parties when determining ownership of a patent.[160]

While the appointment of independent experts by appellate courts has raised some ethical concerns, the appointment of independent experts at the trial level need not raise the same concerns.[161] When an independent expert has been appointed, one way to reinforce the adversarial nature of the dispute is to permit both sides to submit questions, exhibits, and other evidence to the expert and to cross-examine the expert at a deposition or hearing. By permitting this type of questioning, the record will be supplemented with additional evidence and inquiries that will provide the trial judge with sufficient evidence for determining foreign law. Additionally, neither FRCP 53 nor FRE 706 prohibit a party from engaging an expert of its own. A litigant who strongly disagrees with the opinion of a court-appointed expert witness remains free to call its own expert pursuant to FRE 706(e).[162]

Selecting a neutral expert witness can be difficult. The second concern identified in the FJC study is that parties did not suggest the appointment of an expert and did not participate in the selection of the expert.[163] This concern, however, can be mitigated through the active participation of the parties at the show-cause hearing prior to the appointment of an expert or special master.[164] Both rules require that the court provide the parties with an

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foreign law at issue exists even when both parties hire their own experts. Rule 44.1 safeguards against this by making determinations of foreign law questions of law—not fact—and therefore subject to *de novo* appellate review. *See supra* note 26 and accompanying text.

[159] Institut Pasteur v. Simon, 383 F. Supp. 2d 792, 794 (E.D. Pa. 2005).

[160] *See id*. at 799.

[161] *See* Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RSRV. L. REV. 303, 310 (2010) (noting that while appointments of independent experts at the appellate level are problematic, these appointments are not problematic when done by trial courts because parties can challenge expert testimony and credentials at trial and the expert's views become part of the open record which is subject to objection and appeal).

[162] FED. R. CIV. P. 706(e) ("This rule does not limit a party in calling its own experts.").

[163] CECIL & WILLGING *supra* note 81, at 31–32 ("In forty-one of the sixty-six appointments, the judge appointed an expert without suggestions by the parties. In twenty-nine of these cases, the judge used preexisting personal or professional contacts to identify an expert.").

[164] *See* FED. R. EVID. 706(a) ("On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations."); FED. R. CIV. P. 53(b)(1) ("Before appointing a master, the court must give the parties notice and an opportunity to be heard. Any party may suggest candidates

opportunity to be heard and allow the parties to suggest experts for the court to consider appointing. A court can require the parties to jointly propose the names of several neutral experts that the court can choose from.[165]

Courts can also rely on the LLOC's foreign law specialists, who strive to be "objective, nonpartisan, and unbiased" by identifying issues and indicating "how they are viewed by different schools of legal thought."[166] Additionally, the Academy of Court-Appointed Neutrals maintains a website with resources to assist courts with the decision to appoint a special master and provides a directory of masters, a bench book for judges and attorneys, as well as model appointment orders.[167] Courts can also request assistance from the Federal Judicial Center as well as local law schools to obtain a word-of-mouth recommendation as to an appropriate expert.

Expert compensation and case management also pose challenges for courts. Although both FRCP 53 and FRE 706 permit the court to allocate expenses for an independently appointed expert as the court sees fit, it can be an uncomfortable situation for a court to impose an added expense that the litigants find unnecessary. Additionally, the need for a court-appointed expert may not become apparent to the court until after the parties have already submitted their briefing and employed their own experts to support their positions or until shortly before trial.

A court can manage both of these issues by engaging with the parties at the earliest stages of the litigation to identify whether an expert might be called. In most civil proceedings, the parties are required to meet and confer separately and then also before a judge (typically a magistrate judge) during case management conferences where they develop discovery schedules and reports pursuant to FRCP 16. A magistrate judge could require the parties to identify whether they believe the proceeding will involve a determination of foreign law and whether each side is considering the appointment of a foreign legal expert. Judges could also require the parties to confer and consider whether the appointment of a court-appointed expert would be beneficial to the litigation and to jointly propose experts for the court's consideration. A single court-appointed expert can reduce costs for both parties if effectively and timely employed.

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for appointment.").

[165] *See* FED. R. EVID. 706(a).

[166] *See* Andrew Winston et al., *The Law Library of Congress: A Global Resource for Legal Education*, 67 J. LEGAL EDUC. 962, 966 (2018).

[167] *See ACAN Resource Center*, ACAD. OF COURT-APPOINTED NEUTRALS, https://www.courtappointedneutrals.org/resource-center/acan-resource-center/ [https://perma.cc/7NKX-7WJJ].

