NOTE

Lex Incognita No Longer: Making Foreign Law Less Foreign to Federal Courts

ALEJANDRO J. GARCÍA*

TABLE OF CONTENTS

* Georgetown Law, J.D. expected 2020; Brown University, A.B., History. © 2020, Alejandro J. García. This Note is dedicated to the memory of my grandmother, Josefa Infanzón, for whom I was saving a copy. Moreover, I want to express my gratitude to Professor David Stewart, Judge Daniel P. Collins, Michael Paskin, Damaris Hernández, Jonathan Mooney, and Cullen Meade for their feedback on my paper and insights on the reality of rule 44.1 practice. The contributions of Maxwell Hamilton, Masha Goncharova, Lázaro Zamora, and all *The Georgetown Law Journal* editors and staff have also been invaluable. Above all, I would like to thank Shadia, my parents, my aunt Nilda, and all of my friends for their patience, support, and understanding in this process. *Ad majorem Dei gloriam.*

INTRODUCTION

Imagine the following scene: Two large companies are going to bench trial in the Southern District of New York over a long-running dispute about a supply contract. Both are based in New York but have nationwide operations. After several rounds of motions, conferences, and hearings on the matter, the judge determines that the law of the state of Bliss—the place of performance—governs the outcome.[1] True to form, both companies have retained glossy New York law firms. Neither the judge nor the parties' attorneys have ever dealt with Bliss law, let alone visited the state. Indeed, the Bliss-law issue only arose five years into the litigation, when the plaintiff served a one-page notice on the defendants stating its intent, without more, to argue Bliss law. Nine months later, the court denied cross-motions for summary judgment and held that Bliss law governed the contract issues.

In the eighth year of litigation, the matter is finally up for trial. During its case-in-chief, plaintiff's counsel calls Professor Tammany to the stand. Professor Tammany is a Denevers Family Professor at the University of Bliss College of the Law, a renowned authority on Bliss contract law. The professor testifies about a venerable doctrine of Bliss contract law that binds suppliers—such as the defendant—to continue supplying "essential goods" to its clients—such as the plaintiff—even if the client is late in sending payment. Refusal to supply such goods is a breach of contract, says the professor. Some days later, during the defendant's case-in-reply, Professor Dukas takes the stand. Dukas, the Wolfman Chair of Contract Law at Thomas More Law School, is Tammany's archnemesis—their debates on the pages of law reviews are famous. Dukas acknowledges the essential-goods doctrine, but points to recent appellate case law severely restricting its application to situations of *force majeure*. As expected, the professors' assessments are in the record as expert reports. The judge is unfamiliar with Bliss law and, overworked as he and his clerks are, declines to research it further. Instead, he rules in favor of the defendant, finding the essential-goods doctrine inapplicable. The defendant did not breach because the plaintiff has been late in

1. The state of Bliss is, as the reader may suppose, a fictional U.S. state.

sending payment. The judge baldly states that he found Professor Dukas's testimony more credible and decided to accept his legal conclusions.

This situation should appear farcical even to a novice law student. Having "legal experts" testify about the content of another state's law—or any law—is anathema in our system.[2] And the same goes for raising an issue of law through a naked assertion of intent to do so. But prevailing doctrine would have federal courts indulge such practices when faced with issues of foreign law.[3] This result is contrary to the vision of the federal Advisory Committee on Rules of Civil Procedure[4]: to make litigation of foreign law as similar as possible to litigation of domestic American law.[5]

Federal courts' approach to ascertaining foreign law is out of step with the growing prevalence of disputes involving a foreign-law component.[6] Rule 44.1, regarding the treatment of foreign law in federal court, may well have been adequate for the federal judiciary of 1966, when the rule was adopted. But globalization, the intensification of international commerce, and the mass cross-border movement of people have multiplied the number of disputes that involve issues of foreign law.[7] And yet rule 44.1 remains unchanged. Practice under rule 44.1 continues to approach foreign law with tweezers. Litigants and courts seem unwilling to engage with foreign law substantively. This Note argues that federal courts routinely misapply rule 44.1 because of the looseness of its text, resulting in practices that contravene the rule's purpose.

Through a survey of federal case law, this Note critiques three practices that stunt the application of rule 44.1: the (1) use of expert testimony to define the content of foreign law; (2) insistence of some courts on the parties' burden of proving

---

2. *See, e.g.*, *In re* Initial Pub. Offering Sec. Litig., 174 F. Supp. 2d 61, 64–65 (S.D.N.Y. 2001) (noting that "every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law," and surveying relevant circuit case law). Throughout this Note, the capitalized word "State" refers to sovereign states, whereas "state" refers to states of the United States of America.

3. In this paper, "foreign law," without more, refers to the law of States other than the United States. This is notwithstanding the practice of American conflicts-of-law scholars of referring to the law of other states within the Union as "foreign law."

4. The Advisory Committee on Rules of Civil Procedure is one of five advisory committees tasked with devising and evaluating amendments to procedural rules for the federal courts, under the aegis of the Judicial Conference. *See generally* James C. Duff, *Overview for the Bench, Bar, and Public*, U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public [https://perma.cc/HU4Q-ZS82] (last visited Feb. 9, 2020). All Advisory Committee proposals are subject to successive approvals by several entities, most notably the Supreme Court of the United States, which retains statutory authority to promulgate rules of procedure. *Id.* (surveying the rulemaking process).

5. *See infra* Section I.A.

6. *See* Curley v. AMR Corp., 153 F.3d 5, 13 (2d Cir. 1998) (acknowledging that issues of foreign law "can be expected to come to the federal courts with increasing frequency as the global economy expands and cross-border transactions increase").

7. For instance, family law has surprisingly been one of the most abundant wellsprings for such disputes, as families form or disintegrate across borders. *See, e.g.*, Ozaltin v. Ozaltin, 708 F.3d 355, 367–68 (2d Cir. 2013) (establishing joint-custody rights under Turkish law in a Hague Convention action for right of access); Whallon v. Lynn, 230 F.3d 450, 456 (1st Cir. 2000) (determining child custody rights under Mexican law).

foreign law; and (3) inconsistent judicial applications of rule 44.1.[8] I will argue that these practices frustrate the Advisory Committee's vision in enacting rule 44.1 and further muddy an already-difficult area of civil litigation.[9] Rather than facilitate foreign-law disputes, these practices make foreign law more foreign still. From the irregularity of practice under rule 44.1, I conclude that judicial rulemaking is an insufficient implement to regularize practice under rule 44.1. As a solution, I propose an amended text for rule 44.1 to encourage more regular and reliable procedure in cases that raise issues of foreign law.

This Note fills a gap in the scholarship by proposing an overhaul of rule 44.1 to incorporate best practices adopted by courts, suppress inadequate practices, and encourage a more structured approach to foreign-law issues. A recent note in the *New York University Law Review* proposes rewriting rule 44.1 to incorporate a burden of production for parties seeking to raise issues of foreign law.[10] Indeed, the only substantive amendment that the author proposes is requiring a party seeking to rely on foreign law to "(i) produce any relevant statutes to the Court, or (ii) produce substantial materials demonstrating the substance of that law."[11] That note's proposal is limited only to the basic burden that parties must carry to have the court apply foreign law, but does not address other recurring issues with rule 44.1 practice that I identify in this Note. Other recent scholarship has limited itself to critiquing practice under rule 44.1 and recommending ancillary solutions to discrete issues. For instance, authors have recommended international cooperation mechanisms or dedicated institutes;[12] explored methods for finding foreign

8. This Note does not address the issue of what deference—if any—should be due to a foreign government's statement about its own law to a federal court. The Supreme Court took this up recently in *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, holding that the foreign sovereign's interpretation is "entitled to substantial but not conclusive weight." 138 S. Ct. 1865, 1875 (2018). The implications of this case for practice under Rule 44.1 remain unclear. But the intervention of a foreign sovereign in federal-court litigation may be expected to affect only a small subset of cases.

9. *Cf.* Diaz v. Gonzalez, 261 U.S. 102, 106 (1923) (Holmes, J.) (musing that "[w]hen we contemplate such a [foreign legal] system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed").

10. *See* 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).

11. *Id.* at 1374.

12. *See, e.g.*, 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, 1100 (2013) (arguing that "[m]emoranda of understanding, direct judicial communication, certification procedures, lawyer and institutional clearinghouses and networks, and even international instruments" should be used to aid determination of foreign law in federal and state courts); Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT'L L. & POL. 1111, 1134–49 (2013) (proposing the use of party stipulations and transnational certification as to the content of a State's law, judicial cooperation, and the creation of a foreign-law institute to facilitate determination of foreign law in U.S. courts); Frederick Gaston Hall, Note, *Not Everything Is as Easy as a French Press: The Dangerous Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution*, 43 GEO. J. INT'L L. 1457, 1476–87 (2012) (recommending the adoption of a new multilateral convention on inter-State assistance in determining the law of other member States).

law and extracting it from court filings;[13] advocated for a comparative-law mode of analysis in cases involving foreign law;[14] distinguished between applying and adopting foreign law in U.S. litigation;[15] and suggested the use of foreign-State interpretive rules when applying the law of such States.[16] All of these proposed solutions seek to alter practice *around* the existing text of rule 44.1, rather than addressing the rule's textual insufficiency. For this reason, I propose a new text for rule 44.1 that seeks to resolve the most contentious issues that have arisen in the doctrine.

In Part I, I analyze the theory that underpins rule 44.1 and then provide a descriptive account of how the U.S. courts of appeals have applied the rule in practice. In Part II, I present a normative proposal for a rewritten rule 44.1 and explain its intent and operation. I then briefly conclude.

I. FEDERAL RULE OF CIVIL PROCEDURE 44.1 IN PRACTICE

Rule 44.1 of Civil Procedure undergirds all civil litigation of foreign-law issues in federal court.[17] In three sentences, the rule presents a broad scheme to deal with these scenarios. The rule, as amended, reads:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.[18]

---

13. *See generally* Loren Turner, *Buried Treasure: Excavating Foreign Law from Civil Pleadings Filed in U.S. Federal Courts*, 47 INT'L J. LEGAL INFO. 22, 45–50 (2019) (describing available methods for finding and organizing foreign law litigated in U.S. federal courts).

14. Vivian Grosswald Curran, *U.S Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis*, 51 AKRON L. REV. 857, 875–78 (2017) (arguing that courts considering foreign law pursuant to Rule 44.1 in cases involving discovery in foreign States should incorporate comparative-law analysis).

15. *See generally* Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 CORNELL L. REV. 243 (2018) (elaborating on the distinction between applying and adopting a foreign State's law through a procedural-theory lens).

16. Nicholas M. McLean, Comment, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303, 307–11 (2012) (arguing that federal-court proceedings under rule 44.1 should use other States' systems of statutory interpretation when asked to apply the law of such States).

17. The issue of applying foreign law in federal criminal cases presents a set of related considerations that go beyond the scope of this Note. This issue has attracted attention from courts and scholars. *See* FED. R. CRIM. P. 26.1; *see also, e.g.*, United States v. Pink, 315 U.S. 203, 220 (1942) (finding that a declaration by the Soviet Union's Commissariat for Justice was conclusive in establishing the extraterritoriality of a Russian nationalization decree); Ingrid Wuerth, *The Future of the Federal Law of Foreign Relations*, 106 GEO. L.J. 1825, 1840–44 (2018) (discussing the enduring vitality of *Pink* and related cases). Nor do I address foreign-law analysis under analogous state rules of civil procedure, which has provided fruitful examples of how a court ought to approach these issues. *See, e.g.*, Estate of Obata, 238 Cal. Rptr. 3d 545, 547–50 (Cal. Ct. App. 2018) (analyzing an issue of Japanese law through a comprehensive discussion of applicable Japanese law, secondary literature, and history, and applying the relevant California rule of civil procedure).

