

## Federal Rule 44.1: Foreign Law in U.S. Courts Today

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### *Abstract*

*This article presents an in-depth analysis of the latent methodological issues that are as much a cause of U.S. federal court avoidance of foreign law as are judicial difficulties in obtaining foreign legal materials and difficulties in understanding foreign legal orders and languages. It explores Rule 44.1's inadvertent introduction of a civil-law method into a common-law framework, and the results that have ensued, including an incomplete transition of foreign law from being an issue of fact to becoming an issue of law. It addresses the ways in which courts obtain information about foreign law today, suggesting among others the methodological implications causing sometimes hidden and misunderstood frustration on the part of courts with foreign experts. It reviews and critiques suggestions for the use of court-appointed experts, and addresses principal areas in which federal courts encounter foreign law: forum non conveniens and discovery, including both Section 1782 petitions where U.S. courts adjudicate discovery issues for foreign litigants in cases being heard by a foreign tribunal; and the 2018 European General Data Protection Regulation ("GDPR"). The GDPR cases to date allow us to understand European perspectives on U.S. discovery from a background of European history. Although at a still inconclusive stage in U.S. discovery decision-making, current GDPR cases already permit some hypothesizing about potential future discovery developments in transnational litigation. This is because the digital era law's vast*

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*reach suggests the probability that new cases are just as likely to have U.S. multinationals as they are to have foreign multinationals object to discovery requests as being in violation of the GDPR. This would for the first time reverse the traditional discovery pattern in transnational litigation of a U.S. federal court deciding whether to compel discovery against a foreign multinational in violation of its foreign national blocking statute. Courts may be hesitant to discount the GDPR's importance in their balancing test if doing so will entail serious financial penalties against U.S. corporations. As transnational litigation continues to burgeon in the U.S. federal court system, and as U.S. federal court use of the Hague Evidence Convention has become a last resort since the Supreme Court *Aérospatiale* decision, further endorsed by the Restatement (Fourth) of Foreign Relations of the United States, understanding Rule 44.1 more clearly and trying to effectuate its goal of independent judicial determination of foreign law has become part of the everyday needs of adjudication and of harmonizing with the rest of the world.*

## I. INTRODUCTION

U.S. domestic court encounters with foreign law have often been characterized by reluctance and even fictitious denial. For instance, an enduring doctrine of U.S. law, which has been criticized as being “so unrealistic that it offends common sense,”<sup>1</sup> allows courts to conclude that U.S. and foreign law are identical if the parties do not raise foreign law, precluding the need for the judge to apply foreign law or consider that it is in fact different from U.S. law and does apply to the case.<sup>2</sup> As a federal appellate court judge has stated, “[i]t is strange indeed for a court to consciously apply the wrong law, based on the position taken by the parties, while acknowledging a discretionary authority to apply the right law.”<sup>3</sup> More recent analysis refers to

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1. Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 *YALE L.J.* 1018, 1038 (1941); see also Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 *WAKE FOREST L. REV.* 887, 896 (2011) (noting how others have referred to U.S. courts as “ducking and running” in the face of foreign law) (citing Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 *AM. J. COMP. L.* 581, 581 (1995)).

2. See, e.g., *G & G Prods. L.L.C. v. Rusic*, 902 F.3d 940, 948 (9th Cir. 2018); *Walter v. Netherlands Mead N.V.*, 514 F.2d 1130, 1137 n.14 (3d Cir. 1975), *cert. denied*, 423 U.S. 869 (1975); *Stardust Monte-Carlo. S.A.R.L. v. Diamond Quasar Jewelry, Inc.*, No. 1:2016cv09918, 2018 WL 1027754, at \*3 (S.D.N.Y. Feb. 20, 2018); *Taglieri v. Monasky*, No.1:15 CV 1052, 2018 WL 7575037, at \*12–13 (N.D. Ohio Jan. 26, 2018); *Incubadora Mexicana, SA de CV v. Zoetis, Inc.*, 116 F. Supp. 3d 519, 526 (E.D. Pa. 2015); *Sagaan Devs. & Trading Ltd. v. Quail Cruises Ship Mgmt.*, No. 11-23873-CIV, 2013 WL 2250793, at \*4 n.10 (S.D. Fla. May 22, 2013); *Trabucco v. Intesa Sanpaolo, S.p.A.*, 695 F. Supp. 2d 98, 106 n.1 (S.D.N.Y. 2010); *Mazamare v. Winfrey*, 693 F. Supp. 2d 442, 468–69 (E.D. Pa. 2010); *Pet Food Express Ltd. v. Royal Canin USA Inc.*, No. C 09-1483 MHP, 2010 WL 583973, at \*6 n.8 (N.D. Cal. Feb. 16, 2010); *Pavlick v. Advance Stores Co.*, No. 2:10-67147-ER, 2013 WL 1100679, at \*1 n.1 (E.D. Pa. Feb. 21, 2010); *Anglo-American Ins. Grp., P.L.C. v. CalFed, Inc.*, 899 F. Supp. 1070, 1077 (S.D.N.Y. 1995); *Parets v. Eaton Corp.*, 479 F. Supp. 512, 519 n.2 (E.D. Mich. 1979).

3. Miner, *supra* note 1, at 583, 585 (listing a number of other “fictitious presumptions” concerning foreign law) (quoting Yolanda M. Morentin, Note, *Failure to Prove Foreign Law in U.S. Courts*, 1988 *ARIZ. J. INT’L & COMP. L.* 228, 232 (“[T]hat the foreign law is the same as the forum’s common law, that the foreign law is identical to the forum law, that foreign law is based on generally recognized principles of civilized nations . . . and that the party by not proving foreign law has essentially acquiesced to the forum law.”). *But see* John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 *STAN. J. INT’L L.* 3, 10 (1983) (noting the converse, equally irrational situation that judges will agree to apply foreign law if both parties

sweeping “legal isolationism.”<sup>4</sup>

When Federal Rule of Civil Procedure 44.1 was enacted in 1966, its drafters assumed that U.S. judges would progressively lose their fear of foreign law in the process of their newly enhanced authority to determine it,<sup>5</sup> and that henceforth they would take an active role in ascertaining foreign law, rather than merely allowing the parties to explain it: “a judicial practice of . . . refusing to engage in research or to assist or direct counsel would be inconsistent with one of the Rule’s basic premises.”<sup>6</sup> The subject of this article concerns how these predictions are being borne out and why, and what we might realistically aspire to do in dealing with ongoing unresolved issues as U.S. judges increasingly find themselves faced with foreign law. I argue that common-law attributes play a significant role in these encounters and illustrate how often latent systemic and methodological issues hobble judicial understanding and analysis.

The article proceeds by discussing Rule 44.1 in Parts II and III as an incomplete effort to insert a civilian element into a common-law framework, discussing issues of fact and law within the mechanisms of the U.S. trial through case law, and analyzing current challenges of foreign expert reports and affidavits through the lens of challenges civilian foreign-law expert presentations pose to common-law judges. Sections IV through VI explore the other major areas in which U.S. judges are dealing with foreign law, *forum non conveniens* (Section IV), and discovery (Sections V and VI). Section V includes an analysis

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stipulate to it, even if it is inapposite).

4. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015).

5. Rule 44.1 provides in its entirety that: “A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.” FED. R. CIV. P. 44.1. Indeed, it was believed that “judicial attitudes regarding the character of foreign law [had already] matured and that the fear of the difficulties of ascertaining foreign law [had] substantially abated,” see Arthur R. Miller, *Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 631 (1967) (referring to the drafting of Article IV of the Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962, which the Advisory Committee Notes to Rule 44.1 say “has “parallels” “parallel to the Rule. FED. R. CIV. P. 44.1 advisory committee’s notes).

6. Miller, *supra* note 5, at 661.

of the 2018 European Union General Data Protection Regulation. This new law clarifies the European perception of U.S. discovery. It also has the potential for affecting federal court reasoning in transnational discovery because the regulation's digital age characteristics cause the party invoking this foreign blocking statute against U.S. federal rules discovery compliance to be as likely to be a U.S. multinational as a foreign corporation, reversing the traditional transnational discovery paradigm. Section VI focuses on Section 1782, whose pattern is the converse of Rule 44.1's uneasy civilian intrusion into a common-law mechanism, inasmuch as Section 1782 allows U.S. courts to grant federal rules discovery to foreign litigants in foreign proceedings anywhere in the world, thus infusing the civilian world with common-law federal procedure. In Section VII, I review current recommendations and make some of my own in light of my observations about the nature of today's challenges to U.S. courts and to the future. Section VIII offers conclusory remarks.

## II. FOREIGN LAW'S INCOMPLETE TRANSITION FROM FACT TO LAW

By encouraging and expecting judges to take the lead in ascertaining foreign law, Rule 44.1 introduced a distinctly foreign element into the issue of foreign law: it introduced a *method* that is typical of civil-law countries where judges do not just determine foreign law but also lead all aspects of the trial, overshadowing the parties as the primary player. Our common-law system of precedents casts a long shadow over judicial determinations, however.<sup>7</sup> Arthur Miller once said that precedents have a “[P]avlovian quality.”<sup>8</sup> They have still more, inasmuch as cases are an official, primary source of law in the U.S. legal system.<sup>9</sup>

The Advisory Committee Notes to Rule 44.1 recognize “the peculiar nature of the issue of foreign law.”<sup>10</sup> On the one hand, Rule 44.1 formalized a method that was being widely practiced

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7. See Sprankling & Lanyi, *supra* note 3, at 62–64.

8. Miller, *supra* note 5, at 618 (referring in particular to precedents which said that foreign law was a question of fact).

9. See, e.g., EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (2d ed. 2013); KARL N. LEWELLYN, THE BRAMBLE BUSH 19–20 (3d ed. 9th prtg. 2018).

10. FED. R. CIV. P. 44.1 advisory committee's notes.

when it took the issue of foreign law away from the jury.<sup>11</sup> But so far that has done no more than transform the issue from being tried by jury to being tried by bench, a change that would not create an unfamiliar situation for common-law judges.<sup>12</sup> The harder part was the next step of expecting a transformation in the common-law role of the judge from regulating the two parties as an umpire to becoming their guide and leader, or even replacing them entirely, as Rule 44.1 also allows. Today, more than one half century after the enactment of Rule 44.1, a key question is if, on its own, the rule was, or reasonably could have been expected to be, successful in making foreign law become an issue of law within the framework of the common-law trial court.<sup>13</sup>

Rule 44.1 does not oblige judges to do independent research to determine foreign law: “The new rule refrains from imposing an obligation on the court to take ‘judicial notice’ of foreign law because this would put an extreme burden on the court in many cases . . . .”<sup>14</sup> Inasmuch as a court does not engage in independent research and relies on party experts, within the common-law trial system the issue of foreign law necessarily must be one of fact, since it is a matter being presented adversarially by the parties, subject in its determination to the superior credibility of the winning side, except that it has been defined by Rule 44.1 as a question of law and so cannot be a question of fact. Thus, tautologically, foreign law is an issue of law because the rule says it is,<sup>15</sup> but in practice, within the

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11. See Miller, *supra* note 5, at 677–78 (demonstrating that this was already the common practice in state and federal courts).

12. But see John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 MAR. LAW. 179, 195–96 (1984) (“Rule 44.1 is deliberately silent on whether the judge or the jury should determine the foreign law, because such an allocation would exceed the rulemakers’ authority, and might infringe upon the constitutional right to a jury trial in federal civil cases. However, federal judges have decided foreign law issues in civil cases without recourse to a jury both before and since 1966.”) (citation omitted).

13. See Gary Born, *Marginalizing International Law*, [page number required – never received manuscript] n. 200 and accompanying text (unpublished manuscript) (on file with the author) (analyzing the marginalization of international law in U.S. courts and attributing the decline of international law in U.S. courts to coincide with the same period since Rule 44.1’s adoption,; arguing that the trend is against federal political policy. ).

14. FED. R. CIV. P. 44.1 advisory committee’s notes.

15. The rule’s mandate tends to be echoed throughout current cases. See, e.g., *Katsoolis v. Liquid Media Grp.*, 18 Civ. 9382 (LGS), 2019 WL 4735364, at \*3 n.2 (S.D.N.Y. Sept. 27, 2019); *Koshani v. Barton*, 374 F. Supp. 695, 710 (E.D. Tenn. 2019); *Alifax Holding Spa v. Alcor Sci. Inc.*, 357 F. Supp. 3d 147, 160

mechanisms of the common-law trial, it takes on a factual role.

Rule 44.1's definition has led many courts to conclude that a dispute as to foreign law between opposing party experts cannot be a dispute about fact that could in and of itself justify denial of a motion for summary judgment. Thus, in *Matter of Arbitration Between Trans Chemical Ltd. And China Nat. Machinery Import and Export Corp.*, the court stated that "[d]ifferences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact under Rule 56."<sup>16</sup> Interestingly, both the *Trans Chemical* court, and the Fifth Circuit case it quoted, cited as support for this conclusion a law review article that stated no more than the quite different proposition that Rule 44.1's conferring law status on foreign-law matters signifies that issues of foreign law are reviewable *de novo* on appeal.<sup>17</sup> Subsequently, a federal district court in New York echoed the Fifth Circuit's view with respect to summary judgment<sup>18</sup>: "Differences of opinion between experts, as here, do not create issues of material fact precluding summary judgment."<sup>19</sup>

Wright and Miller approve of this position, but their presentation assumes the in fact improbable *independent* judicial ascertainment of foreign law where party experts disagree about it in the context of a motion for summary judgment:

If the proof before the district court on a summary judgment motion is not harmonious . . . the court should request a further showing by counsel, or engage in its own research, or direct that a hearing be held, with or without oral testimony, to resolve the issue. A *combination* of these courses will ensure as detailed a

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(D.R.I. 2019). But see *infra* notes 29–30, for some exceptions.

16. *In re Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 275 (S.D. Tex. 1997) (citing *Banco de Credito Indus., S.A. v. Tesoreria Gen.*, 990 F.2d 827, 838 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994)).

17. See *Brown*, *supra* note 12, at 194.

18. See *St. Pierre v. Dyer*, 21 F. Supp. 2d 138, 142–43 (N.D.N.Y. 1998), *vacated on other grounds*, 208 F.3d 394 (2d Cir. 2000).

19. *Dyer*, 21 F. Supp., at 142–43 (citing *In re Trans Chem. Ltd.*, 978 F. Supp. at 275; *United States v. BCCI Holdings (Lux.), S.A.*, 977 F. Supp. 1, 6 (D.D.C. 1997), *aff'd*, 159 F.3d 637 (D.C. Cir. May 6, 1998)); *Accord Sanofi-Aventis L.L.C. v. Merck Sharp & Dohme Corp.*, No. 16-812-RGA, 2018 WL 2272773, at \*4 (D. Del. <ay 17, 2018); *Immobilaria Axial, S.A. de C.V. v. Robles Int. Servs.*, No. EP-07-CV-269-KC, 2010 WL 2900991, at \*3 (W.D. Tex. July 21, 2010).

foreign-law presentation as might be anticipated at a full trial on the merits. Once foreign law is ascertained to the judge's satisfaction, the court should proceed to decide the summary judgment motion as it would in any other context.<sup>20</sup>

It is almost a foregone conclusion in the U.S. adversarial common-law system that party experts *will* have differing views of the foreign law. In such cases, unless the court does undertake an independent determination of the foreign law, which, for many reasons, is unlikely,<sup>21</sup> concluding that the matter of battling experts does not present an issue of fact is difficult to maintain within common-law legal reasoning.<sup>22</sup> Wright and Miller also try to bring a solution to the summary judgment dilemma for the many U.S. judges who do not engage in independent comparative legal analysis by suggesting that they may treat adversarial expert reports on foreign law as they would handle a trial, by resolving the credibility issue judicially, as at "a full trial on the merits,"<sup>23</sup> and that then they may proceed to rule on the motion for summary judgment, once the trial is completed.<sup>24</sup> But this returns the mechanism to the tautology noted earlier, since the judges would be trying foreign law issues as matters of fact, not as matters of law, as at a bench trial, allowing the motion for summary judgment to be resolved on the superior credibility of one of the two experts "as might be anticipated at a full trial on the merits,"<sup>25</sup> and giving only nominal deference to Rule 44.1's stricture that foreign law is an issue of law.

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20. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2444 (3d ed. 2020) (emphasis added) (citation omitted).

21. Estate of Figueroa v. Williams, No. V-05-56, 2007 WL 2127168, at \*2 (S.D. Tex. July 23, 2010) ("Although the Court may consider any relevant material or source under Rule 44.1, 'expert testimony accompanied by extracts from foreign legal materials is the basic methods by which foreign law is determined.'). *Stare decisis* is one such reason, see *infra* Sections V, VI. In addition, we know that in practice U.S. judges generally rely on party experts, see WRIGHT & MILLER, *supra* note 20, § 2444; see also Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L. J. 1263, 1304 (2007) (demonstrating that where foreign law is concerned, judges construe their ability to do investigate it independently as narrowly as they can or evade the matter entirely); Peter Hay, *The Use and Determination of Foreign law in Civil Litigation in the United States*, 62 AM. J. COMP. L. 213, 217 (2014) ("[T]he determination of the content of foreign law . . . does not occur *ex officio*, except in a few isolated cases, but only upon party initiative.") (citation omitted).