B. Increased Use of Resources of the Law Library of Congress

1. Basics of Proposal

Increasing use of the resources and collections of the Law Library of Congress can help streamline the process for determining foreign law. The Law Library of Congress not only maintains an extensive collection of foreign and comparative legal materials, but also maintains a team of Foreign Law Specialists who are foreign trained attorneys tasked with preparing information and analysis on the laws of foreign countries.[168] When researching foreign law, judges and their law clerks can coordinate with their circuit librarians to request primary source foreign materials from the Law Library of Congress. Additionally, where further exploratory research or some explanation of the foreign legal system would be helpful, circuit librarians can coordinate with the LLOC to request that one of the library's foreign law specialists prepare a report, annotated bibliography, or a summary of how the foreign law at issue is applied.

The Law Library of Congress has a statutory obligation to serve the legislative branch and the Supreme Court of the United States.[169] The ties between the Supreme Court and the Law Library of Congress are historical[170] since the Supreme Court moved into its own building and established its own library.[171] Today, the LLOC fulfills its mandate to serve the Supreme Court by providing "priority lending, research, and reference services to the [Supreme] Court" and "to the other U.S. courts and federal agencies, as well as to state courts and state agencies, and serves as a resource for their librarians."[172]

The LLOC's foreign research service is underutilized by the judicial branch. The Law Library's Director for the Global Research Center, Peter Roudik, estimates that the Law Library receives approximately 400 to 500 requests yearly from the executive and legislative branches of government but less than twenty requests from the judiciary.[173] The judiciary fails to make

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[168] *See* Winston et al., *supra* note 166, at 964–66.

[169] *See id*. at 963; Edward G. Hudon, *The U.S. Supreme Court Library: An Account of Its Development and Growth*, 59 LAW LIBR. J. 166, 166 (1966).

[170] Hudon, *supra* 169, at 166.

[171] *Id*. at 169–70; *About the Law Library: History*, LIBR. OF CONG. (Dec. 30, 2020), https://www.loc.gov/law/about/history.php [https://perma.cc/Q2RF-VAYV]. Although the power of the Supreme Court and the Chief Justice to make regulations for the Law Library of Congress during sittings of the Court has not been used since the Supreme Court moved into its own building, the statute designating these powers has not been repealed.

[172] Winston et al., *supra* note 166, at 967.

[173] Telephone Interview with Peter Roudik, Director, Glob. Legal Rsch. Ctr. for the L. Libr. of Cong. (Nov. 23, 2020); *see also* LAW LIBR. OF CONGR., ANNUAL REPORT FISCAL YEAR 2016 at 1, 10, 12 (2016), https://blogs.loc.gov/law/files/2016/12/FY2016-LAW-ANNUAL-REPORT.pdf [https://perma.cc/EL5R-R2JJ] (reporting thirteen inquiries from the judicial

use of the Law Library of Congress's efficient legal opinion service which typically renders opinions in less than three weeks for requests made by the public and within one to two weeks for legislative and executive branch agencies.[174]

Collaboration with the LLOC may increase independent judicial research on foreign law by increasing the resources available to judges in determining foreign law, therefore permitting them to scrutinize the reliability and accuracy of party-submitted expert reports. The reports prepared by the LLOC strive to be neutral and accurate,[175] thus mitigating the concern that the expert's opinion is tainted by adversarial bias. Additionally, by coordinating requests for information from the LLOC through circuit librarians, courts can safeguard confidential case information and obtain non-case specific general information on foreign law.[176]

Since courts have the inherent power to appoint technical advisors, judges may also reach out to the LLOC directly to request more specific advice from foreign legal specialists either through an informal consultation or through appointment as an independent expert.[177] Judges that choose to appoint an LLOC specialist would have to notify the parties and permit them the opportunity to object.[178]

Appeals courts, including the Ninth Circuit, have demonstrated approval of courts' reliance on memoranda submitted by the Law Library of Congress. In the context of an appeal of a Board of Immigration Appeals determination of foreign law, a Ninth Circuit panel noted that "Library of Congress research deserves considerable evidentiary weight" for matters relating to the application of "unfamiliar, foreign law, particularly unwritten, customary law."[179]

2. Use of Foreign Law Institutes in Civil Law Countries

The Law Library of Congress's services are similar to institutes frequently used by foreign courts to ascertain foreign law. In both Switzerland and the

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branch versus 332 from executive agencies and 406 from Congress).

[174] *See* Telephone Interview with Peter Roudik, *supra* note 173.

[175] *See* Winston et al., *supra* note 166, at 963.

[176] The LLOC has mechanisms in place for safeguarding confidentiality including not disclosing who their work is for, removing identifiable information from their work product, construing the Freedom of Information Act's exemption for litigation as applying to legal opinions drafted for executive agencies and the judicial branch. Telephone Interview with Peter Roudik, *supra* note 173.

[177] *See* Connelly & Muir, *infra* note 209, at 89; Finnerty et al., *infra* note 208.

[178] *See infra* Part IV.C (discussing rules and limitations of federal courts' inherent power to consult technical advisors).

