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Pleading and Proof of Foreign Law in American Courts

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Fantastic improvements in transportation and telecommunications increasingly have led Americans and American companies to come into contact with foreigners and the laws of their nations. For instance, an import contract may call for the application of French law, or an American worker may be injured in an automobile accident in Iran. In some cases, foreigners seek the protection or aid of American justice. For example, a Russian refugee may seek to immigrate to the United States or a Greek sailor on a Panamanian ship may be injured in American waters. As a result, foreign law is appearing in American courts with growing frequency.

This article surveys the treatment of the laws of foreign nations in American courts and attempts to sort out the tangle of laws and practices that affect the application of foreign law in those courts. Part I provides an overview of the area: Section A divides the field into five convenient stages of development; section B deals with methods for keeping foreign law out of court. Part II discusses notice and pleading requirements and the consequences of failure to meet those requirements. Part III considers the applicability of discovery

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techniques in the context of litigation involving foreign law. Part IV deals with methods of presenting information regarding the content and application of foreign law before the court. Part V describes the process of determining the foreign law, including the effect of failure to prove foreign law and the possibilities for judicial investigation. Finally, part VI examines the reviewability of trial court treatment of foreign law. Professor Merryman's article, also contained in this issue, more thoroughly discusses the possibilities for reform in this area.[1]

I. THE TREATMENT OF FOREIGN LAW IN U.S. COURTS: AN OVERVIEW

The first line of inquiry is how often foreign law comes before American courts. The simple answer is quite often: There have been hundreds of reported cases in the federal, California, and New York courts alone.[2] Nevertheless, after a short period of interest following the 1966 enactment of the federal rules,[3] the issue of foreign law in American courts has attracted little attention. Regardless of this lack of interest, there are many problems in the area. Perhaps the most significant are the lack of uniformity in how the various jurisdictions within the United States treat foreign-law questions and the unpredictable overlap of conflict of laws, common-law, statutory, and judicial notice principles.

A. *The Five Stages of Foreign-Law Treatment*

Conceptually, the treatment of foreign law in the United States can be viewed as a five-stage progression. Any jurisdiction may simultaneously apply the principles of several stages—even within a single case. Attorneys must, therefore, be conversant with all of these phases, for any one of them may confront lawyers at different points in litigation. Although there are few states where the common-law requirements of pleading and proof continue in their pristine splendor,[4] an advocate may still encounter the arcane practices of the Common Law. For example, if a judge exercises his discretion under a permissive statute not to take judicial notice of the foreign law, he

[1] Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151, 152–72 (1983).

[2] *See* Wing, *Pleading and Proof of Foreign Law in American Courts: A Selected Bibliography*, 19 STAN. J. INT'L L. 175, 187–202 (1983) (listing the more recent foreign-law cases). *See also infra* appendix A.

[3] For literature on the subject of foreign law in the courts, see *id.* Unless otherwise specified, the rules referred to in the text are Federal Rule of Civil Procedure 44.1 and its nearly identical twin, Federal Rule of Criminal Procedure 26.1.

[4] *See infra* appendix B (listing the law in effect in each state).

binds himself and the litigants to the relevant rules of evidence and, accordingly, "[h]e may not then read a law review article" or in any other way ease the ascertainment of the foreign law.[5] The attorney then must prove the foreign law in the old-fashioned way, with the use of such tools as certified documents and the oral testimony of experts.

1. *The Common Law's Treatment of Foreign Law as Fact.*

Early English Common Law would not hear matters that involved the law of any other nation.[6] Eventually, courts began to permit the pleading and proof of foreign law, regarding foreign law as a fact to be proved by the parties. A common-law judge, given the "inadequate libraries and means of communication then available,"[7] could not be expected to know or discover on his own the law of foreign lands.

Unfortunately, the characterization of foreign law as fact was applied literally and inflexibly. Several logical—and often devastating—consequences flowed from this characterization. First, the foreign law had to be pleaded in a timely and sufficient manner; otherwise, the action could be dismissed for failure to state an essential element of a cause of action.[8] Second, foreign law had to be proved according to the rules of evidence; failure to do so would result in dismissal for failure to carry the burden of proof.[9] Third, since foreign law was seen as a factual question, the jury determined what the law was.[10] Finally, because the Common Law viewed it as a determination of fact, foreign law ordinarily could not be reviewed on appeal.[11]

2. *Early Modifications of the Common Law.*

In time, the patent unfairness of the procedural consequences of

[5] N.Y. CIV. PRAC. R. 4511 legislative studies and reports (McKinney 1963).

[6] For more detailed expositions on the common-law treatment of foreign law, see generally O. SOMMERICH & B. BUSCH, FOREIGN LAW: A GUIDE TO PLEADING AND PROOF (1959); Miller, *Federal R... 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 ... MICH. L. REV. 615 (1967).

[7] Recommer...tion and Study Relating to Judicial Notice of the Law of Foreign Countries, *in* 1 CALIFOR... LAW REVISION COMMISSION, REPORTS, RECOMMENDATIONS AND STUDIES, at I-5 (1957, ...reinafter cited as CLRC Judicial Notice Recommendation].

[8] *See infra* notes 1 ...3 and accompanying text.

[9] *See infra* text acc... ...nying notes 482–500. Only later did courts develop presumptions concerning the forei... ...w to rescue litigants unable to plead or prove the foreign law satisfactorily. *See infra* text ... ...mpanying notes 134–53 and 504–16.

[10] *See infra* text accomp... ...ing notes 439–43.

[11] *See* authorities cited *infra* note 517 and accompanying text.

the fact approach became manifest. The gradual realization that foreign law had at least some of the incidents of law *qua* law led to two basic changes in most American jurisdictions: (1) Foreign law was taken from the jury, and (2) it became susceptible to appeal.[12]

In most jurisdictions, new legislation typically required the judge to determine the foreign law and charge it to the jury, and permitted appellate courts to review the findings.[13] Other jurisdictions simply relied on the wisdom of their courts, which had already altered the treatment of foreign law in their decisions.[14] Although only a few states have failed to make at least these modifications,[15] in peculiar circumstances the old common-law approach still may prevail in some jurisdictions.[16]

3. *"Discretionary Judicial Notice."*

Strictly speaking, a court judicially notices certain facts which do not require proof either because those facts belong to the common knowledge of mankind (e.g., the color of blood) or because the court is expected to know or to discover them (e.g., the laws of the forum). In addition to making the determination of foreign law an appealable decision within the province of the court, many so-called judicial notice statutes permit the court to ignore the rules of evidence when attempting to discover the foreign law.[17]

In the federal and many state systems, the judicial notice provi-

[12] No less than domestic law, foreign law is the command of a sovereign and, despite the ever-present discovery problems which made it more susceptible to treatment as a matter of fact, its use should not be left to the unpredictable and unfettered discretion of a jury. It instead deserves the careful, published, and reviewable decision of a judge. If the criterion for the application of foreign law is that an American court, given the facts, should reach the same decision that the foreign court would have reached, then it is clear that the jury should not have responsibility for determining foreign law. Moreover, assurance of the correctness of the content and application of foreign law requires the supervision of appellate review. *See infra* text accompanying notes 439–443.

[13] *E.g.*, CAL. EVID. CODE § 457 (West 1966); N.Y. CIV. PRAC. R. 4511(c) (McKinney 1963); UNIF. INTERSTATE & INT'L PROCEDURE ACT § 4.03, 13 U.L.A. 498 (1980) [hereinafter cited as UIIPA].

[14] The federal courts represent the strictest adherence to this approach: Neither federal statutes nor the federal rules explicitly require that the judge determine foreign law. *See, e.g.*, FED. R. CIV. P. 44.1.

[15] For a list of the pleading and proof rules in each state, see *infra* appendix B.

[16] *Cf.* United States v. McClain, 593 F.2d 658, 670 (5th Cir.) (criminal trials may require a jury determination, even for foreign law questions), *cert. denied*, 444 U.S. 918 (1979).

[17] *E.g.*, FED. R. CIV. P. 44.1; FED. R. CRIM. P. 26.1; CAL. EVID. CODE §§ 452(f), 454 (West 1966); N.Y. CIV. PRAC. R. 4511(c) (McKinney 1963). The drafters of the California judicial notice statute took care to preserve the exclusion for privileged communications, CAL. EVID. CODE § 454 (West 1966), although most other such statutes do not mention the exclusion. *E.g.*, FED. R. CIV. P. 44.1; N.Y. CIV. PRAC. R. 4511 (McKinney 1963). The exclusion apparently still applies.

sions are purely discretionary.[18] If he chooses, the judge may require presentation by the parties according to the rules of evidence, just as at Common Law. Refusal to take judicial notice does not present grounds for appeal absent an abuse of discretion, which appellate courts do not readily find.[19]

Many judicial notice statutes also permit the trial courts to perform their own research into foreign law.[20] Some statutes even allow judicial investigation and consideration of new information on appeal.[21] This mild form of judicial notice is more expeditious and inexpensive than traditional modes of proof.[22] Moreover, the relaxation of evidentiary principles often proves more just, either because the rules of evidence preclude the proof of foreign law[23] or because a litigant cannot afford the methods mandated by those rules.[24]

The "peculiar nature" of foreign law is often cited to justify freeing the courts and parties from the dictates of the laws of evidence.[25] Although some commentators apparently continue the simple fact-law dichotomy, relabeling foreign law as law rather than fact,[26] foreign law really belongs to a "*tertium genus*, a third category between fact and law."[27] Thus, "the ordinary rules of evidence are often inapposite to the problem of determining foreign law . . . ."[28] Furthermore, in addition to streamlining the process of ascertaining foreign law, judicial notice statutes also eliminate some evidentiary

18 California and New York provide a means to trigger mandatory judicial notice. CAL. EVID. CODE § 453 (West 1966); N.Y. CIV. PRAC. R. 4511(b) (McKinney 1963); *see also infra* text accompanying notes 30–35.

19 *See generally infra* notes 518–29 and accompanying text.

20 *E.g.*, CAL. EVID. CODE § 454 (West 1966); *see* FED. R. CIV. P. 44.1 advisory committee note (1966); *see also infra* text accompanying notes 501–03.

21 *E.g.*, CAL. EVID. CODE § 459 (West 1966); *see infra* text accompanying notes 526–30. Judicial research, however, is also a matter for the discretion of the trial court. *See infra* text accompanying notes 445–71.

22 State laws vary; some embody procedures which are inefficient, time-consuming, and expensive. *See* Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60 (1954); *see also* FED. R. CIV. P. 44.1 advisory committee note (1966).

23 "Strict adherence to the rules of evidence . . . could render it practically impossible to establish foreign law." Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97, 107 (1981). For example, one cannot obtain a certified copy of statutes of a country with which we have no diplomatic relations.

24 In many cases it is important to minimize expenses if justice is to be done. *See* Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957). Attorneys are aware of the costs of proving foreign law and may use this expense to wear down the opposition. Interview with Holly Helmuth and John McKenzie, Attorneys, Baker & McKenzie, San Francisco (Oct. 30, 1981) [hereinafter cited as Baker, McKenzie Interview].

25 *E.g.*, FED. R. CIV. P. 44.1 advisory committee note (1966); FED. R. CRIM. P. 26.1 advisory committee note (1966).

26 *E.g.*, FED. R. CRIM. P. 26.1 advisory committee note (1966).