22. See *supra* notes 3, 21.

23. WRIGHT & MILLER, *supra* note 20, § 2444.

24. *Id.*

25. *Id.*



The uneasy posture of foreign law as an issue of law where the court does not undertake to ascertain it on its own, but, as is usually the case, relies on party experts, was clearly visible in *Sea Trade Maritime Corp. v. Coutsodontis*.<sup>26</sup> The court denied a motion for summary judgment there, based on outstanding issues of material fact. It did not openly categorize foreign law as one such issue of fact.<sup>27</sup> On the contrary, the court took pains to note that Rule 44.1 mandates that foreign law be an issue of law, yet it *treated* the foreign-law issue as an issue of fact, not of law.<sup>28</sup> It first noted that “Federal Rule of Civil Procedure 44.1 controls the determination of foreign law in federal court, and authorizes the court to consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”<sup>29</sup> But the court then went on to contradict itself by deciding that, “[a]lthough the Court’s determination of foreign law is treated as a question of law, Plaintiff[s] submissions are insufficient for the Court to determine on a motion for summary judgment the content of the applicable Liberian law.”<sup>30</sup> To make the matter still clearer, despite the court’s earlier evocation of Rule 44.1’s mandate that foreign law be treated as an issue of law, and after stating that the issue of foreign law was one of two reasons why it could not grant the motion for summary judgment, and having given only two reasons for denial of summary judgment, one of which was the foreign law issue, the court openly concluded that the issue of foreign law *was* one of those outstanding issues of *fact* in the following manner: “[T]he Court finds that there are factual *issues* to be tried and denies summary judgment.”<sup>31</sup> The court’s use of the plural (“issues”) where foreign law was one of only two issues for its denial of the summary judgment motion left no doubt that it was being treated as an issue of fact.

For almost forty years after Rule 44.1 was enacted, the Third Circuit Court of Appeals both continued to treat issues of foreign law as issues of fact, and to ignore Rule 44.1’s requirement that it not do so.<sup>32</sup> The Southern District of New

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26. See *Sea Trade Maritime Corp. v. Coutsodontis*, No. 09 CIV. 488(BSJ)(HBP), 2012 WL 6097726, at \*1 (S.D.N.Y. Dec. 4, 2012).

27. See *id.* at \*3.

28. See *id.*

29. *Id.*

30. *Id.* (citation omitted).

31. *Id.* (emphasis added).

32. See *Abdille v. Ashcroft*, 242 F.3d 477, 489 n.10 (3d Cir. 2001) (“In general, foreign law is treated as a fact that must be proven by the parties.”).

York did as well, stating in 1992 —more than a quarter of a century after Rule 44.1 had been adopted—that “[f]oreign law is a question of fact which must be proved.”<sup>33</sup> One commentator summarized this situation by saying that “some federal courts still have not gotten the word” that Rule 44.1 has changed foreign law from an issue of fact to one of law.<sup>34</sup> It seems improbable that federal judges whose practices increasingly deal with Rule 44.1 remain unaware of it. Federal judges excel in their knowledge of civil procedure, dealing with it as they do every day and in each and every case.<sup>35</sup> A more plausible explanation for such an otherwise inexplicable error is more likely to be the way that issues of foreign law have been playing out in their courtrooms, as was illustrated by *Sea Trade Maritime*, where there was an open contrast between the judge’s paying tribute to the language of Rule 44.1 but not to its substance, as though common-law realities had gotten the better of a civilian intruder.<sup>36</sup>

Foreign law’s uneasy accommodation as an issue of law within the common-law framework no doubt is among the invisible reasons that dealing with the foreign law, which they need to understand and resolve, can be difficult for U.S. judges, and arguably is as, or even more, of a stumbling block to resolving the pressing challenges brought by transnational cases than the more obvious issues of accessing foreign law without sufficient training in understanding it or having sufficient, effective research resources at ready disposal.<sup>37</sup> Significantly, where the transition to issue of law does not require disturbing common-law methodology, Rule 44.1’s implementation has been smoother. For example, issues of foreign law are successfully treated as issues of law for *de novo* review by appellate courts,<sup>38</sup>

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33. *Weiss v. Glemp*, 792 F. Supp. 215, 229 (S.D.N.Y. 1992), *discussed in* Miner, *supra* note 1, at 584.

34. Miner, *supra* note 1, at 584; *see also* DiFederico v. Marriott Int’l, Inc., 714 F.3d 796, 807–08 (4th Cir. 2013) (emphasis added) (citing *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345 (8th Cir. 1983) (“[A] district court’s application of foreign law is a *factual* matter . . .”).

35. *See* Harold Baer Jr., *A View from two Courthouses*, 215 N.Y. L.J. 1, 3 (1996).

36. *See* *Sea Trade Maritime Corp. v. Coutsodontis*, No. 09 CIV. 488(BSJ)(HBP), 2012 WL 6097726, at \*3 (S.D.N.Y. Dec. 4, 2012).

37. *See* Malcolm R. Wilkey, *Transnational Adjudication: A View from the Bench*, 18 INT’L LAW. 541, 542–43 (1984).

38. *E.g.*, *U.S. v. Schultz*, 333 F.3d 393 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004); *Alameda Films, S.A. v. Authors Rights Restoration Corp.*, 331 F.3d 472 (5th Cir.), *cert. denied*, 540 U.S. 1048 (2003).

as befits all issues of law on appellate review. The practice of *de novo* appellate review of issues of law is firmly entrenched in the common-law system and therefore causes no more disruption to it, or difficulty in implementation to the U.S. judge than, at the trial court level, did Rule 44.1's transition of foreign law from an issue for a jury trial to an issue for a bench trial.<sup>39</sup>

To explain the *de novo* appeal of foreign-law issues, the Second Circuit has said that, in cases dealing with foreign-law expert testimony, "it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed."<sup>40</sup> The court meant by this that, "[e]ven though the District Court heard live testimony from experts from both sides, that Court's opportunity to assess the witnesses' demeanor provides no basis for a reviewing court to defer to the trier's ruling on the content of foreign law,"<sup>41</sup> thus justifying *de novo* review on appeal by belying the idea that witness credibility ever played or plays a role. The appellate court then proceeded to discuss the content of the contradictory experts' reports and to explain why it found one more persuasive than the other.<sup>42</sup> Whether this account of what transpired at the trial court level is actually accurate may be dubious, but that is of no import in terms of the appellate court's ability to initiate a *de novo* review within the common-law structure that would bear every legitimate earmark of any other customary review on appeal where the court has *de novo* review powers.

Rule 44.1 makes clear that judges may raise foreign law's applicability on their own initiative where neither party has raised it. The Advisory Committee Notes to Rule 44.1 say "[t]here is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them."<sup>43</sup> Such an arrangement, although not unique to common-law trials, where judges have the power to raise matters parties do not plead, is highly unusual in the common-law system which expects the adversaries to raise every matter of legal substance to be pleaded. Accordingly, some courts continue to this day to

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39. See Miller, *supra* note 5, at 683–84.

40. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 92 (2d Cir. 1998).

41. *Id.*

42. *Id.*; accord Madanes v. Madanes, 186 F.R.D. 279, 283 (S.D.N.Y. 1999).

43. FED. R. CIV. P. 44.1 advisory committee's notes.

require that the parties plead foreign law. A recent Note traces the post-Rule 44.1 development of this requirement in the Fifth and Third Circuit Courts of Appeals,<sup>44</sup> and other courts also do so.<sup>45</sup> Notably, the Ninth Circuit has rejected the burden of ascertaining foreign law independently of the parties, making it clear that that “the information burden [with respect to foreign law] remains at all times on the party invoking foreign law,”<sup>46</sup> and further clarifying and emphasizing that parties “*may get saved* by the court’s own research efforts, but if the task is too great the court may fall back on some other law (usually forum law) as presumptively controlling,”<sup>47</sup> and characterizing completely independent judicial ascertainment of foreign law in the following manner: “Even in the internet age, it would put an extraordinary burden on the court if parties could nakedly invoke foreign law and then delegate the job of figuring it out to the judge and her clerks.”<sup>48</sup>

Such an idea of making the judicial burden truly active and independent of the parties, although endorsed by the Seventh and Second Circuits, is in every way anathema to traditional common-law habits. While U.S. judges have clerks, generally untrained in foreign law or languages and unable to access foreign law adequately,<sup>49</sup> they do not have anything comparable to their civilian brethren. Similarly situated French judges have at their disposal teams of legal comparatists<sup>50</sup> to make such a

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44. See Alejandro J. Garcia, Note, *Lex Incognita No Longer: Making Foreign Law Less Foreign to Federal Courts*, 108 GEO. L.J. 1027, 1047–51 (2020).

45. See, e.g., *Thackurdeen v. Duke U.*, No. 1:16CV1108, 2018 WL 1478131, at \*7 (M.D.N.C. Mar. 23, 2018).

46. *G & G Prods. L.L.C. v. Rusic*, 902 F.3d 940, 949 (9th Cir. 2018) (quoting STEVEN S. GENSLER, 1 FED. R. CIV. P.: RULES AND COMMENTARY, RULE 44.1 (2018)).

47. 902 F.3d at 949 (emphasis in original).

48. *Id.*

49. See generally Pierre Legrand, *Proof of Foreign Law in U.S. Courts: A Critique of Epistemic Hubris*, 8 J. COMP. L. 343, 355 (2013); Loren Turner, *Buried Treasure: Excavating Foreign Law from Civil Pleadings Filed in U.S. Federal Courts*, 47 INT’L J. LEGAL INFO. 22 (2019), for background on the grave difficulties of doing adequate research in foreign law in the U.S. In my own experience with French law, it is practically impossible to do adequate legal research from the United States without obtaining access to the computer-based legal data to which French universities subscribe, comparable to WestLaw or Lexis-Nexis for U.S. law. Few U.S. law schools subscribe to it due to its not being cost effective, given the small number of American faculty able to do research in French.

50. I base this in particular on conversations several years ago with

process part of the normal task of the judge without its becoming an “extraordinary burden;” and in Germany, the historical tradition in one way or another since the Middle Ages has been linking judges to the opinions of academics.<sup>51</sup> It is understandable that the Ninth Circuit would feel exasperated at the suggestion that it would be called upon to decipher the intricacies of an Italian statute of limitations under Rule 44.1, and perhaps equally understandable that, in assessing the need of U.S. courts to address foreign law due to increasing globalization, the drafters of Rule 44.1 did not foresee the ways in which the new judicial undertaking they envisaged would confront and be impeded by common-law traditions and realities. The new Restatement (Third) of Conflict of Laws, States in Section 507 (b) that “[t]he parties are primarily responsible for submitting information about foreign law[,]” and in subsection (c) that, if they “do not provide sufficient information to determine foreign law, the court should ordinarily apply forum law.”<sup>52</sup>

In another 2018 case, the U.S. District Court for the Middle District of North Carolina applied North Carolina law, not because foreign law was inapplicable, but because it held that the parties had the burden of raising it, and in default thereof, the court should apply the law of the forum without further inquiry:

[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 . . . . [W]here the parties do not satisfy both of these

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President Judge Guy Canivet about how the judges of his court, France’s *Cour de cassation*, ascertained foreign law, and on numerous other conversations with French judges and jurists.

51. See generally Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in the History of German Law*, 64 CAMBRIDGE L.J. 481 (2005), (providing information on the evolution of this tradition in the civilian world in general and in Germany in particular); Engelbert Klugkist, *Die Aktenversendung an Juristenfakultäten: Ein gemeinsames Kapitel aus der Geschichte des deutschen Prozeßrechts und der deutschen Universitäten*, 5/6 JURISTENZEITUNG 155156 (1967) (explaining the particular procedure called the *Aktenversendung*).

52. Restatement (Third) Conflict of Laws § 507 (Tentative Draft No. 2, March 25, 2021).

burdens, the law of the forum will apply.<sup>53</sup>

Similarly, in *Oparaugo v. Watts*, the District Court for the District of Columbia asserted that “when both parties have failed to prove foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum.”<sup>54</sup>

#### A. WHOSE INTERPRETATION OF FOREIGN LAW: THE ROLE OF FOREIGN PRECEDENT

A question rarely considered is whose understanding of foreign law U.S. judges should give under Rule 44.1 where judges do not rely on party experts: namely, their own or that of foreign judges interpreting their own legislation. When the Supreme Court decided in *Animal Science Products, Inc. v. Hebei Welcome Science Pharmaceutical Co.* that U.S. judges should accord no more than substantial weight<sup>55</sup> to the views expressed by a foreign government about its opinion of the law of its country within the context of a case being tried in the United States, it was deciding a different question, as it was when it concluded that caution was needed vis-à-vis such foreign government views.<sup>56</sup> The *Animal Science* issue is analogous to the discussion below concerning whether suggested referrals of foreign-law issues to foreign courts might be grounds for similar

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53. *Baker v. Booz Allen Hamilton, Inc.*, 358 F Appx. 476, 481 (4th Cir. 2009); *Thackurdeen v. Duke U.*, No. 1:16CV1108, 2018 WL 1478131, at \*7 (M.D.N.C. Mar. 23, 2018) (internal citations and quotation marks omitted) (citing *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212, 216 (3d Cir. 2010)); *Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 469 (E.D. Pa. 2010).

54. *Oparugo v. Watts*, 884 A.2d 63, 71 (D.D.C. 2005); *accord Minibea Ltd. v. Papst*, 444 F. Supp. 2d 68, 185 (D.D.C. 2006) (quoting *Oparaugo*, 884 A.2d at 71); RESTATEMENT (SECOND) OF CONFLICTS § 136 cmt. h (1971). It should be noted that, read in context, the Restatement does not support this reading, WRIGHT & MILLER, *supra* note 20, § 2441. Wright and Miller have commented as follows on this use of the Restatement: “The Restatement of Conflict of Laws often is used to support the erroneous claim that the court has no obligation to determine foreign law. Although the language of the Restatement can be read in this manner, it closely tracks the language of Rule 44.1.” *id.* at n.9.

55. *Animal Sci. Prod, Inc. v. Hebei Welcome Sci. Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018).

56. *Id.* at 1873 (“[A] federal court is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.”) (Internal reference omitted).

caution.<sup>57</sup> In this section, by contrast, the question concerns U.S. judges' reliance on foreign courts' internal applications of and conclusions about their own law *before* the case at bar has been instituted in the U.S. court, and no impetus for a foreign court or governmental institution to opine on the interests of the foreign party could have arisen.

Most non-common-law legal systems do not consider precedent to be a primary source of law, and thus in principle do not themselves rely on other courts' interpretations of the law when deciding cases.<sup>58</sup> Should U.S. judges then rely on foreign judges' interpretations of the relevant foreign law in foreign cases when judges in that country would not do so themselves? This issue relates philosophically to the point Clermont raises concerning "when a decision maker should decide for itself and when it should instead follow the dictates of another."<sup>59</sup> Significantly, when civil-law judges interpret foreign law, they sometimes prioritize their own views of foreign law over those of even the supreme court of a given foreign country,<sup>60</sup> even though a repeated number of consistent high court rulings also take on precedential effect in those civilian systems.<sup>61</sup> Rule 44.1 gives U.S. judges leeway to do the same.<sup>62</sup> But this means U.S. judges would need to trust their understanding of a foreign country's law—in all of its complexity—within the vast system of interconnections that any given law represents and connotes in

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57. See *infra* notes 296–298 and accompanying text.

58. See generally Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63 (2001), for these and many other differences between the common-law and civil-law systems.

59. Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign Law*, 103 CORNELL L. REV. 243, 249 (2018) (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 57–62 (1988)).

60. Nussbaum, *supra* note 1, at 1033; see also Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 925 (2011) (suggesting in the context of certifying issues of foreign law to foreign courts that U.S. judges should accord no more than "substantial deference" to their foreign brethren).

61. In France, this is the doctrine known as *jurisprudence constante*, see, e.g., Hon. Robert L. Henry, *Jurisprudence Constante and Stare Decisis Contrasted*, 15 A.B.A. J. 11 (1929). In Germany, the doctrine is known as *feststehende Rechtsprechung*, see, e.g., Burke Shartel & Hans Julius Wolff, *Civil Justice in Germany*, 42 MICH. L. REV. 863, 867 (1944). The Italian doctrine is a cognate of the French one, *giurisprudenza costante*, see e.g., Francesco Mazzotta, *Precedents in Italian Law*, 9 MICH. ST. U.-DCL J. INT'L L. 121, 128 (2000).

62. See *supra* note 5, for the text of the rule.

its socio-historico-political semiosis. It is a rare judge who will feel able to meet such a challenge, and a rarer one still who will be able to meet it effectively.

The next sections analyze various alternative options to Rule 44.1 for the judicial ascertainment of foreign law. The first option analyzed is the expert on foreign law. Like the previous section concerning issues of fact versus issues of law, the foreign-law expert issue also has implications for the common-law method of adjudication.