[179] Dulai v. INS, No. 93-70036, 1994 WL 684496, at *2 (9th Cir. Dec. 7, 1994) (citing Cheung Tai Poon v. INS, 707 F.2d 258, 259 (6th Cir. 1983) (relying on Library of Congress memorandum relating to Hong Kong laws)).

Netherlands, courts frequently task specialized institutes with preparing reports and legal opinions to assist courts and litigants with the ascertainment of foreign law.[180]

In Switzerland, for example, the Swiss Institute of Comparative Law ("SICL" or "Institut suisse de droit compare" or "ISDC") is tasked with providing information and research on foreign and international law to other government agencies and courts in Switzerland.[181] Much like the Law Library of Congress, the SICL was created by Swiss federal law to "provide information and legal opinions to tribunals, administrative bodies, lawyers and other interested persons on foreign law."[182]

The SICL provides legal opinions through its staff, who are trained in the laws and legal systems of foreign countries and have access to resources that permit them to determine the content of foreign law, as well as information on the practical application of foreign legal provisions.[183] The SICL is an independent government entity like the Law Library of Congress and strives to present its opinions in a neutral and objective manner that is not influenced by the interests of the Swiss Government or its clients.[184] The Swiss Supreme Court has recognized its independence and impartiality.[185] Moreover, just as in the United States, Swiss law does not require courts to adhere to opinions rendered by the SICL.[186] Swiss courts are obliged to determine foreign law independently and have discretion to rely on a number of resources in ascertaining applicable law, including the legal opinions of the SICL.[187]

Unlike the LLOC, however, the SICL charges both the government and the public for its legal opinion service.[188] In 2019, the SICL received 215 requests for legal opinions.[189] Almost forty percent of the requests received

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[180] Ilaria Pretelli & 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?, *supra* note 20, at 375, 390*;* GEEROMS, *supra* note 57, at 156.

[181] *See* Duncan Alford, *Séjour at the Swiss Institute of Comparative Law*, 33 INT'L J. LEGAL INFO. 65, 65–66 (2005).

[182] Pretelli & Lalani, *supra* note 180, at 390.

[183] *Id*.

[184] *Legal Opinions*, SWISS INST. OF COMP. L., https://www.isdc.ch/en/services/legal-opinions [https://perma.cc/5FQS-Q59B].

[185] *Id*.; Pretelli & Lalani, *supra* note 180, at 390.

[186] *See* Pretelli & Lalani, *supra* note 180, at 390. *But see id*. at 391 ("It should be noted that judicial authorities must place significant weight on the legal information provided by experts: a decision that disregards or diverges from the information provided by the experts must be justified.").

[187] *See id*. at 390–91.

[188] *Id*. at 391.

[189] SWISS INST. OF COMP. L., RAPPORT ANNUEL 9 (2019), https://www.isdc.ch/media/1965/rapport-annuel_2019_vf.pdf [https://perma.cc/G95F-QD5K].

by the SICL were from attorneys, and practically half of requests from the federal and cantonal governments.[190]

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 in The Hague to advise the judiciary, the Netherlands Bar, and public notaries on foreign private law.[191] The IJI drafts the majority of its reports for the Bar, with the minority drafted at request of the judiciary.[192] Just like the SICL, the IJI charges its clients and the courts a fee for the legal opinions it drafts. The IJI provides legal advice and opinions to the judiciary, attorneys, mediators, notaries, and in house lawyers.[193] The IJI specializes in private international law and foreign contract, property, and family law.[194]

Although attorneys can hire it to provide an opinion in a litigation, the Institute maintains its mission of providing unbiased opinions on foreign law by requiring a requesting party to pay even if the Institute renders a non-favorable and non-beneficial opinion.[195] Lawyers who receive an unfavorable opinion can decide whether to submit it to the court, but do not otherwise have a say in the drafting of the opinion.[196]

Despite courts' hesitancy to incur the costs associated with researching foreign law, the legal opinions provided by the IJI are very popular with the Dutch judiciary who view these opinions as "a preliminary aid, even for foreign law where it might not be that difficult to ascertain its substance."[197] In the Netherlands, as in many civil law countries, foreign law is treated as a question of law to be determined by the court on its own initiative. In practice, and due to the costs associated with researching foreign law, Dutch courts often assume that the parties have assented to forum law if they only refer to Dutch law in their submissions and pleadings.[198]

3. Overcoming Challenges to Implementation

One issue with the implementation of this proposal is that it may subvert

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[190] *Id*.

[191] GEEROMS, *supra* note 74, at 156; *see also* Telephone Interview with Fieke van Overbeeke, CEO & Legal Couns., Internationaal Juridisch Instituut (May 28, 2021).

[192] GEEROMS, *supra* note 74, at 156.