27 Sass, *supra* note 23, at 98.

28 FED. R. CIV. P. 44.1 advisory committee note (1966).

barriers. Once the determination of foreign law is removed from the jury, exclusionary rules designed to prevent the jury from being misled become an extraneous impediment to the proper application of foreign law.[29]

4. *"Triggered Judicial Notice."*

Despite the virtues of judicial notice, the absolute discretion of the judge may be a drawback. In some jurisdictions, a judge may not take judicial notice of foreign law unless the litigants have brought it to the attention of the court.[30] However, some statutes provide that the parties can "trigger"—that is, compel—the taking of judicial notice if (1) each adverse party is advised of the intent to rely on judicial notice for the proof of foreign law, and (2) the requesting party furnishes the court with information sufficient to enable it to take such judicial notice.[31] Nevertheless, the determination of the timeliness of notice[32] and the sufficiency of the materials[33] lies largely within the discretion of the court. That discretion enables the court to turn the "mandatory" statute back into a more permissive statute.[34]

There are few situations in which a judge should attempt to avoid judicial notice of foreign law. Courts should refuse judicial notice only to prevent one party from taking advantage of the lesser resources of the other or from swamping the court with marginally relevant material; they should not refuse to take judicial notice out of ignorance of their powers[35] or misguided fear of reversal.

5. *True Judicial Notice and* Iura Novit Curia.

Under the rule of *iura novit curia,* a court has an affirmative obligation to know or discover the substance and applicability of foreign

29 Sass, *supra* note 23, at 107. The use of evidentiary rules may create a record for appeal, but it also excludes potentially relevant material. Any judge who wishes to avoid reversal on an issue of foreign law will refer to his sources for the decision. Courts may, moreover, be required to record any material submitted and allow argument. *E.g.*, CAL. EVID. CODE § 455 (West 1966).

30 This can be accomplished by timely pleading or by request. *See infra* text accompanying notes 92–171.

31 *E.g.*, CAL. EVID. CODE § 453 (West 1966); N.Y. CIV. PRAC. R. 4511(b) (McKinney 1963).

32 *See infra* text accompanying notes 92–130.

33 *See infra* text accompanying notes 482–516.

34 *See* R. SCHLESINGER, COMPARATIVE LAW 68–69 (3d ed. 1970). Some states guard against such abuses by requiring the judge to state in writing his reasons for refusing to take judicial notice. *E.g.*, CAL. EVID. CODE § 456 (West 1966).

35 *But see* Walton v. Arabian Oil Co., 233 F.2d 541, 546 (2d Cir.) (Frank, J., dissenting in part), *cert. denied*, 352 U.S. 872 (1956).

law in a case. Although most states already place this responsibility on their courts with respect to the law of sister states,[36] no American jurisdiction does so with respect to the law of foreign nations.[37]

Even if the courts did have a duty to ascertain foreign law, the parties would still find it advantageous to discover independently the foreign law in order to help them plan, frame trial strategies, and point out to the court other sources and constructions of the applicable law. True judicial notice should enable the court to allocate the burden of finding the foreign law rather than allowing the parties to shift the entire task to the court. The courts should help those who help themselves or those who cannot, for lack of means or access, protect themselves.

The major hindrances to adoption of *iura novit curia* or a triggered equivalent in the United States are the inaccessibility of foreign-law materials and the discomfort which courts experience in dealing with foreign law. Both of these considerations will lose importance as increasing telecommunications and world trade necessitate better handling of foreign-law questions. Foreign law no doubt will appear more frequently in American courts as technology provides easier access to foreign law and expertise.[38]

B. *Avoiding Foreign Law: Conflict Of Laws and Forum Non Conveniens*

There are many reasons for attorneys and judges to avoid bringing foreign law into court. Common-law judges and lawyers frequently have difficulty understanding legal systems other than their own. Further, the process of ascertaining foreign law can be very expensive and time-consuming. Materials containing the law often are difficult to find and many are not available in English. An attorney also may wish to stay away from foreign law because the law of the forum favors his client. Judges will often go to great lengths to avoid questions of foreign law because they feel uncomfortable dealing with non-U.S. legal systems.[39] If neither party to an action brings up foreign law, judges will probably apply the law of the fo-

[36] *See* UIIPA, *supra* note 13, § 4.01 action in adopting jurisdictions, 13 U.L.A. 496.

[37] By contrast, West German courts do apply the *iura novit curia* doctrine with respect to foreign law. *See* Tueller, *Reaching and Applying Foreign Law in West Germany: A Systemic Study*, 19 STAN. J. INT'L L. 99, 108 (1983).

[38] *Cf.* Fitzgerald v. Texaco, Inc., 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting) (calling *forum non conveniens* a relic in the age of the "transportation revolution"), *cert. denied*, 423 U.S. 1052 (1976).

[39] Baker, McKenzie Interview, *supra* note 24. Judges probably feel less uncomfortable with the laws of other common-law systems, in which many of the concepts and foundations of the law are familiar. *Id.*

rum whenever possible.[40] This is not due to malice or laziness; judges select the law of the forum either because it is simpler or because it appears to be the choice of the parties.[41]

In many cases the parties will stipulate to the foreign law and the judge will accept it, even if the stipulation is incorrect.[42] Although our adversary system leans heavily toward party control,[43] it is difficult to accept the notion that parties can agree on an incorrect statement of the law which will control a case when the law is that of a foreign sovereign, but not when the law is domestic law. The use of stipulations appears to be a holdover from the fact approach of the Common Law.

Judges can avoid the ascertainment and application of foreign law even though some of the parties want the foreign law to control. They can, for example, apply conflict of laws rules which indicate that local law should govern the disputed issue. By consciously or unconsciously manipulating the choice of law rules of the jurisdiction, a judge can get back to the familiar law of the forum.[44] Even if the parties specify the governing foreign law by contract or stipulation, a judge can return to the comfortable confines of the local law

[40] This statement is based on the results of a nonrepresentative survey taken by the authors. The authors sent a questionnaire to all federal district court judges in the Southern District of New York, and the Northern and Central Districts of California, on the assumption that foreign law cases would be most common in those jurisdictions. Out of approximately 50 judges, 25 responded. Of those, only one said that he would ignore an obvious question of foreign law. Eight said that they would suggest the parties raise the issue and nine would raise it *sua sponte*. *See infra* appendix A, question 5.

[41] *See infra* text accompanying notes 134–54.

[42] *See* R. SCHLESINGER, *supra* note 34, at 71–72; interview with Paul Dezurick and David Gross, Attorneys, Graham & James, San Francisco (Oct. 30, 1981) [hereinafter cited as Graham & James Interview].

[43] "[L]awyers move and argue while judges preside and decide." Merryman, *supra* note 1, at 166.

[44] Professor Schlesinger suspects that, in order to avoid the embarrassing results of Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956), the district judge in Couch v. Mobil Oil Corp., 327 F. Supp. 89 (S.D. Tex. 1971), tinkered with the conflicts rules so that he could apply the tort law of Texas rather than dismiss the action. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 10 n.49 (1973); *cf.* Wyatt v. Fulrath, 38 Misc. 2d 1012, 239 N.Y.S.2d 486 (1963) (refusing to apply Spanish community property law to accounts held in New York banks), *aff'd mem.*, 22 A.D.2d 853, 254 N.Y.S.2d 216 (1964), *modified*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965).

In a recent case, following an initial attempt to determine the applicable law of Singapore, the judge applied the law of the forum based on a governmental interests test, despite an earlier statement that the court of appeals would reverse him if he did not apply the foreign law. The attorneys urging the application of Singapore law suspect that the judge discovered that, even though Singapore belongs to the British Commonwealth and adheres to British law, the U.K. law is not as easy to determine as might have been thought. Graham & James Interview, *supra* note 42.

through an application of conflicts principles,[45] especially under the easily manipulated "center of gravity" and "governmental interests" theories.

Judges also can avoid foreign law by dismissing an action on the grounds of *forum non conveniens*.[46] Several cases have explicitly considered the difficulties in determining the applicable foreign law as a reason to dismiss for *forum non conveniens*.[47]

II. The Process of Invoking Foreign Law: Pleading or Notice

A. *The Decision to Invoke Foreign Law*

A party to an action in which foreign law arguably is applicable initially must decide whether to raise the foreign law issue at all. Many factors influence the decision to invoke foreign law in a domestic action.[48] At the most fundamental level, an attorney may not realize that the action contains elements which would justify the application of foreign law, either because of improper analysis of the case, incomplete information,[49] or a misunderstanding of the choice of law rules prevailing in the forum. Alternatively, an attorney may realize the potential applicability of foreign law but fail to determine the content of such law. Because this determination is a key step in the process of deciding whether to invoke foreign law, such failure of discovery could be fatal. As noted by a New York court, an attorney

[45] Baker, McKenzie Interview, *supra* note 24.

[46] Interview with Michael Tierney, Attorney, Coudert Brothers, New York City (Mar. 28, 1982) [hereinafter cited as Coudert Interview]. There are many cases where *forum non conveniens* may have been applied to avoid foreign law issues. *See, e.g.*, Schertenleib v. Traum, 589 F.2d 1156 (2d Cir. 1978); Fitzgerald v. Texaco, Inc., 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J., dissenting), *cert. denied*, 423 U.S. 1052 (1976); Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 924 (S.D.N.Y. 1977), *aff'd*, 588 F.2d 880 (2d Cir. 1978); De Mateos v. Texaco Pan., Inc., 417 F. Supp. 411 (E.D. Pa. 1976), *aff'd*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); Spencer v. Alcoa S.S. Co., 221 F. Supp. 343 (E.D.N.Y.), *aff'd mem.*, 324 F.2d 957 (2d Cir. 1963).

[47] *See* Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980); Founding Church of Scientology v. Verlag, 536 F.2d 429, 436 (D.C. Cir. 1976) (dictum); Panama Processes, S.A. v. Cities Serv. Co., 500 F. Supp. 787 (S.D.N.Y. 1980), *aff'd*, 650 F.2d 408 (2d Cir. 1981); Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 735 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *aff'd*, 454 U.S. 235 (1981); Mohr v. Allen, 407 F. Supp. 483 (S.D.N.Y. 1976); Noto v. Cia Secula di Armanento, 310 F. Supp. 639, 648 (S.D.N.Y. 1970). *But see* Hoffman v. Goberman, 420 F.2d 423, 427 (3d Cir. 1970).

[48] *See* Schlesinger, *supra* note 44, at 2–3.

[49] The applicability of foreign law often will be unclear due to incomplete information, particularly in the early stages of an action: "In some situations the pertinence of foreign law is apparent from the outset . . . . In other situations the pertinence of foreign law may remain doubtful until the case is further developed." Fed. R. Civ. P. 44.1 advisory committee note (1966). In the vast majority of cases, however, it would seem that any foreign element would be readily apparent.

is charged with knowledge of the law of the foreign jurisdiction involved in the matter, whether or not he has any training in the subject.[50]

A threshold question in the invocation process is whether the jurisdiction retains the traditional approach which mandates dismissal of the action for failure to raise the foreign law. Plaintiffs in the few jurisdictions that take this approach have no choice but to invoke foreign law.[51] Most jurisdictions, however, implicitly grant discretion to the parties in this regard. Thus, if neither side invokes foreign law, the court will apply the law of the forum.[52] In these jurisdictions, attorneys, employing a rough cost-benefit analysis, consider various criteria in making the decision. These criteria include: (1) the extent to which foreign law favors the client; (2) the number and importance of issues to which foreign law might be applicable; (3) the attorney's familiarity with the foreign legal system; (4) the cost and inconvenience of establishing the foreign law; (5) the complexity of the system for establishing foreign law in the jurisdiction; (6) the knowledge and experience of the court;[53] and (7) the likelihood that the adverse party will invoke foreign law.