### III. III. EXPERTS

#### A. PARTY AND COURT EXPERTS

As the Seventh Circuit has made clear, U.S. courts may be skeptical of party experts' rendition of foreign law to the extent they are mutually contradictory and seem to be part of advocacy rather than an objective portrayal of foreign law.<sup>63</sup> What one may describe as inherent credibility questions of the party expert on foreign law is shared with party experts on issues unrelated to foreign law, but is particularly fraught in the area of foreign law if the judge has no independent basis for forming an opinion. Although experts on foreign law in principle are only allowed to explain foreign law, and not apply it to the case at hand or reach conclusions, they do, in reality, apply the law to the legal issues to describe how the case would come out under that law.<sup>64</sup>

While some courts strike foreign-law expert reports for drawing such conclusions, the tendency is to permit them, and, indeed, some courts seem critical of experts who *fail* to apply foreign law to the case.<sup>65</sup> In *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, the court described a foreign-law expert's conclusory statements as unproblematic because, under Rule

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63. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010); *Sunstar Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495–96 (7th Cir. 2009); *see also* Vivian Grosswald Curran, *U.S. Discovery in A Transnational and Digital Age*, 51 AKRON L. REV. 857, 877–78 (providing further analysis of *Bodum*). But *see* Legrand, *supra* note 49, for a critique of the majority opinions in *Bodum* and approval of the concurrence. ;

64. *See* WRIGHT & MILLER, *supra* note 20, § 2444 (“[A]n expert witness in foreign law is to aid the court in determining the content of the applicable foreign law, not to apply the law to the facts of the case”); *see also supra* notes 56–64 and accompanying text.

65. *See* *G & G Prods. L.L.C. v. Rusic*, 902 F.3d 940, 945 n.3 (9th Cir. 2018).



44.1, they were for the judge to assess; they would not go before a jury, and therefore were not subject to the *Daubert* rule.<sup>66</sup> Similarly, in *Excel Fortress Ltd. v. Wilhelm*, the court denied a motion to strike a foreign-law expert's report for stating legal conclusions, noting that both Second and Ninth Circuit courts had established that Rule 44.1 permitted this:

Although it is true that Dr. Yang offers legal conclusions (*i.e.*, the Chinese contract is enforceable) and purports to apply the law to the facts (*i.e.*, Dr. Li was required, under the contract, to give 60 days' notice before leaving)—things that experts are usually prohibited from doing—a different set of rules and standards apply when foreign law is at issue[ . . . ] For this reason, the Ninth Circuit and other courts have concluded an expert may, under Rule 44.1, opine on the ultimate issue of whether a contract is enforceable under foreign law[:] . . . [a] court may . . . consider a foreign law expert's opinion even on ultimate legal conclusions.<sup>67</sup>

The court added that, although it would not strike the expert's report, it also need not “uncritically accept” it.<sup>68</sup>

Other courts reject the standard of allowing experts on foreign law to express legal conclusions. In *Minebea Co. v. Papst*, the District Court for the District of Columbia stated that

[t]he Court does not credit Dr. Ann's conclusory statement that Papst Licensing should be held to Papst Motoren's contract on these facts. The purpose of expert testimony such as that of Dr. Ann is to aid the court in determining the content of the applicable foreign law—not to apply it to the facts of the case.<sup>69</sup>

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66. *Lith. Commerce Corp., Ltd. V. Sara Lee Hosiery*, 177 F.R.D. 45, 264 (D.N.J. 1997); *see also* *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 597 (1993) (setting a standard for general expert testimony admissibility).

67. *Excel Fortress Ltd. v. Wilhelm*, No. CV-17-04297-PHX-DWL, 2019 WL 163252, at \*3 (D. Ariz. Jan. 9, 2019) (quoting *Winn v. Schafer*, 499 F. Supp. 2d 390, 396 n.28 (S.D.N.Y. 2007) (citing *Universe Sales Co., Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038–39 (9th Cir. 1999) (internal quotation marks omitted)).

68. *Excel Fortress Ltd.*

69. *Minebea Co., Ltd. v. Papst*, 444 F. Supp. 2d 68, 182 (D.D.C. 2006) (discussing, additionally, the court's frustration with German law expert, Dr.

Along the same lines, the United States District Court for the District of Idaho specified in *Gibson v. Credit Suisse AG* that the plaintiffs' expert on Bahamian law would be permitted to testify only "to the extent of discussing Bahamian standards, not legal conclusions."<sup>70</sup> In *Siswanto v. Airbus Americas, Inc.*, the court denied a motion to strike, but said "the Court will disregard [the foreign law expert's] declaration to the extent the report [extends] beyond providing an analysis of [Indonesian] law, and [is] offered to assist the fact finder as to which facts to find."<sup>71</sup>

The courts' frustrations on expert partisanship may have been most strikingly expressed by the Seventh Circuit in *Bodum* and *Sunstar*, but it can be sensed in many cases throughout the various circuits, as well as in Wright and Miller's rendition of proving foreign law, which states that an impetus to having the courts ascertain foreign law independently was precisely to overcome the problem of expert partisanship: "All too often counsel will do an inadequate job of researching and presenting foreign law or will attempt to prove it in such a partisan fashion that the court is obliged to go beyond their offerings . . . [I]t must be remembered that one of the policies inherent in Rule 44.1 is 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. To effectuate this policy, *the court is obliged to take an active role in the process of ascertaining foreign law.*"<sup>72</sup>

It has been suggested as a remedy to the partisanship of the party expert that courts appoint their own, presumably objective, experts.<sup>73</sup> This is the practice in civil law countries, but

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Ann's, failure to explain the statements he made in his report about the BGB, the German Civil Code, merely citing to a Code Commentary without, however, entering into the particular factors relevant for German court determination of case outcomes, despite the fact that a presentation such as Dr. Ann had made would have been sufficient in a German expert report such as Dr. Ann may have been accustomed to making or would have been likely to have as his model).

70. *Gibson v. Credit Suisse AG*, No. CV 10-1-EJL-REB, 2010 WL 1904773 at \*5, n.4 (D. Idaho May 11, 2010).

71. *Siswanto v. Airbus Am., Inc.*, No. 15-CV-5486, 2016 WL 7174860 at \*5 (N.D. Ill. Dec. 9, 2016) (quoting in part *Labuda v. Schmidt*, No. 04 C 1281, 2005 WL 2290247, at \*7 (N.D. Ill. Sept. 19, 2005) (internal quotation marks omitted).

72. WRIGHT & MILLER, *supra* note 20, at § 2444 (emphasis added); *see also* *Medline Indus. Inc. v. Maersk Med. Ltd.*, 230 F. Supp. 2d 857, 862 n.5 (N.D. Ill. 2002) (stating that the court was obliged to do independent research on foreign law because of partisanship of expert presentations); *accord*, *Twohy v. First Nat'l Bank of Chi.*, 758 F.2d 1185, 1193 (7th Cir. 1985).

73. *See, e.g.*, Hay, *supra* note 21, at 230-31; Wilson, *supra* note 1, at 927-33; Miner, *supra* note 1, at 588. *But see* Louise Ellen Teitz, *Determining and*

it is not a panacea even there. Within those systems, criticisms of various kinds have been levelled at the manner in which experts are selected and at the level of their performance.<sup>74</sup> More fundamentally, the court expert may also sit uneasily within the U.S. common-law system.<sup>75</sup> Judge Douglas Ginsburg opposes judicial experts who would not be subject to party cross-examination as an institution that would damage the adversarial system by denying the parties an equal opportunity to prevail.<sup>76</sup> Ginsburg is concerned that judges would be delegating their constitutional obligation to decide to experts they appoint who might advise them *ex parte*:

In a complex case, the judges may defer substantially to the explanations they receive from the court-appointed expert; indeed, there would be little point in appointing an expert if the judges did not do so. These experts are not authorized under Article III of the Constitution to exercise the “judicial Power of the United States”; they are neither subject to the nomination and confirmation process nor vested with the life tenure and salary protections deemed critical to the independence of the judiciary, yet they would influence the outcome of cases and may effectively decide them.<sup>77</sup>

Ginsburg took pains to note that he was addressing court-

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*Applying Foreign Law: The Increasing Need for Cross-Border Cooperation*, 45 N.Y.U. J. INT’L L. & POL. 1081, 1099 (2013) (mentioning the court-appointed expert as efficacious but increasingly unrealistic as court budgets grow more strained. It should be noted, however, that Federal Rule of Evidence 706 places the burden of paying for the court-appointed expert on the parties to the extent the judge so chooses). See Fed. R. Evid. 706(c), (stating that compensation is to be provided “by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.”).

74. See Antoine Garapon, *L’Expertise Française sous le Regard International*, COUR DE CASSATION, [https://www.courdecassation.fr/colloques\\_activites\\_formation\\_4/2007\\_2254/ais\\_e\\_sous\\_10911.html](https://www.courdecassation.fr/colloques_activites_formation_4/2007_2254/ais_e_sous_10911.html) (last visited July 24, 2020), for a comparative analysis of French and U.S. experts, including the insight that the parties do not have equal say in French proceedings, as well as that lying is not considered as serious an infraction in France as in the United States, and, finally, that experts in France form a small, club-like group of people who may tend not to be at the forefront of their fields as they are virtually assured of being chosen for future expert needs of courts once they are inscribed on judicial expert registers.

75. See Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RES. L. REV. 303, 314–18 (2010).

76. *Id.* at 314.

77. *Id.* at 315.

appointed experts outside Federal Rule of Evidence 706, who would not be subject to party cross-examination.<sup>78</sup> But even where Rule 706 applies, Ginsburg's concerns still may be apposite. It has been noted, for example, that, where the U.S. District Court for the Southern District of Florida appointed its own expert in foreign law,<sup>79</sup> "the court accept[ed] the expert's findings *in toto*"<sup>80</sup> and that "there [was] no indication that the court did any research outside the expert's report . . . ." <sup>81</sup> Although the court-appointed expert for foreign law has been urged on the courts for numerous years,<sup>82</sup> with rare exceptions U.S. courts have not sought this solution in the area of foreign law.<sup>83</sup> Indeed, Judge Ginsburg's concerns about court-appointed experts appear to be widely echoed in the state court judicial surveys conducted and collected by Cheng, which reflect, as one of two principal judicial concerns, that court-appointed experts in any area violate "traditional adversarial . . . values."<sup>84</sup> Where a party seeks to argue that the court apply foreign law, it may even advocate the use of a court-appointed expert or master in order to fight dismissal, as in *Stoyas v. Toshiba*, where the lower court dismissed the case on *forum non conveniens* grounds.<sup>85</sup>

Not only do they rarely appoint their own experts, but even today many U.S. courts maintain that they have no duty to determine foreign law at all, sometimes citing to the *Restatement*

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78. *Id.* at 314–15.

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

80. *Garcia*, *supra* note 44, at 1053 (discussing the *Lucite Ball* case).

81. *Id.*

82. *See* VED P. NANDA ET AL., LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 18:11 (2020).

83. *See* Hay, *supra* note 21, at 221; Ginsburg, *supra* note 75, at 309 n.35; *see also id.* *But see* Behrens v. Arconic, Inc., 487 F. Supp. 3d 283, (E.D. Pa. 2020) (representing one such exception was the judge who appointed an expert to explain the French Blocking Statute. The selection was excellent as the expert, Noëlle Lenoir, is a former judge on France's highest courts, a partner in an international law firm and a published scholar of comparative law, including in the precise area of France's blocking statute. Her expert report, on file with the author, is a clear and thorough explanation of France's blocking statute and of France's legal outlook on the appropriate role of the Hague Convention in discovery matters). For more instances of court-appointed experts, see *Restatement (Third) Conflict of Laws (Tentative Draft No. 2) § 507, Reporters' Note 1.*

84. Cheng, *supra* note 21, at 1280–82 (describing the other concern as the difficulty of achieving accuracy regarding decisions involving scientific facts).

85. *Stoyas v. Toshiba*, 191 F. Supp. 3d 1080, 1098–99 (C.D. Cal. 2016), *rev'd on other grounds*, 896 F.3d 933 (9th Cir. 2018).

of *Conflict of Laws* for this proposition.<sup>86</sup> In practice, the two most common ways U.S. courts resolve the issue of foreign law are (1) not to apply it, whether by concluding that it does not apply under a conflicts analysis or by dismissing the case on *forum non conveniens* grounds;<sup>87</sup> or (2) to rely on party experts in what at best makes foreign law a mixed issue of fact and law. As others have suggested, where the courts entertain foreign law, “[w]ritten or oral [party] expert testimony accompanied by extracts from various kinds of foreign legal materials probably will continue to be the basic mode of proving foreign law.”<sup>88</sup>

The next section explores a dimension of the foreign-law expert in U.S. courts that is pervasive: limits of communication across legal systems.

#### B. COMMUNICATING BETWEEN SYSTEMS OF SIGNS: SHIPS PASSING IN THE NIGHT

“Remember, the knowledge of expert counsel has no influence on the decision unless it is clearly communicated to the court.”

-The Hon. Malcom R. Wilkey<sup>89</sup>

There are two levels at which the foreign-law expert faces communication challenges. The first is to communicate the meaning of particulars of foreign law that are not separable from the vast networks to which they are attached in their own legal

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86. See also *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 431 (10th Cir. 2006) (remanding foreign law issue for proof by parties at trial court level on reasoning that Rule 44.1 granted it only “*some discretion* to decide to determine ourselves what Swiss law provides . . .”, and that such independent judicial determination of the foreign law would not constitute the best practice) (emphasis added). But see WRIGHT & MILLER, *supra* note 20 (explaining Wright, Miller, and Curran’s criticisms of this reading of the Restatement of Conflicts); e.g., *Hammerl v. Acer Europe, S.A.*, No. C 08-4754 JF (RS), 2009 WL 30130, at \*8 (N.D. Cal. Jan. 5, 2009); *Minebea Co., Ltd. v. Papst*, 444 F. Supp. 2d 68, 182–85 (D.D.C. 2006); *In re Spring Ford Indus., Inc.*, No. 02–15015DWS, 2004 WL 1291223, at \*3 n.5 (Bankr. E.D. Pa. May 20, 2004).

87. See *infra* Section IV.

88. WRIGHT & MILLER, *supra* note 20, § 2444 (emphasis added); see, e.g., *Sunstar, Inc. v. Alberta Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009) (“[T]hat is the route followed in most cases.”); *Siswanto v. Airbus Americas, Inc.*, 2016 WL 7178460, at \*4 (N.D. Ill. Dec. 9, 2016) (citing *Leibovitch v. Syrian Arab Republic*, 25 F. Supp. 3d 1071, 1081 (N.D. Ill. 2014)).

89. Wilkey, *supra* note 37, at 542.

order, and which are not translatable by way of English legal terms that emanate from the context of the U.S., U.K. or other common-law legal system. Even words as simple as “trial” or “contract” do not convey the meaning of French “*procès*” or “*contrat*”.<sup>90</sup> The legal phenomena are different.<sup>91</sup> In a contract issue of some sophistication, how deeply within a foreign legal system should a foreign legal expert go in order to convey everything necessary to the U.S. judge? A dissertation, rather than an expert report, arguably would be required. An equally apt question is whether a foreign expert on the foreign law would even be aware that a U.S. judge’s understanding of the foreign law may be far afield of the foreign expert’s intended meaning. To what extent are foreign experts aware of the gulf that may separate the English terms they use for the legal phenomena in their legal order that they describe? The U.S. understanding of the English terms need not be any better understood by the foreign expert than the U.S. judge’s understanding of the foreign legal phenomena described in the foreign expert’s report.

Moreover, to the extent that foreign legal experts explain the law of their country to U.S. judges without referring to caselaw, U.S. judges may tend to be skeptical of the expert’s statements and conclusions, even though, within the foreign legal system, it may not be customary to cite to cases. Thus, in *Carlisle Ventures, Inc., v. Banco Español de Crédito*, the Second Circuit rejected the expert report of a Spanish attorney and former law professor it characterized as “prominent” because the report “cite[d] no Spanish cases that employ this particular remedy . . . .”<sup>92</sup> Similarly, in *Knight Capital Partners v. Henkel Ag & Co.*, an Eastern District Court of Michigan judge rejected a German expert’s interpretation of a German statute where the expert “did not cite any judicial decision . . . ,”<sup>93</sup> and was dismissive of the expert’s citation to other sources even though

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90. See, e.g., Vivian Grosswald Curran, *Comparative Law and Language*, in *The OXFORD HANDBOOK OF COMPARATIVE LAW* at 681–709 (Matthias Reimann & Reinhard Zimmermann eds., 2d ed. 2019); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 54–59 (1998), for a portrayal of my general views on the issue of communicating across legal orders. See generally FRANÇOIS OST, *TRADUIRE: DÉFENSE ET ILLUSTRATION DU MULTILINGUISME* (2009), for a deep inquiry into the challenges of language and translation to law.

91. See Curran, *supra* note 90, at 684.

92. *Carlisle Ventures, Inc. v. Banco Espanol de Credito*, 176 F.3d 601, 604–05 (2d Cir. 1999).

93. *Knight Capital Partners Corp. v. Henkel Ag & Co.*, 290 F. Supp. 3d 681, 689 (E.D. Mich. 2017).

they were authoritative within the German legal system.<sup>94</sup>

The second communication problem concerns the manner in which the expert report is drafted. Foreign law experts may present an expert report as they would in their native country; namely, with less concern about avoiding what would seem to a U.S. legal reader like sweeping, conclusory statements made with insufficient buttressing legal authority.<sup>95</sup> The U.S. judge generally expects all legal writing to be punctilious in providing continuous, pervasive cited legal authority of an explicit and verifiable nature for each and every statement building up to any conclusion, as is necessary to justify legal views based on inductive reasoning, the reasoning of common-law legal systems.<sup>96</sup> The civilian law expert may be inclined to base statements on cited Code articles that do not provide the U.S. judge with evident legal support, but would garner credence in the expert's native system where legal reasoning is deductive, where law is organized according to different systemic rules and divisions, and, equally importantly, where the norm is for the expert to be court-appointed and able to rely on considerably more credibility derived from that status.<sup>97</sup> Thus, in *Twohy v. First National Bank of Chicago*, the Seventh Circuit rejected the expert reports of Spanish lawyers on Spanish law as inadequate on the ground that those "experts, attorneys practicing in Spain, opined from their personal knowledge that plaintiff's action is barred under Spanish law . . . Something more concrete might have been expected of defendant, and plaintiff has been quick to point out the lack of discussion of substantive law within and the conclusory nature of defendant's affidavits."<sup>98</sup>

The concrete and the specific that the judge thought "might have been expected" are, however, the hallmarks of the common-

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94. *Id.*

95. *Minebea Co., Ltd. v. Pabst*, 444 F. Supp. 2d 68, 182 (D.D.C. 2006).