18. FED. R. CIV. P. 44.1.

The rule itself is textually sparse. The text's substance remains identical to the 1966 original, save for insertion in 1972 of a reference to the Federal Rules of Evidence.[19] A general restyling of the Federal Rules of Civil Procedure in 2007 left the text mostly untouched, save for an amendment discussed below.[20] In this Part, I first address the theory that animated the enactment and amendment of rule 44.1. Broadly stated, rule 44.1 is meant to liberalize the process of litigating issues of foreign law in federal court. The ultimate purpose of this liberalization is to make courts and litigants treat these issues as they would issues of domestic law, to the degree that that is possible. Then, I survey and critique the various approaches that the federal courts of appeals take in applying rule 44.1. I focus particularly on the Third, Fifth, Seventh, and Ninth Circuits, whose case law includes extensive discussion of procedure under rule 44.1. As a result of this survey, I identify the polycentric, liberal approach now gaining currency in the Ninth Circuit as best comporting with the purpose of rule 44.1. I also analyze innovative approaches taken by some district courts to resolve these issues.

A. THE THEORY OF RULE 44.1

As early as 1966, the Advisory Committee on Rules of Civil Procedure sought to standardize the procedure for applying foreign law. Indeed, rule 44.1 of Civil Procedure "fundamentally changed the mode of determining foreign law in federal courts."[21] In proposing a new rule 44.1 of Civil Procedure, the Advisory Committee envisioned a "uniform and effective procedure for raising and determining an issue concerning" foreign law.[22] It attempted this through a threefold scheme: (i) requiring notice when raising an issue of foreign law; (ii) expanding the materials that a court may consult; and (iii) treating such issues as questions of law.[23]

The original proposed rule read as follows:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.[24]

---

19. The amendment sought to liberate the district court from the strictures of the rules of evidence when assessing testimony on the content of foreign law. *See* FED. R. CIV. P. 44.1 advisory committee's note to 1972 amendment. In many respects, this is analogous to procedure for preliminary determinations under the rules of evidence. *See* FED. R. EVID. 104(a).

20. *See* FED. R. CIV. P. 44.1 advisory committee's note to 2007 amendment; *infra* note 33 and accompanying text.

21. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018).

22. FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption.

23. *Id.*

24. ADVISORY COMM. ON CIVIL RULES, STATEMENT ON BEHALF OF THE ADVISORY COMMITTEE ON CIVIL RULES 68 (1965), http://www.uscourts.gov/sites/default/files/fr_import/CV08-1965.pdf [https://perma.cc/6KGL-A442] [hereinafter ADVISORY COMM., 1965 STATEMENT]. The Standing Committee

The Advisory Committee crafted the rule jointly with the now-defunct Commission and Advisory Committee on International Rules of Judicial Procedure,[25] and the Columbia Law School Project on International Procedure.[26] The Supreme Court adopted the rule on February 28, 1966, and it became effective on July 1 of that year.[27]

From its inception, the rule was intended as a liberal blueprint for litigation of foreign-law issues. It was conceived in three parts.

First is the notice requirement. The notice requirement is intended to "avoid unfair surprise" and to clarify that foreign law need not be pleaded from the outset.[28] The Advisory Committee determined that the "pertinence of foreign law" can be discerned at different times in different cases, and thus the rule refused to force parties to engage in potentially wasteful pre-complaint research by not setting time limits for serving notice of an issue of foreign law.[29] Instead, the original rule merely required a party to raise a foreign-law issue through "reasonable written notice."[30] This change was seen as being in harmony with notice pleadings and rule 8(a)'s requirement of a "short and plain statement."[31]

The Advisory Committee suggested three factors to aid courts in determining reasonableness: (1) "[t]he stage which the case has reached at the time of the notice," (2) "the reason proffered by the party for his failure to give earlier notice," and (3) "the importance to the case as a whole of the issue of foreign law sought to be raised."[32] These factors sprung from the Rules' overarching

---

recommended adoption in September of that year. *See generally* COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 13, 31–32 (1965), http://www.uscourts.gov/sites/default/files/fr_import/ST09-1965-1.pdf [https://perma.cc/5JNB-S7YL].

25. These two entities were created to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (establishing the Commission and Advisory Committee on International Rules of Civil Procedure).

26. *See* FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption. The Columbia Law School Project on International Procedure, led by Professor Hans Smit, produced a series of book-length studies of foreign States' systems of civil procedure between 1960 and 1968. *See generally* Stefan A. Riesenfeld, 67 COLUM. L. REV. 1176 (1967) (reviewing RUTH BADER GINSBURG & ANDERS BRUZELIUS, CIVIL PROCEDURE IN SWEDEN (1965), and MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY (1965)). Each volume was jointly authored by an expert in the relevant State's law and an American law professor, including then-Professor Ruth Bader Ginsburg and renowned Italian scholar Mauro Cappelletti. *Id.* at 1176.

27. Amendments to Rules of Civil Procedure for the U.S. Dist. Courts, 383 U.S. 1029, 1031, 1055 (1966).

28. FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption.

29. *Id.* (observing that "[a] requirement that notice of foreign law be given only through the medium of the pleadings would tend . . . to force the party to engage in a peculiarly burdensome type of investigation which might turn out to be unnecessary; and correspondingly the adversary would be forced into a possible wasteful investigation. The liberal provisions for amendment of the pleadings afford help if the pleadings are used as the medium of giving notice of the foreign law; but it seems best to permit a written notice to be given outside of and later than the pleadings, provided the notice is reasonable.").

30. ADVISORY COMM., 1965 STATEMENT, *supra* note 24, at 68.

31. *See* FED. R. CIV. P. 8(a)(1), (2), (d)(1). For a discussion of the interaction between this requirement and post-*Twombly–Iqbal* pleading, see *infra* Section II.B.1.a.

32. FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption.

objective of preventing parties from abusing the system. Yet for economy's sake, the requirement that the notice be "reasonable" was expunged by the 2007 style amendment.[33] As discussed below, the reasonableness requirement may well be read into the rule by implication.[34] But a clear, uniform standard of reasonableness is crucial for ensuring regular procedure under the rule.[35]

The second part of the rule specifies the foreign-law sources that a court may consult. Simply put, the rule imposes no limitations on courts. "[A]ny relevant material or source" has been understood to truly mean *any* material or source.[36] The Advisory Committee textually liberated courts applying rule 44.1 from limitations in the rules of evidence[37] to make litigation of foreign-law issues more similar to litigation of domestic-law issues. Parties may cite to primary or secondary sources of foreign law. They may also deploy experts on the relevant foreign law to submit reports or testify as to its content.

Courts need not limit themselves to the material the parties present. They may instead do any research they deem proper for resolving the issue, as they would in domestic-law cases. And they may freely raise and determine any issue not raised by the parties.[38] But the rule does not put the millstone of obligatory judicial notice around the judiciary's neck. Instead, it allows courts to demand full presentation of the issues by the parties.[39] This liberalization was a step in the right direction because it mirrors the flexibility in litigation of domestic-law issues. However, allowing testimony by foreign-law experts as a matter of course is a grave step backwards, as I discuss in Part II.[40]

Most crucially, in its third part, rule 44.1 "sound[ed] the death knell"[41] for the common-law approach of treating foreign law as a fact to be proven. At common

---

33. *See* Amendments to Fed. Rules of Civil Procedure, 550 U.S. 1003, 1098 (2007). The Style Consultant to the Committee on Rules of Practice and Procedure addressed this amendment obliquely in his discussion of removing "intensifiers" as part of the 2007 restyling of the Rules. In the context of "reasonable written notice," the Reporter remarked that "[u]sing *reasonable* might imply that, in every other rule that requires notice, the notice does not have to be reasonable." Memorandum from Joseph Kimble, Style Consultant, Comm. on Rules of Practice and Procedure of the Judicial Conf. of the U.S., to All Readers, at xiv (Feb. 21, 2005), https://www.uscourts.gov/sites/default/files/guiding_principles.pdf [https://perma.cc/4LUS-CWE6]. This could, he argued, "create negative implications for other rules." *Id.* Although I sympathize with the thrust of this argument, eliminating a clear reasonableness requirement from Rule 44.1 opens the door to irregular practice. *See infra* Section II.B.1.b.

34. *See infra* Section II.B.1.b.

35. *See id.*

36. *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018) (noting that FED. R. CIV. P. 44.1 "frees courts to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail" (alteration in original) (quoting FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption)).

37. *See* FED. R. CIV. P. 44.1 advisory committee's note to 1972 amendment. The original rule's reference to Rule 43 was deemed insufficiently expansive to fulfill the rule's purpose. *See id.*

38. FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption.

39. *Id.*

40. *See infra* Section II.B.2.

41. *See* 9A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2441 (3d ed. 2008) (Aug. 2019 update); *see also* 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 (1967).

law, the content of a foreign State's law had to be proven *as fact*, rather than as law. This resulted in absurd situations in which appellate courts could only review these legal determinations for clear error.[42] It also required parties to plead foreign law from the outset and present foreign law material in a manner admissible under the rules of evidence.[43] The third part of rule 44.1 abolished the practice in federal court. The Advisory Committee pointed to longstanding distrust of juries in making these determinations.[44] It also noted how, by 1966, most states and many federal courts had already assigned the determination of foreign law to the court.[45] This also means that appellate courts may review foreign-law issues de novo, as they are not bound to give deference on a factual matter. The abolition of the foreign-law-as-fact approach was the Advisory Committee's masterstroke. It ended a practice as deleterious to litigants—who effectively had only one chance to argue the foreign law—as it was to the development of jurisprudence dealing with foreign-law issues.

But more must be done. As I demonstrate in the following section, federal courts have applied rule 44.1 in ways that frustrate the Advisory Committee's liberal vision. This has created inconsistency among and within the circuits, which might only be solved through an overhaul of rule 44.1.

B. PRACTICE IN THE FEDERAL COURTS

This section surveys and critiques the approaches of federal courts of appeals when applying rule 44.1. I focus on the methodological disputes within the Seventh and Ninth Circuits, as well as the idiosyncratic approach of the Fifth Circuit and the burden-oriented framework of the Third Circuit. These circuits are the only ones to have discussed the methodology of practice under rule 44.1, rather than merely applying it. Finally, I address some innovative approaches that district courts have taken when facing issues of foreign law.

I note in passing that the Supreme Court has offered precious little guidance on how to approach practice under rule 44.1. The only case to directly engage with the issue was *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, handed down in June 2018, which raised the question of whether a federal court applying foreign law must "treat as conclusive a submission from [a] foreign government describing its own law."[46] No, said the Court. It concluded, somewhat cryptically, that "a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight."[47] In reaching this

42. *See, e.g.*, Remington Rand, Inc. v. Societe Internationale Pour Participations Industrielles et Commerciales S.A., 188 F.2d 1011, 1013 (D.C. Cir. 1951) (inquiring whether the trial court's findings regarding the content of Swiss contract law were clearly erroneous). *See generally* Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 322–24, 322 n.38 (1958) (reviewing the pre-rule 44.1 procedure for determining the law of foreign States).

43. WRIGHT ET AL., *supra* note 41, § 2441.

44. FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption.

45. *Id.*

46. 138 S. Ct. 1865, 1872 (2018).

47. *Id.* at 1875.

conclusion, the Court briefly surveyed the theory of rule 44.1, in a manner substantially similar to my discussion above.[48] Most of the Court's discussion was based on the Advisory Committee note to the rule, and Wright and Miller's writings on the subject. The Court nevertheless declined to go beyond the narrow issue of deference to foreign government declarations. Thus, the importance of *Animal Science* to regulating rule 44.1 practice is limited.

My analysis is limited mainly to the doctrine of the U.S. courts of appeals, because their methodological prescriptions bind all inferior courts within their respective circuits. Further research could focus on practice at the district-court level, to determine what trial courts are *actually* doing when faced with foreign-law issues. But that inquiry is beyond the scope of this Note.

I begin my survey with the Seventh Circuit, which has begun to favor direct engagement with foreign law, with some room for foreign-law experts, as a result of methodological disputes between its judges. I then turn to the Ninth Circuit, where a polycentric, liberal approach to foreign-law issues has coalesced in recent years. This approach, I argue, is the most desirable in light of the Advisory Committee's stated aims in enacting rule 44.1. Third, I consider the Fifth Circuit's jurisprudence requiring parties to "prove" the relevant foreign law, which sets it apart from its sister circuits and preserves a vestigial foreign-law-as-fact approach that rule 44.1 was supposed to abolish. Then I look at the Third Circuit, which continues to speak of parties' "burden" of demonstrating the foreign law. Finally, I discuss how some district courts have used court-appointed experts and special masters to resolve thorny issues of foreign law.