The last factor presents important tactical considerations.[54] One side may remain silent when foreign law is seriously adverse to its

50 "When counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to their client for the proper conduct of the matter and may not claim that they are not required to know the law of the foreign state." *In re* Roel, 3 N.Y.2d 224, 232, 144 N.E.2d 24, 28, 165 N.Y.S.2d 31, 37 (1957). The quotation refers to knowledge of the law of both sister states and foreign nations.

51 There may be tactical reasons for not doing so, however. For example, where the client clearly would lose if the court applied foreign law, an attorney might avoid raising the question (to the extent consistent with ethical obligations) in the hope that his opponent would not raise it (because of incompetence, carelessness, or client poverty), thus leaving forum law to apply. Given the finality of the sanction—and the possibility of an opponent raising the question late in the action, after substantial expense—the above approach seems to represent a questionable gamble at best. However, a party may decide to risk dismissal rather than suffer the cost of proving foreign law, particularly where the amount in controversy is small.

52 *See infra* text accompanying notes 134-54.

53 The significance of this factor is difficult to assess. That most judges are reluctant to apply foreign law is universally recognized. *See, e.g.*, Miller, *supra* note 6, at 619. This reluctance presumably stems from a perceived inability to learn enough about an unknown legal system in a short period of time and thus to be able to render a proper decision. Thus, a party may not mention foreign law before a judge who is reputed to dislike its use simply to avoid the possibility of alienating the judge. Conversely, a party may be more likely to raise foreign law in a jurisdiction with substantial experience in the area, such as the United States District Court for the Southern District of New York.

54 Each side in the action normally undertakes such an analysis, leading to questions of tactics. For example, one side may attempt to trick the other into being the first to invoke the foreign law, in order to shift the burden of establishing it. For a more detailed discussion of such strategy, see Schlesinger, *supra* note 44, at 2-3.

position, hoping that the other side will not raise it. Even if a party has discretion as to whether to formally invoke the foreign law, however, his attorney may have an ethical obligation to alert the court and the opposing side that such law is potentially applicable,[55] thus allowing the other side to raise it. Under the American Bar Association's Model Code of Professional Responsibility, an attorney has the duty to disclose legal authority in the "controlling jurisdiction" known to him which is "directly adverse to the position of his client and which is not disclosed by opposing counsel."[56] One could argue that the forum is the "controlling jurisdiction", unless foreign law is invoked to displace it. This, however, is an overly technical approach to the issue since the purpose of the requirement is to ensure that the court is fully informed of applicable law so that it can make a fair and accurate determination of the merits.[57] The "controlling jurisdiction" is the jurisdiction which should control under the choice of law rules of the forum. In such a situation, then, a party should raise the possible applicability of foreign law whenever it is reasonably certain that his opponent will not do so.

If neither party invokes foreign law, the court should, in appropriate cases, raise the possibility of its application to make certain that the silence resulted from a conscious decision.[58] When the potential applicability of foreign law is clear on the face of the pleadings, the court should broach the question so that the unthinking or dilatory attorney can invoke such law early enough to avoid last-minute confusion. One commentator has suggested that the court do this at the pretrial conference, pursuant to Federal Rule of Civil Procedure 16.[59] Another option, chosen by at least one court, is to raise the issue at the first contested motion on the merits of the action.[60]

55 *See* Saltzburg, *Discovering and Applying Foreign and International Law in Domestic Tribunals: An Introduction to the Second Annual Sokol Colloquium*, 18 VA. J. INT'L L. 609, 617 (1978); *cf.* ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949) (although as an officer of the court an attorney has a duty to inform the court of adverse legal authority, as an advocate he need do this only upon request of the court for such information).

56 "In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-106(B)(1) (1979).

57 *See id.* EC 7-23 (1979); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1(a)(4) (Discussion Draft 1980) (would expand the Model Code provision significantly, to require disclosure of "legal authority which would probably have a substantial effect on the determination of a material issue").

58 *Cf.* Sass, *supra* note 23, at 118 (mentioning that such judicial action may be desirable in unspecified instances).

59 Schlesinger, *supra* note 44, at 26.

60 Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474, 487-88 (D.N.J. 1977).

B. *The Requirements of Pleading and Notice*

Assuming that foreign law is to be invoked, the party is then confronted with one of the two prevailing procedures for doing so: pleading or notice.

A substantial number of states cling to the traditional "fact" approach. In those states, the substance and effect of the foreign law relied upon must be pleaded.[61] Failure to do so with the required degree of specificity may justify a demurrer or motion to dismiss—the logical consequence of the absence of what is viewed as an element of the cause of action.[62] The federal system and many states have rejected this approach, however, recognizing that equity and efficiency are served better by treating foreign law as a "hybrid" of law and fact. In these jurisdictions, a party need only give reasonable notice of his intention to rely on foreign law, and such notice need not be given by means of pleadings. This standard reflects an attempt to avoid the often harsh results inherent in the strict application of the fact approach, while avoiding the unfair surprise which might result from a total lack of notice to the adverse party.[63]

1. *Content of Pleading or Notice.*

Under the traditional view, the "substance" of the foreign law relied upon must be pleaded in the complaint or answer.[64] It is not sufficient to allege the effect of such law or to state generally, for

[61] One such state is Texas. *See* TEX. R. CIV. P. 184(a). The "fact" approach has been universally condemned by contemporary commentators as a relic of an era that delighted in accentuating the technicalities of procedure to the detriment of substance, particularly in the pleading arena. *See, e.g.*, Miller, *supra* note 6, at 624-28.

[62] *E.g.*, Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y. 1965). This case followed the traditional approach in use in the federal courts prior to the adoption of rule 44.1.

[63] *See* FED. R. CIV. P. 44.1 advisory committee note (1966). This standard further reflects the modern concept that pleading serves essentially a notice function, so there is no reason to limit the location of notice to a pleading. Finally, it represents an attempt to limit often expensive and time-consuming motions claiming technical defects in pleadings which do little to advance the merits of the action.

The jurisdictions using a notice system fall into two basic types. Sixteen states have enacted provisions substantially identical to rule 44.1, while five states have adopted the Uniform Interstate and International Procedure Act. *See supra* note 13. Section 4.01 of the Uniform Act is identical to the operative language in the first sentence of rule 44.1: "A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state shall give notice in his pleadings or other reasonable notice." UIIPA, *supra* note 13, § 4.01, 13 U.L.A. 495; *see infra* appendix B. On the other hand, nine states have general judicial notice statutes whose wordings vary, but which broadly permit or require the court to take judicial notice of foreign law when, *inter alia*, reasonable notice is given to the court and the opposing counsel. *See infra* appendix B.

[64] *See, e.g.*, Byrne v. Cooper, 11 Wash. App. 549, 523 P.2d 1216 (1974). For a general examination of the common-law approach to foreign law, see McKenzie & Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353 (1956).

example, that the action is governed "by the laws of France".[65] At a minimum, the foreign law relied upon should be set out with enough detail to enable the court to judge its effect.[66] Normally this is done by paraphrasing statutes or other authorities.[67] As a practical matter, however, attaching translated and original copies of such authorities is preferable. Most states that follow the pleading approach require citations to applicable legal authorities.[68]

Even under this rigid view, many courts have recognized the need to mitigate potential hardships[69] and have utilized various devices to offset these results. Some courts have emphasized the need to liberally grant leave to amend pleadings;[70] others have lowered the standards for pleading the substance of foreign law by requiring only a "general" statement of the foreign law,[71] that is, enough information to "grasp the significance of the pleader's claim."[72] Further, most courts have precluded the need for extensive initial research by allowing a party to plead both domestic and foreign law alternatively, thus delaying the point at which an election must be made.[73]

Even jurisdictions which adopted a notice approach have not fully resolved the question of how much information should be provided. The federal system is a case in point. Prior to rule 44.1, a party invoking foreign law was required to plead its "substance."[74] While the rule rejects this approach,[75] it does not specify what infor-

65 *But see* Busch, *Outline on How to Find, Plead, and Prove Foreign Law in U.S. Courts With Sources and Materials*, 2 INT'L LAW. 437, 441 (1968).

66 *See* Geller v. McCowan, 64 Nev. 102, 104-05, 177 P.2d 461, 462-63 (1947); Byrne v. Cooper, 11 Wash. App. at 550-51, 523 P.2d at 1218.

67 For examples of proper common-law pleading, see Busch, *supra* note 65, at 440-42 and McKenzie & Sarabia, *supra* note 64, at 362-63.

68 Washington, for example, requires that the citations to applicable statutes and cases be pleaded. Byrne v. Cooper, 11 Wash. App. at 551, 523 P.2d at 1218. Yet there is some authority in older New York cases to the contrary. *Compare* Sultan of Turkey v. Tiryakian, 213 N.Y. 429, 108 N.E. 72, 73 (1915) (allowing paraphrase of two statutes, one without citation), *with* Haines v. Cook Elec. Co., 20 A.D.2d 517, 244 N.Y.S.2d 483, 484 (1963) (per curiam) (noting that citation to statute should have been pleaded).

69 For a classic modern example of the harsh results this approach can cause, see Modarelli v. Midland Mut. Ins. Co., 10 Ohio App. 2d 115, 226 N.E.2d 137, 139, 140 (1967), where the court of appeal used the fact that Canadian law had not been pleaded in the complaint, even though evidence had been admitted at trial to prove such law, as an independent ground for finding for the defendant. This decision is distinctly out of step with every decision in the area for decades, and is best viewed as an aberration. *See infra* text accompanying notes 134-54.

70 *See* Byrne v. Cooper, 11 Wash. App. at 551, 523 P.2d at 1218.

71 Milwaukee Cheese Co. v. Olafsson, 40 Wis. 2d 575, 580, 162 N.W.2d 609, 612 (1968).

72 Byrne v. Cooper, 11 Wash. App. at 551, 523 P.2d at 1218.

73 *See, e.g.*, Tsangarakis v. Panama S.S. Co., 197 F. Supp. 704, 705 (E.D. Pa. 1961).

74 *See, e.g.*, Telesphore Couture v. Watkins, 162 F. Supp. 727, 730 (E.D.N.Y. 1958).

75 The concept of expressly requiring that the "substance" of foreign law be contained in the notice was considered and rejected in the drafting process. Miller, *supra* note 6, at 645.

mation must be contained in a notice. In his landmark article on the rule, Professor Miller concluded that, at least in "spirit," the rule requires the party giving notice to specify the segment of the controversy governed by foreign law and identify the controlling foreign jurisdiction.[76] More recently, Stephen Sass has argued that the notice also should summarize the content of the relevant foreign law and cite legal authorities.[77] Perhaps motivated by the need to prevent surprise through full disclosure,[78] this position finds no support in either the reported decisions or the spirit of the rule.[79]

The only two decisions directly confronting the issue suggest that merely mentioning the possible applicability of foreign law may be sufficient to comply with the rule, a standard far weaker than that espoused by Miller. In *Laminoirs, Inc. v. Southwire Co.*,[80] the losing party objected to the enforcement of an arbitration award on the ground, *inter alia*, that the arbitrators had used French law in computing the interest rate on the award, although foreign law had been neither raised nor proven. The district court upheld the award, noting that the terms of reference for the arbitration had referred to a clause in the disputed contract calling for the use of French law in controversies between the parties. According to the court, this mention "should have" put the defendant on notice that such law had a

The history of rule 44.1 further demonstrates this. The rule is a response—at least in part—to the uncertainty generated by Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 196 (2d Cir. 1955). There, the Second Circuit interpreted Federal Rule of Civil Procedure 8(a), requiring only a "short and plain statement of the claim," as eliminating the need to plead the content of English law. *See* Miller, *supra* note 6, at 639.