96. See Curran, *supra* note 58, on the differences between the two legal orders, and especially the punctilious, individual fact-oriented, detailed nature of the common law in contrast to the converse civilian methodology which I have analogized to attributes of Romanticism versus the Enlightenment.

97. See Jean-François Guillemin, *Le Tunnel Sous la Manche: Confrontation et Fusion Permanente de Deux Cultures Juridiques Réputées Antagonistes*, 47 *Revue Internationale de Droit Comparé* 403 (1995), for more on such systemic divisions and categories in French contract law in particular and their contrasts with British law that came as a shock to those on both British and French legal teams working jointly on Eurotunnel contracts.

98. *Twohy v. First Nat. Bank of Chi.*, 758 F.2d 1185, 1193 (7th Cir. 1985); see also Curran, *supra* note 63, at 868–69 (highlighting another form of miscommunication between foreign expert and judge).

law legal analysis, while the general and deductive are those of civil-law analysis, the system of the foreign-law legal expert.<sup>99</sup> Spanish lawyers might not be expected or have been trained to submit a presentation of Spanish law in in their own country in the manner that the U.S. common-law judge expected. Relatedly, the conclusory nature of expert reports is commonplace to civilian lawyer experts, although a frequent cause of U.S. judicial displeasure.<sup>100</sup> While U.S. judges may take such reports to be legally deficient on the basis of lacking in adequate legal support from a common-law perspective, it is a characteristic style of experts in at least some civilian countries.<sup>101</sup>

Rule 44.1 allows experts on foreign law to be American lawyers and scholars: “[T]he expert need not even be admitted to practice in the country whose law is at issue.”<sup>102</sup> Such common-law experts are best positioned to address U.S. judges in a way that judges understand but, unless they are adept comparatists steeped in the foreign law, which by force also means the foreign language, society, culture and history that the foreign law is part of, American lawyers and scholars are least prepared to understand the foreign law within its own context. This means, on the whole, that foreign-law experts on civilian law who can accomplish their task well and communicate effectively to U.S. judges are few and far between.

An exception to this rule occurred in a case in which a U.S. court was relying on experts and where the level, if any, of its independent assessment was not clear, but where it thoughtfully considered and rejected foreign court decisions.<sup>103</sup> In *Films by Jove, Inc. v. Berov*,<sup>104</sup> the U.S. District Court for the Eastern District of New York rejected both post-Soviet Russian court interpretations of Soviet law and prior French court interpretations of that law.<sup>105</sup> The U.S. court’s touched on aspects of France and Russia’s legal systems, including the lack

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99. *Id.* at 1193.

100. *See supra* notes 72–78 and accompanying text.

101. *See generally id.* As a foreign-law expert in civil law, the author can confirm this is typical of U.S. judicial reaction.

102. *Accord* WRIGHT & MILLER, *supra* note 20 (emphasis added) (noting that neither the Rule itself nor the Notes of the Advisory Committee notes restrict foreign-law experts in this way).

103. *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 164–75 (E.D.N.Y. 2003).

104. *Id.*

105. *Id.* at 216–17.



of *stare decisis* in civil-law systems, that affected the otherwise seemingly bizarre status of the case which had had inconsistent appellate court resolutions on the same issue.<sup>106</sup> One of the plaintiff's experts, an international law professor, had explained the civilian legal systems in such detail and with such lucidity in his expert affidavit that the court was able to reproduce many salient details in the court's rendition of the relevant laws, both Russian and French, in its opinion.<sup>107</sup> The court also made a point of citing to a leading comparative law textbook on the subject — which, again, the expert had used in his affidavit — in the court's depiction of how an otherwise bewildering (to common-law eyes) set of judicial circumstances could have occurred.<sup>108</sup>

The plaintiff's expert had been able to plow through the confusing nomenclature of a Russian court (the High Arbitrazh Court) to indicate numerous reasons, including some stemming from internal Russian judicial hierarchy, why the U.S. judge need not defer to its judgment.<sup>109</sup> Ultimately, the U.S. judge, after considering the interests of comity that led him initially to presume deference to Russia's High Arbitrazh Court, decided against deferring to its judgment, despite the Russian court's facial appearance of having supreme court status, as well as against giving *res judicata* effect to a Paris Court of Appeals decision.<sup>110</sup> The extensive legal analysis based on comparative law sources, and, especially, on the adept comparative legal analysis of one of plaintiff's foreign-law experts, is a rare occurrence in Rule 44.1 U.S. case law. It was not clear from the opinion if the court had engaged in independent research concerning the foreign law or if it had relied entirely on the authoritative comparative legal analysis of party experts.<sup>111</sup>

Because of the inherent difficulties associated with

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106. *Id.* at 192.

107. *See id.* at 180.

108. *Id.* at 192 (citing JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985)).

109. *Films by Jove, Inc.*, 250 F. Supp. 2d at 181.

110. *Id.* at 216–17.

111. *See* Legrand, *supra* note 49, at 371–73 (discussing the Swiss legal system in terms that a common-law judge was able to appreciate); *see also* Behrens v. Arconic, Inc., No. 19-2664, 2020 WL 5542387, at \*9 n.14 (E.D. Pa. Sept. 16, 2020) (applying the Hague Convention rules instead of the Federal Rules of Civil Procedure where the judge had reason to trust the court-appointed expert).

understanding and applying foreign law, judges and scholars have counselled against U.S. courts' engaging in an examination of foreign law.<sup>112</sup> This is not a realistic option today, however. U.S. courts increasingly must contend with foreign law. The next sections deal with three principal areas in which U.S. courts contend with foreign law today: *forum non conveniens*; discovery, and Section 1782 cases. In all of these areas, U.S. courts are obliged to take foreign law into account and engage in comparative legal analysis in some measure.

#### IV. RULE 44.1 AND FORUM NON CONVENIENS

The seminal case on *forum non conveniens* in transnational litigation is *Piper Aircraft Co. v. Reyno*,<sup>113</sup> in which the United States Supreme Court set forth standards for a U.S. court's assessment of foreign law for purposes of determining the adequacy of the foreign forum the defendant proposes in its motion to dismiss.<sup>114</sup> U.S. courts will dismiss cases on *forum non conveniens* even where, as in *Piper*, a plaintiff's recovery will be lower in amount in the foreign forum than in the U.S.,<sup>115</sup> and even where some causes of action, such as strict liability, are not available at all in the foreign forum,<sup>116</sup> so long as the plaintiff would not be "deprived of any remedy."<sup>117</sup> *Forum non conveniens* cases differ from Rule 44.1 cases in placing the burden squarely

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112. See Tanya J. Monestier, *Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments*, 96 B.U.L. REV. 1729, 1748–56 (2016).

113. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (applying the domestic doctrine to international cases (citing *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947))).

114. *Piper Aircraft Co.*, 454 U.S. at 247–49.

115. See *id.* at 250.

116. See *id.* at 240–44.

117. See *id.* at 255; *In re Alcon S'holder Litig.*, 719 F. Supp. 2d 263, 272 (S.D.N.Y. 2010) (establishing that dismissal was warranted unless the foreign jurisdiction provides "no remedy at all"); accord *Logan Int'l, Inc. v. 1556311 Alta. Ltd.*, 929 F. Supp. 2d 625, 632 (S.D. Tex. 2012) (quoting *Piper Aircraft*, 454 U.S. at 102). Courts can hold that this criterion is satisfied so long as the defendant is "amenable to process in the foreign jurisdiction," *DRFP, L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 519 (6th Cir. 2010). More frequently, courts add to this first prong of availability of courts a separate inquiry related to the requisite inquiry into the adequacy of the foreign court, but here too the bar is low, sometimes termed as the possibility of litigating the issue in dispute, see, e.g., *New Hampshire Ins. Co. v. Sphere Drake Ins. Ltd.*, No. 01 CIV. 3226(BSJ), 2002 WL 1586962, at \*6 (S.D.N.Y. July 17, 2002), *aff'd in part, vacated in part on other grounds*, 51 Fed. App'x 342 (2d Cir. 2002).

on the parties to establish the adequacy of the foreign law (the defendant's burden),<sup>118</sup> and to refute the same (the plaintiff's burden).<sup>119</sup> U.S. judges nevertheless are most frequently placed in the same position in such cases as in Rule 44.1 cases inasmuch as they make these determinations based on their assessments of party expert affidavits and reports, as in practice do judges under Rule 44.1.<sup>120</sup> On the other hand, courts have repeatedly held that the bar is very low for a defendant to prevail on a *forum non conveniens* case, and in particular that ruling a foreign nation's law to be inadequate is so likely to be harmful to international comity that U.S. judges generally do not explore foreign law once they have reached a determination that the foreign legal system would afford plaintiff some recovery, and that plaintiff would not be unfairly treated.<sup>121</sup> As one court stated, "this test is easy to pass."<sup>122</sup>

According to Bookman, cases tend to be dismissed "because [they are] too foreign."<sup>123</sup> The importance of judicial understanding of the relevant foreign law is not diminished by the current practice of not examining it before dismissing for *forum non conveniens*, however. Understanding the foreign forum well enough to ascertain that it is adequate and preferable requires an appreciation of the laws to which the case will be subject. Bookman argues that the alacrity with which U.S. courts dismiss cases in this area leads to deprivation for the United States' interest in adjudicating cases under its own

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118. *E.g.*, *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006).

119. *E.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189–90 (2d Cir. 2009).

120. *See, e.g.*, *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999); *FR 8 Singapore Pte. Ltd. v. Albacore Mar., Inc.*, 754 F. Supp. 2d 628, 637 (S.D.N.Y. 2010) (deciding *forum non conveniens* motions on the basis of parties' foreign-law expert affidavits).

121. The inquiry into unfairness of treatment is severely constricted in practice by the courts' reluctance to hold that a foreign state's courts do not treat parties fairly because that is a condemnation of corruption, *see Banco Latino v. Lopez*, 17 F. Supp. 2d 1327, 1331 (S.D. Fla. 1998) (countering allegations of corruption and injustice with the summary remark that "[i]t is not the business of our courts to assume responsibility for supervising the integrity of the judicial system of another sovereign nation.") (quoting *Blanco v. Blanco Indus. de Venez., S.A.*, 997 F.2d 974, 982 (2d Cir. 1993)).

122. *Krish v. Balasubramaniam*, No. 1:06-CV-01030 OWW TAG, 2007 WL 1219281 at \*2 (E.D. Cal. Apr. 25, 2007); *Banco Latino*, 17 F. Supp. 2d at 1331 ("[T]he burden of establishing whether an alternative forum exists is not a heavy one.").

123. Bookman, *supra* note 4, at 1084.

laws.<sup>124</sup> Born critiques the heightened rate of dismissals where the plaintiff is foreign as “inconsistent with both principles of customary international law and long-standing policies of the federal political branches, and likely expos[ing] U.S. parties to comparable discrimination by foreign courts,”<sup>125</sup> and also notes that, as a result of *forum non conveniens* dismissals, U.S. courts cannot make, *inter alia*, choice-of-law decisions.<sup>126</sup>

As Symeonides has discussed, in the domestic context, conflicts law promotes and recognizes state interests in their own laws.<sup>127</sup> On the international level, Symeonides’ evocation of a “revolution” is echoed by Muir-Watt, referring to transnational litigation, who speaks of a crisis in conflict of laws due to globalization.<sup>128</sup> According to Muir-Watt, conflict of laws traditionally had been

understood both to provide an overall scheme of intelligibility through which to understand other social spheres and to make available operational tools with which to define authority, allocate responsibilities, and guide the conduct of public and private actors. However, the emergence of diffuse (post-Westphalian) forms of authority challenges the law in these ordering functions.<sup>129</sup>

Seen through this lens, the evolution of *forum non conveniens* in the United States from a rare outcome into a widely available one, goes hand in hand with transnationalization’s alteration of conflicts of law. The RESTATEMENT (THIRD) OF CONFLICT OF LAWS, currently being drafted, has come under criticism for insufficient attention to the international dimension.<sup>130</sup>

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124. *Id.* at 1123–24.

125. Born, *supra* note 13, at [page number required – never received manuscript] n.194.

126. *Id.* at n.197.

127. See, e.g., Symeon Symeonides, *The American Choice-of-Law Revolution*, in 4 THE HAGUE ACADEMY OF INTERNATIONAL LAW MONOGRAPHS 1, 374–77 (2006).

128. Horatia Muir-Watt, *Jurisprudence Without Confines: Private International Law as Global Pluralism*, 5 CAMBRIDGE J. INT’L & COMP. L. 388, 391–92 (2016).

129. *Id.* at 392.

130. See Ralf Michaels, *The Conflicts Restatement and the World*, 110 AJIL UNBOUND 155, 155 (2016); Ralf Michaels & Christopher A. Whytock, *Internationalizing the New Conflict of Law Restatement*, 27 DUKE J. COMP. &

Generally thought to be a uniquely common-law doctrine,<sup>131</sup> *forum non conveniens* has come under considerable and varied criticism.<sup>132</sup> It has been suggested that this doctrine, rejected in civil law systems where a court's jurisdiction over the parties obligates the court to hear the case,<sup>133</sup> should be abandoned altogether,<sup>134</sup> and that its incoherent results "are at odds with its stated objectives of promoting justice, fairness and and international comity."<sup>135</sup> This section focuses on the doctrine as it affects federal judges and Rule 44.1. The least controversial aspect of finding a foreign forum adequate is where U.S. courts do not hold foreign courts to be inadequate merely because of attributes that are characteristic of non common-law courts. Thus, U.S. courts generally hold that lack of jury trials in civil (non-criminal) cases;<sup>136</sup> lack of punitive damages,<sup>137</sup> lack of discovery,<sup>138</sup> and other systemic attributes of the civilian legal

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INT'L L. 349, 350 (2017). *But see* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and Party Autonomy*, 27 DUKE J. COMP. & INT'L L. 381, 384 (2017) (criticizing the draft for suggesting that the interstate and international analyses do not require different analyses).

131. This needs to be qualified by its availability in limited form in Panamanian maritime law, a civil-law state. *See* Carreira Pitti, *Panama*, 9 INT'L J. MARINE & COASTAL L. 247, 249 (1994). *But see* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 458 (2017) (quoting Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. INT'L L. & POL. 1063, 1071 (2013)) (stressing the doctrine's rarity, and noting that even among common law states, only a few recognize it, and that "the trend internationally has been to jettison the doctrine altogether").

132. *See generally* Gardner, *supra* note 131, at 391–429, for a powerful argument against *forum non conveniens*, as well as a review of supporting literature.

133. *See, e.g.*, Commission Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, 11 ("Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.").

134. Gardner, *supra* note 131, at 399.

135. Born, *supra* note 13, [page number required – never received manuscript] n.194 (parentheses omitted).

136. *Adams v. Merck & Co. Inc.*, 353 F. App'x. 960, 964 (5th Cir. 2009); *Logan Int'l Inc. v. 1556311 Alta. Ltd.*, 929 F. Supp. 2d 625, 633 (S.D. Tex. 2012); *Adamowicz v. Barclays Private Equity France S.A.S.*, No. 05CIV.0961(HB), 2006 WL 728394, at \*3 (S.D.N.Y. Mar. 22, 2006).

137. This was the case in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981) where plaintiffs' forum shopping was a concern for the Court; *accord* *Exter Shipping Ltd. v. Kilakos*, 310 F. Supp. 2d 1301, 1322 (N.D. Ga. 2004); *Warter v. Bos. Sec., S.A.*, 380 F. Supp. 2d 1299, 1309 (S.D. Fla. 2004).

138. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001);

orders that dominate the world, are insufficient bases on which to deny dismissal for *forum non conveniens*.<sup>139</sup> Substantial criticism of the doctrine in transnational litigation cases addresses the second prong of the foreign legal system inquiry, the more serious matter of whether it will allow the plaintiff a fair hearing: “[B]y categorically rejecting generalized accusations of corruption, delay, and other inadequacies in foreign judicial systems, or imposing too high a level of proof on these points, federal courts ignore the realities of the nature of the justice systems of many nations.”<sup>140</sup> Bookman observes that *forum non conveniens* also has the consequence of immunizing U.S. defendants at home and undermining the principle that U.S. courts have general jurisdiction over a defendant where it is legally at home,<sup>141</sup> a principle strongly enunciated by the U.S. Supreme Court in 2014 in *Daimler AG v. Bauman*.<sup>142</sup>

As a general matter, U.S. courts eschew in-depth analyses of foreign legal systems in *forum non conveniens* cases, rejecting plaintiff arguments that the U.S. forum is needed to preserve their due process rights, with the courts stressing that to do so would be to condemn an entire foreign nation’s judiciary, and that they will do this only under the most extreme circumstances.<sup>143</sup> In *Shiley Inc. v. Superior Court*,<sup>144</sup> the court stated that such extreme circumstances would be “where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law.”<sup>145</sup> In practice, however, U.S. courts do not apply those criteria except in their most extreme version of the above, and they tend to be particularly generous in granting *forum non conveniens* dismissals if keeping the case would require application of foreign law.<sup>146</sup>

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*Logan Int'l Inc.*, 929 F. Supp. 2d at 633; *Akerblom v. Ezra Holdings Ltd.*, No. 4:11-cv-00694, 2012 WL 464917, at \*3 (S.D. Tex. Feb. 13, 2012), *aff'd*, 509 Fed. Appx. 340, 350 (5th Cir. 2013).