1. The Seventh Circuit and its Methodological Battles Over Rule 44.1

The Seventh Circuit has been an unlikely battleground for rule 44.1 doctrine. The loudest voice—as in many fields of private law—has been that of recently retired Judge Richard Posner.[49] During his stint on the Seventh Circuit, Judge Posner was highly critical of the use of foreign-law experts in litigation under the second part of rule 44.1. But he faced pushback. On the one hand, Judge Diane Wood has taken a more functionalist approach to the issue, welcoming the use of experts to inform the court about the content of foreign law. On the other hand, Judge Frank Easterbrook, who distrusts but does not reject experts, favors direct, unmediated engagement with foreign law where possible.

Since Judge Posner's retirement, the Seventh Circuit has followed Judge Easterbrook's direct-engagement approach, which has the judge look at the primary sources of foreign law (and secondary sources elucidating it) without regard to the experts' presentation. But Judge Posner's approach, with its emphasis on

48. *See id.* at 1872–73.

49. *See, e.g.*, Beanstalk Grp., Inc. v. AM Gen. Corp., 283 F.3d 856, 860 (7th Cir. 2002) (applying a post-modern textualist approach to a dispute about a marketer's commission for a joint venture); Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1181–82 (7th Cir. 1990) (using cost-benefit analysis to reject theory of strict liability for chemical company following spill).

American courts' and lawyers' expertise on law, remains a cogent theoretical model that should inform any reform of rule 44.1.

In short, Judge Posner argued that foreign-law "experts" have no place in federal court. The main thrust of Judge Posner's critique was that, in our system, *judges* are the "experts on law."[50] Foreign-law experts are no more qualified than judges to determine the law. This may not be so when a case involves a technical or scientific issue such that it would be unreasonable for a judge *not* to seek recourse in expert testimony.[51] But when the issue is one of law, the judge is perfectly able to assess the primary materials, which are "superior sources."[52] These may be translated at the parties' expense. Expert witnesses are partisan, said Judge Posner, and they are selected because they will testify in favor of the view of the party that is paying them.[53] Judges need not be "spoon [fed]"[54] on most questions of foreign law. That is unless the applicable law is that of a State with "such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn."[55]

In *Sunstar, Inc. v. Alberto–Culver Co.*, Judge Posner applied this approach. The case involved a complex trademark dispute between Alberto–Culver, an American hair-care titan, and Sunstar, its Japanese analog.[56] Although the contract called for application of Illinois law, the case turned on the meaning of a *senyoshikoyen*.[57] A *senyoshikoyen* is the rough equivalent of an exclusive-use right under American copyright law.[58] Before the district court, the parties fielded Japanese-law experts, who swore affidavits regarding the meaning of a *senyoshikoyen*.[59] But the district court refused to determine the meaning of the term, finding it irrelevant.[60]

On appeal, Judge Posner puzzled over the district judge's refusal to determine the meaning of a *senyoshikoyen* under Japanese law. In his view, the entire case depended on this determination.[61] To accomplish this task, Judge Posner plumbed the scholarly literature that the experts cited in their reports.[62] Strangely, he began by stating U.S. law on the alteration of a trademark's typeface.[63] He then baldly stated that "the Japanese rule is the same as the American," citing to Japanese case law factually analogous to American precedent on the subject.[64] The judge

50. *See* Sunstar, Inc. v. Alberto–Culver Co., 586 F.3d 487, 496 (7th Cir. 2009).
51. *Id.*
52. *Id.* at 495.
53. *Id.* at 495–96.
54. *Id.* at 496.
55. *Id.*
56. See *id.* at 490–94 for a recitation of the facts.
57. *Id.* at 494–95.
58. *Id.* at 492–93.
59. *Id.* at 494.
60. *Id.*
61. *Id.* at 495.
62. *Id.* at 496.
63. *Id.*
64. *Id.* at 497.

made no analysis of additional Japanese jurisprudence. Judge Posner then proceeded to analyze English translations of Japanese trademark law—provided by the parties—as well as English-language scholarly literature on the subject.[65] On this basis, he concluded as a matter of law that a *senyoshikoyen* entitles its holder "to make minor changes in the trademark without being deemed to have exceeded the rights conferred on it by the license."[66] This gave the victory to Sunstar, given the smallness of the changes it made to the VO5 trademarks and the extreme length—ninety-nine years—of the license agreement.[67]

Nowhere was Judge Posner more forceful, however, than in *Bodum USA, Inc. v. La Cafetiere, Inc*.[68] The U.S. distribution arm of coffee colossus Bodum sued a competitor, alleging that the latter was wrongfully marketing and selling a French press identical to Bodum's iconic Chambord coffeemaker.[69] Bodum claimed a violation of its common-law trade dress, recognized by both federal and state statutes.[70] Extraordinarily, the case produced opinions from all three judges on the panel. They all agreed on the outcome—the defendant did not violate Bodum's copyright.[71] But the sticking point was how to proceed under rule 44.1.

Then-Chief Judge Frank Easterbrook wrote the panel's opinion. In discussing rule 44.1, he noted that recourse to experts is discretionary.[72] After all, the rule says only that "judges 'may' rather than 'must' receive expert testimony and adds that courts may consider 'any relevant material or source.'"[73] For Judge Easterbrook, the well-published law of France should have been equally accessible to an American court as would the law of Puerto Rico or Louisiana, civil-law jurisdictions within the American sphere.[74] Rather than expensive experts, who add "an adversary's spin" to the foreign law, courts should prefer "objective, English-language descriptions of [foreign] law."[75] Thus, in analyzing the issue before the court, Judge Easterbrook did not make allusion to the content of the parties' expert reports. Instead, he went directly to the applicable sections of the French Civil Code and other statutes, French case law, and English-language secondary sources elucidating the relevant law. These "objective" sources,[76] read together, allowed him to apply the relevant French law directly, rather than credit one expert over the other.

---

65. *Id*. at 498.
66. *Id*. at 499.
67. *Id*. at 499–500.
68. 621 F.3d 624, 631–38 (7th Cir. 2010) (Posner, J., concurring).
69. *Id*. at 625–26 (majority opinion). The opinion helpfully features a photographic comparison of both coffeemakers, which are remarkably similar. *Id*. at 626–27.
70. *Id*. at 626 (citing 15 U.S.C. § 1125(a); 815 ILL. COMP. STAT. ANN. 510/2(a) (West 2001)).
71. *Id*. at 631.
72. *Id*. at 628.
73. *Id*. (quoting FED. R. CIV. P. 44.1).
74. *Id*. at 628–29.
75. *Id*. at 629 (first citing Sunstar, Inc. v. Alberto–Culver Co., 586 F.3d 487, 495–96 (7th Cir. 2009); and then citing Abad v. Bayer Corp., 563 F.3d 663, 670–71 (7th Cir. 2009)).
76. *Id*.

Judge Posner was predictably livid about the state of the record. The parties had relied only on partial translations of French statutes and their experts' affidavits to present their case.[77] In Judge Posner's view, this "produced only confusion" that recourse to French commercial-law treatises and the relevant statutes would have avoided.[78] Indeed, the district court relied exclusively on these sources in ruling for the defendant.[79] He therefore wrote separately to decry this "common and authorized but unsound judicial practice."[80]

Reiterating his argument in *Sunstar*, Judge Posner insisted that reliance on testimony is "excusable" when the reference State has "such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn."[81] He noted that, when dealing with the law of other U.S. states—including civil-law Louisiana—federal courts will not permit experts to testify on its content.[82] But hearing experts is routine for the law of any other State, even when dealing with the law of other Anglophone countries with common-law systems.[83] In these cases, there is an abundance of published materials "to provide neutral illumination" of the content of these States' laws.[84] Even for French law, there are plenty of translations of primary and secondary sources into English.[85] Consulting literature in the original language would of course be ideal, even though most Americans lack "even a reading knowledge of a foreign language."[86] But "linguistic provincialism does not excuse intellectual provincialism," Judge Posner insisted.[87] Judges should therefore avoid having experts "spoon feed them foreign law that can be found well explained in English-language treatises and articles."[88] This is a "bad practice, followed like so many legal practices out of habit rather than reflection."[89]

Turning to the issue before the court, Judge Posner took an idiosyncratic approach. Rather than merely proceeding to analyze and apply the French law—as he seemed to recommend—he took pains to compare the doctrine of contractual intention under French Civil Code Article 1156 with the equivalent common-law analysis.[90] The selection of materials is odd, as it relies on a reading of the civil law as doctrinally uniform, rather than focusing on how French law treats the issue of extrinsic evidence. Judge Posner also spilled much ink

77. *Id*. at 632 (Posner, J., concurring).
78. *Id*. at 638.
79. *Id*. at 632.
80. *Id*. at 631.
81. *Id*. at 633–34.
82. *Id*. at 632.
83. *Id*. at 632–33. To Judge Posner, this is the most egregious use of experts, as American judges would be well-equipped to read and interpret the case law of other Anglophone common-law States. *Id*.
84. *Id*. at 633.
85. *Id*. (citing English-language sources of French law).
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*. at 634–38.

comparing the civil law's stance on extrinsic evidence in contract interpretation with that of American courts. He finished by refuting the defendant's expert's affidavit on the merits, finding it misconstrued the relevant French Civil Code provision.

Judge Wood was not impressed. Concurring, she noted her disagreement with her "colleagues' assertion that expert testimony is categorically inferior to published, English-language materials."[91] Rule 44.1 "establishes no hierarchy for sources of foreign law," and "[e]xercises in comparative law" by American judges may lead to misunderstandings of the foreign law.[92] For Judge Wood, expert testimony may sometimes be not only useful, but perhaps even necessary to disentangle these issues.[93] Often, the parties' experts and the authors of the leading treatises and articles are the same.[94] Or practicing attorneys may gloss upon the highly theoretical academic literature that is the norm in some foreign jurisdictions.[95] Nothing counsels against using written sources of foreign law, but "[t]here is no need . . . to disparage oral testimony from experts in the foreign law."[96] A court may of course always use the methods of Federal Rule of Evidence 702 to probe the expert's opinion, as it would for a fact expert.[97] Judge Wood also rejected as inapposite the other judges' comparison of French law to that of Louisiana and Puerto Rico, which are more integrated into the American legal systems than the other opinions let on.[98] Her approach may be characterized as functionalist, especially as she noted that "responsible lawyers" have used foreign-law expert testimony "for years."[99] This clashes directly with Judge Posner and Judge Easterbrook's formalist insistence on engaging with the substantive law without the mediating—or polluting—effect of a partisan expert's view.

Although Judge Posner's rejection of experts is theoretically sound, his execution did not advance the goals of rule 44.1. He premised his method of analysis in both *Sunstar* and *Bodum* on contrasting the relevant foreign law with equivalent American law. Although this may prove instructive, it does not comport with the Advisory Committee on Civil Rules' goal of likening litigation of foreign law with that of domestic law. It would be bizarre for a court in Boston applying, say, New York contract law to make a lengthy comparison with its Massachusetts analog, unless the facts of the case required it. Trying to understand foreign law through the prism of American equivalents may give the court valuable reference points in its analysis. But insisting on comparative law, rather than direct engagement with the foreign law, multiplies the evils that rule 44.1 was designed to combat. Some question also remains as to whether Judge Posner, despite his

91. *Id.* at 638 (Wood, J., concurring).
92. *Id.* at 638–39.
93. *Id.* at 639.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (citing FED. R. EVID. 702).
98. *Id.* at 639–40.
99. *Id.* at 639.

vehement disapproval of expert witnesses, relied on their reports. In *Sunstar*, he acknowledged that he did, at least in part.[100] On the other hand, in *Bodum*, Posner cited to the experts' affidavits to refute them on the merits.[101] For better or for worse, Judge Posner's approach has not gained traction, even within his circuit.

Judge Easterbrook, by following a more systematic approach, brushes the experts' affidavits aside and gets to the meat of the foreign law. In *Bodum*, rather than criticizing the experts or weighing their value, Judge Easterbrook tackled the applicable French law head-on, reasoning through it as he would domestic law. His approach comes close to the Advisory Committee's vision and avoids the doctrinal befogging that Judge Posner's comparative-law approach tends to produce. In many ways, Judge Easterbrook's method is similar to the emerging methodology of the Ninth Circuit, which I discuss below.