76 Miller, *supra* note 6, at 646.

77 Sass, *supra* note 23, at 100-01. These requirements implicitly suggest a return to the rule that the "substance" of foreign law be provided.

78 That two such well-known authorities in the area can take such divergent views illustrates the tension between the competing values of flexible timing and full disclosure discussed above. Of course, any such disclosure would be one-sided: The party giving notice would not receive a reciprocal disclosure of authorities. The other element to consider in this analysis is the breadth of available discovery. If a party can later discover the legal authorities upon which his opponent relies, there is little need for full disclosure at the early notice stage.

79 *See* Grice v. A/S J. Ludwig Mowinchels, 477 F. Supp. 365 (S.D. Ala. 1979). The Magistrate noted:

> It would be patently unfair to hold an admiralty lawyer to a requirement that—on pain of dismissal—he set out in the complaint both the choice of law and the applicable substantive law . . . . Certainly rule 44.1 does not by its terms impose such a requirement; it would be unreasonable for the Court to do so on its own.

Id. at 367. A parallel, and probably more important basis for the ruling was the lack of need under the rule to give notice of foreign law in the complaint. It can be done at any "reasonable" time. FED. R. CIV. P. 44.1. *But see* Kalmich v. Bruno, 404 F. Supp. 57, 60-61 (N.D. Ill. 1975), *rev'd*, 553 F.2d 549 (7th Cir.), *cert. denied*, 434 U.S. 940 (1977).

80 484 F. Supp. 1063 (N.D. Ga. 1980).

potential bearing on the outcome of the case.[81]

The Second Circuit reached a similar result in *Panama Processes, S.A. v. Cities Service Co.*[82] The plaintiff had included in its complaint a clause stating only that it "reserved the right to claim the benefits of the laws of the Republic of Brazil" in the action. The court found that this fleeting reference was adequate notice under the rule.[83]

The required content of notice is no more clear in those states which have adopted a judicial notice approach. In California, for example, notice need only contain sufficient information to allow the adverse party to prepare to meet the request.[84] No decision has yet examined just what standard this sets. The situation in New York is even less certain. Although New York had a well-established judicial notice system, the legislature passed a statute requiring that the substance of foreign law be pleaded, apparently in an attempt to preclude surprise.[85] The decisions and commentators, however, are split over whether such pleading is truly required[86] or whether a court has discretion to take judicial notice absent such pleading.[87] Nevertheless, notice invoking foreign law must set forth the content of the law upon which the party relies:

> In the case of foreign law, notice is required if the court is to be compelled to afford it recognition, and the degree of notice will vary directly with the inaccessibility, strangeness, abstruseness, uncertainty, and other general difficulty in apprehending the foreign law. Notice as to the law of another

81 *Id.* at 1067.

82 650 F.2d 408 (2d Cir. 1981).

83 The court said:

> We note that, despite PPSA's present arguments that New York law will control this action, its complaint "reserve[d] the right to claim the benefit of the laws of the Republic of Brazil insofar as the provisions of those laws may be applicable to any issue in this action," pursuant to Fed. R. Civ. P. 44.1 which requires that "[a] party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings. . . ."

Id. at 413.

84 CAL. EVID. CODE § 453(a) (West 1966).

85 N.Y. CIV. PRAC. R. 3016(e) (McKinney 1974), which provides: "Where a cause of action or defense is based upon the law of a foreign country or its political subdivision, the substance of the foreign law relied upon shall be stated."

86 *See, e.g.*, Taca Int'l Airlines, S.A. v. Rolls Royce of England, Ltd., 47 Misc. 2d 771, 263 N.Y.S.2d 269 (Sup. Ct. 1965).

87 *See, e.g.*, Gevinson v. Kirkeby-Natus Corp., 26 A.D.2d 71, 270 N.Y.S.2d 989 (1966). One commentary has suggested that pleading is not a condition precedent to taking judicial notice of foreign law, but only an alternative means of giving notice, and that a sentence merely mentioning the foreign country involved (e.g., "the law of Mexico") would satisfy the "substance" requirement. *See* 3 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 3016.17 (1982). Such a position seems to reflect the justifiable belief that the section is regressive and thus should be interpreted narrowly.

> common-law English-speaking country may be considerably less detailed than that required as to a non-English-speaking country with a civil or oriental jurisprudence.[88]

This sliding scale approach properly reflects the problems of access and understanding inherent in establishing foreign law and the consequent need for flexibility.

Most jurisdictions recognize justifications for allowing the content of notice to be tentative. First, a party may wish to give notice of his intent to invoke foreign law in the alternative and thereby retain the right to rely on domestic law.[89] Second, the content of the notice is probably subject to change through amendment as new or further information renders such change desirable.[90] Finally, the content of the notice normally will not limit the scope of materials which may be presented to establish foreign law, even if specific references to legal authorities are provided. The process of investigating foreign law normally continues after notice is given, and it would impose too great a burden to require a party to provide each new citation to his opponent as it was discovered.[91]

2. *Timing of Pleading or Notice.*

The time of pleading or notice may have a substantial impact on the progress of an action. If foreign law is invoked late in the action, the adverse party may not have sufficient time to conduct discovery or to secure his own expert testimony.[92] Further, if foreign law is raised after domestic law has been used to decide a substantive question (for example on summary judgment), an action may awkwardly

88 *Gevinson*, 26 A.D.2d, at 74–75, 270 N.Y.S.2d at 993.

89 *E.g.*, Tsangarakis v. Panama S.S. Co., 197 F. Supp. 704, 705 (E.D. Pa. 1961); *see* FED. R. CIV. P. 8(e)(2).

90 By analogy to Federal Rule of Civil Procedure 15, five criteria have been suggested for modifying such notice: (1) lapse of time since the first notice; (2) the good faith of the party giving notice; (3) the complexity of the foreign law issue; (4) the extent of past reliance by, or prejudice to, other parties; and (5) the court's attitude toward allowing amendments in the interests of justice. Miller, *supra* note 6, at 646–47. As a practical matter, however, the notice need only contain such sketchy information that it appears that any such amendments will be quite rare.

91 *See id.* at 647; *cf.* Continental Assurance Co. v. Henson, 297 Ky. 764, 181 S.W.2d 431 (1944) (not necessary to give notice of reliance upon entire statute where only one section of statute was pleaded); Valdesa Compania Naviera, S.A. v. Frota Nacional de Petroleiros, 348 F.2d 33 (3d Cir. 1965) (under pre-Rule standards, court limited legal authorities used at trial to those disclosed to court and opposing counsel in brief on foreign law issues requested by court at pretrial conference).

92 Tactically, then, a party wishing to invoke foreign law would be best advised to wait until the last possible minute before giving such notice, in order to maximize his opponent's confusion. It is, however, difficult to assess just when the last possible moment occurs, turning to some extent on the reason for the delay, so that such a course is foolish at best.

combine both. Although these concerns are lessened when foreign law is raised early, a flat requirement of early invocation would unfairly penalize a party when the applicability of foreign law was not readily apparent at the onset of an action.

The traditional pleading requirement sacrifices flexibility for the advantages derived from the early invocation of foreign law.[93] Foreign law still can be raised through amendment after the pleadings are filed, however.

Many states allow great liberality in the amendment of pleadings,[94] recognizing the potential importance of foreign law and the fact that it is often unclear at the outset of an action whether the application of foreign law is justified.[95] Under the traditional rules governing the amendment of pleadings, the court can consider such factors as the prejudice which might result to other parties in the action, thereby dealing with the potential problems caused by delay. In addition, a court can often alleviate unfairness by granting a continuance, giving the adverse party an opportunity to secure expert aid.[96]

In the federal system, the timing of notice under rule 44.1 need only be "reasonable."[97] The drafters of the rule were reacting to the hardship caused under the fact approach, where late discovery would bar the use of foreign law. Thus, they did not set a firm time standard:

> The stage which the case had reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issues foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice.[98]

Professor Miller suggests, however, that a party should not be permitted to raise a foreign law issue after the pretrial conference, absent "extenuating circumstances."[99] This is sensible since a party

93 *See* Modarelli v. Midland Mut. Ins. Co., 10 Ohio App. 2d 114, 226 N.E.2d 137 (1967); Byrne v. Cooper, 11 Wash. App. 549, 523 P.2d 1216 (1974); Milwaukee Cheese Co. v. Olafsson, 40 Wis. 2d 575, 162 N.W.2d 609 (1968).

94 *See, e.g.*, Byrne v. Cooper, 11 Wash. App. 549, 523 P.2d 1216 (1974).

95 *See* FED. R. CIV. P. 44.1 advisory committee note (1966).

96 *Cf. Valdesa Compania Naviera*, 348 F.2d, at 37 (no abuse of discretion to refuse to receive evidence of Brazilian law raised for first time at trial, where only alternative would be to grant a continuance so opposing party could meet the new contention and obtain its own expert witness).

97 *See* FED. R. CIV. P. 44.1 advisory committee note (1966).

98 *Id.*

99 Miller, *supra* note 6, at 648.

should have sufficient knowledge of its case to allow clarification and simplification of all issues by the time of the pretrial conference.[100] The "extenuating circumstances" standard, however, seems largely to paraphrase the factors suggested by the drafters. In any event, the advisory committee note recognizes that notice given after trial may be considered reasonable.[101]

Grice v. A/S J. Ludwig Mowinchels[102] made it clear that notice need not be given in the complaint. Beyond this point there is little solid legal ground. While in no case has notice given prior to appeal been held so untimely as to bar the use of foreign law,[103] only one decision has gone so far as to suggest that invoking foreign law would be proper at any stage in the litigation.[104]

A good illustration of liberality in the context of notice timing is *First National Bank v. British Petroleum Co.*,[105] an antitrust action involving an Iranian oil contract dispute. The action arose in 1956 and had already involved three amended complaints under domestic law when defendants brought a summary judgment motion in 1970 based on Iranian law.[106] The motion raised a foreign law claim for the first time.[107] Although the evidence showed that the defendants had been aware of their rights under Iranian law for five years, the court found that the plaintiff would not be prejudiced by its use and that tactical reasons justified the delay.[108] If *First National Bank* is a

[100] *See* FED. R. CIV. P. 16.

[101] *See* FED. R. CIV. P. 44.1 advisory committee note (1966).

[102] 477 F. Supp. 365 (S.D. Ala. 1979).

[103] Notice has been held untimely, however, under Federal Rule of Criminal Procedure 26.1, the parallel rule for notice of foreign law in criminal proceedings, which uses almost the same language as rule 44.1. In United States v. Kearney, 560 F.2d 1358 (9th Cir.), *cert. denied*, 434 U.S. 971 (1977), the trial court refused to give the jury an instruction regarding the possible effect of felony convictions on the credibility of witnesses under the law of Japan. The Ninth Circuit upheld the ruling, concluding that the defendant had failed to give "reasonable" notice of intent to rely on the Japanese law. In this instance, at least, notice during trial came too late. *See also Valdesa Compania Naviera*, 348 F.2d at 36-37 (after requesting memorandum on foreign law during pretrial conference, judge refused to permit party filing the memorandum, which was filed very late, to raise authorities during trial which were not cited in the memorandum).