[193] *See About Us*, INTERNATIONAAL JURIDISCH INSTITUUT, https://iji.nl/en/contact/about-us/ [https://perma.cc/37TV-GJJA].

[194] *See id*.; *PIL and Foreign Law Expertise*, INTERNATIONAAL JURIDISCH INSTITUUT, https://iji.nl/en/pil-and-foreign-law/ [https://perma.cc/N9J5-8PNR].

[195] *See* Telephone Interview with Fieke van Overbeeke, *supra* note 191.

[196] *Id*.

[197] GEEROMS, *supra* note 74, at 156 (citing Dutch court's decision relying on IJI to ascertain Belgian property law).

[198] Aukje van Hoek, Ian Sumner & Cathalijne van der Plas, *The Netherlands*, *in* CROSS BORDER LITIGATION 395, 400 (Paul Beaumont et al. eds., 2017).

the adversarial process in much the same way that appointing an independent expert would.[199] To the extent that a judge requests a legal opinion from the LLOC to assist with researching and ascertaining foreign law but chooses not to inform the parties or place this legal opinion on the record, this could pose some ethical concerns. Although judges have an inherent power to consult with technical advisors, the Code of Conduct for U.S. Judges specifies that judges may only "obtain the written advice of a disinterested expert on the law" after "giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received."[200]

Accordingly, judges choosing to rely on the legal opinion service of the Law Library of Congress are obliged to communicate with the parties about their intent to rely on such an opinion and to permit the parties an opportunity to object. Although the rule does not require the court to file the legal opinion on the record, placing these opinions on the record and permitting the parties an opportunity to respond to these opinions and seek their exclusion would overcome concerns that such opinions violate adversarial norms.

C. Informal Consultations with Foreign Judges

One practice that has been used by some judges, both in the United States and abroad, is informal consultations with foreign judges and foreign law experts to understand the legal landscape and the laws of a particular country.[201] These conversations may happen informally and *ex parte*, or they may be on the record when a court appoints a foreign law expert to serve as a technical advisor.[202] In Canada, for example, a judge in British Columbia coordinated a joint hearing with a circuit court of Oregon and with all parties

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[199] *See supra* Part IV.A.3.

[200] *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(4)(c) (2019).

[201] JUDGE GARBOLINO, FED. JUD. CTR., THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES 178 (2015) ("Although there are few reported examples of U.S. courts communicating directly with courts in other countries, it is well known that these communications take place."); Nishitani, *supra* note 20, at 50–51 (describing the Hague Judicial Network, the European Judicial Network, and the Ibero-American Network of Judicial Cooperation in Civil and Criminal Matters as networks permitting direct oral or written communication between judges); Diego P. Fernández Arroyo & Paula María All, *Argentina: The Changing Character of Foreign Law in the Argentinian Legal System*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE?, *supra* note 20, at 453, 471–72.

[202] *See, e.g.*, Luxor Agentes Autonomos de Investimientos, LTDA. v. Oliveira, No. 13-cv-20806, 2014 WL 11878426, at *4 (S.D. Fla. Nov. 3, 2014) (filing technical advisor's report on Brazilian law in entry on docket); Rodriguez v. Casa Chapa S.A., de C.V., No. DR:04-cv-00034, 2006 WL 8433818, at *4 (W.D. Tex. Aug. 22, 2006) (choosing not to file technical advisors' reports on docket but court's communication with experts noted in record).

present for a case involving the same underlying issues and parties.[203]

One of the mechanisms that facilitates these informal consultations is the International Hague Network of Judges ("HNJ") which is most frequently used in the context of the Hague Convention on the Civil Aspects of International Child Abduction to understand custody laws in foreign countries.[204] Although this network is not mentioned in the text of the Convention nor the U.S. implementing legislation, the network was developed by the Permanent Bureau of the Hague Conference on Private International Law as a way for judges from the contracting states to exchange information on the practical operation of the Convention and significant developments in a member judge's jurisdiction.[205] This network includes representative judges from eighty-eight jurisdictions who can be contacted by other judges to provide informal assistance in understanding that member state's laws.[206] Foreign judges who are contacted for assistance can help their domestic counterparts understand the foreign country's rules on habitual residency, custody, the legality of the removal of the child from the country, as well as the procedures and rules on repatriation.[207]

Although there is no statutory basis for informal consultations, judges have long enjoyed an inherent power to consult with technical advisors.[208] This inherent power has been recognized by the Supreme Court[209] but is not well defined by the civil rules of procedure. Unlike court-appointed experts, technical advisors may not testify or be deposed and do not usually present evidence or reports.[210]Although no rule of civil procedure mandates that

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[203] Talia Einhorn, *Israel: Proof of and Information About Foreign Law in Israel*, *in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE?, *supra* note 20, at 563, 578 (discussing Hoole v. Hoole (2008), 89 B.C.L.R. 4th 383 (Can. B.C. S.C.)).