139. See, e.g., *Valenti ex rel. Valenti v. Marriott Int'l, Inc.*, Civ. No. 10-0758, 2011 WL 869189, at \*4 (D.N.J. Mar. 10, 2011) (referring explicitly to absence of a “common feature of civil law systems” as insufficient to warrant keeping the case in the U.S.).

140. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828.3 (4th ed. 2013).

141. Bookman, *supra* note 4, at 1093.

142. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

143. Monestier, *supra* note 112, at 155.

144. *Shiley Inc. v. Superior Ct.*, 4 Cal. App. 4th 126 (1992).

145. *Id.*, at 133–34.

146. See Wilson, *supra* note 1, at 898.

On the contrary, where plaintiffs argue that they will not be accorded due process, the courts overwhelmingly reject plaintiffs' position, on the ground of international comity.<sup>147</sup> They also do so by analogizing to international comity, even in multiple cases where the U.S. Department of State has made findings against the system in question,<sup>148</sup> or where the European Union has repeatedly done so and warned the Member State.<sup>149</sup> The role of adjudicative international comity in *forum non conveniens* has been critiqued in light of foreign countries' evident objections to U.S. courts dismissals of cases brought by their nationals against U.S. defendants, as shown by their enacting laws to deny jurisdiction in their own courts to cases that have been dismissed in the U.S. for *forum non conveniens*.<sup>150</sup> One judge has said that "[c]omity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions."<sup>151</sup> Gardner notes that comity abstention, applied where a court seeks to avoid conflicts with foreign law,<sup>152</sup> contravenes "the Supreme Court's renewed emphasis on the 'virtually unflagging obligation' of the federal courts 'to exercise the jurisdiction given them' by Congress."<sup>153</sup> She also argues that international and national comity abstention issues are similar.<sup>154</sup>

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147. RIGroup LLC v. Trefonisco Mgmt. Ltd., 949 F. Supp. 2d 546, 553–54 (S.D.N.Y. 2013) (quoting PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)) (citing Blanco v. Banco Indus. de Venezuela, S.A., 997 F.2d 974, 982 (2d Cir. 1993)), *aff'd*, 559 F. App'x 58 (2d Cir. 2014).

148. Harp v. Airblue Ltd., 879 F. Supp. 2d 1069, 1073 (C.D. Cal. 2012) (Pakistan); MBI Group, Inc. v. Credit Foncier du Cameroun, 558 F. Supp. 2d 21, 29–30 (D.D.C. 2008) (Cameroon), *aff'd*, 616 F.3d 568, 575 (D.C. Cir. 2010); Johnston v. Multidata Sys. Int'l Corp., No. G–06–CV–313, 2007 WL 1296204, at \*27 n.19 (S.D. Tex. Apr. 30, 2007) (Panama), *rev'd on other grounds*, 523 F.3d 602 (5th Cir. 2008).

149. Zeevi Holdings Ltd. v. Rep. of Bulg., No. 09 Civ. 8856(RJS), 2011 WL 1345155, at \*7 (S.D.N.Y. Apr. 5, 2011), *aff'd*, 494 F. App'x 110, 114–15 (2d Cir. 2012). The author served as an expert for the plaintiff in this case.

150. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 21 (2004).

151. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 687 (Tex. 1990) (Doggett, J., concurring) (quoted in Bookman, *supra* note 4, at 1104 n.149).

152. Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 65 (2019).

153. *Id.* at 67 (quoting Colo. River Conservation District v. United States, 424 U.S. 800, 817 (1976)).

154. See generally *id.* at 81–88; William S. Dodge, *International Comity in*

While numerous individual cases involve U.S. court dismissals to foreign countries where evidence seemed fairly compelling of government corruption and lack of judicial independence,<sup>155</sup> Lii's empirical study suggests a statistically meaningful correlation between those attributes and U.S. court denial of *forum non conveniens* motions:

The worst bottom one-third of countries were found to be adequate only 67% of the time. The medium countries were adequate 76% of the time. The best countries were found to be adequate 86% of the time. The differences in adequacy rates between the best countries and the other two tiers are statistically significant. Thus, even though the definition of an adequate forum does not explicitly require it, there is evidence that district courts are less likely to find foreign forums adequate in countries with ineffective and corrupt governments and countries that lack the rule of law.<sup>156</sup>

On the other hand, or put another way, however, this means that Lii's figures indicate that *U.S. courts have a close to 70% finding of adequacy* in the foreign forum among the countries ranked most corrupt and most lacking in the rule of law.<sup>157</sup> According to both Whytock and Lii in their separate studies, about half of all *forum non conveniens* motions are granted,<sup>158</sup> even though, as Gardner has pointed out, the U.S. Supreme Court intended to have the doctrine of *forum non conveniens* used only sparingly.<sup>159</sup> Robertson concurs with the approximately 50 percent grant rate, further noting a 400 percentage increase in *forum non conveniens* cases brought in transnational litigation in recent years.<sup>160</sup> According to other commentators, "[w]hat is clear is that virtually no case involving

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*U.S. Law*, 115 COLUM. L. REV. 2071 (2015) (providing a comprehensive analysis of international comity).

155. See generally Gardner, *supra* note 131.

156. Michael Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOB. L. & BUS. 513, 542 (2009).

157. See *id.*

158. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 502 (1986); Lii, *supra* note 156, at 526.

159. Gardner, *supra* note 131, at 396.

160. Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1092 (2010).



a transnational event is immune from a *forum non conveniens* battle,”<sup>161</sup> and that just about any reason a judge believes to mean that another forum will be more satisfactory will suffice for a case to be dismissed.<sup>162</sup>

It has been argued that *forum non conveniens* requires a significant foray into foreign law on the part of judges, who must “make a whole series of complex evaluations about the availability of foreign evidence, the level of foreign interest in a case, and the content of foreign law.”<sup>163</sup> In *Piper*, however, the Supreme Court reversed the appellate court’s holding precisely because it would require courts in *forum non conveniens* cases

frequently . . . to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum. The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law.<sup>164</sup>

This United States Supreme Court directive to avoid U.S. judicial engagement with the foreign law it confronts every day does not distinguish *forum non conveniens* from the other frameworks in which the courts are faced with foreign cases in transnational litigation. Both discovery law and Section 1782 cases have their own precedential equivalents.<sup>165</sup> In practice,

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161. Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1150–51 (2006).

162. Bookman, *supra* note 4, at 1094.

163. Gardner, *supra* note 131, at 418.

164. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 263 (1981).

165. *See generally* *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522 (1987) (contrasting with respect to discovery with *Piper Aircraft Co.*, 454 U.S. on *forum non conveniens* and with *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) on Section 1782 by placing emphasis on the inexperience of judges with respect to foreign law, and implying rather than directing that comparative legal analysis should be avoided).

however, among the various encounters U.S. judges have with foreign law, *forum non conveniens* standards require the least assessment and understanding of foreign law, because (1) the courts require the parties to bear all of the burdens of production and persuasion, as well as evidence described as “not detailed”, with no or very little discovery;<sup>166</sup> and (2) the courts have set the bar for dismissal very low.<sup>167</sup> Thus, their foreign-law inquiry tends to be more perfunctory under current norms for granting dismissals under *forum non conveniens* than it legitimately can be in discovery cases and Section 1782 cases, the two principal remaining areas in which U.S. courts encounter foreign law in transnational litigation.

We have seen that Rule 44.1's spirit is at loggerheads with the dominant trend in *forum non conveniens*. As will be described in the next two sections, each of these two areas has a precedential history of its own in discouraging courts from engaging in comparative legal analysis. It is argued here that the necessity of encountering foreign law entails comparative law analysis on the part of the courts. While Rule 44.1 accepts this necessity, and tries to facilitate it, and while at the same time it is understandable that courts hesitate to engage in what the U.S. Supreme Court has (quite accurately) termed a “slippery business,”<sup>168</sup> the better procedure for U.S. courts is to address the issue of foreign law wherever it appears by seeking to understand it, and by learning how to do so.

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166. *Piper Aircraft Co.*, 454 U.S. at 267; *Herbert v. VWR Int'l, LLC*, 686 Fed. App'x. 520, 521 (9th Cir. 2017); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1297 (11th Cir. 2009); *Barak v. Zeff*, 289 Fed. App'x. 907, 915 (6th Cir. 2008); *Moskovits v. Moskovits*, 150 Fed. Appx. 101, 102–03 (2nd Cir. 2005). The Southern District of New York has a practice of deciding *forum non conveniens* motions on affidavits alone and is generally unwilling to allow any discovery, see *FR 8 Singapore Pte. Ltd. v. Albacore Mar. Inc.*, 754 F. Supp. 2d 628, 637 (S.D.N.Y. 2010).

167. See *Knight Capital Partners Corp. v. Henkel Ag & Co.*, 290 F. Supp. 3d 681, 689 (E.D. Mich. 2017), for how low the bar is. Significantly, it has been argued that international comity, one rationale for dismissal in favor of a foreign country with jurisdiction, should more properly be interpreted by the courts as giving plaintiffs access to U.S. courts, and therefore militates against dismissals on *forum non conveniens* grounds, see Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1491–92 (2011).

168. *Intel Corp.*, 542 U.S. at 243.

## V. RULE 44.1 AND U.S. DISCOVERY

## A. INTRODUCTION

Discovery cases are unlike Rule 44.1 cases in that parties bear the burden of proof, but to the extent that foreign law, such as a blocking statute, is an issue for the court to deal with in discovery, the case becomes a hybrid that also encompasses Rule 44.1.<sup>169</sup> One such case involved the Eastern District of Michigan's interpretation of a German data privacy blocking statute.<sup>170</sup> The court referred to Rule 44.1's permitting it to consult any source it deemed relevant to understanding the German law, including scholarly, legislative history, and case law.<sup>171</sup> The judge took his duty of independent assessment seriously in rejecting the German expert's interpretation of German law, stating that he could interpret the German statute "informed by the ordinary principles of statutory construction and by reference to the plain meaning of the statute itself."<sup>172</sup> He quoted language from the German statute to support his conclusion that he should compel the discovery plaintiff had requested.<sup>173</sup>

The endeavor to understand and construe the German statute independently is what Rule 44.1 drafters had in mind, and it has become a clear necessity in transnational discovery cases today. Although Germany has what is probably the most highly developed system of statutory construction in the world,<sup>174</sup> and German legislators naturally are aware that statutory language will be subject to the German system of

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169. See, e.g., *United States v. Vetco Inc.*, 691 F.2d 1281, 1288 (9th Cir. 1981); *BrightEdge Techs., Inc. v. Searchmetrics, GmbH*, No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062, at \*4 (N.D. Cal. Aug. 13, 2014) ("As the party seeking to rely on German and European Union law, it is Searchmetrics' burden to demonstrate that these laws bar production of the documents at issue."). Numerous courts also maintain under Rule 44.1 that the parties bear all burdens, but, as argued above, this is a misreading of the Rule, see, e.g., *Abdille v. Ashcroft*, 242 F.3d 477, 489 (3d Cir. 2001); Aurora Bewicke, *The Court's Duty to Conduct Independent Research into Chinese Law: A Look at Federal Rule of Civil Procedure 44.1 and Beyond*, 1 U. PA. E. ASIA L. REV. 97, 106 (2005).

170. *Knight Capital Partners Corp.*, 290 F. Supp. 3d at 681.

171. *Id.* at 687.

172. *Id.* at 689.

173. *Id.* at 687.

174. See generally Thomas C. Wegerich, *Statutory Interpretation in Germany: The Continental European Approach to Dealing with the Law*, 15 *HOLDSWORTH L. REV.* 217 (1991-1992).

construction, the Michigan district court judge in *Knight Capital* unfortunately proceeded to set forth U.S. principles of statutory construction for understanding this German statute.<sup>175</sup> U.S. principles are by comparison few in number and so unsystematic that judges who are regularly tasked with interpreting statutes, such as those on the D.C. Circuit court, have been known to state as a difficulty of their judicial functions a dearth of sufficient legislative direction for statutory interpretation.<sup>176</sup> The present lack of comparative law education and training on the bench makes it a hit or miss event as to how well U.S. judges are able to analyze when they do undertake a Rule 44.1 examination of foreign law.

Court opinions show that U.S. judges generally undertake efforts to understand the foreign law that parties argue in discovery cases because they must, sometimes while denying that they are doing so, and sometimes seemingly in spite of themselves. In a telling statement that reflects the unfulfilled hopes of Rule 44.1's drafters concerning its ability to effect change in judicial attitudes, as well as the relentlessness with which today's modern judge confronts the undeniable need to engage with foreign law, one court said: "[a]lthough the Court is reluctant to interpret Swiss law, the Court finds the [Swiss] expert's reading accurate."<sup>177</sup> Judicial engagement with foreign law on discovery generally, although not always, is at a deeper level than in *forum non conveniens* issues, despite the landmark U.S. Supreme Court discovery case where the concurring and dissenting justices expressed doubts about the U.S. judge's ability to do so.<sup>178</sup>

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175. *Knight Cap. Partners Corp.*, 290 F. Supp. 3d at 687–88.

176. Judge Brett M. Kavanaugh, Remarks at the Opening Session of the American Law Institute 90th Annual Meeting (May 30, 2013) (illustrating the central point of then-D.C. Circuit Judge Kavanaugh's address to the American Law Institute on May 30, 2013).

177. *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 333 (N.D. Tex. 2011).

178. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 552–54 (1987) (making a paradoxical point in the concurring and dissenting opinion is an extremely successful judicial engagement with French and civilian law despite an assertion to the contrary). See *Sec. & Exch. Comm'n*, at 329.

B. THE EUROPEAN UNION'S 2018 GENERAL DATA  
PROTECTION REGULATION<sup>179</sup>

Nothing epitomizes the de-territorialization of modern law as much as the movement of data, as demonstrated by the cloud issues raised but ultimately not resolved by the Supreme Court in *United States v. Microsoft Corp.*<sup>180</sup> Kerr is among those who have questioned whether there is territory at all in such cases,<sup>181</sup> expressing the view that “the very idea of online data being located in a particular physical ‘place’ is becoming rapidly outdated[,]”<sup>182</sup> an assertion Judge Lynch quoted in his Second Circuit concurring opinion in *Microsoft*.<sup>183</sup>

The EU's General Data Protection Regulation (“GDPR”) concerns such issues since it regulates modern data transmission. It took effect in 2018.<sup>184</sup> Its subject overlaps with a profound part of civilian legal orders' general objection to the U.S. discovery system: a different philosophy of privacy that is deemed unacceptably intrusive to the civilian world.<sup>185</sup> As a regulation, it applies in each EU Member State.<sup>186</sup> In terms of discovery and foreign law, U.S. courts reason within the

179. See generally Regulation 2016/679 of the European Parliament and of the Council of 27 April, 2016 on the Protection of Natural Persons and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119/1) [hereinafter GDPR].

180. See generally *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (demonstrating issues associated with applying domestic law to data held by multinational companies).

181. See Vivian Grosswald Curran, *U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis*, 51 AKRON L. REV. 857, 884 (2018).

182. Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 408 (2014).

183. *In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 229 (2d Cir. 2016) (Lynch, J., concurring), *vacated and remanded*, *Microsoft Corp.*, 138 S. Ct. at 1188.

184. Yolande D'Mello, *How Did We Get Here? A Brief History of the GDPR*, AUTHORITY (May 3, 2018), <https://authority.com/technology/analytics/how-did-we-get-here-a-brief-history-of-the-gdpr/> (giving a timeline of the GDPR).

185. See Nathalie Meyer-Fabre, *L'obtention des preuves à l'étranger, Travaux du comité français de droit international privé*, 16 PÉDONE 119, 200 (2005) (Fr.) (contrasting the U.S.' approach to information gathering with France's protective stance as reflecting two diametrically opposed philosophies).

186. *Regulations, Directives and Other Acts*, EUROPA, [https://europa.eu/european-union/law/legal-acts\\_en](https://europa.eu/european-union/law/legal-acts_en) (last visited July 27, 2020) (providing a schematic overview of EU institutions, including the binding nature of regulations within all member states, see Regulations, Directives and other acts).

framework of traditional standards of U.S. discovery for transnational cases, such as those surrounding a foreign defendant's ability to assert with success a foreign blocking statute's penalties against its nationals as an argument to be relieved from a U.S. judge's Federal Civil Procedure Rule 26 discovery order.<sup>187</sup> The GDPR has been described as reversing the traditional issue that has occupied U.S. courts by posing the question of the extraterritoriality of the European regulation, as opposed to the extraterritorial application of U.S. discovery law to other countries.<sup>188</sup> The GDPR does contain clear extraterritorial language within it,<sup>189</sup> but the U.S. judge considers the GDPR as similar to the standard blocking statute inasmuch as both, from the judge's perspective, represent a potential extraterritorial infringement on the jurisdiction of the U.S. court, just as, in both cases, the European entity, nation or EU, considers the U.S. discovery order to be an extraterritorial infringement on *its* sovereignty.<sup>190</sup>

The GDPR does represent a notable difference from the traditional foreign blocking statute, however, in that for the first time the party objecting to discovery may as likely be a U.S. multinational entity as a foreign-based one, due to the law's focus on the nationality of the victim, not the defendant.<sup>191</sup> It remains to be seen whether the prospect of U.S. companies being subject to onerous penalties will affect the outcome of transnational discovery cases applying the GDPR.<sup>192</sup> In a case involving a foreign applicant in a Section 1782 case<sup>193</sup> — the

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187. See discussion *infra* Subsection B.