[104] Fairmont Foods Co. v. Manganello, 301 F. Supp. 832 (S.D.N.Y. 1969). *See also* Hodson v. A.H. Robins Co., Inc., 528 F. Supp. 809, 824 (E.D. Va. 1981) (suggesting that notice "may come at any time sufficient to give the court and the defendants adequate notice of the need to research the foreign rules").

[105] 324 F. Supp. 1348 (S.D.N.Y. 1971).

[106] *Id.* at 1361-62.

[107] *See id.* at 1354.

[108] *See id.* at 1354-55. Most significantly, the court noted that the defendants had made a similar summary judgment motion in 1964 under domestic law. *Id.* at 1354. Had they raised foreign law at that time, it would have created a question of fact under the pre-1966 standards which automatically would have resulted in denial of the motion. Thus, the court was most concerned about the period from 1966 to 1970 when such a motion would pose no

guidepost, a party can raise a question of foreign law at any time prior to trial, regardless of how long he has known that it might apply.

Morse Electro Products Corp. v. S.S. Great Peace[109] is the only decision suggesting any limitation on this liberal approach. In that action, a consignee had shipped goods from Japan to the United States and sued the shipper because the goods had disappeared en route. During the hearing of motions for summary judgment, the court noted that the bill of lading called for the application of Taiwanese law and asked the parties to brief the applicability of that law.[110] When only the plaintiff provided the requested supplemental brief—which the court found superficial—the court concluded that the conduct of all parties "indicate[d] a desire to abandon whatever rights or liabilities [were] created" under foreign law,[111] and applied domestic law in denying the bulk of the motions.[112]

To the extent that *Morse* suggests that the court can force parties to elect between foreign and domestic law prior to trial, the decision may be flawed. Rule 44.1 was intended to preclude the imposition of a sharp cut-off point, recognizing that there may be valid reasons for failure to raise foreign law even during trial.[113] Yet there is some justice in the implicit thrust of *Morse*: Parties should not be allowed to raise foreign law after a major motion on the merits has been decided under domestic law. Otherwise the same issues would be governed by domestic law at one time, and by foreign law at another, leading to a host of confusions. A party who has lost a summary judgment motion made under domestic law, for example, would have a second chance to bring the same motion, this time under foreign law.[114] The use of domestic law in a major motion should constitute a milestone in the progress of the case, and should be given heavy weight in determining whether notice is late.

Commentators have reached different conclusions regarding whether notice would be proper if given for the first time on appeal.[115] The dispute centers on *Ruff v. St. Paul Mercury Insurance Co.*,[116]

factual issue. In this analysis, the court ignored the factors cited in the advisory committee note to rule 44.1, *see supra* text accompanying note 98, and analogized to the requirements of estoppel.

109 437 F. Supp. 474 (D.N.J. 1977).

110 *Id.* at 487.

111 *Id.* at 487-88.

112 *See* id. at 488-95.

113 *See* FED. R. CIV. P. 44.1 advisory committee note (1966).

114 This very situation occurred in *First National Bank*. *See supra* note 108 and accompanying text.

115 *Compare* Sass, *supra* note 23, at 101-02 (foreign law should not be raised for the first

where the plaintiff, who had contracted polio while working in Liberia, attempted to raise the Liberian workmen's compensation law for the first time on appeal. The Second Circuit refused to take judicial notice of the foreign law on two grounds. First, the court interpreted rule 44.1 as requiring a party to give notice "in the district court proceedings in order to raise an issue concerning the law of a foreign country on appeal."[117] Second, the court concluded that "in any event, were we to consider Liberian law in deciding this appeal, we do not see how it would change the result."[118] This second point implies that the court was not wholly comfortable resting its decision on a flat holding that notice at the trial level was a condition precedent to raising foreign law on appeal. The advisory committee note to rule 44.1 indicates that notice may be given after trial and there seems little practical difference, in terms of the adverse party's ability to respond, whether such notice is given before or after judgment.[119] The rule itself provides that the decision of the trial court is to be considered a question of law.[120] This suggests that for appeal purposes foreign law is to be treated as an issue of law, so that normal appellate procedures which allow parties to raise new legal authorities should apply.

In sharp contrast to the flat rule enunciated in *Ruff*, a series of cases applying rule 44.1 intimates that the required notice can be given for the first time on appeal.[121] The scope of these decisions may well be limited by other procedural factors, however. For exam-

time on appeal), *with* Peritz, *Determination of Foreign Law Under Rule 44.1*, 10 TEX. INT'L L.J. 67, 71–72 (1975) (suggesting that foreign law can be so raised).

116 393 F.2d 500 (2d Cir. 1968) (per curiam). Implicit to some degree in the decision is the court's recognition that the plaintiff was teaching law at the University of Liberia when the injury occurred, and thus pursued his case at the trial level with professional legal care, such that any failure to give notice was intentional, not accidental.

117 *Id.* at 502.

118 *Id.*

119 *See* FED. R. CIV. P. 44.1 advisory committee note (1966). The key here is the ability of the adverse party to respond. A fair argument could be made that notice must be given before the end of trial, so that both parties can present information on the foreign law in the regular manner by which it is proven, and the trial court can make an appropriate decision. If notice is given after trial, however, these avenues for proof are cut off, and at best the parties may be allowed to brief the foreign law, a method hardly designed to ensure an informed decision. Seemingly, the adverse party could respond as well if the issue were briefed on appeal for the first time. In this context, the brief itself would seem to serve as the written notice required by the rule.

120 "The court's determination shall be treated as a ruling on a question of law." FED. R. CIV. P. 44.1.

121 *See, e.g.*, Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 952 (9th Cir. 1977); Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252, 1261 n.16 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975); Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 n.3 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968). *But see* Schlesinger, *supra* note 44, at 8 n.37.

ple, it is unlikely that such law could be invoked for the first time on appeal after a jury trial using instructions based on domestic law.[122] Rudolf Schlesinger also points out that the general rule against raising new matters on appeal may block attempts to bring foreign-law issues up for the first time on review.[123] Although appellate courts often disregard this principle to prevent injustice, failure to object to the application of forum law below may constitute a waiver.[124] On the other hand, Professor Schlesinger suggests that an appellee could raise a point of foreign law for the first time on appeal to urge affirmance of the dismissal of a claim or defense.[125]

States adopting the judicial notice approach have been very flexible in their treatment of the timing question. California, for example, simply requires "sufficient" notice.[126] In some cases, notice is required by the pretrial conference, while in others notice during trial may be timely.[127] Notice after trial, however, is probably too late.[128] Ironically, California expressly authorizes its appellate courts to take judicial notice of foreign law, even if the trial court did not do so.[129] New York law, in contrast, merely provides that, unless the court orders otherwise, notice is to be given prior to the presentation of evidence at trial.[130]

C. *Effect of Failure to Invoke Foreign Law*

Often the parties to an action will not invoke foreign law even though it is clearly applicable under the choice-of-law rules prevailing in the forum. Historically, the basic rule was that such a failure would result in the dismissal of the action,[131] either at the request of a party or *sua sponte* by the court.[132] This result stemmed largely from

122 *See* FED. R. CIV. P. 51; *see also* Schlesinger, *supra* note 44, at 21–23 (ability to raise foreign law for first time on appeal may depend on existence and nature of notice statutes).

123 Schlesinger, *supra* note 44, at 23. This rule may present an attractive solution to judges, whom lawyers generally perceive as reluctant to handle foreign-law issues. Baker, McKenzie Interview, *supra* note 24; Graham & James Interview, *supra* note 42. Appellate judges, however, do not seem to share the reticence of the trial bench. Interview with Chief Judge Robert Peckham of the Northern District of California (Oct. 12, 1981) [hereinafter cited as Peckham Interview].

124 Schlesinger, *supra* note 44, at 23; *see id.* at 21–22.

125 *Id.* at 22 n.115.

126 CAL. EVID. CODE § 453(a) (West 1966).

127 *See id.* law revision commission comment.

128 *See* Smith v. Smith, 201 Cal. App. 2d 377, 382, 20 Cal. Rptr. 95, 98 (1962).

129 CAL. EVID. CODE § 459 (West 1966).

130 *See* N.Y. CIV. PRAC. R. 4511(b) (McKinney 1963).

131 *See, e.g.*, Philp v. Macri, 261 F.2d 945 (9th Cir. 1958); Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y. 1956).

132 *See, e.g.*, Pitts v. Pacific & Atl. Ry. Naval Co., 12 Alaska 145 (D. Alaska 1948); Whitford v. Panama R.R., 23 N.Y. 465 (1861); *see also* cases cited in Annot., 75 A.L.R.2d 529,

the vested rights theory of conflicts of law, under which a cause of action was viewed as existing only under the foreign law which created it.[133] When this theory was superimposed on the "fact" approach to pleading, the necessary consequence of a failure to plead foreign law was the omission of a material "fact" necessary to support the cause of action, which led to dismissal.

The harshness of the sanction for noncompliance prompted courts to create exceptions to the basic rule.[134] These exceptions took the form of presumptions that the law of the foreign jurisdiction and the law of the forum were similar.[135] Probably the earliest presumption used in American courts was that certain "fundamental" principles of law were so inherently just that all "civilized countries" must recognize them.[136] A number of courts recognized a presumption that the law of another common-law jurisdiction was the same as the law of the forum.[137]

Depending on how broadly the phrase is stretched, the "fundamental principles" presumption did recognize certain basic underly-

532-34 (1961) (view that no presumption may be indulged in and foreign substantive law should not be applied).

133 *See* Schlesinger, *supra* note 44, at 4-5.

134 This harsh sanction also traditionally applied when the content or timing of pleading or notice was improper, impairing the willingness of courts to use it for what appear to be technical omissions. Yet the only normal, recognized procedure by which the party receiving notice can raise deficiencies is objection at trial. *Cf.* United States v. Kearney, 560 F.2d 1358 (9th Cir.) (objection at trial made under Federal Rule of Criminal Procedure 26.1), *cert. denied*, 434 U.S. 971 (1977). Such a late objection—even if successful—can only cause havoc, as each side makes last-minute changes in preparation for trial. This procedural gap could readily be cured by allowing a party to challenge either the timing or the sufficiency of notice. It would be reasonable to require that such a motion be brought within a set period after receipt of the notice, lest a party objecting to notice spring a last-minute surprise on the party relying on foreign law.

Other effective sanctions are also possible. For example, when a jurisdiction requires the notice to state the legal authorities on which the foreign-law claim is based, a court could respond to a successful claim of insufficiency by simply requiring that the response be supplemented. This could be done by analogy to the traditional practice involving motions to dismiss and bills of particular. *See, e.g.*, Haines v. Cook Elec. Co., 20 A.D.2d 517, 244 N.Y.S.2d 483 (1963) (per curiam); McQuade v. Szytkgold, 1 A.D.2d 872, 149 N.Y.S.2d 378 (1956) (per curiam). Where notice comes late, a court could condition the use of foreign law on compensation by the party invoking such law for monies expended by his opponent in researching domestic law to that date. The mere recognition of such creative sanctions might do much to give force to the notice requirement.