Ultimately, Judge Easterbrook's method seems to have prevailed, as demonstrated in *Garcia v. Pinelo*, a child custody battle between two Mexican nationals.[102] First the court rejected the defendant's argument that the plaintiff was obligated to "prove" the foreign law—relying partially on Fifth Circuit precedent that I discuss below[103]—by reiterating that "whenever possible issues of foreign law should be resolved on their merits and on the basis of a full evaluation of the available materials."[104] Then, the court decided the issue of *patria potestas* under Mexican law by reference to the civil code of the state of Nuevo León, contemporary scholarship on the subject, and American case law applying Nuevo León law.[105] Nowhere did the court mention experts or of their reports. This is not the functionalism that Judge Wood—who wrote for the panel in *Garcia*—advocated in *Bodum*. Rather, it is the direct-engagement model that Judge Easterbrook championed. But the court undertook this analysis without reference to its most recent methodological precedent, suggesting that these issues are as of yet unresolved.

2. The Ninth Circuit and the *de Fontbrune* Method

Seeing the chaos of practice under rule 44.1, the Ninth Circuit—mainly by voice of Judge M. Margaret McKeown—sought to bring some method to the madness starting in 2016. Rather than settle for *ad hoc* application of rule 44.1, the norm in most circuits, Judge McKeown has striven to build a doctrinal framework to guide district courts and future appellate panels. Her approach is meant to preserve the flexibility that rule 44.1 sought to ensure. But it is a principled

100. Sunstar, Inc. v. Alberto–Culver Co., 586 F.3d 487, 496 (7th Cir. 2009) (noting that "fortunately the experts cited to scholarly literature as well, which can help us decide whether a *senyoshiyoken* allows its holder to vary a licensed trademark").

101. *Bodum*, 621 F.3d at 638 (Posner, J., concurring) (refuting defendant's expert's interpretation of French law).

102. 808 F.3d 1158 (7th Cir. 2015).

103. *Id.* at 1162–63 (citing Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990)).

104. *Id.* at 1163 (quoting WRIGHT ET AL., *supra* note 41, § 2444).

105. *Id.* at 1164–69.

flexibility, imbued with the Advisory Committee's guiding objectives. I call this the *de Fontbrune* method, after the case in which Judge McKeown first stated her approach.

Writing for the majority in *de Fontbrune v. Wofsy*, Judge McKeown recognized "the difficulty that can arise in determining foreign law and the confusion surrounding the role of foreign law in domestic proceedings."[106] The case involved an attempt by Yves Sicre de Fontbrune to enforce a French judgment he had obtained against Alan Wofsy.[107] De Fontbrune held a copyright in photographs of Picasso's works contained in a *catalogue raisonné*, which Wofsy infringed by reproducing the images.[108] A French court had awarded de Fontbrune €2 million in *astreinte* against Wofsy for the violations.[109] De Fontbrune sued in California, seeking recognition of the French judgment under the California Uniform Recognition Act.[110] Wofsy moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6).[111]

The district court vacillated on the French-law issue. The main issue was whether an *astreinte* could be characterized as damages enforceable under the Uniform Recognition Act or merely as a penalty.[112] Both parties fielded French-law experts, who offered conflicting answers to this question.[113] But could the court consider evidence outside the pleadings, such as the expert reports, in ruling on the 12(b)(6) motion? The court initially said no, concluding that rule 44.1 does not expressly allow it and that a party that relies on foreign law has the burden of proving its content.[114] Wofsy's motion for reconsideration prompted the court to "reverse[] course," however.[115] It ultimately held that, because the content of foreign law is a determination of law and not of fact, the court could take notice of the experts' reports under rule 44.1, "insofar as they relate[d] to French law."[116] Relying on said reports, the court dismissed the action with prejudice because the *astreinte* was a penalty not cognizable under the Uniform Recognition Act.[117]

Facing the district court's odd about-face, the court of appeals—through an opinion by Judge McKeown—took the opportunity to clarify its rule 44.1 doctrine. At the outset, it noted the rule's deliberate abandonment of the foreign-law-

106. 838 F.3d 992, 994 (9th Cir. 2016).

107. *Id.*

108. *Id.* at 995.

109. *Id.* at 994. Under French law, an *astreinte* is a "judicial injunction ancillary to an order to perform a contract," as a form of penalty for noncompliance with the contract. Dennis Tallon, *Contract Law*, *in* INTRODUCTION TO FRENCH LAW 205, 234 (George A. Bermann & Etienne Picard eds., 2008). An *astreinte* is distinct from compensatory damages for breach of contract. *Id.*

110. *Id.*; *see also* California Uniform Foreign-Country Monetary Judgments Recognition Act, CAL. CIV. PROC. CODE §§ 1713–25 (West 2019).

111. The action was removed from California state court on diversity grounds. *De Fontbrune*, 838 F.3d at 995.

112. *Id.*

113. *See id.* at 995–96.

114. *Id.* at 996.

115. *Id.*

116. *Id.*

117. *Id.*

as-fact approach.[118] This required "making the process of ascertaining foreign law equivalent to the process for determining domestic law, insofar as possible."[119] The court noted the freedom that rule 44.1 gives courts in consulting materials to ascertain foreign law, which should be used "to independently research and analyze foreign law."[120] District courts are thus obligated "to adequately ascertain relevant foreign law, even if the parties' submissions are lacking."[121] A mix of independent research, along with expert testimony and foreign legal materials, is the key to this enterprise.[122] But federal courts "have largely remained hesitant to engage with questions of foreign law as fully and independently as they do with questions of domestic law."[123] In the court's view, this hesitation and lack of guidance from higher courts has led to conflicting methods for applying rule 44.1.[124]

To answer the 12(b)(6) question, the *de Fontbrune* court applied the rationale behind rule 44.1. If a federal court applying domestic law is free to conduct legal research in ruling on a 12(b)(6) motion, and rule 44.1 requires courts to treat foreign law as they would domestic law, why not consult foreign-law materials? The logic is irresistible. When a court investigates the law, there are no "judicial notice and ex parte issues" raised by factual research outside the pleadings.[125] It would be equally "antithetical to the language and purpose of Rule 44.1" to force courts to resolve these issues through summary judgment, unless the case raises genuine factual disputes.[126] Instead, courts should determine the foreign law through "adequate study," as they would do for domestic law.[127] The court ultimately held that rule 44.1 authorizes district courts to consider foreign legal materials outside the pleadings in ruling on a motion to dismiss.[128]

The recent decision in *Fahmy v. Jay-Z* illustrates the Ninth Circuit's method post-*de Fontbrune*.[129] This topical copyright case involved an Egyptian composer's claim to "moral rights" under Egyptian law over a song that celebrity rapper

118. *Id.* at 997.

119. *Id.* (citing WRIGHT ET AL., *supra* note 41, § 2444.)

120. *Id.*

121. *Id.* (citing Universe Sales Co. v. Silver Castle, Ltd., 182 F.3d 1036, 1039 (9th Cir. 1999)).

122. *Id.*

123. *Id.* at 998. The court particularly noted some of its sister circuits' insistence that the party raising an issue of foreign law must carry the burden of proving it, which it characterized as "semantic sloppiness," and "at odds with the mandate of Rule 44.1." *Id.*; *see* McGee v. Arkel Int'l, LLC, 671 F.3d 539, 546 (5th Cir. 2012); Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 216 (3d Cir. 2006). This view unduly preserves the discredited common-law-as-fact approach.

124. *De Fontbrune*, 838 F.3d at 998.

125. *Id.* at 999.

126. *Id.* at 998.

127. *Id.* at 999 (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991)). Although the court did not elaborate on what constitutes "adequate study," it continued to quote from *Salve Regina* by saying that, without adequate study, "there can be neither the adequate reflection nor that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." *Id.* (internal quotation marks omitted).

128. *See id.* at 1000.

129. *See* 908 F.3d 383 (9th Cir. 2018).

Jay-Z sampled in his 1999 hit single *Big Pimpin'*.[130] Jay-Z and his producer Timbaland purchased the right to use the song from EMI for $100,000.[131] But Osama Ahmed Fahmy, an heir to the original song's composer, sued Jay-Z and his production team in district court in 2007.[132] Fahmy alleged that he had inherited certain moral rights to the original song, *Khosara*, despite sundry agreements that transferred distribution rights for the song in Egypt and elsewhere to various companies.[133] This allegedly put Jay-Z in violation of section 106(2) of the Copyright Act.[134] After several procedural twists and turns, the matter came to trial in October 2015. By that point, the district court had ruled that the claim did not arise under American copyright law.[135]

When faced with cross-motions for judgment as a matter of law, the district court proceeded to consider the matter under Egyptian copyright law.[136] On approaching the chasm of rule 44.1, the court leaned on circuit precedent favoring the use of expert testimony to determine the content of foreign law.[137] From the outset, the court stated its intention to rely on the parties' submissions, which included deposition and trial testimony by "experts on Egyptian copyright law," along with translated Egyptian statutes.[138] In particular, it found that for Fahmy to have standing in federal court, he had to show he "retained rights, other than moral rights, in the *Khosara* musical composition and that defendants infringed

130. *Id.* at 389; *see* JAY-Z, *JAY-Z - Big Pimpin' ft. UGK*, YOUTUBE (Nov. 9, 2010), https://youtu.be/Cgoqrgc_0cM. The sampled track was the 1957 song *Khosara*, composed for the film *Fata Ahlami* and famously sung by Abdel Halim Hafez. *Fahmy*, 908 F.3d at 385; *see* Abdel Halim Hafez (حافظ الحليم - عبد خساره), *Khosara - Abdel Halim Hafez* (حافظ الحليم — عبد خساره), YOUTUBE (Aug. 12, 2015), https://youtu.be/4PmyTqM0xuE. Per the Ninth Circuit, under Egyptian law, moral rights are inalienable rights in a work that "protect the author's personal or moral interests" therein. *Fahmy*, 908 F.3d at 390.

131. *Fahmy*, 908 F.3d at 386. EMI held publishing rights for *Khosara* in every country other than Egypt, pursuant to a set of agreements transacted by the composer and his assignees. *Id.*

132. *Id.* at 387.

133. The facts are knotty. Baleigh Hamdy, the composer of *Khosara*, executed an agreement in 1968 to grant license and distribution rights for the song to Sout el Phan, a recording company. *Id.* at 385. In 1995, Hamdy's heirs executed an agreement with Sout el Phan to ratify the latter's rights under the 1968 agreement. *Id.* at 386. Later that year, Sout el Phan transferred its license and distribution rights for *Khosara* to EMI Music Arabia, applicable everywhere other than Egypt. *Id.* By 2001, Sout el Phan's rights had passed to another company, Alam el Phan. *Id.* Then, in 2002, Fahmy signed an agreement with Alam el Phan's owner, Jaber, to transfer certain rights to *Khosara* to Jaber. *Id.*

134. *Id.* at 387. The statute allows only copyright holders to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2) (2012).

135. *See* Fahmy v. Jay-Z, No. 2:07-cv-05715-CAS(PJWx), 2015 WL 6394455, at *4 (C.D. Cal. Oct. 21, 2015).

136. *Id.* at *4–6.

137. The court observed that "[a]lthough it is permissible under Rule 44.1 for a court to engage in its own research to determine the content of foreign law, 'it is neither novel nor remarkable for a court to accept the uncontradicted testimony of an expert to establish the relevant foreign law.'" *Id.* at *4 (quoting Universe Sales Co. v. Silver Castle, Ltd., 182 F.3d 1036, 1038 (9th Cir. 1999)).

138. *Id.* The parties' experts were of varying quality. The defendants presented Walid Abu Farhat, an attorney who had dealt with matters of Egyptian copyright law on "numerous occasions," as well as lectured on the subject. *Id.* at *5 n.4. The plaintiff fielded Hossam Loutfi, a professor of copyright law at Cairo University and experienced copyright attorney, who advised the Egyptian government in drafting their copyright laws. *Id.* at *6 n.5.

those particular rights."[139] This is because American copyright law does not recognize moral rights.[140] As promised, the court relied heavily on the experts' trial testimony in concluding that Fahmy had signed away any economic rights in *Khosara* by way of a 2002 agreement. For this reason, the court found that Fahmy lacked standing to assert his rights in federal court. The proper venue would be an Egyptian court, where moral rights would be enforceable.[141]

On appeal, the Ninth Circuit reappraised the issue but ultimately affirmed. The court, in a majority opinion by Senior Judge Carlos Bea, explicitly pointed to *de Fontbrune* as its methodological basis.[142] Unlike the district court, the court here analyzed the primary sources of Egyptian law. Only when it determined the content of Egyptian copyright law did it proceed to contrast it with its American analog.[143] Mention of the expert testimony was a relative afterthought and only served to confirm the court's reading of the primary sources. This may stem in part from the court of appeals' distance from the experts' testimony, as compared to the district court. On the Egyptian law claim, the court of appeals agreed with the district court, finding that Fahmy's moral rights—whether he had them or not—could only afford him injunctive relief in Egyptian court.[144] Fahmy's claim thus failed.