188. Corby F. Burger, Note, *Domesticating Comity: Territorial U.S. Discovery in Violation of Foreign Privacy Laws*, 105 CORNELL L. REV. 549, 561 n.75 (2020).

189. See GDPR, *supra* note 179 at 32–33; *Guidelines 3/2018 on the Territorial Scope of the GDPR* (Article 3) (Nov. 12, 2019), [https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices\\_en..](https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices_en..)

190. See *infra* Subsection C1.

191. *Corel Software, L.L.C. v. Microsoft Corp.*, No. 2:15-cv-00528-JNP-PMW, 2018 WL 4855268 (D. Utah Oct. 5, 2018) (illustrating such a case, but the court opinion did not address the issue head on); see Lucie Cluzel Métayer & Emilie Debaets, *Le droit de la protection des données personnelles: la loi du 20 juin 2018*, 6 RFDA 1101,1103 (2018) (demonstrating the GDPR is also seen as introducing a paradigmatic change into French law).

192. GDPR, *supra* note 179, at 83 (dealing with severer infringements, “Infringements . . . shall . . . be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher”).

193. See *infra* Section VII (regarding how 28 U.S.C. § 1782 has separate

subject of the next Section, which can, and in this case did, involve U.S. court discovery assistance to a private party in foreign litigation — a U.S. court granted the foreign party all of the discovery it requested. However, it only did so to the extent that this did not violate the GDPR, or, alternatively, with that party's obligation to remunerate its opponent for any fines that might be imposed on it for violating the GDPR in order to comply with the U.S. court's discovery order.<sup>194</sup> This case may illuminate the U.S. federal bench's tendency to honor the GDPR more completely where both litigants are foreign and the trial will occur abroad.<sup>195</sup>

The GDPR is a far strengthened version of a previous data privacy law that was deemed insufficiently protective of its European citizens' privacy.<sup>196</sup> In keeping with other blocking statutes across Continental Europe and with general European objections to U.S. discovery laws, the GDPR makes clear how deep the European Union concern for privacy is, and also how differently it is conceived in Europe and the United States. Civilian revulsion at U.S. discovery has come from dual origins that are intermingled in the wish to rebel against submission to it: U.S. discovery's disregard for privacy rights as understood in Europe and its turning unquestioned aspects of the civil-law legal order on its head. In France, for example, the legal system forbids requiring a party to produce a document unfavorable to itself.<sup>197</sup> It may be a commonplace to say that a nation's laws are tied to its society and history, but it is also a truth that sheds

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standards from Rule 26 discovery cases).

194. *In re Hansainvest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243, 252 (S.D.N.Y. 2018).

195. *See Morgan Art Found. Ltd. v. McKenzie*, No. 18-mc-310 (RJS) 2019 WL 2725625, at \*4 (S.D.N.Y. July 1, 2019) (referring to discovery, but at a stage in the litigation before discovery requests had been made); *see also* *Pearlstone v. Blackberry Ltd.*, 332 F.R.D. 117, 122 (S.D.N.Y. 2019) (denying plaintiff's motion to compel defendant to reveal a person's private home address where "Defendants have represented that, under the European Union's General Data Protection Regulation, they are unable to disclose his address without his consent, which they have not received[,] and not analyzing the issue in terms of explaining its weighing of the *Aérospatiale* factors).

196. *See generally* Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (enacting the Data Protection Directive).

197. *See Omar Attia, Secret des Affaires et Procédure de Discovery: Quelle Situation Juridique pour les Entreprises Françaises*, VILLAGE DE LA JUSTICE (Feb. 6, 2019), <https://www.village-justice.com/articles/directive-sur-secret-des-affaires-procedure-discovery-issue-des-etats-unis,30618.html>.

light on why it is insufficient for a U.S. judge to consider that a foreign law is comprehensible once the judge has read an English translation of its text.<sup>198</sup>

The European Union was founded in the wake of the Second World War among countries whose populations had been terrorized by the total invasiveness of private life by the Nazis, whose massive gathering of information about individuals was used to enable deportations and annihilation throughout occupied Europe as well as Germany.<sup>199</sup> Throughout the Nazi years in Germany, citizens were spied on by trusted party members in apartment buildings and their places of work.<sup>200</sup> Not long after the end of the USSR, the Stasi (East Germany's secret police)<sup>201</sup> and the KGB arose within the newer members of the EU. What may seem like an obsessive protection of privacy—including the “right to be forgotten,” often the subject of jokes in the United States—is explained in terms of the past in innumerable places on European business sites.<sup>202</sup> In an era of

198. This would be an incomplete reading of the Seventh Circuit's recommendation, but the emphasis it has put on simply using translated foreign laws risks misleading the reader, as Judge Woods argued in her concurring opinion in *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 638–39 (7th Cir. 2010) (Woods, J., concurring).

199. See *World War II in Europe*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/world-war-ii-in-europe> (last visited on Feb. 17, 2021); *Id.*, *Introduction to the Holocaust*.

200. Patrick Bergemann, *Nazi Germany*, in JUDGE THY NEIGHBOR: DENUNCIATIONS IN THE SPANISH INQUISITION, ROMANOV RUSSIA, AND NAZI GERMANY 125–64 (2019). See generally JKL PUBLIKATIONEN, TÄGLICH KRIEG: DEUTSCHLAND 1939-1945: 41 GESCHICHTEN UND BERICHTEN VON ZEITZEUGEN [DAILY WAR: GERMANY 1939-1945: 41 STORIES AND REPORTS BY CONTEMPORARY WITNESSES] (2000), for an excellent source of information about daily life under the Nazis, a slice of life series spanning various social, ethnic and political strata, written by those who lived through the period of 1933 through 1945 in Germany.

201. Stasi is the German acronym for the *Ministerium für Staatssicherheit* (Ministry for State Security) or *Staatssicherheitsdienst* (State Security Service), Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 104 (2001).

202. See generally John W. Dowdell, *An American Right to Be Forgotten*, 52 TULSA L. REV. 311 (2017) (explaining the concept of the “right to be forgotten”); see also James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (detailing Continental Europe and the United States' attitudes towards privacy and their prevailing concerns for dignity and honor as well as for liberty, respectively); *Germany: Land of Data Protection and Security – But Why?*, DOT MAG. (Feb. 2017), <https://www.dotmagazine.online/issues/security/germany-land-of-data-protection-and-security-but-why..>



ever-increasing data collection in the United States, one might do well to consider the past state abuses of collected data about European citizenry that inspired Europe's GDPR as a cautionary tale.<sup>203</sup> For the GDPR, data protection is one of the EU citizen's fundamental rights.<sup>204</sup>

Europe's past also explains another aspect of the regulation that causes the wide breadth of possibility for violating it: the GDPR's focus is so overwhelmingly concentrated on the rights of its citizenry to privacy that its reach is immeasurably vast. Thus, it encompasses any company which does business with a citizen of any EU member state;<sup>205</sup> and anyone who either "processes"<sup>206</sup> or "controls" data;<sup>207</sup> and it insists on EU citizens' need to consent to having their data collected;<sup>208</sup> and on their right to withdraw such consent at any time.<sup>209</sup>

Existing case law applying the GDPR has shown U.S. courts' reasoning under the legal standards set in place for determining whether to allow discovery under the Federal Rules of Civil Procedure, which make it impossible for judges to do an effective job without understanding relevant foreign laws and undertaking the comparative legal analysis needed to reach such an understanding. The next section analyzes GDPR case law as of this writing, and hypothesizes how the courts may develop their thinking in the future when GDPR enforcement action (or inaction) against violations due to compliance with U.S.

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203. EU privacy law follows the civilian pattern of an overarching, codified set of rules. A critique of U.S. privacy law focuses on its common-law aspects without analyzing them as such: that it is driven by laws that respond to situational needs or problems of society in a detailed manner, rather than through the formulation, as in Europe, of a general overview of principles, even though this may preserve flexibility. *See generally* Braidyn Fairclough, *Private Piracy: The Shortcomings of the United States' Data Privacy Regime and How to Fix It*, 42 J. CORP. L. 461 (2016).

204. GDPR, *supra* note 179, art. 1(2). *See also* Michèle Fink, *Cobwebs of Control: Why Data Subjects Should Not Be Data Controllers under the GDPR*, n.99, 100, 101 and surrounding text (Germany's goal in data protection was protection of human dignity, France's was liberty, and Austria's "the right to family life") (manuscript in file with author).

205. *Id.* at art. 3(2).

206. *Id.* at art. 4(8) (defining a processor as any "natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller").

207. *Id.* at art. 4(7) (defining a controller as any "natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data . . .").

208. *Id.* at art. 7.

209. *Id.*

discovery orders can be proffered as evidence.

C. THE GDPR AND OTHER U.S. COURT CONFRONTATIONS  
WITH FOREIGN LAW IN DISCOVERY CASES

1. G.D.P.R. Transnational Discovery Cases

In keeping with U.S. courts' principal way of dealing with foreign law, by avoiding it as best they can, one such "foreign" law has been and continues to be the Hague Evidence Convention,<sup>210</sup> negotiated and ratified by the United States, which was intended to facilitate the taking of evidence located abroad.<sup>211</sup> Since the U.S. Supreme Court decided in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa* that the treaty was only a potential alternative means rather than the exclusive or even favored means for obtaining evidence in transnational cases,<sup>212</sup> discovery through the Federal Rules of Civil Procedure has been the predominant method of getting discovery evidence in such cases.<sup>213</sup> By the time the *Restatement (Fourth) of Foreign Relations of the United States* was drafted, this situation was so well established that the Restatement refers to the Hague Convention only as an option available to a judge who rejects the federal rules:

A court in the United States seeking the production of evidence located outside the United States in a civil or commercial matter may use the mechanisms established by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters . . . . as an alternative to the authority to order the production of evidence under domestic law.<sup>214</sup>

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210. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Oct. 7, 1972, 23 U.S.T. 2555, 847 U.N.T.S. 231.

211. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987).

212. *Id.* at 538.

213. This was predicted at the time of the decision by Justices Blackmun, Brennan, Marshall and O'Connor in their partially concurring and partially dissenting opinion to the case, *id.* at 548 (urging that the Hague Convention be the first, preferred although not exclusive, method, and suggesting that the Court's decision would lead to "the somewhat unfamiliar procedures of the Convention [being] invoked infrequently" in the future).

214. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 426 cmt.. 6

By applying the Federal Rules, U.S. judges have been able to prolong their unfamiliarity with the workings of the treaty as they continue to apply the federal rules which they know well and with which they are comfortable. Given that the Hague Convention does not provide for the broad discovery considered fundamental to parties' rights in the U.S. legal system, and which many U.S. judges evoke, the Hague Convention seems the less preferable choice to U.S. judges.<sup>215</sup> But to European signatories, the Hague Convention is the exclusive means they recognize as legitimate once a state has become a signatory; as such, they consider the United States' ratification of the treaty to signify its undertaking the obligation to use it as the exclusive method of obtaining evidence in transnational cases.<sup>216</sup>

Failure to use the Hague Convention thus became another cause of indignation at U.S. discovery after the treaty's entry into force. This was foreseen by the four justices who partially concurred and partially dissented in *Aérospatiale*: "Some might well regard the Court's decision in this case as an affront to the nations that have joined the United States in ratifying the Hague Convention on the Taking of Evidence . . .".<sup>217</sup> In France, Parliament passed a law in 1980 (its amended blocking statute), specifically making the taking of depositions or other evidence-gathering by foreign lawyers in France a criminal offense if conducted outside the scope of the Hague Evidence Convention.<sup>218</sup> When a German law expert expressed the

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(AM. L. INST. 2018).

215. See generally Stephen F. Black, *United States Transnational Discovery: The Rise and Fall of the Hague Convention*, 40 INT'L & COMPAR. L.Q. 901 (1991) (summarizing the combined aftermath of the Hague Convention and *Aérospatiale* case, resulting in a preference by U.S. courts to defer to domestic rules rather than the international treaty).

216. See generally Vivian Grosswald Curran, *U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis*, 51 AKRON L. REV. 857, 860–61 (2017), for the author's discussion of this issue.

217. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 547–48 (1987) (Blackmun, J., concurring in part and dissenting in part) ("Some might well regard the Court's decision in this case as an affront to the nations that have joined the United States in ratifying the Hague Convention on the Taking of Evidence . . .").

218. Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères (1) [relating to the communication of documents and information of an economic, commercial or technical nature to foreign natural or legal persons (1)] Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 17, 1980, p. 1799. One French scholar, former high court justice and practicing transactional lawyer, Noëlle

German legal position of the Hague Convention as having exclusive legitimacy in transnational discovery in his brief on German law in *Knight Capital*, the U.S. judge responded that the German expert was simply wrong: “[T]he expert’s opinion that discovery is permissible only when conducted according to the Hague Convention is flatly contrary to the Supreme Court’s decision in the *Aerospatiale* case . . . ,”<sup>219</sup> with no recognition that the German expert was asserting the official legal position of Germany and of most civilian signatory nations.<sup>220</sup>

Bruno A. Ristau, a transnational litigation lawyer, recounts how he explained to a U.S. district court judge that he needed to conduct depositions in France under the Hague Convention rather than under U.S. federal rules lest he otherwise be put in jail in France.<sup>221</sup> The U.S. judge in the discovery dispute observed that it was silly for the French to have such a law forbidding federal rules discovery in France, but that he would take the Hague Convention request under advisement.<sup>222</sup> At the time of the writing, however, Ristau had not received the court’s authorization to proceed with the Hague Convention rather than the Federal Rules of Civil Procedure.<sup>223</sup> In a 2019 GDPR case,<sup>224</sup>

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Lenoir, objects to the law’s being called a blocking statute, arguing that the statute does not block the transmission of evidence, but, rather, channels it, see Noëlle Lenoir, *Le Rôle du Commissaire dans le Cadre de la Loi de Blocage*, 37 LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES 593 (2020); Noëlle Lenoir et al., *Le Commissaire, Artisan de L’entraide Civile ou Commerciale Internationale et du Respect de la Loi Preuves Improprement Dite “Loi de Blocage,”* 48 LA SEMAINE DU DROIT 2115 (2020).

219. *Knight Capital Partners Corp. v. Henkel AG & Co.*, 290 F. Supp. 3d 681, 689 (E.D. Mich. 2017).

220. See TIMOTHY P. HARKNESS ET AL., *DISCOVERY IN INTERNATIONAL CIVIL LITIGATION: A GUIDE FOR JUDGES* (2015). Harkness and his co-authors have put what is these states’ official positions as an assumption: “[M]any contracting states operate on the assumption that the Hague Convention is the only means for securing [extraterritorial] discovery . . . ,” *id.* at 11.

221. Bruno A. Ristau, *Overview of International Judicial Assistance*, 18 INT’L. LAW. 521, 531 (1984).

222. *Id.*

223. *Id.* Noëlle Lenoir expresses optimism which seems to be based on her experience in the *Behrens v. Arconic, Inc.* case, that a heightened interest in applying the Hague Convention is detectible in the United States, Lenoir, *supra* note 218. The anomaly of that case in my own view, however, was that the judge knew her and trusted her ability, a rare situation with a foreign-law expert. After initially appointing her to be the court’s expert on the French blocking statute, he followed her advice to apply the Hague Convention and, with the parties’ agreement, she became Commissioner under the Hague Convention to deal with evidentiary issues. See *Behrens v. Arconic, Inc.*, No. CV 19-2664, 2020 WL 5542387, at \*9 (E.D. Pa. Sept. 16, 2020).

224. *Finjan, Inc. v. Zscaler, Inc.*, No. CV 17-06946, 2019 WL 618554 (N.D.

a California district court ruled against the defendant which had argued that it would be violating the GDPR if it complied with federal rule discovery.<sup>225</sup> The court's analysis started with the principles laid down by the Supreme Court in *Aéropostale*,<sup>226</sup> and of the subsequent, nationally influential Ninth Circuit *Richmark*<sup>227</sup> case. The court did not find against the defendant by ruling that plaintiff's right to discovery prevailed over the mandates of the GDPR. Rather, it held that defendant had failed to prove that the GDPR in fact prohibited it from producing the requested emails in unredacted form, a conclusion that has been critiqued by scholarship;<sup>228</sup> and that defendant had also failed to prove that the GDPR's penalties would be enforced even if defendant were found to have violated its provisions.<sup>229</sup> Since the GDPR is so new, there would have been no history available to defendant of entities being subjected to the regulation's penalties for complying with U.S. discovery. It remains to be seen what U.S. courts will do if such penalties are imposed.

In a RICO case against a resident of Poland with U.S. citizenship, the District Court for the Eastern District of Pennsylvania found that all of the *Aéropostale* factors militated in favor of ordering the defendant to produce the requested documents, including the United States' interest.<sup>230</sup> As in

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Cal. Feb. 14, 2019).