135 The propriety of presumptions has been a fertile ground for legal analysis. *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 16-18; Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U.L. REV. 602, 608-19 (1975); Miller, *supra* note 6, at 632-38; Schlesinger, *supra* note 44, at 4-6.

136 *See, e.g.*, Parrot v. Mexican Cent. Ry., 207 Mass. 184, 93 N.E. 590 (1911); State v. Morrill, 68 Vt. 60, 33 A. 1070 (1896).

137 *E.g.*, Frost v. C.W. Cone Taxi & Livery Co., 126 Me. 409, 139 A. 227 (1927); Hammond v. American Express Co., 107 Md. 295, 68 A. 496 (1908); *see* cases cited in Annot., 75 A.L.R.2d 529, 538-39 (1961).

ing similarities in Western legal systems. In addition, as offshoots from the common-law system of England, the law in most states was similar in content, structure, and method to that of England and, to a lesser degree, other common-law countries. Thus, the early presumptions generally reflected the foreign law involved with at least some accuracy as to major points, probably justifying their use in place of expensive and inconvenient proof. They allowed a cheap, rough approximation of foreign law and were rebuttable by evidence that the foreign law differed from that of the forum.[138] Most importantly, they allowed cases to be decided on their merits, with the avowed goal of reaching the same result that a foreign court would have reached, without unduly stretching the fabric of legal fiction.

This fabric was irreparably torn, however, by the creation of a sweeping "presumption" in many jurisdictions that the entire body of law of any country was the same as the law of the forum.[139] Early cases innocently "presumed" that the laws of Hong Kong and Washington,[140] Guatemala and California,[141] and Italy and Pennsylvania[142] were the same. The scope of foreign-law presumptions thus became divorced from reality. The net practical effect in such jurisdictions was to make the use of foreign law discretionary. The parties could, in effect, require that domestic law govern the action. A more recent approach by Professors Currie and Ehrenzwieg argued that the internal law of the forum should govern unless justification was shown for displacing it.[143] A party who wished to challenge the presumption, therefore, could do so by establishing that the relevant foreign law differed from that of the forum. Later decisions developed a related approach, holding that the failure of the parties to invoke the foreign law constituted an acquiescence to the use of domestic law.[144] Other decisions utilized the law of the forum with no explanation.[145]

Thus, the contemporary trend is for state courts to apply their

138 *E.g.*, Connecticut Valley Lumber Co. v. Maine Cent. R.R., 78 N.H. 553, 103 A. 263 (1918).

139 *See* cases cited in Annot., 75 A.L.R.2d 529, 536-38 (1961).

140 Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 P. 1140 (1913).

141 Christ v. Superior Court, 211 Cal. 593, 296 P. 612 (1931).

142 Rucci's Estate, 58 Pa. D. & C. 210, 214 (1946).

143 *See* Schlesinger, *supra* note 44, at 5.

144 *E.g.*, Leary v. Gledhill, 8 N.J. 260, 84 A.2d 725 (1951).

145 *E.g.*, Lane v. St. Louis Union Trust Co., 356 Mo. 76, 201 S.W.2d 288 (1947). The trend in favor of applying forum law was recognized and stimulated by the conflicts theories of Brainerd Currie and Albert Ehrenzweig, which encouraged the application of forum law unless justification existed for displacing it. *See* Schlesinger, *supra* note 44, at 5.

own law when foreign law is not invoked.[146] Commentators nevertheless continue to assume that at least some jurisdictions will dismiss an action if foreign law is not pleaded.[147] Yet during the past forty years no reported state decision—except in New York—involved a dismissal for failure to raise foreign law. Now, even New York has joined the ranks of states using forum law based on a party-acquiescence theory.[148]

A similar evolution occurred in the federal system. Prior to the enactment of rule 44.1, federal courts generally adhered closely to the vested rights approach, dismissing actions when foreign law was not pleaded.[149] Following enactment of the rule, the use of foreign law became discretionary, at least as to federal claims. The federal deci-

[146] Most jurisdictions adopt the presumption that the foreign law is the same as that of the forum, so that it prevails unless challenged with proof to the contrary. The manner in which this concept developed, however, is worthy of note. Most states appear to have analogized, with no analysis, to their treatment of the law of sister states, by supporting their initial use of this presumption with a citation to a decision which presumed that the law of a sister state was identical to that of the forum—a more realistic assumption. *See, e.g.*, Noble v. Noble, 26 Ariz. App. 89, 546 P.2d 358 (1976); Adamsen v. Adamsen, 151 Conn. 172, 195 A.2d 418 (1963); Cove-Craft Indus., Inc. v. B.L. Armstrong Co., 120 N.H. 195, 412 A.2d 1028 (1980). Probably the most extreme example is Doan Thi Hoang Ahn v. Nelson, 245 N.W. 2d 511 (Iowa 1976), "presuming" that the law of Vietnam is the same as that of Iowa. In California and New Jersey, the presumption was created by statute. *See* CAL. EVID. CODE § 311 (West 1966); N.J. STAT. ANN. 2A:84A, Rule 9(3) (West 1976).

[147] Miller, *supra* note 6, at 633-34; *see* Schlesinger, *supra* note 44, at 6-12. Professor Schlesinger suggests that the cases decided under the vested rights theory, taken together with its exceptions, can be reconciled with those decided under the local law theory by the use of four factors, and that therefore a uniform approach existed in fact, despite the labels used. The factors are: (1) the degree to which a strong public interest is involved in the dispute; (2) the access of the parties to foreign legal authorities; (3) forum shopping; and (4) the nature of the foreign legal system and of the issue involved in the case. *Id.* at 14-15.

[148] Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970). Due to the general paucity of foreign-law actions, the dismissal question doubtless has not arisen in some states during this period. It seems unlikely, however, that the modern trend will be ignored in these states when the issue does arise.

[149] The leading case is Crosby v. Cuba R.R., 222 U.S. 473 (1912), where the Supreme Court reversed the district court's verdict for the plaintiff—who had lost his hand in an industrial accident in Cuba—because the law of Cuba had not been established. Writing for the Court, Justice Holmes stated:

> With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. . . . [T]he only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it.

Id. at 478-79; *accord* Philp v. Macri, 261 F.2d 945, 948 (9th Cir. 1958); Walton v. Arabian Am. Oil Co., 233 F.2d 541, 543-45 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). Prior to the enactment of rule 44.1, federal courts were much more active than state courts in adhering strictly to the vested rights approach; the myth that modern courts would dismiss a claim for failure to raise foreign law was perpetuated largely by the lingering effect of this activity.

sions which consider failures to raise foreign law under the rule have uniformly applied the law of the forum. Most have adopted the broad "presumption" that the law of the forum is identical to that of the foreign country unless challenged;[150] many others have used an acquiescence rationale.[151]

A recent decision in the area, *Vishipco Line v. Chase Manhattan Bank, N.A.*,[152] summarizes the federal approach to the failure to raise foreign law:

> [W]ith the decline of the vested rights theory, . . . the movement has been away from a mandatory application of the forum's choice of law rules and toward the adoption of a discretionary rule. While, as the Advisory Committee's Notes to rule 44.1 make clear, a court is still permitted to apply foreign law even if not requested by a party, we believe that the law of the forum may be applied here, where the parties did not at trial take the position that plaintiffs were required to prove their claims under Vietnamese law, even though the forum's choice of law rules would have called for the application of foreign law. This reflects the view adopted by ourselves and other federal courts since 1966.[153]

Although the decision cited federal cases employing both the presumption and acquiescence theories, its rationale does not fit either label. This might reflect the lack of any effective difference between these two theories, at least at the level of invoking foreign law. The decision thus implies that the two theories reflect a single standard: The parties have discretion to invoke foreign law.[154]

The question remains whether this discretion should ever be limited by the court. As noted above, sound judicial practice suggests that the court should raise the possible application of foreign law, when appropriate, to ensure that the silence of the parties stems from

[150] *See, e.g.*, Walter v. Netherlands Mead N.V., 514 F. 2d 1130, 1137 n.14 (3d Cir.), *cert. denied*, 423 U.S. 869 (1975); Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252, 1261 n.16 (2d Cir.), *cert. denied*, 423 U.S. 838 (1975); Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 n.3 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968). For a brief look at the interrelation between these common-law presumptions and rule 44.1, see Note, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 WASHBURN L.J. 296 (1971).

[151] *See, e.g.*, Commercial Ins. Co. v. Pacific-Peru Constr. Co., 558 F.2d 948 (9th Cir. 1977).

[152] 660 F.2d 854 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982).

[153] *Id.* at 860.

[154] *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS. §§ 186-187 (1969) (approving the use of contract law provisions to select the governing law); U.C.C. § 1-105 (1972) (same). If the parties have discretion—at least in the contract context—to select the law to govern prior to litigation, it makes little sense to deny this right after a dispute has arisen.

a conscious decision to rely on domestic law.[155]

Certainly the court has the power to require application of foreign law. Most judicial notice statutes allow the court to consider foreign law without any request from the parties.[156] Similarly, the advisory committee note to rule 44.1 makes it clear that the court can apply foreign law even if the required notice is not given.[157] To the extent that notice has not been given because of expense, inconvenience, or lack of understanding of the foreign law, however, the parties may be able to offer little aid in determining that law. Judicial research of the foreign law[158]—perhaps with the help of a court-appointed expert[159]—could fill this gap in many instances, but a judicial decision *sua sponte* to impose the use of foreign law may often result in inadequate legal analysis.

Although the court clearly has the power to require proof of foreign law over the objection of the parties, there is no agreement on when this power should be exercised. In a few situations, such as where the relationship of the forum to the dispute is so slight that application of its laws would violate due process, the use of domestic law is wholly improper.[160] Generally, however, the American adversary system relies on counsel to shape the issues for decision in a manner which best protects the rights of their respective clients, and thus sets no criteria as to when the court should intrude in this process. The judge is viewed as a passive umpire, resolving only those issues presented by the parties.[161] Other than jurisdictional questions, courts traditionally raise few issues *sua sponte*.[162] The umpire metaphor is somewhat diluted in the foreign-law area, however, since both counsel and the court should actively participate in establishing

155 *See supra* text accompanying notes 58-60.

156 *E.g.*, N.Y. CIV. PRAC. R. 4511 (McKinney 1963).

157 FED. R. CIV. P. 44.1 advisory committee note (1966); *see Vishipco Line*, 660 F.2d at 856, 859-60.

158 *See infra* text accompanying notes 445-71.

159 *See infra* text accompanying notes 318-35; *cf.* Note, *supra* note 150, at 305 (judges have resources to conduct research on foreign-law issues).

160 *See* Home Ins. Co. v. Dick, 281 U.S. 397, 407-08 (1930); *cf.* Allstate Ins. Co. v. Hague, 449 U.S. 302, 313-20 (1981) (sufficient contact with Minnesota was shown so that application of Minnesota law did not violate due process).

161 *See, e.g.*, Quong Wing v. Kirkendall, 223 U.S. 59, 63-64 (1912). The court noted:

> It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our account. Laws frequently are enforced which the court recognizes are possibly or probably invalid if attacked by a different theory or a different way.

Id. at 64. *See generally* Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 487-90 (1958) (discussing the willingness of courts to let litigants control the course of lawsuits).