The Ninth Circuit's post-*de Fontbrune* methodology remains a nascent view, however, and has required further clarification. Sensing confusion regarding the *de Fontbrune* method, Judge McKeown recently reiterated that rule 44.1 and *de Fontbrune* obligate "a party relying on foreign law . . . to raise the specific legal issues and to provide the district court with the information needed to determine the meaning of the foreign law."[145] The rule therefore establishes "the parties' informational duty to the court."[146] If the parties fail to carry this initial burden, the court is free to apply the law of the forum.[147] The enterprise of determining foreign law must be "cooperative," and "[t]here is nothing 'cooperative' about

139. *Id*. at *4.

140. *Id*. at *6.

141. *See id*.

142. *See* Fahmy v. Jay-Z, 908 F.3d 383, 392 n.13 (9th Cir. 2018).

143. *See id*. at 390–91.

144. *See id*. at 392.

145. G & G Prods. LLC v. Rusic, 902 F.3d 940, 949 (9th Cir. 2018) (noting academic commentary such as STEVEN S. GENSLER, 1 FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY R. 44.1 (2018 ed.), that suggests the confusion that *de Fontbrune* could cause).

146. *Id*.

147. *Id*. at 950. The court cites to Ninth Circuit case law for the proposition that, "[a]bsent a showing to the contrary, it is presumed that foreign law is the same as the law of the forum." *Id*. (quoting United States v. Westinghouse Elec. Corp., 648 F.2d 642, 647 n.1 (9th Cir. 1981)). This venerable presumption can be traced back to the common law of England, where it remains in use. *See* Leavenworth v. Brockway, 2 Hill 201, 201 (N.Y. Sup. Ct. 1842) (per curiam) (observing that "[i]n the absence of such proof, the court, in cases like the present, should act according to its own laws" and discussing the development of the doctrine); Hoffman v. Carow, 22 Wend. 285, 324 (N.Y. 1839). In the United States, it has most often been applied in cases where parties seek to apply the law of a different state, which is traditionally considered "foreign law." *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (AM. LAW INST. 1971). Although useful as a legal fiction, the logic that the *G & G Productions* court applied implicitly is more convincing: application of the forum law should act as a

simply invoking foreign law and expecting a court to decide every legal permutation, including ones that the parties failed to raise."[148]

Following this rule, the court refused to reverse the lower court's decision to credit the defendant's "uncontradicted and well-supported submissions and arguments on the meaning of" the applicable Italian law.[149] The plaintiff had presented no such materials or arguments before the district court, and had raised them for the first time—in haphazard fashion—before the court of appeals.[150] In remanding three of the claims to the district court, the court admonished the parties to "properly brief the district court on the meaning of any Italian law used to support their legal arguments."[151] The court of appeals evidently hoped the parties and the district court would engage with the substance of applicable Italian law, following the *de Fontbrune* approach.[152] As of this writing, the case is ongoing before the United States District Court for the Central District of California.

The Ninth Circuit's new approach represents a practical compromise between courts shouldering the burden of ascertaining foreign law and requiring parties to inform the court of its content. It comes closer to fulfilling the Advisory Committee's vision of making foreign-law litigation no different from domestic law by rejecting a strictly court- or party-centric method and instead crafting a polycentric process responsive to the needs of each case. Indeed, the *de Fontbrune* doctrine eschews prescription of specific procedures. For instance, Judge McKeown has remained noncommittal on the question of experts, preferring to leave such decisions to individual judges.[153] Rule 44.1 practice in the Ninth Circuit has since fallen, somewhat sluggishly, into the *de Fontbrune* groove.[154] The breadth and dynamism of the Ninth Circuit may ultimately reduce *de Fontbrune* to a voice crying out in the wilderness. But it represents a step in

sanction when parties fail to make the requisite showing of the content of the forum law. *See G & G Prods.*, 902 F.3d at 950.

148. *G & G Prods.*, 902 F.3d at 950. Judge McKeown did not take kindly to the plaintiff's insistence that "in the final analysis it is *the court, not the litigants*, which must get it right." *Id.* at 949.

149. *Id.* at 951.

150. *See id.* at 945. The court's exasperation with the plaintiff was palpable. *See id.* at 954 (bemoaning that "clarity has not been a hallmark of this litigation").

151. *Id.* at 954.

152. The court made a point of quoting language in *Animal Science* stating the purpose of rule 44.1 as "mak[ing] the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." *Id.* at 948 (quoting Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1873 (2018) (internal quotation marks omitted)).

153. In a footnote to her mention of "declarations by qualified experts" in *G & G Productions*, Judge McKeown cited to all three of the opinions in *Bodum*, without expressing preference for any. *Id.* at 954 & n.10 (citing Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 628–31 (7th Cir. 2010); *id.* at 631–38 (Posner, J., concurring); *id.* at 638–40 (Wood, J., concurring)).

154. *See, e.g.*, Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V., 899 F.3d 1081, 1089 (9th Cir. 2018) (noting that a disagreement over Mexican corporate law was "a question of law for the court, not a fact that [the defendant] was required to prove"); Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 964 n.12 (9th Cir. 2017) (relying on "the record below, submissions [including experts] from the parties and amici, and . . . independent research" to resolve issues of Spanish law).

the right direction that merits the attention of other circuits and the Advisory Committee.

3. The Fifth Circuit and the "Reasonable Certainty" Standard

The Fifth Circuit currently follows an approach that imposes a burden on parties raising issues of foreign law to prove its content. This method runs counter to the text and purposes of rule 44.1 because it preserves a vestigial foreign-law-as-fact approach that rule 44.1 was meant to abolish.[155]

The court begins with the mandate that a plaintiff wishing to litigate issues of foreign law must provide "sufficient proof to establish with reasonable certainty the substance of the foreign principles of law."[156] Otherwise stated, plaintiffs seeking application of foreign law have an obligation to "present to the district court clear proof of the relevant . . . legal principles."[157] This is "a plaintiff's burden," and a court may supplement it through independent research.[158] Failing such a showing, the court will apply the law of the forum.[159] In large part, this relies on the time-honored presumption that domestic law is identical to foreign law.[160]

The Fifth Circuit's standard can be traced back to *Symonette Shipyards, Ltd. v. Clark*, a case decided six weeks after the effective date of rule 44.1.[161] An injured seaman and another seaman's estate had sued a shipowner after the two seamen were crushed by equipment being moved by a shipboard crane.[162] The Bahamian defendants urged the district court to apply Bahamian maritime law on seaworthiness.[163] They argued that, because the accident happened on a Bahamian ship

155. *See* FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption (observing that "the court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact,' so that appellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a)" and that it is for the court, not the jury, to make such determinations).

156. Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V., 817 F.3d 241, 247 (5th Cir. 2016) (quoting Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966)).

157. Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990).

158. McGee v. Arkel Int'l, LLC, 671 F.3d 539, 546 (5th Cir. 2012) (citing FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption). The court's insistence that the burden of proof fall on the plaintiff makes it unclear what the burden of a different party—a defendant or an intervenor—seeking to argue foreign law would be under this rule. This emphasis on the *plaintiff's* burden may stem from the discussion in *Banque Libanaise*, where the court insisted on the plaintiff Bank's obligation to plead foreign law. *Banque Libanaise*, 915 F.2d at 1006. But the *Banque Libanaise* court only speaks of the Bank's burden because it was the only party that raised foreign law in the proceedings below, not because it was the plaintiff.

159. *See Banque Libanaise*, 915 F.2d at 1006; *see also Symonette*, 365 F.2d at 468 n.5 ("In the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied.").

160. See *supra* note 147 for a discussion of this presumption.

161. *Symonette*, 365 F.2d at 464. The decision in the case was handed down on August 15, 1966, and the rule had gone into effect on July 1 of that year. *See* Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1031 (1966).

162. *Symonette*, 365 F.2d at 466–67.

163. *Id.* at 467.

owned by a Bahamian citizen, the law of that State should apply.[164] The district court refused, and the Fifth Circuit affirmed.

Urged to reverse the district court and apply Bahamian maritime law, the court of appeals insisted that "the law of the United States [on the subject] is established and easily determinable, whereas the evidence relating to the law of the Bahamas is vague and indefinite."[165] In the court's eyes, the shipowner's Bahamian-law expert had not established the negligence requirement for an unseaworthiness action or the nature of common-law defenses to such a claim.[166] The court went on to note that "no body of reported decisions of Bahamian cases exists and that the only source of Bahamian case law is found in the knowledge and memory of local practitioners."[167] For this reason, the shipowner had a heavier onus of proving the content of Bahamian maritime law.[168] Because the shipowner failed to carry this burden, the court affirmed the district court's application of American maritime law.[169] This conclusion relied on case law and treatises predating the enactment of rule 44.1.[170] Indeed, the court did not apply or even mention the newly minted rule.

In 1990, the Fifth Circuit reaffirmed the *Symonette* doctrine in its much-cited decision in *Banque Libanaise Pour Le Commerce v. Khreich*.[171] There, the court affirmed the district court's application of Texas law to a debt collection action brought by a French bank on an overdraft agreement made in Abu Dhabi.[172] The bank contended that Abu Dhabi law should apply and authorized the interest it sought to collect.[173] But it had only submitted partial translations of Abu Dhabi statutes, secondary sources on "basic Abu Dhabi law," and "a translation of something entitled 'Principles of Proof,' which discusses signing a document in blank."[174] The district court was unimpressed, as was the court of appeals. Only on appeal did the bank produce "extensive translations" of relevant statutes and "a letter from an Abu Dhabi lawyer" elucidating their meaning.[175] Regardless of

164. *Id*.

165. *Id*. at 468. This observation presages Judge Posner's contention that expert testimony on foreign law should only be used when the relevant State's legal system is so "obscure or poorly developed" that an American court would have no materials to which it could turn. *See* Sunstar, Inc. v. Alberto–Culver Co., 586 F.3d 487, 496 (7th Cir. 2009).

166. *Symonette*, 365 F.2d at 468.

167. *Id*. at 468 n.5.

168. *Id*. (noting that the shipowner had to "present clear proof of the relevant legal principles" of Bahamian law to have the court apply such law).

169. *Id*. at 468 (finding "no error in the trial court's ruling that the law of the United States should govern").

170. *Id*. at 468 n.5 (citing Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd., 336 U.S. 386, 396–97 (1949); Tidewater Oil Co. v. Waller, 302 F.2d 638, 640 (10th Cir. 1962); Liechti v. Roche, 198 F.2d 174, 176 (5th Cir. 1952); United States *ex rel*. Zdunic v. Uhl, 137 F.2d 858, 861 (2d Cir. 1943); Rowan v. Comm'r of Internal Revenue, 120 F.2d 515, 516 (5th Cir. 1941)).

171. 915 F.2d 1000, 1006 (5th Cir. 1990). For an argument that the Fifth Circuit had distanced itself from the *Symonette* doctrine in *Banque Libanaise*, see Ahn, *supra* note 10, at 1366.

172. For a discussion of the facts, see *Banque Libanaise*, 915 F.2d at 1001–03.

173. *Id*. at 1006.

174. *Id*.

175. *Id*.

rule 44.1's provision for de novo review of foreign-law questions, the bank failed to carry its burden at the trial level.[176] This failure could not entitle the bank "to a second chance to meet [its] burden of proof on appeal."[177] Unsurprisingly, the court grounded its burden-of-proof analysis in *Symonette* and other pre-1966 case law.[178] The court thus concluded that the bank did not "provide the legal pigment" or "paint the district court a clear portrait of the relevant Abu Dhabi law."[179] The law of the forum therefore applied.