[204] *See* Nishitani, *supra* note 20, at 50–51; Garbolino, *supra* note 201, at 178.

[205] *See* Judith L. Kreeger, *The International Hague Judicial Network — A Progressing Work*, 48 FAM. L.Q. 221, 222 (2014).

[206] Nishitani, *supra* note 20, at 50; *International Hague Network of Judges (IHNJ)*, HAGUE CONF. ON PRIV. INT'L L. (Feb. 2023), https://assets.hcch.net/docs/665b2d56-6236-4125-9352-c22bb65bc375.pdf [https://perma.cc/WC7A-AF2F].

[207] Nishitani, *supra* note 20, at 50–51; *see, e.g.*, Saada v. Golan, No. 1:18-cv-5292, 2020 WL 2128867, at *1 (E.D.N.Y. May 5, 2020) (contacting Hague Network judges to assist with understanding of repatriation procedures).

[208] Christopher S. Finnerty et al., *Behind the Curtain: Technical Advisors in Complex Litigation*, K&L GATES (June 2, 2016), https://www.klgates.com/Behind-the-Curtain--Technical-Advisors-in-Complex-Litigation-06-02-2016 [https://perma.cc/V8NZ-NNW5].

[209] *See In re* Peterson, 253 U.S. 300, 312–13 (1920) (noting that trial courts have inherent "authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause"); Michael Connelly & John Muir, *Special Masters, Court-Appointed Experts and Technical Advisors in Federal Court*, 76 DEF. COUNS. J. 77, 89 (2009).

[210] *See* Connelly & Muir, *supra* note 209, at 89. *But see* Luxor Agentes Autonomos de Investimientos, LTDA. v. Oliveira, No. 13-cv-20806, 2014 WL 11878426, at *4–5 (S.D. Fla.

courts disclose the appointment of a technical advisor and the court may communicate with these advisors *ex parte*,[211] the Code of Conduct for U.S. Judges requires judges to notify the parties of the court's intent to appoint an expert advisor and to allow the parties an opportunity to object.[212]

Foreign legal experts who are appointed to serve as technical advisors can be particularly useful in assisting a judge in determining foreign law. Because these experts serve in an informal advisory role, the appointment of such an advisor can facilitate a judge's understanding of a foreign law at issue in an expeditious and efficient way.

Of course, the appointment of a technical advisor who presents information to a judge that will sway the judge's ultimate decision may pose some procedural concerns,[213] and some courts have held that a judge cannot appoint a technical advisor to opine on legal matters.[214] Where a court appoints an expert to serve as a technical advisor but does not permit the parties an opportunity to cross-examine the expert or respond to the expert's opinion, the adversarial process can be undermined. Some courts have appointed technical advisors who prepared reports that were ultimately used by the court to ascertain foreign law but were not disclosed to the parties on the record prior to the court's decision on the motion implicating the foreign law.[215] Although these courts ultimately disclosed the appointment of such experts and satisfied all ethical obligations, neither explicitly provided a procedure for the parties to address the experts' reports.

The Ninth Circuit and the Federal Circuit have endorsed several procedural safeguards that district courts should follow when appointing technical advisors. These safeguards require a court to:

Nov. 3, 2014) (relying on report prepared by court-appointed technical advisor on Brazilian law instead of expert affidavit presented by party).

[211] Connelly & Muir, *supra* note 209, at 89; Finnerty et al., *supra* note 208.

[212] *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 3(A)(4)(c) (2019) (noting that a judge may "obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received").

[213] *See* Douglas H. Ginsburg, *supra* note 161, at 310 & n.43 (noting that, whereas court-appointed experts operate entirely within the confines of an open adversarial proceeding, technical advisors whose opinions are not part of the record and are not subject to cross-examination can be problematic).

[214] *See* Reilly v. United States, 863 F.2d 149, 158 (1st Cir. 1988) ("A judge may not, for example, appoint a legal advisor to brief him on legal issues, since 'determination of purely legal questions is the responsibility of the court itself.'") (quoting Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 747 (6th Cir. 1979)).

[215] *See* Gerloff v. Hostetter Schneider Realty, No. 12 Civ. 9404, 2014 WL 1099814, at *3 (S.D.N.Y. Mar. 20, 2014); Rodriguez v. Casa Chapa S.A., de C.V., No. DR:04-cv-00034, 2006 WL 8433818, at *4 (W.D. Tex. Aug. 22, 2006).