162 *See* Vestal, *supra* note 161, *passim*.

the law.[163] This cooperative approach springs from the practical difficulties of proof in the area, not from any abstract directive that the court should raise issues *sua sponte*.[164]

Some authorities suggest that the court should require the use of foreign law when necessary to protect the rights of the litigants. For example, in *Watts v. Swiss Bank Corporation,* [165] the court noted in dicta that "[i]t need not now be determined whether a court's failure *sua sponte* to notice foreign law, if a manifest injustice would result from such failure, would constitute an abuse of discretion as a matter of law."[166] Stephen Sass has remarked that such action should be taken whenever necessary to protect the "justifiable" interests of the litigants.[167] The desire to protect the rights of the parties should not justify restrictions on the discretion of the parties not to invoke foreign law, however, since choice of law principles do not mandate increased judicial intervention. Counsel, not the court, are best situated to protect the interests of the parties. Especially when given the difficulties inherent in establishing foreign law, the notion of party autonomy would seem more justifiable here than in many other areas.

Rather than considering the rights of the parties, justifications for limiting the discretionary use of forum law should focus on the extent to which the public interest is affected by the action. The rights of the public as a whole may be impaired when the normal choice of law rules of the forum—designed to protect both public and private interests—are bypassed.[168] Further, state interests in general increasingly provide the standard by which choice of law decisions are to be made.[169] Thus, to the extent that an action involves questions of family relations[170] or criminal activity[171] arising under foreign law, a

163 *See* Schlesinger, *supra* note 44, at 24–25.

164 *See generally infra* text accompanying notes 241–44 (need for expert to sift through complexities of proving foreign law).

165 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970).

166 *Id.* at 276, 265 N.E.2d at 743, 317 N.Y.S.2d at 320.

167 Sass, *supra* note 23, at 118.

168 A number of commentators have examined the public interest as a limitation on the court in the related context of deciding when an action should be dismissed for failure to raise foreign law. *See* Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1040–42 (1941); *cf.* Schlesinger, *supra* note 44, at 14 (public interest may lead court to apply foreign law even though parties have acquiesced in application of domestic law).

169 *See, e.g.*, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). *See generally* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (choice of law based on tempered self-interest of the concerned states).

170 *See* Nussbaum, *supra* note 168, at 1041–42; *cf.* Tsilidis v. Pedakis, 132 So. 2d 9, 13 (Fla. Dist. Ct. App. 1961) (court suggests that it would not allow the parties to stipulate to the validity of a Greek adoption for purposes of action in which the adoptee seeks recovery from decedent's estate as a pretermitted heir).

court probably should insist on the use of foreign law. Similarly, where the rights of parties not before the court are in issue, as in class actions, it would make little sense to allow the immediate parties to decide which law to apply.

It would be naive, however, to believe that a court is likely to apply foreign law over the objections of the parties with great frequency. The tradition of judicial inertia and the perceived barriers to effective judicial research conspire to discourage the best intentions, even though such a course may be required in rare instances.

III. DISCOVERY OF FOREIGN LAW

The applicability of discovery procedures to foreign law issues remains unsettled.[172] This uncertainty stems from the sharp historical distinctions between law and fact. The procedural realities involved in this distinction first led courts to treat foreign law as fact. Since knowledge of foreign law could not be imputed to judges, it had to be established through the mechanisms available to prove facts.[173] More recently, two opposing trends have made resolution of the issue more difficult. On the one hand, the scope and propriety of discovery in general have broadened dramatically; on the other hand, foreign law increasingly has been treated as law for procedural purposes.[174]

A. *Scope of Discovery into Foreign Law*

In most jurisdictions, normal discovery procedures can be used to resolve minor questions involving the application of foreign law.[175]

171 *See* Schlesinger, *supra* note 44, at 14.

172 There has been surprisingly little examination of discovery in the foreign law context by either courts or commentators. For a dated treatment of the subject, see O. SOMMERICH & B. BUSCH, *supra* note 6, at 90–93, focusing mainly on discovery from a party's own experts. For an equally brief, but more contemporary examination, see Miller, supra note 6, at 663–69, discussing the scope of discovery in this area but without extensive analysis as to how the hybrid nature of a case involving foreign law should affect traditional discovery methods.

173 *See, e.g.*, Monroe v. Douglass, 5 N.Y. 447 (1851).

174 *See supra* note 63 and accompanying text.

175 Federal Rule of Civil Procedure 33(b) was amended in 1970 to add: "An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogators involves an opinion or contention that relates to fact or the application of law to fact . . . ." FED. R. CIV. P. 33(b). This change recognizes that "requests . . . call[ing] for the application of law to fact . . . [could] be most useful in narrowing and sharpening the issues, which is a major purpose of discovery." *Id.* advisory committee note (1970). The committee was careful to note, however, that "[o]n the other hand, under the new language interrogatories may not extend to issues of 'pure law,' *i.e.*, legal issues unrelated to the facts of the case." *Id.* Similarly, Federal Rule of Civil Procedure 36(a) was amended to extend the scope of requests for admissions to include "any matters within the scope of Rule 26(b) . . . that relate to statements or opinions of fact or of the application of law to fact. . . ." FED. R.

Less clear is whether a party can use discovery procedures to determine the foreign law authorities upon which his opponent relies. Generally, a party cannot discover the legal theories or reasoning of his opponent—whether they involve the laws of the forum[176] or those of a sister state.[177] This rule stems from values that are central to our adversary system. First, it reflects the perceived need to protect the attorney's work product so that he may zealously represent his client.[178] Second, it embodies a sense that it is unfair to allow one party to avoid the cost and difficulty of doing legal research.[179] Third, it echoes the unspoken assumption that law is to be argued to the court, rather than proved to the trier of fact.

In applying this rule to foreign law, the federal courts have reached conflicting results. In *Bernstein v. N.V. Nederlandsche-Amerikaansche,*[180] the district court allowed the plaintiff to propound interrogatories asking defendant to "specify the foreign law" upon which its affirmative defenses and counterclaims were based. In so doing, the court endorsed the fact approach:

> The defendant having pleaded foreign law, it is to be proved as a fact. The information would tend to narrow the issues—. an important consideration in deposition-discovery procedure under the new Federal Rules of Civil Procedure, 28 U.S.C.A. The substance of the foreign law relied upon should be stated with appropriate citation of applicable statutes and one or more citations of decisional law, if any.[181]

CIV. P. 36(a). However, "[t]he amended provision does not authorize requests for admissions of law unrelated to the facts of the case." *Id.* advisory committee note (1970).

Accordingly, it would appear proper in a personal injury action to request the defendant to admit that its employee was acting within the scope of his employment under the applicable foreign law. *See* McSparran v. Hanigan, 225 F. Supp. 628 (E.D. Pa. 1963), *aff'd mem.*, 356 F.2d 983 (3d Cir. 1966), which the Advisory Committee cited as a proper application of the newly revised Rule 36. FED. R. CIV. P. 36 advisory committee note (1970). Similarly, a party has freedom to obtain and preserve the testimony of his own foreign-law expert through depositions or other procedures. *See infra* text accompanying notes 236-38.

176 *See, e.g.*, United States v. Maryland & Va. Milk Producers Ass'n, 22 F.R.D. 300 (D.D.C. 1958).

177 *See, e.g.*, Gevinson v. Kirkeby-Natus Corp., 26 A.D.2d 71, 73-73, 270 N.Y.S.2d 989, 991-93 (1966).

178 *See* Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

179 *Cf.* Fishermen & Merchants Bank v. Burin, 11 F.R.D. 142, 145 (S.D. Cal. 1951) (Rule 33 does not go "so far as to require a party to present to his adversary the authorities upon which he predicates his case").

180 11 F.R.D. 48 (S.D.N.Y. 1951).

181 *Id.* at 49 (citations omitted). This statement is a good example of the common-law view of what sources are important in demonstrating the content of foreign law. Under this view, law is to be found in cases and statutes, not in treatises. By contrast in civil-law jurisdictions, where they are considered "doctrine", treatises frequently are of greater importance than the past decisions.

By extending the fact approach from pleading and proof phases to the intervening phase of discovery, the court implicitly rejected the argument that such discovery called for a legal conclusion.[182]

Within a few days of the *Bernstein* decision, a district court reached a contrary result with respect to similar interrogatories. In *Fishermen & Merchants Bank v. Burin,*[183] the defendants moved to compel the plaintiff to answer its interrogatories which requested the citations for English law referred to in the complaint, contending that foreign law was properly discoverable as a fact since it was pleaded and proved as a fact.[184] By analogizing to cases involving domestic law, however, the court upheld the plaintiff's refusal to answer. First, it noted that, as a general rule, interrogatories could not be used to procure opinions or conclusions.[185] Second, it stressed the unfairness of requiring a party to provide his opponent with a list of legal authorities.[186] The court, however, did not consider whether there are qualitative differences between foreign and domestic law in the context of discovery.

Bernstein and *Fishermen & Merchants Bank* thus present a clash between the two contemporary approaches to foreign law for purposes of discovery: *Bernstein* embodies the waning fact approach, whereas *Fishermen & Merchants Bank* reflects the modern trend of treating foreign law like domestic law and implies that, since foreign law need no longer be pleaded, it is not discoverable.

The *Bernstein* approach is buttressed by decisions involving the use of bills of particulars to obtain foreign law authorities. Two federal decisions prior to *Bernstein* allowed the use of bills of particulars to secure the specific legal authorities upon which the adverse party

182 *Bernstein* was, of course, decided in the pre-rule 44.1 era, when it was necessary to plead the substance of foreign law in order to maintain a complaint or answer against a motion to dismiss for technical insufficiency. Presumably, the plaintiff could have moved to strike the answer and to dismiss the counterclaim as inadequately pleaded, and the trial court would have granted the motion, with leave to amend. The net effect of the decision to require interrogatory answers is the same as if such motions had been made; it serves to correct a technical defect in the pleadings. An argument can be made that the shift from pleading foreign law to merely giving notice of intent to rely on foreign law under rule 44.1 thus undercuts the foundation of this decision.

183 11 F.R.D. 142 (S.D. Cal. 1951).

184 *Id.* at 145.

185 *Id.*

186 *See id.* The court obviously was troubled by the lack of any decisions supporting the defendants' viewpoint. *Bernstein* had been decided, but not yet reported:

> At the time of argument the Court asked counsel for authorities sustaining their contention that they had a right to demand . . . citations of the alleged English law and, if case law, the names and citations of cases. Evidently counsel have been unable to produce authority which gives the right to demand such information.

Id. at 145.

had relied in a pleading.[187] In one of those decisions, the court noted that such information was necessary "so that the defendant may be adequately informed of the issues raised and enabled to prepare for trial."[188] A line of New York decisions supports the same result.[189] Since bills of particulars supplement pleadings in New York,[190] they can be used to elicit details about claims made in the pleadings.[191] A recent New York case, which cites discovery of the law of Puerto Rico as a suitable example, makes it clear that normal discovery procedures can be used to determine the foreign legal authorities on which an opponent relies when the authorities are "difficult of ascertainment."[192]

Although the replacement of the technical pleading requirement with a notice standard—through the passage of rule 44.1—signifies a shift from the fact approach toward the treatment of foreign law as domestic law, the federal system nevertheless seems to favor the *Bernstein* analysis. At the same time, the *Fishermen & Merchants Bank* approach is becoming increasingly blurred. As noted above, the 1970 amendments to Federal Rules of Civil Procedure 33 and 36 extended the scope of discovery to the application of law to fact, excluding only questions of "pure law."[193] Recent decisions have gone so far as to suggest that it is proper to propound interrogatories asking for an opponent's theories under domestic law, as long as the question will serve a "substantial purpose" in the action, such as narrowing the issues.[194] In addition, discovery into the adverse party's legal authorities has been permitted in the context of foreign law, without com-

187 *See* United States v. National City Bank, 7 F.R.D. 241 (S.D.N.Y. 1946); Egyes v. Magyar Nemzeti Bank, 1 F.R.D. 498 (E.D.N.Y. 1940). The *National City Bank* decision appears to assume that the information could have been obtained through later discovery proceedings, but allows the request in order to facilitate an answer to the complaint. Of course, the bill of particulars was viewed as an adjunct to the pleadings in the federal system, rather than as a discovery device.