The Fifth Circuit has continued to apply the *Symonette–Bank Libanaise* doctrine in recent decisions.[180]

The *Symonette–Banque Libanaise* standard is an example of—in the words of Judge McKeown—the "semantic sloppiness" that has "beset" practice under rule 44.1.[181] Its insistence on a burden of proof continues to tether rule 44.1 practice to the ghost of the foreign-law-as-fact approach. This approach allows a court to abdicate its duty to determine the law by setting a bar that parties must meet before the court will engage with the foreign law at all. The Advisory Committee's silence on burdens of proof—both in the rule and its notes—indicates its desire to eliminate such hurdles. Indeed, it deliberately rejected as "inapposite" the application of the rules of evidence.[182] As has been endlessly urged, the rule was meant to "provide[] flexible procedures" for tackling foreign-law issues.[183] Requiring parties to fulfill an uncertain evidentiary quantum before the court's and the other parties' obligations under rule 44.1 are triggered makes light of this intention.

---

176. *Id*. at 1006–07.

177. *Id*. at 1007.

178. *Id*. at 1006–07 (first citing Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966); then citing Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom, 347 F.2d 168, 174–75 n.3 (5th Cir. 1965); and then citing Liechti v. Roche, 198 F.2d 174, 176 (5th Cir. 1952)).

179. *Id*. at 1007. The court continued:

> The Bank failed to provide a pallet, a painter with a usable brush, and paint possessing distinct visibility. The resultant picture contains neither abstract nor realistic exposition. Given this state of the art, the district court was well within its discretionary realm to refuse to accept this virtually barren canvas when it was within the Bank's power to present a canvas upon which it had etched a clear and visible statement of the applicable Abu Dhabi law.

Id.

180. *See, e.g*., Malin Int'l Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V., 817 F.3d 241, 247 (5th Cir. 2016) (quoting *Symonette*, 365 F.2d at 468 n.5) (holding that Texas law applied where neither party pointed to Mexican law before the district court, despite a contractual amendment to that effect); DeJoria v. Maghreb Petroleum Expl., S.A., 804 F.3d 374, 384–85 (5th Cir. 2015) (citing *Banque Libanaise*, 915 F.2d at 1005–06) (holding that the defendant adequately rebutted the plaintiff's evidence regarding judgment reciprocity under Abu Dhabi law); McGee v. Arkel Int'l, LLC, 671 F.3d 539, 546–48 (5th Cir. 2012) (citing *Banque Libanaise*, 915 F.2d at 1006) (holding that plaintiffs successfully proved the content of Iraqi law on prescription for delictual acts—and thus carried their burden—by presenting two affidavits from an Iraqi law expert).

181. De Fontbrune v. Wofsy, 838 F.3d 992, 998 (9th Cir. 2016).

182. FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption.

183. *Id*.

But there is some wheat among the chaff. A requirement that parties give specific notice as to the foreign law they wish to raise would prove salutary to rule 44.1 practice. Although it should not rise to the level of a burden of proof, a minimal requirement of specificity in raising issues of foreign law would help to "avoid unfair surprise."[184] I discuss this possibility below.[185]

4. The Third Circuit and the Burdens Framework

Much like the Fifth Circuit, the Third Circuit continues to require parties to meet a "burden" in proving foreign law. As recently as 2001, the Third Circuit reaffirmed its view that foreign law must be treated as a fact to be proven by the parties.[186] The court seems to have misread rule 44.1 as establishing a "fact-finding procedure," whereby a court may "take judicial notice" of foreign law.[187] From this framework, the court proceeded to a lengthy discussion to determine which party bore the "burden of establishing the content" of the foreign law.[188] Relying on precedent and rules of procedure from the Board of Immigrant Appeals—whose decision the court was reviewing—the panel held that the burden fell on "the party seeking to rely" on foreign law.[189] Although its subsequent opinions do not repeat this anachronistic foreign-law-as-fact doctrine, the Third Circuit seemingly remains tied to the idea that parties "carry the burden of proving foreign law."[190] Other circuits have similarly followed this approach.[191] However, this party-centric approach

184. *Id.*

185. *See infra* Section II.B.

186. *See* Abdille v. Ashcroft, 242 F.3d 477, 489 n.10 (3d Cir. 2001) (citing Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386, 397 (1949)); Intercontinental Trading Co. v. M/V Zenit Sun, 684 F. Supp. 861, 864 (E.D. Pa. 1988)). This is baffling, seeing as multiple prior decisions within the Third Circuit had indicated that "[i]nterpretations of foreign law are subject to plenary [that is, de novo] review and may be resolved by reference to any relevant information." United States *ex rel.* Saroop v. Garcia, 109 F.3d 165, 167 (3d Cir. 1997); *see also* Grupo Protexa S.A. v. All Am. Marine Slip, 20 F.3d 1224, 1239 (3d Cir. 1994); Kilbarr Corp. v. Bus. Sys. Inc., B.V., 990 F.2d 83, 87–88 (3d Cir. 1993); Mobile Marine Sales, Ltd. v. M/V Prodromos, 776 F.2d 85, 89 (3d Cir. 1985).

187. *See Abdille*, 242 F.3d at 489–90, 489 n.10. *Contra* FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption (noting that rule 44.1 "avoids use of the concept of 'judicial notice' in any form because of the uncertain meaning of that concept as applied to foreign law").

188. *See Abdille*, 242 F.3d at 490–92.

189. *Id.* at 490 (quoting Matter of Soleimani, 20 I. & N. Dec. 99, 106 (B.I.A. 1989)).

190. *See* Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 216–18 (3d Cir. 2006) (concluding that plaintiff "had the burden of establishing Tunisian law and showing that it differs from United States law"); *see also* Bel-Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 440 (3d Cir. 1999) (observing that "[t]he parties therefore generally carry both the burden of raising the issue that foreign law may apply in an action, and the burden of adequately proving foreign law to enable the court to apply it in a particular case"). The court in *Ferrostaal* complained that it could not "readily obtain the information [it] need[ed] to make supportable findings about Tunisian law." *Ferrostaal*, 447 F.3d at 218. Thus, it proceeded to apply the equivalent American law. *Id.*

191. *See, e.g.*, Baker v. Booz Allen Hamilton, Inc., 358 F. App'x 476, 481 (4th Cir. 2009) ("[T]he party claiming foreign law applies carries both the burden of raising the issue that foreign law may apply in an action and the burden of proving foreign law to enable the district court to apply it in a particular case. . . . Where a party fails to satisfy either burden, the district court should apply the forum state's law.") (first citing Whirlpool Fin. Corp. v. Sevaux, 96 F.3d 216, 221 (7th Cir. 1996); and then citing *Ferostaal*, 447 F.3d at 216). However, the Ninth Circuit cited Third Circuit case law disapprovingly in *de Fontbrune v. Wofsy*. *See* 838 F.3d 992, 998 (9th Cir. 2016) (citing *Ferostaal*, 447 F.3d at 216).

carries the same infirmities as the Fifth Circuit's approach and does not comport with the text and theory of rule 44.1 as it stands.

5. Other Circuits' Approaches

Other circuits have not ruminated on the subject of rule 44.1 as extensively as the Third, Fifth, Seventh, and Ninth Circuits. In most instances, courts will cite to rule 44.1 as a standard of review and then proceed to evaluate the foreign-law issues based on the parties' briefing and expert reports, and independent research.[192] Yet, none of these reported decisions offer explicit methodological guidance as to proper procedure under rule 44.1. Nor do they cite to circuit precedent that offers such methodological guidance, because—as of this Note's publication—those circuits have not set such explicit methodological precedent. These cases therefore offer little guidance in determining the proper application of rule 44.1.

6. Innovative District Court Approaches

Although they lack stare decisis value, the decisions of some district courts offer valuable insight into creative solutions to tough foreign-law issues. Two practices that have proven effective are court-appointed experts on foreign law and special masters to advise the court on how to resolve issues of foreign law. Both mechanisms serve to dull the partisanship of parties' experts and thus neutrally inform the court. But these approaches are, and should remain, exceptional, used only to help the court sort through unusually difficult issues of foreign law.

a. Court-Appointed Experts.

Some courts have opted for appointing their own foreign-law experts by applying Federal Rule of Evidence 706. This rule allows a district court to independently appoint an expert witness to elucidate a contested issue.[193] Although it is meant to be a "relatively infrequent occurrence," the Advisory Committee reasoned this procedure would "exert a sobering effect" on parties' experts.[194] In theory at least, rule 706 is meant to combat both expert-shopping, "the venality of some experts," and some experts' reluctance to become involved in litigation.[195] Such a method is especially relevant in foreign-law disputes, where courts have pointed to the danger of partisanship.[196]

---

192. *See, e.g.*, Baloco *ex rel.* Tapia v. Drummond Co., 640 F.3d 1338, 1349 n.13 (11th Cir. 2011); City of Harper Woods Emps' Ret. Sys. v. Olver, 589 F.3d 1292, 1298 (D.C. Cir. 2009); Servo Kinetics, Inc. v. Tokyo Precision Instruments Co., 475 F.3d 783, 790 (6th Cir. 2007); Yavuz v. 61 MM, Ltd., 465 F.3d 418, 431 (10th Cir. 2006); Whallon v. Lynn, 230 F.3d 450, 458 (1st Cir. 2000); Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 29 F.3d 79, 81 (2d Cir. 1994).

193. *See* FED. R. EVID. 706.

194. *See* FED. R. EVID. 706 advisory committee's note to 1972 proposed rules.

195. *Id.*

196. *See, e.g.*, Sunstar, Inc. v. Alberto–Culver Co., 586 F.3d 487, 495–96 (7th Cir. 2009) (arguing that expert witnesses are inevitably partisan because parties select them based on alignment with their own view of the law).

For instance, the Southern District of Florida used rule 706 to analyze an issue of Honduran law that arose in an in rem dispute.[197] The case involved a civil forfeiture proceeding for a moon rock encased in Lucite polymer and mounted on a plaque.[198] The Honduran government wanted the moon rock back from its American owner, alleging it had been stolen in violation of a laundry list of Honduran laws.[199]

The court, by voice of Judge Daniel P. Jordan, initially observed that the *lex loci delicti*, "the law of the place from where the item was taken," should be applied to determine ownership of the rock.[200] As such, Honduran law applied.[201] To this end, the court appointed a law professor to research and analyze the issue, with the consent of the parties.[202]

The expert issued a preliminary report, was deposed by both parties, and issued a final revised report setting out his conclusions.[203] The expert concluded that the Honduran government was the rightful owner of the moon rock.[204] Under the Honduran Civil Code, title to the rock was transferred by donation to the Republic of Honduras.[205] But the Honduran laws protecting cultural patrimony did not apply to the moon rock because it was a natural item that fell outside their scope.[206] Instead, its sale was barred due to a lack of authorizing legislation for its alienation, pursuant to Article 354 of the Honduran Constitution.[207] Moreover, the taking and sale of the moon rock was classified as larceny under Article 223 of the Honduran Penal Code.[208] Finally, the claimant could not have obtained good title to the moon rock because the statute of limitations for prescribing stolen property under Article 2669 of the Honduran Civil Code did not apply to national property of public use,

197. *See* United States v. One Lucite Ball Containing Lunar Material (*Lucite Ball*), 252 F. Supp. 2d 1367, 1372 (S.D. Fla. 2003).

198. *Id*. President Nixon had given the rock as a gift to the Republic of Honduras in 1973. *Id*. at 1369. One Alan Rosen bought the rock from a retired Honduran colonel for $50,000 in 1995. *Id*. The federal government was soon on his case; a Customs Service inspector posed as an interested buyer and strung Rosen along. *Id*. at 1370–72. Pursuant to a warrant, the agent seized the rock during a scheduled photography session in November 1998. *Id*. at 1372. A few months later, the Honduran government petitioned the Customs Service to return the rock. *Id*.

199. *Id*. at 1369–72.

200. *See id*. at 1372. Specifically, the court found that "the law of the place from where the item was taken" governed the questions of (a) whether the claimant government had "a property interest in the item such that it c[ould] be stolen" and (b) "whether the receiver of the item ha[d] a property interest in it." *Id*. (quoting United States v. Portrait of Wally, 105 F. Supp. 2d 288, 292 (S.D.N.Y. 2000)).

201. *Id*.