> (1) utilize a fair and open procedure for appointing a neutral technical advisor; (2) address any allegations of bias, partiality, or lack of qualification; (3) clearly define and limit the technical advisor's duties; (4) make clear to the technical advisor that any advice he or she gives to the court cannot be based on any extra-record information; and (5) make explicit, either through an expert's report or a record of *ex parte* communications, the nature and content of the technical advisor's advice.[216]

Substantially similar safeguards have also been endorsed by the Hague Network of Judges.[217] The HNJ guidelines also promote notifying the parties "of the nature of the proposed communication," keeping a record "of communications . . . to be made available to the parties," and providing parties an "opportunity to be present in certain cases" via teleconference.[218] Federal judges can ensure that their use of a technical advisor comports with procedural due process and does not undermine the adversarial process by following these proposed procedural safeguards.

D. Improving Partisan Expert Testimony

As indicated in Part II, judges and litigants rarely make use of the opportunity to obtain testimony from foreign legal experts at hearings. In this section, I propose that the U.S. practice in this regard can be improved by borrowing several practices from other common law systems.

1. Concurrent Expert Testimony or "Witness Hot-tubbing"

One practice, originating in Australia and common in the context of competition lawsuits, is that of concurrent testimony of expert witnesses.[219] This practice, colloquially known as "hot-tubbing," places the expert witnesses for all parties on the stand at the same time.[220] There are some variations, but typically the experts prepare a report before trial.[221] In some

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[216] Fed. Trade Comm'n v. Enforma Nat. Prods., Inc., 362 F.3d 1204, 1214–15 (9th Cir. 2004) (quoting Ass'n of Mexican-Am. Educators v. State of California, 231 F.3d 572, 614 (9th Cir. 2000) (Tashima, J., dissenting)); *see also* TechSearch, L.L.C. v. Intel Corp., 286 F.3d 1360, 1379 (Fed. Cir. 2002).

[217] HAGUE CONF. ON PRIV. INT'L L., DIRECT JUDICIAL COMMUNICATIONS 13 (2013), https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf [https://perma.cc/X79X-EDWX].

[218] *Id*.

[219] Lisa C. Wood, *Experts in the Tub*, 21 ANTITRUST 95, 95 (2007).

[220] *Id*.

[221] Justice Rares, *Using the "Hot Tub" — How Concurrent Expert Evidence Aids Understanding Issues*, FED. CT. OF AUSTL., ¶¶ 1, 23 (Oct. 12, 2013), https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20131012 [https://perma.cc/7MNE-EXBD].

instances, the court requires the experts to prepare a joint report that highlights areas of agreement and disagreement.[222] A hearing then takes place at which the experts sit next to one other in the courtroom. The experts can make brief oral statements at the beginning of the process that detail what they believe to be the primary issues.[223] After the opening statements, each expert is permitted the opportunity to comment and ask questions about what the other expert has said.[224] The parties are then permitted to cross-examine and re-examine in the conventional manner.[225]

Australian judges report that the taking of concurrent expert testimony saves substantial time and costs for courts.[226] One of the primary criticisms of this approach is that experts who are more confident, persuasive, and assertive can overshadow an expert who does not possess those qualities.[227] Another criticism of the practice has focused on the possibility that it will confuse a jury.[228] In one Australian state, however, experts and their professional organizations reported overwhelming support for this form of testimony taking.[229]

This practice has received significant attention and has been used in complex tort, antitrust, patent, and other civil cases in the United States.[230] The practice of taking concurrent expert testimony has most frequently been used in non-jury cases.[231] Judges have used this practice when they "sensed an expert was holding back and not conceding points because of excessive control by counsel."[232] Often, the method used by judges in the U.S. is more informal and conversational, with the judge directing the questioning instead

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[222] *Id.* ¶ 23.

[223] *Id.* ¶¶ 25–26; Wood, *supra* note 219, at 95.

[224] Justice Rares, *supra* note 221, ¶ 26.

[225] *Id.* ¶ 33; Wood, *supra* note 219, at 95.

[226] Wood, *supra* note 219, at 95–96.

[227] Justice Rares, *supra* note 221, ¶ 39.

[228] *See* Adam E. Butt, *Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There a Proper Role for Hot Tubbing*, 40 HOUS. J. INT'L L. 1, 44–45 (2017).

[229] Justice Rares, *supra* note 221, ¶ 44.

[230] *See* Butt, *supra* note 228, at 10, 55–56, 64–65, 68; Adam E. Butt, *Concurrent Expert Evidence in the United States — Is There a Role for Hot Tubbing?*, CIV. JURY PROJECT AT NYU SCHL. OF L., https://civiljuryproject.law.nyu.edu/concurrent-expert-evidence-in-the-united-states-is-there-a-role-for-hot-tubbing/ [https://perma.cc/KN7Q-VWV5]; Adam Liptak, *In U.S., Expert Witnesses Are Partisan*, N.Y. TIMES (Aug. 12, 2008), https://www.nytimes.com/2008/08/12/us/12experts.html [https://perma.cc/N2F2-NH3F]; Judge Zouhary, Commentary, *Jumping In — A Different Approach to Expert Evidence*, 62 FED. LAW. 22, 23 (2015); *see also* Justice Rares, *supra* note 221, ¶ 21 (expanded to criminal trials in Australia).