225. *Id.* at \*3.

226. *Id.* at \*1; *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987). The criteria the Supreme Court set forth in *Aéropostale*, widely applied since then, are consistent with Restatements (Third) and (Fourth) of the Foreign Relations of the United States standards, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442(1)(c) (AM. LAW INST. 1987); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 426 cmt. a (AM. LAW INST. 2018) (instructing courts to assess the importance of the requested documents to the litigation; the specificity of the requests; the location of the documents (in the United States or abroad, a factor of ever-less significance in the era of e-discovery); if evidence located abroad originated in the United States; if deferring to a blocking statute would harm U.S. interests or if the U.S. court's requiring discovery would contravene "important interests" of the foreign state. .

227. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992).

228. David Zwier, *Aéropostale's Comity Analysis Adapted for Discovery of GDPR-Protected Materials* 29 (2020) (unpublished manuscript) (on file with author) (criticizing the court's analysis of the GDPR as not prohibiting the unredacted emails).

229. *Id.* at 28.

230. *Giorgi Glob. Holdings, Inc. v. Smulski*, No. CV 17-4416, 2020 WL 2571177, at \*1-3 (E.D. Pa. May 21, 2020).

*Finjan*, the court found that defendant had not established that the discovery sought would violate the GDPR.<sup>231</sup> On the other hand, in another case, in response to defendant's prediction at the pleading stage that plaintiff would in the future try to evade discovery by invoking blocking statutes, the Southern District of New York stated its intention with respect to discovery as follows:

Plaintiff has merely indicated that it is subject to different privacy laws in different jurisdictions . . . Plaintiff lodg[ed] general objection to discovery requests "to the extent they request any documents that are protected by law, statute, or regulation, including applicable privacy and data protection laws of Switzerland, England, and/or the European Union, such as the EU General Data Protection Regulation, the Swiss Data Protection Act, the Swiss Federal Act on Data Protection, and the Swiss Criminal Code. [Plaintiff] will produce any such responsive documents only in accordance with, and upon and after complying with, all applicable laws, statutes, and regulations." *The Court shall not penalize Plaintiff for complying with the laws of the jurisdictions in which it operates.*<sup>232</sup>

To date, GDPR cases do not yet have the often elaborate expert reports and even foreign governmental explanations of foreign law that characterize many transnational discovery cases concerning more established foreign blocking laws.<sup>233</sup>

Where a U.S. court did engage on its own with the substance of the GDPR, in *D'Amico Dry D.A.C. v. Nikka Finance, Inc.*,<sup>234</sup> the court disagreed with defendant's argument that discovery by use of a videotaped deposition required his consent under the

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231. *Id.* at \*2.

232. *Morgan Art Found. Ltd v. McKenzie*, No. CV 18-4438, 2019 WL 2725625, at \*4 (S.D.N.Y. July 1, 2019) (parentheses omitted) (emphasis added). One wonders if the court would have altered its pronouncement had the plaintiff referred to the French blocking statute. The Swiss laws have a history of faring better with U.S. courts for many years, starting with *Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958).

233. Research for this article included every federal case mentioning the GDPR as of July 29, 2020.

234. *d'Amico Dry d.a.c. v. Nikka Fin., Inc.*, No. CV 18-0284, 2018 WL 5116094 (S.D. Ala. Oct. 19, 2018).

GDPR, which he had withheld.<sup>235</sup> The court quoted the relevant language of the GDPR to conclude that it only required consent where the videotaped party was unaware of being taped, a somewhat stretched if not mysterious interpretation of the language the court quoted.<sup>236</sup> The issue of the GDPR's substantive content then became moot once the judge decided the regulation was inapplicable. If, in future cases, parties objecting to discovery proffer EU interpretations of the GDPR which contradict the *D'Amico* court's understanding of this provision, especially if they are in the context of GDPR enforcement actions, U.S. courts will need to grapple again with the issue of unconsented-to videotaped depositions of EU citizens.

Another case involved a Special Master's findings, purportedly about the GDPR, but in relating those findings, the District Court of New Jersey focused on the *Restatement* (or *Aéropostale*) and *Richmark* factors.<sup>237</sup> As in prior GDPR discovery cases, the court noted that “[t]he Special Master also found, as an additional consideration to the fifth factor, that Defendants failed to produce evidence that producing the information at issue here would lead to an enforcement action against Daimler by an EU data protection supervisory authority for breach of the GDPR. *Indeed, whether an EU authority aggressively polices this type of data production in the context of pre-trial discovery in U.S. litigation remains to be seen.*”<sup>238</sup> The ubiquity of the GDPR's reach combined with the severity of its penalties may cause U.S. courts to proceed with more caution than they have been in the two years since the regulation was adopted if the GDPR in fact enforces its provisions for violators which comply with U.S. discovery orders, and if the importance of privacy in the EU can be successfully analogized to that of privacy law in precedents interpreting Swiss bank privacy laws.<sup>239</sup>

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235. *Id.* at \*4.

236. *Id.*

237. *In re Mercedes-Benz Emissions Litig.*, No. CV 16-881, 2020 WL 487288, at \*6–8 (D.N.J. Jan. 30, 2020).

238. *Id.* at \*8 n.5 (emphasis added). U.S. courts in non-discovery cases may also be unwilling to honor the GDPR where it would contravene the First Amendment, *see In re DMCA Subpoena to Reddit, Inc.*, 383 F. Supp. 3d 900 (N.D. Cal. 2019).

239. *See supra* notes 231–32 and accompanying text.

## 2. Non-GDPR Transnational Discovery Cases

Foreign nations' track record of enforcing their blocking statutes has been key to U.S. courts' interest-balancing analysis under *Aérospatiale*.<sup>240</sup> This inquiry has been part of U.S. courts' foray into the law of other countries in transnational litigation. They have had to reach conclusions based on party evidence, about the blocking laws and foreign legal measures to enforce those statutes. *Aérospatiale* in its partial concurrence and partial dissent illustrates the paradox of at least implicitly recommending the avoidance of foreign law analysis while itself entering into a detailed (and admirable) discussion of it. The case involved the French blocking statute.<sup>241</sup> The Supreme Court majority relied on the lower court's assessment in that case that France did not enforce its law against violators.<sup>242</sup> Under Rule 44.1, technically, U.S. court decisions about foreign law do not have *stare decisis* effect,<sup>243</sup> but the U.S. judicial system is inseparable from *stare decisis*. Consequently, after *Aérospatiale*, courts have cited to the Supreme Court and its progeny for the conclusion that France does not enforce its blocking statute.<sup>244</sup> This was in fact accurate for many years, but even after France had started to enforce it, albeit not often or systematically,<sup>245</sup> some courts refrained from going beyond established U.S. precedents concerning the French law, citing to precedents predating French application of its blocking statute to the effect that it was not enforced, and never had been intended to be enforced.<sup>246</sup>

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240. See *supra* note 167, for the *Aérospatiale* factors.

241. Loi 80-538 du 16 juillet 1980 relative à la communication de documents et renseignements d'ordre économique, commercial ou technique à des personnes physiques ou morales étrangères, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 17, 1980, p. 1799.

242. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 527 n.9 (1987) (“[T]he legislative history [of the blocking law] shows only that the Law was adopted to protect French interests from abusive foreign discovery procedures and excessive assertions of extraterritorial jurisdiction.”) (internal quotation marks and citation omitted).

243. See Sprankling & Lanyi, *supra* note 3, at 63 (critiquing this situation for the confusion it can cause in terms of inconsistent findings and the need for repeated proof, without, however, reference to the many cases in which courts do in fact rely on prior case law rulings despite the bar on precedential effect).

244. *E.g.*, *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 225 (E.D.N.Y. 2007).

245. See Curran, *supra* note 63, at 864 n.48.

246. See, *e.g.*, *Republic Techs., L.L.C. v. BBK Tobacco & Foods, LLP*, No. 16



In 2016, an omnibus law was enacted in France, known as *la loi Sapin II*.<sup>247</sup> It contains provisions to strengthen France's blocking statute, both in terms of penalties and enforcement mechanism.<sup>248</sup> In 2019, at the request of then Prime Minister Philippe, Raphaël Gauvain, a member of France's Parliament, issued a report urging for stronger enforcement and penalties under its blocking law.<sup>249</sup> The report is unabashedly a statement of the need for France to fight U.S. judicial extraterritorial economic harm done to France,<sup>250</sup> titled *Reestablishing France and Europe's Sovereignty and Protecting Our Businesses from Extraterritorial Laws and Acts*.<sup>251</sup> Ironically, the aim of protecting foreign national businesses from U.S. discovery is one of the very aspects attributed to French blocking statutes by U.S. courts that has convinced them *not* to allow French laws to stymie U.S. discovery under the Federal Rules.<sup>252</sup> These new developments in France seem poised to launch an era of enforcement of the French blocking law against French companies which comply with U.S. discovery orders in violation of the French statute. Since foreign enforcement is only one of the factors U.S. federal courts consider in their analyses, however, it is far from clear if this will alter U.S. discovery decisions, particularly in light of U.S. courts' reliance on precedential findings with respect to France's blocking

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C 3401, 2017 WL 4287205, at \*4 (N.D. Ill. Sept. 27, 2017).

247. Loi 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique [Law 2016-1691 of December 9, 2016 Relating to the Transparency, the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016.

248. See Décret 2016-66 du 29 janvier 2016 instituant un commissaire à l'information stratégique et à la sécurité économiques et portant création d'un service à compétence nationale dénommé « service de l'information stratégique et de la sécurité économiques » [Law 2016-99 of January 29, 2016 Establishing a Commissioner for Strategic Information and Economic Security and Creating a Service with National Competence Called "Strategic Information and Economic Security Service"], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 30, 2016.

249. See RAPHAËL GAUVAIN, RÉTABLIR LA SOUVERAINETÉ DE LA FRANCE ET DE L'EUROPE ET PROTÉGER NOS ENTREPRISES DES LOIS ET MESURES À PORTÉE EXTRATERRITORIALE (2019).

250. See *id.* at 1.

251. *Id.*

252. See, e.g., *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 508 (N.D. Ill. 1984) ("The Blocking Statute obviously is a manifestation of French displeasure with American pre-trial discovery procedures . . ."); *Republic Techs., L.L.C. v. BBK Tobacco & Foods, LLP*, No. 16 C 3401, 2017 WL 4287205, at \*4 (N.D. Ill. Sept. 27, 2017).

statute,<sup>253</sup> despite Rule 44.1's theoretical rejection of *stare decisis*.<sup>254</sup>

Where established laws older than the GDPR have been raised and well briefed by parties, U.S. court opinions occasionally analyze foreign law at some length. This was the case in *Graco*, where the court went through several articles of the French blocking statute that it deemed potentially applicable, discussing each.<sup>255</sup> This did not lead it to apply the French statute, however. The court stated its conclusion against application bluntly:

The Blocking Statute is not Graco's [the party requesting discovery] problem, and it is not the court's problem; it is SKM's [the party invoking the French blocking statute] problem. In enacting the Blocking Statute France imposed a serious disability on its nationals. If SKM is unable to comply with the court's order, it runs a real risk of suffering a default judgment or other severe sanctions.<sup>256</sup>

Just as U.S. courts have a tradition of not honoring France's blocking statute, they have a long one of respecting Switzerland's, developed since the 1958 case where the U.S. Supreme Court analyzed and applied the Swiss bank privacy law, reasoning that it was enforceable against the defendant and a matter considered of great public interest to Switzerland.<sup>257</sup> Given the U.S. judge's curtailment of discovery for some blocking statutes, such as Swiss banking privacy law, strict enforcement of the GDPR may trigger a similar response, particularly in light of the susceptibility of U.S. multinationals. It would seem but a small step for the post-Gauvain report and post-*loi Sapin II* French blocking statute to become an analogous beneficiary of such (speculated) new judicial analysis were it not for the Pavlovian sway of *stare decisis*.

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253. See, e.g., *Bodner v. Paribas*, 202 F.R.D. 370, 375 (E.D.N.Y. 2000).

254. See *supra* note 254 and accompanying text.

255. *Graco*, 101 F.R.D. at 508–12.

256. *Id.* at 527.

257. *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 211–12 (1958).

## VI. RULE 44.1 AND SECTION 1782

Section 1782 is a subspecies of discovery in civil litigation.<sup>258</sup> It injects U.S. discovery into the non-common-law world, as it allows U.S. judicial assistance in aid of foreign litigation, and applicants may be foreign, whether individuals, entities or courts.<sup>259</sup> In this sense, it reverses the infusion of civil law into the American courtroom that is Rule 44.1's hallmark as is analyzed in earlier Sections of this article. Foreign litigants in transnational cases are taking note of the signal advantages the U.S. discovery system can provide, with one study noting a quadrupling of Section 1782 requests between 2005 and 2017.<sup>260</sup> As the partial concurrence and dissent pointed out in *Aérospatiale*, the United States is unique in its vast discovery, with civil-law countries having an extremely limited ability of parties to obtain information from adversaries, and even other common-law countries having nothing comparable to the U.S. system.<sup>261</sup>

Although the idea behind Section 1782 was to provide U.S. judicial assistance abroad, and it has been warmly welcomed by foreign litigants in private foreign lawsuits who are able to obtain information from their opponents beyond anything comparable in the civil-law systems which have no discovery,<sup>262</sup> Section 1782 and U.S. discovery in general often are characterized by serious commentators as part of a U.S. hegemonic drive to force its system on Europe to the detriment of European economic interests.<sup>263</sup> U.S. courts tend to see

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258. 28 U.S.C. § 1782.

259. *See id.*

260. Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089, 2109 (2020).

261. *See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 557–60 (1958).

262. The most a litigant in a civil-law system can obtain from its opponent is a document it knows to be in existence, and only after a successful application to the judge, not just explaining why the document is needed, but also describing the document itself with specificity. Moreover, while all members of the civil-law trial are theoretically supposed to be members of a supportive search for truth in the inquisitorial system of law, there is no obligation in civil-law countries for parties to assist their adversaries, which explains why no party can be asked to produce a document harmful to itself, *Attia*, *supra* note 197.

263. *See* Nathalie Meyer-Fabre, *L'obtention des preuves à l'étranger*, in 16 DROIT INTERNATIONAL PRIVÉ: TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 199, 205 (2005) (discussing hegemonic tendencies of the United States); *id.* at 211 (arguing that U.S. imposition of federal rules of

Section 1782 as a genuine and generous offering of aid, with one court commenting that “Congress purposefully engineered section 1782 as a one-way street [to] grant[] wide assistance to others, but demand[] nothing in return.”<sup>264</sup> It is noteworthy that in 2005 the French Committee on Private International Law began its report on obtaining evidence abroad by referring to 28 U.S.C. § 1782 as raising a “jurisdictional conflict in the public international law sense.”<sup>265</sup>

Unlike Rule 44.1, Section 1782 both immerses U.S. courts in the totally foreign context of usually dual foreign parties and always foreign tribunals and a foreign legal proceeding, while simultaneously operating under the guidance of a U.S. Supreme Court that counsels avoidance of engaging with foreign and comparative law in the sole Supreme Court precedent to have decided a Section 1782 controversy, *Intel*.<sup>266</sup> The Court in *Intel* decided in the affirmative the issue of whether the European Commission (EC) had operated as a “tribunal” within the meaning of Section 1782, despite its being the EU’s executive branch, and despite the EC’s arguing that its function was not that of a tribunal.<sup>267</sup> In reaching this decision, the Court explored the structure of the EU legal system and how the EC should be perceived from a comparative legal perspective.<sup>268</sup> Yet the Court also stated that Section 1782 “does not direct United States courts to engage in comparative analysis . . . .”<sup>269</sup> The Court’s reasoning, echoing that of Justice Ginsburg’s former colleague at Columbia Law School, Hans Smit,<sup>270</sup> was to the effect that Section 1782 drafters’ idea was that “[c]omparisons . . . can be fraught with danger.”<sup>271</sup> In a footnote, Justice Ginsburg further observed that “[the] comparison of systems is slippery business.”<sup>272</sup> The contrast between U.S. courts’

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discovery in furtherance of promoting U.S. legal and economic interests come at the cost of French ones); *see also* Wang, *supra* note 260, at 2096 (describing the export of American discovery as “legal imperialism” and “officious intermeddl[ing]”).

264. *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1097 (2d Cir. 1995) (internal quotation marks omitted).

265. *Meyer-Fabre*, *supra* note 263, at 199.

266. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 243 (2004).

267. *Id.* at 243–44.

268. *Id.* at 250.

269. *Id.* at 263.

270. *See infra* note 285 and accompanying text; *Intel Corp.*, 542 U.S. at 263.

271. *Intel Corp.*, 542 U.S. at 263.

272. *Id.* at 263 n.15.

engaging in the comparative law analysis that engaging with foreign law signifies, and that modern transnational litigation increasingly thrusts upon them, and the reluctance to do so in light of its pitfalls and in light of precedential direction to avoid it, typifies modern caselaw.