202. *Id*. The expert was Professor Keith S. Rosenn, a longtime professor at University of Miami School of Law, who has written extensively on Latin American law. *Id*.; *see also Keith S. Rosenn*, UNIV. OF MIAMI SCH. OF LAW, https://www.law.miami.edu/faculty/keith-s-rosenn [https://perma.cc/C33K-3BJW] (last visited Feb. 12, 2020).

203. *Lucite Ball*, 252 F. Supp. 2d at 1372.

204. This was despite some doubts as to how the retired Honduran colonel had come into possession of the rock and the political turmoil in Honduras in the 1970s. *See id*. at 1372–73.

205. *Id*. at 1373.

206. *Id*. at 1374.

207. *Id*. at 1375–76. Interestingly, the court cited to the complaint, which stated that the Consul General of Honduras had asserted the illegality of the alienation. *Id*. at 1376. But the court did not discuss the statement further and seemed to assign it no special weight.

208. *Id*.

such as the rock.[209] The court agreed with all of the expert's conclusions and ultimately held that the rock was to be forfeited to the United States.[210] In doing so, there is no indication that the court did any research outside the expert's report, other than citations to the complaint and a legal dictionary.[211]

Although appointment of experts may cure the partisan bias of party-supplied experts, it does little to incentivize meaningful engagement with foreign-law issues. Courts can rest on the expert's knowledge of the foreign law and thus avoid having to scrutinize the issue themselves. In many ways, using a court-appointed expert is no different from relying on expert reports in technical subjects that judges are unfamiliar with. This is especially the case when, as in *Lucite Ball*, the court accepts the expert's findings *in toto*. Such an approach prevents these issues from being "examined in the crucible of litigation."[212] It drains the litigation of foreign-law issues of its adversarial nature and stunts the development of doctrine. Its utility in informing the court is undeniable, but court-appointed experts should be a minor exception rather than the rule.

b. Special Masters.

Other district courts have invoked rules 44.1 or 53 of civil procedure as authority to appoint a special master.[213] Acting as an adjunct to the court, a special master makes findings and recommendations on foreign-law issues. The court, reviewing de novo, is then free to adopt or reject them. This mechanism allows the court to delegate ascertainment of the foreign law in the first instance to an expert in the relevant State's law.

An illustrative case is *Venture Global Engineering, LLC v. Satyam Computer Services Ltd.*[214] The underlying controversy involved a joint venture gone sour.[215] Satyam, an Indian corporation, entered into the project with Venture Global Engineering (VGE).[216] After five years, Satyam claimed that VGE was not funding the joint venture's operations, violating its duties as a joint venture partner.[217]

209. *Id.*

210. *Id.* at 1377, 1381. Because the rock was not currently in the Honduran government's possession, it had been stolen and was thus subject to civil forfeiture once brought into the United States. *Id.* at 1376–77, 1381.

211. *See id.* at 1375 n.3, 1376 (citing HENRY SAINT DAHL, DAHL'S LAW DICTIONARY 41 (3d ed. 1999)).

212. Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (demonstrating the importance of adversarial litigation to shape a previously ambiguous issue relating to freedom of religion).

213. *Compare* Henry v. S/S Bermuda Star, 863 F.2d 1225, 1227–28, 1228 n.3 (5th Cir. 1989) (noting that the district court invoked Federal Rule of Civil Procedure 44.1 to appoint an expert on Panamanian labor law), *with* Venture Glob. Eng'g, LLC v. Satyam Comput. Servs. Ltd., No. 10–15142, 2014 WL 2158421, at *1 (E.D. Mich. May 23, 2014) (invoking "Federal Rule of Civil Procedure 53 and the inherent authority of the court" to appoint an expert on Indian law). Proper respect for the Federal Rules of Civil Procedure counsels invoking the more specific rule 53, which directly addresses the appointment of masters.

214. *Venture Glob. Eng'g*, 2014 WL 2158421, at *1.

215. *Id.*

216. *Id.*

217. *Id.*

The matter went to arbitration, and Satyam sought enforcement in the Eastern District of Michigan of an order that VGE deliver its fifty-percent interest in the joint venture.[218] The district court granted enforcement and the Sixth Circuit affirmed.[219] Protracted litigation resulted in a contempt order against VGE, after which VGE filed an action against Satyam, accusing Satyam of massive financial fraud, which caused VGE's failure to fund the joint venture.[220] While the matter was ongoing, VGE filed suit in India to vacate the arbitration award, but it was denied by the High Court of Judicature of Andhra Pradesh at Hyderabad.[221] A dispute then arose as to the impact of this Indian decision, because Satyam raised the decision to support a motion to dismiss or to compel arbitration.[222]

Faced with an exceptionally complex case, the court issued an order appointing a special master.[223] The special master was tasked with "conduct[ing] a hearing on Satyam's motion," which raised substantial issues of Indian law, and "submit[ting] a report and recommendation regarding his proposed outcome."[224] In doing so, the court clarified that the master could consider the various Indian court documents the parties had presented "as well as 'any relevant material or source, including testimony' to aid in the interpretation of Indian law."[225] The remainder of the order set out the obligatory elements of the special master's appointment under rule 53.[226] Other courts have taken a similar approach.[227]

Resort to special masters may prove especially useful in cases raising complex issues of foreign law. Special masters preserve the adversarial nature of litigation and place a knowledgeable decisionmaker between the parties. It is a superior alternative to appointing experts because the master may hear arguments from the parties and inspect their evidence. Conversely, experts are usually confined to parties' filings and may not be able to probe the parties' positions through questioning. But appointing special masters might not be appropriate in simpler cases

218. *Id.*

219. Venture Glob. Eng'g, LLC v. Satyam Comput. Servs., Ltd., 233 F. App'x 517, 524 (6th Cir. 2007); Satyam Comput. Servs., Ltd. v. Venture Glob. Eng'g, LLC, No. 06–CV–50351–DT, 2006 WL 6495377, at *8 (E.D. Mich. July 13, 2006).

220. *Venture Glob. Eng'g*, 2014 WL 2158421, at *2.

221. *Id.* at *3–4.

222. *Id.* at *4. The facts are far more complex than this paltry summary let on, but for the sake of economy, I have reduced them to their bare bones.

223. *Id.* ("Due to the complexity of the issues involved in this dispute, the court would need to invest significant time to familiarize itself with the concurrent Indian litigation and to possibly research and apply Indian law.").

224. *Id.* at *1. The special master was Professor Vikramaditya S. Khanna of Michigan Law, who researches various aspects of Indian law, as well as international corporate and securities law. *Id.*; *see Khanna, Vikramaditya S.*, MICH. L.: UNIV. OF MICH., https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=vskhanna [https://perma.cc/DL55-7DMT] (last visited Feb. 12, 2020).

225. *Venture Glob. Eng'g*, 2014 WL 2158421, at *5 n.4.

226. *Id.* at *5–6. Interestingly, the court required the parties to pay the special master's "retainer of $10,000 ($7,500 by [VGE] and $2,500 by Satyam)," given the corporate parties' "means to compensate" him. *Id.* at *6 & n.6.

227. *See, e.g.*, Bouchillon v. SAME Deutz–Fahr, Grp., 268 F. Supp. 3d 890 (N.D. Miss. 2017) (assessing the conclusions of a special master on German law issues in a products liability action against a German tractor manufacturer).

or where the parties effectively brief the issues of foreign law. Courts may be disinclined to entrust these duties in laypersons. But it is a powerful tool in district courts' toolbox to overcome thorny foreign-law issues—or parties' inertia.

II. MAKING FOREIGN LAW LESS FOREIGN

A. REWRITING RULE 44.1

The text of rule 44.1 is lacking in guidance for litigants and courts. The text's open-endedness is precisely what has led to confusion and irregularity among the lower courts. Rather than leaving the matter to judicially crafted solutions, the rule should be rewritten to present a more structured approach to engaging with foreign-law questions. Individual judges may have some success advocating ad hoc for improved practice. The Ninth Circuit is a testament to this, although the impact of recent decisions is still difficult to gauge.[228] But a reformed rule 44.1 would have the power to compel judges and litigants across the federal system to adopt better practices. It must not unduly trammel courts' discretion in tailoring the structure of the litigation to the needs of a particular case. Common-law development of foreign-law practice still has much to teach us. Yet the balance at the outset must tilt in favor of providing structure, in the interest of regularizing procedure in these cases.

I propose the following text for rule 44.1:

(a) ***Issues of Foreign Law; How to Raise***. Any party who intends to raise an issue about a foreign country's law must give notice of its intention to do so.
  (1) Such notice shall be:
    (A) reasonably specific and, to the extent practicable, apprise the court and all other parties of:
      (i) the body of foreign law or specific provisions the party believes govern the issue; and
      (ii) the issues in controversy to which the party believes the foreign law applies; and
    (B) served—by means of a pleading, a motion, or other writing—within a reasonable time of when the party knew or should have known that the issue of a foreign country's law was relevant to the litigation.
  (2) If the court deems a party's notice insufficient or untimely under paragraph (1), it may require renewed notice or apply the law of the forum state.
  (3) The court may raise one or more issues of a foreign country's law sua sponte, subject to timely notice to all parties, and order the parties to address such issues.

(b) ***Sources of Foreign Law***. In determining foreign law, the court may consider any relevant material or source, whether or not submitted by a party or admissible under the Federal Rules of Evidence.
  (1) Any party that seeks to introduce expert testimony as to the substance of a foreign country's law must show that such testimony is necessary for determining foreign law, on grounds including:

228. *See supra* notes 145–54 and accompanying text.

(A) inadequacy of published materials;
(B) complexity of the legal issues; or
(C) lack of transparency of the foreign country's legal system.

(2) The court alone shall hear expert testimony on the substance of a foreign country's law.

(c) ***Stipulations***. The court may require the parties to submit stipulations as to the substance of those parts of a foreign country's law that are not disputed. The parties may voluntarily submit such stipulations at any time, but the court may reject as untimely any stipulation made after the beginning of trial.

(d) ***Question of Law***. The court's determination on the issue of a foreign country's law must be treated as a ruling on a question of law.

B. EXPLANATION OF THE PROPOSED RULE

The new text of rule 44.1 is divided into four subsections. Subsections (a) and (b) expand on the original first two sentences of rule 44.1, lending more structure to what was previously amorphous. Subsection (d) preserves intact the third sentence of rule 44.1. Finally, new subsection (c) articulates a power that courts already held implicitly—requiring stipulations as to the content of foreign law or allowing parties to submit voluntary stipulations. I outline the theory behind the proposed amendment in the following subsections.

1. When and How to Raise an Issue of Foreign Law

The new subsection (a) sets out the conditions that a party must meet in giving notice of its intent to raise an issue of foreign law. Its language seeks to compel parties to more precisely divulge the foreign law they intend to raise and to do so at a time that allows other parties and the court to adequately prepare to engage with it. This will incentivize parties to flesh out issues of foreign law earlier in the process and more thoroughly. Moreover, it clarifies the court's role as a gatekeeper on questions of foreign law.

a. The Content of the Notice.

Most case law regarding the notice element of rule 44.1 has focused on the timing of notice.[229] Little attention has been paid to the substance of the notice. The

229. *See, e.g.*, Desarrolladora Farallon S. de R.L. de C.V. v. Cargill Fin. Servs. Int'l, Inc., 666 F. App'x 17, 24 (2d Cir. 2016) (holding that "where the only hint that foreign law might apply comes from a court's attempt to draw reasonable inferences from the facts in a plaintiff's complaint, without any guidance from the plaintiff as to the nature of the foreign law claim, the plaintiff has provided insufficient notice of the potential application of foreign law that Rule 44.1 requires"); Johnson v. PPI Tech. Servs., L.P., 613 F. App'x 309, 313 (5th Cir. 2015) (holding that plaintiff forfeited Nigerian law arguments by failing to raise issue of Nigerian law in the complaint, opposition to summary judgment, and other district court filings); Belleri v. United States, 712 F.3d 543, 548 (11th Cir. 2013) (holding that the parties' failure to give notice before the district court of an intent to argue that Colombian law governed an agreement precluded them from raising it in the first instance before the court of appeals); Melea, Ltd. v. Jawer SA, 511 F.3d 1060, 1071 (10th Cir. 2007) (rejecting defendant's lack-of-notice argument by noting that plaintiff "repeatedly argued before the district court that Swiss law governed the dispute").

text of the rule suggests that a simple declaration stating an intent to raise foreign law will suffice. Conceivably, a party could file a writing stating nothing more than: "Party A intends to raise an issue of Russian law in this case." This amounts to "giv[ing] notice by a pleading or other writing"[230] and squares with the theory underpinning rule 8 notice pleadings, insofar as it seeks to liberate parties from the strictures of form when seeking relief.[231] Because the notice has no legal effect beyond triggering potential recourse to rule 44.1, an adverse party would have little incentive to respond. As such, the applicability of foreign law to the issues of a case might only come to be fully litigated on motions for summary judgment or at trial.