[231] *See* Wood, *supra* note 219, at 97; Butt, *supra* note 230.

[232] Wood, *supra* note 219, at 97.

of the parties.[233]

As pointed out by Judge Zouhary of the Northern District of Ohio in an article on concurrent expert testimony, federal judges have the power to control the examination of witnesses.[234] Although the federal rules do not regulate the practice, the Federal Rules of Evidence give judges control "over the mode and order of examining witnesses and presenting evidence" so as to "make those procedures effective for determining the truth" and to "avoid wasting time."[235]

Adopting this practice in the context of determining foreign law at a hearing can be a particularly efficient way to combat conflicting and partisan testimony. Courts can require the experts to submit a joint report in advance of a hearing to highlight areas of agreement and disagreement. This joint report will prepare the court to direct the questioning of the expert witnesses and can help the court focus on the salient differences between the experts, which can overcome the problem of an articulate and confident witness overshadowing a less articulate one. Moreover, because foreign law is a question of law and not fact, there is no risk of confusing a jury by permitting experts to testify concurrently.

2. Expert Witness Oaths

Another practice used in England requires testifying witnesses to sign declarations of loyalty to the court and not to the party paying their bills.[236] England has a common law system where the determination of foreign law is one of fact.[237] Foreign legal experts are treated as fact witnesses and the parties are responsible for retaining such witnesses.[238] Unlike fact witnesses retained in the U.S., courts in England require expert witnesses to sign a declaration indicating that they have an overriding duty of truthfulness, independence, and impartiality to the court.[239]

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[233] *See, e.g.*, *id.*; Judge Zouhary, *supra* note 230, 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).

[234] *See* Judge Zouhary, *supra* note 230, at 23.

[235] FED. R. EVID. 611.

[236] Liptak, *supra* note 230.

[237] Otto C. Sommerich & Benjamin Busch, *Expert Witness and the Proof of Foreign Law*, 38 CORNELL L. REV. 125, 127 (1953).

[238] Matthew Hoyle, *Pleading and Proving Foreign Law in the English Courts*, WESTLAW (2022), https://uk.practicallaw.thomsonreuters.com/w-036-2170 [https://perma.cc/RX6S-GGT5].

[239] Steven Huyghe & Adrian Chan, *The Evolution of Expert Witness Law Under UK and US Jurisdiction*, FTI CONSULTING (2013), https://www.fticonsulting-asia.com/~/media/Files/apac-files/insights/white-papers/the-evolution-of-expert-witness-law-under-uk-and-us-jurisdiction.pdf [https://perma.cc/9HCU-RQP4]; Civ. P. R. 35.3 (UK), https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35 [https://perma.cc/YNJ3-

Federal Rule of Evidence 603 requires testifying experts to give an oath or affirmation that they will testify truthfully. The rule does not specify the form of the oath and only requires that it be "in a form designed to impress that duty on the witness's conscience."[240] FRE 603, however, applies only to the oral testimony and not specifically to written reports and declarations. Although attorneys filing expert witness reports are bound by the requirements of FRCP 11, the English expert witness rules go further by requiring the experts to confirm the truthfulness of their opinions or be subject to proceedings for contempt of court.[241] Individual judges can set forth a standing order requiring expert witnesses to file a declaration of truthfulness with their report. Alternatively, the court may wish to alter the local rules so that all cases heard within a district require expert witnesses to file these declarations with their reports.

3. Virtual Hearings

Courts in the United States can make the process of holding hearings on foreign legal issues more efficient and cost-effective by holding these hearings virtually. In many cases, experts on foreign law reside abroad. Given the developments in technology and the federal courts' embrace of virtual hearings during the pandemic,[242] virtual hearings may be a more efficient and cost-effective way to consult with foreign law experts in the future. Virtual hearings are commonly used in arbitrations and their use has been attributed to greater efficiency, particularly in cross-border disputes.[243]

CONCLUSION

Despite the fact that FRCP 44.1 and the Supreme Court's reasoning in *Animal Science* grants federal courts great flexibility in determining foreign law, most courts faced with a foreign law issue have relied on expert reports and evidence submitted by the parties to determine foreign law. There are

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[240] FED. R. EVID. 603.

[241] *See* Vivien King, *The Civil Procedure Rules — Amendment to the Statement of Truth*, HOLLIS GLOB. (Sept. 30, 2020), https://www.hollisglobal.com/our-perspective/insights/the-civil-procedure-rules-amendment-to-the-statement-of-truth/ [https://perma.cc/MP36-QM8F].