Justice Breyer's dissent in *Intel* partially stemmed from the majority's denial of foreign law's significance, including the majority's discounting the EC's self-understanding of the nature of its role within its own legal system.<sup>273</sup> Justice Breyer's interest in international comity has been a driving force throughout his jurisprudence and is also reflected in his book, *The Court and the World: The New Global Realities*.<sup>274</sup> Deference to Europe's self-understanding is in keeping with the global governance aspiration Wang has expressed as a Section 1782 reform goal,<sup>275</sup> and with the French International Private Law Committee's criticism of both *Aérospatiale* and Section 1782 as undermining the vital international legal cooperation the Hague Evidence Convention embodies.<sup>276</sup> Justice Ginsburg's *Intel* approach is more protective of the U.S. court's prerogative to make its own assessment under Rule 44.1 of all foreign law, as the Court reiterated in 2018 in *Animal Science Products*<sup>277</sup> in another opinion she wrote.<sup>278</sup> That decision — a unanimous one which Justice Breyer joined —<sup>279</sup> limited the U.S. judge's deference to

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273. *Id.* at 271 (Breyer, J., dissenting). See Legrand, *supra* note 49, at 349, for more on the importance of understanding the foreign from within to the extent possible (critiquing Judges Posner and Easterbrook in *Bodum* for failing to try to apprehend “French-law-as-it-is-lived-in-France”); *accord* Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 83 (1998).

274. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 4–5 (Vintage House ed., 2015).

275. *See* Wang, *supra* note 260, at 2155.

276. *See* Meyer-Fabre, *supra* note 263, at 210–11.

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

278. *Id.* at 1869.

279. *Id.* *Animal Science* has been cited by progeny in general for the proposition of giving less deference to foreign governments' views than before, *see, e.g.*, *Petersen Energia Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 208 (2d Cir. 2018); Daniel Farenthold, Note, *Respectful Consideration: Foreign Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. 1597, 1621 (2019). *But see* Kristen E. Eichensehr,

*Supreme Court of the United States—Deference to Foreign Government Filings—Federal Rule of Civil Procedure 44.1—Determining Foreign Law*, 113 AM. J. INT'L L. 116, 119 (2019) On the other hand, Eichensehr has concluded that a . (concluding that a foreign government's filing an amicus brief in and of itself did matter to the Court in *Animal Science* and noting also that which

a foreign government's explanation of its domestic law, especially if there might be "cause for caution" about that government's partisanship.<sup>280</sup>

The current tortured relation of U.S. courts in transnational litigation which analyze foreign law where the procedural context renders this necessary, including *forum non conveniens*, discovery and Section 1782 cases, while simultaneously saddled with precedential instruction to avoid doing so, is a disincentive to judicial education, although many individual judges have asked for assistance from practicing attorneys and others in becoming more adept with foreign law,<sup>281</sup> and although others have shown themselves able to analyze foreign law as adeptly as any scholar or foreign-law expert.<sup>282</sup> The paradox was reflected in Hans Smit's own argument about Section 1782, which I believe may have played a considerable influence on Justice Ginsburg's *Intel* view against U.S. Courts' engaging in comparative law. Professor Smit, originally from the Netherlands, and a long-time professor at Columbia Law School, a comparatist who was involved in the 1964 amended version of the statute,<sup>283</sup> explained that Section 1782's drafters

definitely did not want to have a request for cooperation [under Section 1782] turn into an unduly expensive and time-consuming fight about foreign law. That would be quite contrary to what was sought to be achieved. They also realized that, although civil law countries do not have discovery rules similar to those of common law countries, they often do have quite different procedures for discovering information that could not properly be

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country matters equally). This interpretation is borne out by the Court in *Animal Science* which emphasized that federal courts "should carefully consider a foreign state's views about the meaning of its own laws." *Animal Sci. Prods., Inc.*, 138 S. Ct. at 1873.

280. *Animal Sci. Prods., Inc.*, 138 S. Ct. at 1873.

281. See Miner, *supra* note 1, at 589 (1995); Wilkey, *supra* note 37 at 542-43.

282. In this category I place Judge Friendly. See *infra* notes 287-290 and accompanying text, for the precedential effect his foray into French law created in what to my mind is an illustration of Rule 44.1's independent judicial determination in a case decided only one year after the Rule's adoption, *In re Letters Rogatory Issued by Dir. of Inspection of Gov't of India*, 385 F.2d 1017, 1020 (1967).

283. Section 1782 was originally enacted in 1948 and amended in 1964. See Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 869, 949; Act of Oct. 3, 1964, Pub. L. No. 88-619, §9(a), 78 Stat. 995, 997 (1964).

evaluated without rather broad understanding of the subtleties of the applicable foreign system. It would, they judged, be wholly inappropriate, for an American district court to try to obtain this understanding for the purpose of honoring a simple request for assistance.<sup>284</sup>

Section 1782 is not a matter of “a simple request for assistance,” however, since it involves complex decision-making by U.S. judges that requires them to analyze foreign law, just as the majority in *Intel* engaged in even while cautioning against the practice. Similarly, Smit himself was to explain the fallacy of a U.S. court opinion for failing to apply foreign legal standards to a Section 1782 decision even as he maintained that U.S. district court judges should not need to understand foreign law for such simple a matter as a Section 1782 request.<sup>285</sup> Smit was explaining that the Second Circuit had not applied Section 1782 in accordance with its drafters’ intent when it applied U.S. attorney-client standards to a case involving a Spanish litigant in a Spanish court:

In the *Sarrio*<sup>286</sup> case, [the Second Circuit] did not follow the analysis indicated by Section 1782. The evidence of which production was sought were documents under the control of the bank in Spain and Great Britain . . . [The court’s] analysis focused on whether the evidence was covered by the attorney-client privilege under American law. The appropriate analysis would have focussed on whether the documents that were located in Spain and Great Britain were covered by a privilege extended by Spanish or English law . . .<sup>287</sup>

Section 1782 thus clearly is not a matter of a “simple request for assistance” that allows the U.S. judge to remain impervious to foreign law. The next Section reviews and critiques the recommendations that currently are being made to facilitate judicial access to foreign law and offers my own suggestions.

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284. Hans Smit, *Recent Developments in International Litigation*, 35 S. TEX. L. REV. 215, 235 (1994).

285. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1033 (1965).

286. See generally *Application of Sarrio, S.A.*, 119 F.3d 143 (2d Cir. 1997).

287. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals*, 25 SYRACUSE J. INT’L. L. & COM. 1, 17–18 (1998).

VII. OVERVIEW OF POTENTIAL JUDICIAL ACCESS  
TO FOREIGN LAW

It cannot be sufficiently emphasized that solutions are not independent of individual human capacity and talent. No suggestion is likely to be universally applicable, and still less in a mechanical way. Rule 44.1's ideal of the judge who independently seeks and understands and applies foreign law has not been fulfilled in general, but it has in isolated cases. In a case that was decided one year after Rule 44.1 was adopted, Judge Friendly of the Second Circuit in *In re Letters Rogatory*<sup>288</sup> offered an excellent exposition of French law after studying comparative law scholarly articles. Further, his conclusions about French law took on the typical Pavlovian precedential effect that Miller described,<sup>289</sup> as later caselaw cited to it.<sup>290</sup> Judge Friendly did not shy away from embarking on the examination of a foreign legal system, and the comparative analysis without which understanding a profoundly different systemic order cannot be achieved, as Michaels and Whytock also have argued.<sup>291</sup> Once he had reached a conclusion that enabled him to decide his discovery issue, later judges could rely on his findings about French law. Because of its rarity, it may be as vain to exalt this individual case as it is to reiterate the intention of Rule 44.1's drafters half a century later, since both have remained an ideal rather than a common practice.

The human issue infuses the party expert issue with, as we have seen, the pitfalls of foreign experts as well as American experts on foreign law being detailed in Section III. We also saw that some exceptional party experts who are adept, as was the case in *Films by Jove*,<sup>292</sup> and the Swiss expert academic.<sup>293</sup> In recent years, several other suggestions have become more common, such as court-appointed experts, analyzed earlier,<sup>294</sup> court to court referrals and requests to foreign governments for

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288. *In re Letters Rogatory*, *supra* note 282, at 1020.

289. *See* Miller, *supra* note **Error! Bookmark not defined.**, at 617–18.

290. *E.g.*, *In re Letter of Request from the Gov't of Fr.*, 139 F.R.D. 588, 590 (S.D.N.Y. 1991).

291. *See* Michaels & Whytock, *supra* note 130, at 356–58.

292. *See* *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156, 177, 197 (E.D.N.Y. 2003).

293. *See* *Sec. & Exch. Comm'n v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 333 (N.D. Tex. 2011).

294. *See* Teitz, *supra* note 73, at 1099.



interpretations of foreign law.<sup>295</sup> While such options may work well in individual cases, caution is needed before implementing them, and these suggestions should not be adopted as a panacea or as a replacement for U.S. judicial examination of foreign law.

Court to court certification or direct contact with judges in another country concerning foreign-law issues have been recommended as a way for U.S. judges to obtain information without having to determine it themselves or to rely on party experts.<sup>296</sup> Both Teitz and Hay have pointed to the success of the Memorandum of Understanding between the highest courts of New South Wales and New York, entered into by those courts' chief judges.<sup>297</sup> Where the foreign court is in the civil-law world, however, the issues of communication examined earlier with respect to foreign experts from the civilian world communicating with U.S. common-law judges would be apposite. The judge on each side would understand the other through the prism of each legal system's institutions and vocabulary. In addition, where blocking statutes and other issues touching on national sovereignty and deep-seated views of rights such as privacy are concerned, it cannot be discounted that judges will understand legal issues through national legal concerns and goals. This need not mean that such contacts cannot be useful, but rather that U.S. judges who delegate the foreign-law determinations that Rule 44.1 assigns to them may run the risk of failing to understand all of the ramifications of the answers they receive from abroad. In *Animal Science*, the Supreme Court referred approvingly to two international treaties (to neither of which the United States belongs) which stipulate that where a country obtains an official interpretation of another country's law from the latter country, its effect will not be binding.<sup>298</sup>

For the reasons mentioned above, international judicial dialogue outside the framework of cases at bar is likely to be more productive as part of furthering mutual education and understanding of each other's legal systems, outlooks and concerns. The Hague Conference has been tackling the issue of

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295. *See id.* at 1101–03; *see also* Hay, *supra* note 21, at 223.

296. Teitz, *supra* note 73, at 1106–07.

297. Hay, *supra* note 21, at 223; Teitz, *supra* note 73, at 1102.

298. *Animal Sci. Prods., Inc., v. Hebei Pharm. Welcome Co.*, 138 S. Ct. 1865, 1875 (2018) (referring to the European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147 and the Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, 1439 U.N.T.S. 107).

access to foreign law since 2006.<sup>299</sup> The Conference has reached conclusions and made recommendations, as well as developed *Guiding Principles to be Developed in Considering a Future Instrument*,<sup>300</sup> and instituted transnational judicial seminars<sup>301</sup> and a judicial networks.<sup>302</sup> While the United States has participated in the Conference, it has not been among its most active participants.<sup>303</sup>

The liberality of Rule 44.1 opened the door for U.S. judges who welcomed foreign law into their courtroom. Its drafters recognized that foreign law would become ever more of a presence. As Judge Miner remarked, “[t]hese cases are beginning to form a significant part of the business of the federal courts.”<sup>304</sup> Unfortunately, as he observed, “foreign law has not been welcomed.”<sup>305</sup> There is no easy solution to this problem. For those on the bench with no background in foreign languages and comparative law, an effort to read scholarly articles on the subjects that arise in their courtrooms is needed. This article has emphasized the need for judges to undertake to understand foreign law. It also has tried to demonstrate the importance of their understanding the nature and difficulties of the undertaking.<sup>306</sup> Good experts are needed to assist in this

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299. See Philippe Lortie & Maja Groff, *The Evolution of Work on Access to Foreign Law at the Hague Conference on Private International Law*, in TREATMENT OF FOREIGN LAW: DYNAMICS TOWARDS CONVERGENCE?, at 615, 615–37 (Ius Comparatum – Global Stud. in Comp. L. Ser. No. 26) (Yuko Nishitani ed., 2017).

300. *Id.* at 632–33.

301. See *List of Judicial and Other Conferences 1998-2019*, HAGUE CONVENTION ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj> (last visited Oct. 2, 2020) (identifying Anglophone-francophone and Anglophone-germanophone judicial seminars that have been held, particularly in the area of family law, under the auspices of the Hague Conference).

302. See *id.*, *The International Hague Network of Judges*, (last visited Oct. 3, 2020).

303. Cf. Teitz, *supra* note 73, at 1102 (noting that the Hague Conference has been working on this issue for a long time, yet common law countries, like the United States, are more reluctant to consider it).

304. Miner, *supra* note 1, at 581.

305. *Id.* at 582.

306. See *DiFederico v. Mariott Int'l, Inc.*, 714 F.3d 796 (4th Cir. 2013) (denying a *forum non conveniens* motion to spare the widow of a victim of a Pakistani terrorist attack from travelling to Pakistan for trial, the Fourth Circuit summed up the situation for a U.S. court to ascertain Pakistani law, if need be, as an everyday matter of no great difficulty:

Here, the district court provided no reason why Pakistani law on this topic

knowledge process. It would be most helpful if organizations such as the American Law Institute, which has done a great deal to assist judges in adapting to the revised rules aiming to limit the scope and extent of discovery under the Federal Rules of Civil Procedure, were also to spearhead an educational effort to educate the federal judiciary in matters relating to Rule 44.1, along with the commendable training offered by the Federal Judicial Center, many of whose publications deal with transnational legal issues and foreign law.<sup>307</sup> Similarly, the Bolch Judicial Institute of Duke University Law School offers training to judges in dealing, among others, with the foreign law they encounter.<sup>308</sup>

New generations of U.S. lawyers are becoming more exposed to comparative law than were their predecessors, and their memoranda and briefs to courts will become a vital part of judicial education, as will the input of judicial clerks. Efforts to teach law courses in foreign languages which deal with foreign legal systems in U.S. law schools should be encouraged as part of the undertaking to prepare the next generation of lawyers who will help to educate the bench and who will practice law in a transnationalized legal world.

## VIII. CONCLUSION

An important, previously overlooked issue for the incorporation of foreign law in U.S. federal courts is Rule 44.1's inadvertent infusion of a civil-law method into common-law

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creates any particular difficulty in interpretation. The court noted that it would have to interpret "(1) decisions from Islamabad's High Court and Pakistan Supreme Court, (2) Pakistani statutes . . . , and (3) local ordinances." *DiFederico*, No. 8:11-cv-1508, at \*15. This is precisely the kind of work American judges perform on a daily basis. The district court's "apprehension appears to be predicated wholly on conjecture . . . "

*Id.* at 808 (quoting *Mobil Tankers Co., S.A. v. Mene Grande Oil Co.*, 363 F.2d 611, 615 (3d Cir. 1966)).

307. See *Manuals, Monographs, & Guides*, FED. JUD. CTR., <https://www.fjc.gov/education/manuals-monographs-guides?page=3> (last visited Feb. 21, 2020). See also AM. SOC'Y OF INT'L L., *BENCHBOOK ON INT'L L.*, at i (Diane Marie Amann ed., 2014), which was published by the American Society of International Law and inspired by the Federal Judicial Center manuals, addressed to federal district court judges.

308. I am grateful to Ralf Michaels, formerly Professor at Duke Law School, currently Managing Director of the Max Planck Institute for Comparative and International Private Law, Hamburg, Germany, for telling me about Duke's educational LL.M. program for judges and its particular efforts in the area of comparative legal analysis.

courts. The struggle of U.S. courts to adjust to the mandates of the rule within the structures of their courts has been a large part of the failure to accommodate to the goals of the rule, along with more evident obstacles to ascertaining the nature of foreign law, such as locating foreign-law materials and understanding the relevant foreign language. The common judicial reaction of avoiding foreign law is neither feasible nor desirable today. While courts grant *forum non conveniens* motions liberally without examining foreign law independently more than at a superficial and cursory level, they do examine foreign law in transnational discovery issues, including Section 1782 petitions, because their decisions are dependent on foreign-law analysis, despite precedential warnings to avoid it. Those analyses are, however, hampered by a history of judicial avoidance of foreign law as well as by Supreme Court adjudications which disfavor comparative law.

Much has been said about the explosion of cases dealing with foreign parties and circumstances in today's courts due to globalization. Law's transnationalization collides with law as a national and territorial construct.<sup>309</sup> While the post-pandemic era may see reconfigurations in transnationalization's patterns, territoriality's increasing obsolescence derives from its source in the information-driven nature of the world.<sup>310</sup> The fundamental transition of society from a material-based to a knowledge-based society<sup>311</sup> suggests that, while the means may change through which people connect, the connections across national borders will remain robust. As long as virtual contacts continue to be conducted multinationally, with or without physical presence involved, with likely increases in many transnational projects even as the international aspects of crises impress themselves on the public consciousness, laws of multiple nations will continue to need the attention of our courts and their presence in them will continue to burgeon.

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309. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 299 (7th ed. 2008); see also Helge Dedek, *Out of Site: Transnational Legal Culture(s)*, in *THE OXFORD HANDBOOK OF TRANSNAT'L L.* (Peer Zumbansen ed., forthcoming) (stating that law's current "task [is] freeing itself from the 'straightjacket of the nation-state framework' . . .") (quoting William I. Robinson, *Beyond Nation-State Paradigms: Globalization, Sociology, and the Challenge of Transnational Studies*, 13 *SOC. F.* 561, 562 (1998)), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3678046](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678046).

310. See YUVAL NOAH HARARI, *HOMO DEUS: A BRIEF HISTORY OF TOMORROW* 14–16 (2017).

311. *Id.*