But notice pleadings have changed since 1966. The introduction of plausibility pleadings by the *Twombly* and *Iqbal* line of cases has wrought nothing short of a revolution in civil procedure.[232] Under this regime, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[233] Thus, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[234] This stems from the principle that "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[235] As Professor Miller has noted, "[a]fter *Twombly* and *Iqbal*, mere notice of a claim for relief likely does not satisfy the Court's newly minted demand for a factual showing."[236]

In the spirit of *Iqbal* and *Twombly*, new subparagraph (a)(1)(A) would import a heightened *legal* pleading standard for issues of foreign law. Thus, parties must give specific notice of *what* foreign law they wish to raise. Otherwise stated, it ought not suffice for a party to say, "Russian law applies." Rather, a party should say, for instance, "Party A will argue that X and Y provisions of Russian law apply to issue Z in this case," and so on.[237] This does not require the parties to provide factual support for their notice. Nor would it elevate notice to carrying a burden of "reasonable certainty," as *Symonette* would demand.[238] What I propose is to require a party to be specific as to what State's law it is seeking to argue and

230. FED. R. CIV. P. 44.1.

231. *See* FED. R. CIV. P. 8(a), (d)(1). *See also* WRIGHT ET AL., *supra* note 41, § 1281 (observing that "[t]he effect of Rule 8(d)(1) is to give a party great flexibility in framing his pleadings. Neither technical expressions nor any particular form of words is required. A pleader is free to select language that he believes most simply and clearly sets forth the claims or defenses that are being advanced").

232. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

233. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

234. *Id*. (citing *Twombly*, 550 U.S. at 556).

235. *Id*. at 679. *See generally* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014) (describing the requirements and consequences of plausibility pleading).

236. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010).

237. The equivalent under *Iqbal–Twombly*'s pleading requirement would be to substitute the conclusory "Party B breached the contract" with the more factual "Party B failed to deliver the widgets by the date specified in the contract."

238. *See* Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966).

what parts of that State's law will apply. This approach tracks the Ninth Circuit's mention of parties' "informational duty" to the court.[239] The proposed paragraph (a)(1)(A) applies the *Twombly* and *Iqbal* rationale by analogy: naked statements of an intent to raise foreign law will not do. Like a well-pleaded complaint should give a plausible factual basis for the claim, a well-crafted rule 44.1 notice should inform the court and the other parties about what parts of a foreign State's law will be the subject of litigation. To achieve this, a party must know its case and investigate potentially applicable law prior to raising it before the court.

The specificity required of this notice will also incentivize parties to litigate the content of a given State's law at an early stage of a case. This avoids postponing the determination of this issue—which may be pivotal to the case—to later stages, when factual issues begin bleeding into the law. It also helps the court become aware of the preparation needed to resolve the case. Therefore, the new text would raise the standard for notice under rule 44.1 to incentivize parties to more fully develop and litigate the foreign law.

The proposed text does include a caveat that the notice should indicate the relevant body of foreign law and specific issues "to the extent practicable." In some cases, the specific nature of a foreign-law issue may be closely tied to facts that have yet to be developed. Thus, a party may be unable to fully articulate the applicable foreign law and related legal issues, but will still be subject to the timing requirement in paragraph (a)(2)(B). To resolve this tension, which could result in a draconian penalty for the party, the specificity requirement is softened when it would not be practicable for the party to provide complete notice of the applicable law.

b. A Clear Standard of Reasonable Timing.

The second new requirement is that a party should give notice of its intention to raise foreign law as soon as reasonably practicable after becoming aware of the foreign-law issue. As noted above, practice under rule 44.1 has indulged this notice being made at any point between the complaint and the end of trial. But this flexibility leaves space for subterfuge. Thus, placing a temporal constraint on rule 44.1 notice incentivizes parties not to keep foreign law under their hats, but rather to raise it as its applicability becomes apparent.

The Advisory Committee was understandably apprehensive about confining the notice to a specific time within the litigation.[240] As mentioned above, it offered three factors a court should consider in determining whether notice is reasonable: (1) "[t]he stage which the case has reached at the time of the notice, [(2)] the reason proffered by the party for his failure to give earlier notice, and [(3)] the importance to the case as a whole of the issue of foreign law sought to be

239. *See* G & G Prods. LLC v. Rusic, 902 F.3d 940, 949 (9th Cir. 2018)

240. *See* FED R. CIV. P. 44.1 advisory committee's note to 1966 adoption ("The new rule does not attempt to set any definite limit on the party's time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial and notice then given may still be reasonable.").

raised."[241] These three may be replaced with a standard based on when *the party* knew that foreign law could come into play. Taking a page from tort law, the time for reasonable notice should begin counting from when the party knew or *should have known* that a foreign law applied. Obviously, this is a fact-intensive determination that depends on the procedural posture of the case, the sophistication of the parties and counsel, the familiarity of the court with the foreign law, and the clarity of the legal issues. But the sanctions under paragraph (a)(2), which I discuss below, should motivate parties to move quickly and avoid protracted litigation as to the timeliness of notice.

c. The Court's Role.

The proposed text also makes clear the court's gatekeeper role in rule 44.1 litigation. Paragraph (a)(2) requires the court to assess the sufficiency and timeliness of a notice of intent to raise foreign law. The court should only determine sufficiency and timeliness based on the standards established in paragraph (a)(1). Crucially, paragraph (a)(2) is not an invitation for the court to assess the content or applicability of the foreign law at the notice stage. It merely envisages that the court will police notice under rule 44.1 to make sure it accomplishes its purpose of informing the court and the other parties of potential foreign-law issues and the foreign law that is likely to apply. Nor should determinations under paragraph (a)(2) invite drawn-out motions practice. Rather, the court should make these threshold determinations summarily to allow the litigation to proceed accordingly.

If a party's notice is insufficient or untimely, the court has two options. If the defect is curable—such as by adding a missing element of the notice—and the party's mistake was in good faith, the court may order the party to file a renewed notice. But if the court finds that the defect is not curable, that the party acted in bad faith—such as to misdirect or conceal—or that the renewed notice is again insufficient or untimely, the court may apply the law of the forum as a sanction.[242] This procedure is meant to give some teeth to the requirements of paragraph (a)(1). In practice, the court's supervision should limit unfair surprise in foreign-law litigation to a greater degree than the current text.

On the other hand, paragraph (a)(3) places at the forefront a useful mechanism: the court raising foreign-law issues sua sponte. This mechanism takes from *de Fontbrune*'s conception of rule 44.1 practice as a "cooperative venture" between the court and the litigants.[243] The court would therefore be empowered to raise issues that not even the parties have spotted when, for instance, the presiding judge has specialized knowledge of a foreign State's law. Subject to proper notice

241. *Id.*

242. As noted above, courts already apply this sanction by operation of the common-law presumption of the identity of the foreign law and the law of the forum. *See supra* note 147 and accompanying text.

243. De Fontbrune v. Wofsy, 838 F.3d 992, 997 (9th Cir. 2016) (quoting WRIGHT ET AL., *supra* note 41, § 2444).

to the parties—as it would be for any order—the court may bring these issues into the mix and order parties to brief or argue them as they would any other legal issue.

2. Showing the Need for Expert Testimony

The use of expert testimony in the rule 44.1 context is an unfortunate vestige of the foreign-law-as-fact approach that the rule was meant to abolish. It must, therefore, be confined only to those situations where it is necessary to resolve issues of foreign law. Although Judge Posner's total rejection of expert testimony is conceptually attractive, it may prove too extreme in practice. As foreign-law disputes multiply, so does the number of States' laws that may come into play. It is impossible for judges to keep abreast of developments worldwide, and experts may be necessary in unraveling cases with multiple layers of foreign law.

Instead, the amended rule 44.1 seeks to have counsel argue foreign law as they would domestic law. Rather than being presented with the gloss of an expert report, foreign law should be integrated into pleadings and briefing as would any other law at issue. Nothing should prevent parties or counsel from consulting experts in preparing their pleadings and briefs. This would be advisable in most contexts. Parties, especially sophisticated business entities, may also seek out counsel with specialized capabilities in the foreign law relevant to their case. Allowing experts as a matter of course, as courts do now, serves to maintain foreign law under a glass bell—to be looked at, but not to be touched.

For this reason, if a party is to use expert testimony to elucidate foreign law, it must demonstrate a need for it. Parties will therefore be discouraged from using expert reports and instead integrate experts' advice into their ordinary pleadings and filings. The amended text proposes three non-exhaustive factors that courts may consider in admitting experts: (a) inadequacy of published materials; (b) complexity of the legal issues; or (c) lack of transparency of the foreign country's legal system. For instance, an expert may be necessary if the case raises issues dealing with the law of a State with an ill-defined legal system.[244] Such may be the case with new States, or States with hermetic or highly idiosyncratic legal systems. The dramatic uptick in publication and dissemination, especially online, of international legal materials will progressively narrow the roster of such States. Nevertheless, it would be a superior alternative for parties to plead and argue applicable foreign law as they would domestic law.

As a final provision, the amended rule states unequivocally that only the court, and not a jury, will hear expert testimony on applicable law. Even in 1966, the tendency was to disallow juries from hearing and weighing expert evidence on

244. *See* Sunstar, Inc. v. Alberto–Culver Co., 586 F.3d 487, 496 (7th Cir. 2009) (recognizing a need for expert testimony where the relevant State has "such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn").

foreign law. But the rule should make this clear—experts are to testify on the law, and the law alone, and it is for the court to determine the law.[245]

3. Stipulations

Finally, the amended rule allows for the court to require parties to stipulate as to the content of foreign law. Stipulations are a powerful tool to whittle down the issues that go to trial. This is especially useful when there is no meaningful dispute as to the *content* of a foreign law, but rather as to its *application* to the facts of the case. Parties may be blinded by partisan zeal and therefore disinclined to make stipulations *motu proprio*. The amended text would allow courts to compel this salutary process, in the spirit of judicial economy. Such could be the effect of forcing stipulations that parties could be moved to settle claims before trial. Subsection (c) intends to invite such stipulations as soon as reasonably practical. Parties may voluntarily submit stipulations at any time prior to trial. But the court is also empowered to reject these stipulations as untimely if they arise during trial. The court should base this decision on factors such as (i) the disruptiveness of the stipulation; (ii) the danger that it could unduly prejudice the jury; (iii) the centrality of the issue to the case; and (iv) undue delay by the parties. Ultimately, the norm should be for these stipulations to occur well before the pretrial conference to allow the parties and the court to prepare adequately for trial.

CONCLUSION

Rule 44.1 and the case law it has spawned are inadequate to face the ever-growing prevalence of foreign-law litigation in federal court. The inconsistency of judicial approaches to applying the rule shows that more is needed to regularize foreign-law practice. Even where individual judges have taken the initiative to clarify rule 44.1 doctrine, approaches have remained inconsistent from circuit to circuit. This Note has proposed overhauling rule 44.1 to incorporate some of the best practices I identified in the case law. This would affect the entire federal system and have the force of law. By proposing a stronger structure over the original looseness of rule 44.1, I hope to help contribute to the conversation surrounding foreign-law litigation in a foreign court. An amended rule is but the starting point: implementing it will require a willing, informed bench and a diligent bar. A well-implemented reform could help fulfill—and in some ways improve upon—the Advisory Committee's vision for a system where foreign law is litigated in the same manner, and with the same meticulousness, as domestic law. Fulfillment of this vision would be key in preparing the federal system for managing and correctly deciding a progressively increasing docket of cases involving foreign law.

245. *See* FED. R. CIV. P. 44.1 advisory committee's note to 1966 adoption ("It has long been thought . . . that the jury is not the appropriate body to determine issues of foreign law.").