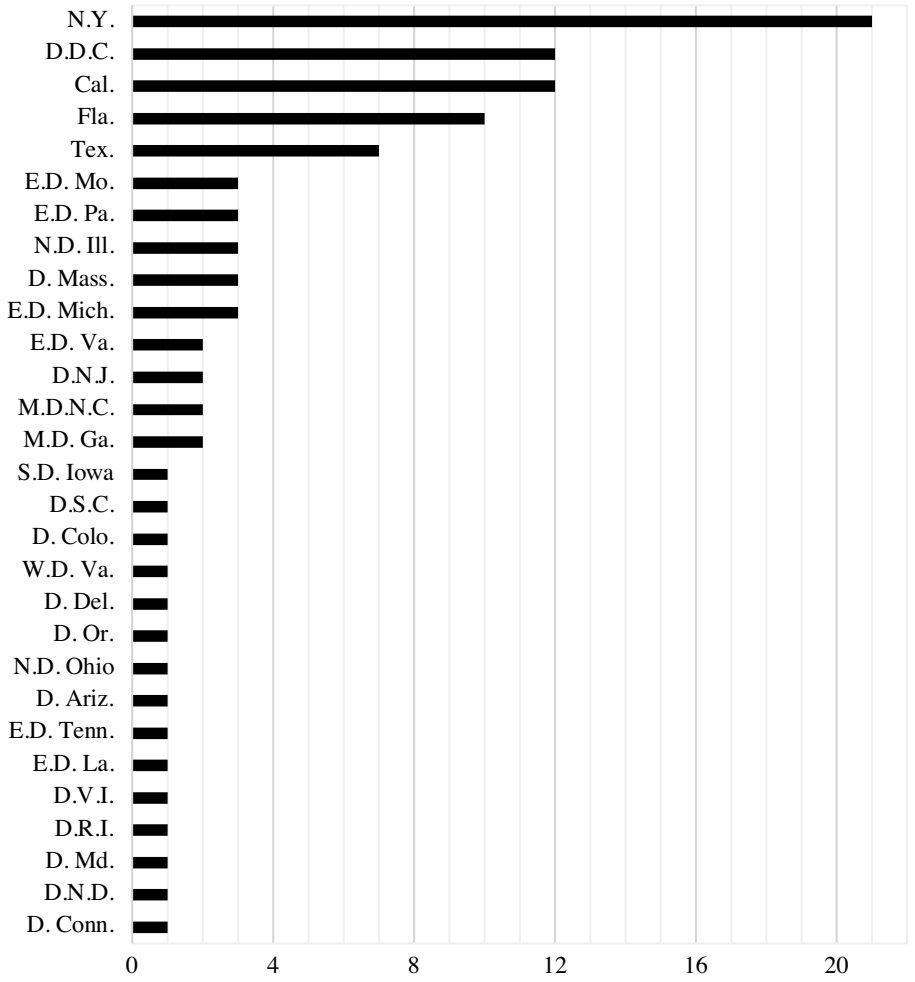
[242] *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology [https://perma.cc/DL2D-SBTV].

[243] *See* Graham Smith-Bernal, *Virtual Hearings Point the Way Forward for International Arbitration*, LEGALTECH NEWS (Dec. 17, 2020, 7:00 AM), https://www.law.com/legaltechnews/2020/12/17/virtual-and-hybrid-hearings-the-future-of-international-arbitrations/ [https://perma.cc/9HHL-3FUL]; Lars Markert & Jan Burghardt, *Navigating the Digital Maze — Pertinent Issues in E-Arbitration*, 27 J. ARB. STUD. 3, 12 (2017) (describing increasing use of video conferencing for the examination of individual witnesses or experts, particularly in smaller cases).

many reasons why judges rely on party submissions to make these determinations, including a lack of adequate resources and a hesitancy to overstep their perceived role as a neutral arbiter. As shown above, there are many practices commonly used in other countries that can be implemented in federal trial courts without infringing on procedural rights and the structure of our adversarial system. To improve foreign law determinations, courts can rely on existing resources, like the Law Library of Congress, and procedures, like the appointment of independent experts and special masters. Courts can also take a more active role in the questioning of foreign law experts and might consider requiring these experts to prepare joint reports or submit oaths of truthfulness in addition to their individual declarations. These measures can be easily implemented in trial courts as a way to more efficiently and effectively determine foreign law.

APPENDIX

Attachment A: Chart of Frequency of Foreign Law Cases by Court[244]



[244] Please note that the following districts were combined for purposes of this chart: Southern and Eastern Districts of New York; Western, Northern, and Southern Districts of Texas; and Eastern, Northern, and Central Districts of California. Please also note that districts not located on this chart did not have a foreign law case in accordance with this author's survey. The full list of 100 cases surveyed is on file with the author.