188 *National City Bank*, 7 F.R.D. at 243.

189 For a detailed discussion of older, and largely unpublished, New York cases involving bills of particulars to elicit foreign law authorities, see O. SOMMERICH & B. BUSCH, *supra* note 6, at 34–38.

190 *See* Buckley v. Franklin Savings Bank, 258 A.D. 53, 15 N.Y.S.2d 477 (1939).

191 One commentator has analyzed the discovery devices in the Federal Rules of Civil Procedure as reviving the function of the bill of particulars. *See* James, *The Revival of Bills of Particulars Under the Federal Rules*, 71 HARV. L. REV. 1473 (1958). Although it has generally fallen into disuse elsewhere, the bill of particulars has retained amazing vitality as an important tool in New York practice. *See generally* 3 J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 87, ¶¶ 3041.05–.08.

192 Gevinson v. Kirkeby-Natus Corp., 26 A.D.2d 71, 76, 270 N.Y.S.2d 989, 994–95 (1966). At issue was the use of a bill of particulars as to the law of Texas, but the discussion and rationale extended to both sister-state and foreign law.

193 *See supra* note 175.

194 Hockley v. Zent, Inc., 89 F.R.D. 26, 31 (M.D. Pa. 1981).

ment, in at least two federal decisions since the passage of rule 44.1.[195]

From a policy standpoint, it makes little sense to treat foreign law as "law" for discovery purposes. The advisory committee note to rule 44.1 states that its goal is to provide "flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be obtained with fairness to the parties."[196] Discovery of foreign law authorities would seem to serve this end. Besides narrowing or eliminating certain issues, such discovery can facilitate the efficient and accurate determination of remaining issues. Knowledge of an opponent's legal contentions and authorities allows a party to focus the testimony of his foreign-law expert and to prepare an effective cross-examination of the opposing expert. Moreover, this process ensures that the court will be presented with testimony by the experts on the same themes, rather than wholly different interpretations based on distinct lines of reasoning.[197]

The difficulties in deciding whether foreign law is discoverable stem largely from the sharp historical distinction between law and fact, a division at the heart of the common-law adversary system. "Law" is perceived as readily available to the court and to the attorneys for the parties. All have been trained in the folkway and assumptions of the common-law system in which they practice and in the substance of its legal principles. All have the ability to locate unknown legal rules in readily available material. Accordingly, "law" is established through a set of procedures—briefing and argument—which reflects this continuing, shared knowledge. "Facts", however, differ from action to action, and thus must be established step by step, often in an oversimplistic fashion, to meet the needs of a jury as the trier of fact. The court has no advance knowledge of the facts in an action, nor do counsel prior to their retention. Thus, facts are established through a parallel set of procedures—pleading, discovery and proof—whose extent and detail serves to inform the court

195 *See* Curtis v. Beatrice Foods Co., 481 F. Supp. 1275 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980); IIT v. Cornfeld, 462 F. Supp. 209 (S.D.N.Y. 1978), *aff'd in part, rev'd in part*, 619 F.2d 909 (2d Cir. 1980). The authors' survey of federal judges reveals some uncertainty, however, about the present scope of discovery as to foreign-law authorities. When asked how effectively discovery liberalization and/or mandatory disclosure of foreign-law authorities would reform the present system, 19% indicated that such an action would be "most effective"; 62% said that it would be "somewhat effective"; and 19% said that it would be "ineffective". *See infra* appendix A, question 4(a). These results suggest that most federal judges see discovery in this area as somewhat limited today.

196 FED. R. CIV. P. 44.1 advisory committee note (1966).

197 This problem prevents effective adjudication. *But see* Diaz v. Southeastern Drilling Co. of Argentina, 324 F. Supp. 1 (N.D. Tex. 1969), *aff'd*, 449 F.2d 258 (5th Cir. 1971).

as to the nature of the facts upon which each side relies. The procedural realities in this distinction first led courts to treat foreign law as fact. Since no knowledge of foreign law could be imputed to judges, it had to be established using the only other mechanisms available—those employed to prove facts. The assumption of shared knowledge of the law simply does not apply to foreign law.

These same procedural realities support treatment of foreign law as fact for purposes of discovery. First, in many instances neither the court nor the parties have access to foreign legal materials. These materials often are available only in large university law libraries[198] and generally are printed only in the language of the foreign country.[199] Even if access is obtained, American attorneys are trained in neither the substance of foreign law nor its interpretation.[200] Consequently, the parties to an action involving foreign law normally are dependent on an expert for gaining knowledge of the foreign law. That law is then established according to the procedures used to prove expert opinion—through presentation of an affidavit or oral testimony.[201] As noted above, effective presentation of such expert opinion—and refutation of the other party's expert—turns on full and accurate knowledge of the foreign law, which cannot be obtained without discovery of the foreign legal authorities.

The decision in *Fishermen & Merchants Bank* is not necessarily incompatible with these concerns. Since that case involved English law—a body of law that is more similar to U.S. law than are the laws of other nations[202]—access to the foreign law was not a significant problem. Indeed, American courts have long applied English law in domestic actions, either directly or by analogy.[203] Accordingly, the

198 *See, e.g.*, Telesphore Couture v. Watkins, 162 F. Supp. 727, 730-31 (E.D.N.Y. 1958).

199 *See, e.g.*, Samaras v. S.S. Jacob Verolme, 187 F. Supp. 406 (E.D. Pa. 1960). *But cf.* Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) (securing translations of Mexican law poses no problem for Texas courts due to the number of Spanish-speaking residents). Certainly Texas and the states of the Southwest are likely to have ready access to translations of Mexican laws. This situation will be as unusual, however, as it is helpful.

200 *See, e.g.*, Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956); *see also* Diaz v. Gonzales, 261 U.S. 102 (1923) (deference to local courts on matters of purely local concern, where reviewing court is unfamiliar with local law). *But cf.* Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) (finding Texas judges "fully competent" to interpret foreign law).

201 *See infra* text accompanying notes 285-305.

202 Further decisions have recognized, due to the historical ties between the two systems, the substantial kinship between English and American law. *See, e.g.*, Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955). The normal procedural requirements for establishing foreign law often have been ignored where English law is concerned. *See infra* note 403.

203 *Cf.* CAL. CIV. CODE § 22.2 (West 1982) (establishing the Common Law of England as a formal source in California).

extent to which foreign law is treated as a fact for discovery purposes appears to turn on the extent to which such law is available and understandable.[204] Moreover, courts should condition or deny discovery on the basis of burden or oppression[205] in those occasional instances when the foreign law can be handled easily by American attorneys.

As a practical matter, a party can secure the foreign-law authorities relied upon by his opponent by filing a summary judgment motion.[206] Further, certain courts require the parties to prepare and exchange legal memoranda on foreign law.[207] A regular procedure for the discovery of foreign legal authorities is preferable to haphazard arrangements, especially since potential unfairness can be mitigated by broad judicial power to limit discovery.

B. *Specific Discovery Procedures*

Even if discovery into foreign law is permitted, there may be limitations on the specific procedures used to effect such discovery. Probably the most significant potential limitation is the set of restrictions which many jurisdictions impose on the discovery of expert opinions. Federal Rule of Civil Procedure 26(b), for example, permits only limited discovery of expert opinions without court authorization.[208] These limitations are crucial in the foreign-law context because American attorneys usually rely on experts for general background concerning the foreign law, in order to determine whether to invoke

[204] Professor Miller has argued for a significantly more narrow discovery scope in this area. He would allow discovery to the extent necessary to define or narrow the scope of a foreign law question, but not discovery devoted to examining legal authorities. *See* Miller, *supra* note 6, at 664-67. Thus, for example, he would not allow discovery of the opinions of the adverse party's foreign law expert absent a "significant discrepancy" in the ability of the litigants to gain access to experts, or a "persuasive showing" that such discovery is necessary to prepare for trial. *Id.* at 666. This position reflects both the limitations imposed on discovery generally at the time of his analysis and his own view that foreign law should be treated like domestic law to the extent possible.

[205] The district court has broad power to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." FED. R. CIV. P. 26(c).

[206] The risk, of course, is that the party filing such a motion may prompt a countermotion by the adverse party. If the moving party has failed to research the foreign law himself to the required degree, he may well lose. Thus, reliance on such motions for the purpose of informal discovery is, at best, fraught with risk.

[207] *See infra* notes 404-05 and accompanying text.

[208] In federal courts, discovery of expert opinions—beyond the identities of experts and the general nature of their testimony—is conditioned upon payment of "such fees and expenses as the court may deem necessary." FED. R. CIV. P. 26(b)(4)(A)(ii). By contrast, California allows unfettered discovery of such opinions. *See* CAL. CIV. PROC. CODE §§ 2037-2037.8 (West Supp. 1983).

it, and for "proving" the content of that law.[209] In light of these limitations, this section will examine the potential efficacy of specific discovery methods in the foreign law context.

1. *Interrogatories*.

In the initial stages of an action, interrogatories normally are the most fruitful discovery device. A party might propound interrogatories asking the adverse party whether he is making a particular contention based on foreign law and, if so, upon what authorities the contention is based. The sole potential limitation on this process is the involvement of expert opinion. Since an attorney normally works in concert with a foreign-law expert in responding to interrogatories, the answers might reveal expert opinion. Under the federal system such interrogatories would be improper, absent a court order.

Rule 26(b) distinguishes between experts who are expected to testify at trial and experts "retained or specially employed" in anticipation of litigation who will not testify.[210] For experts who will testify, interrogatories can be used to learn their identity, the subject matter of their testimony, the substance of the opinion which will be given, and the grounds for that opinion.[211] A party can also move the court to order further discovery, subject to restrictions on scope and cost allocation.[212] The use of interrogatories in this context is unlikely to produce substantial results, since the responding party usually can avoid detailed answers. The requirement that the substance of expert testimony and grounds for the opinion be provided has been so narrowly interpreted that brief, conclusory statements have been found sufficient.[213] The second step, however, opens up the possibility of full discovery of expert opinion.

Rule 26 does not provide criteria by which the court is to determine whether, or to what extent, further discovery should be permitted. Relevant cases indicate that further discovery is proper so long as the procedure is not "abused" and the expert is compensated by the party seeking discovery.[214] Thus, it appears that a party could secure answers to interrogatories requesting foreign legal authorities through such a motion.

Rule 26(b) erects high barriers, however, against discovery of in-

209 *See infra* text accompanying notes 244–63.

210 *See* FED. R. CIV. P. 26(b)(4)(A)–(B).

211 *Id.* at 26(b)(4)(A)(i).

212 *Id.* at 26(b)(4)(A)(ii).

213 *See, e.g.*, Hockley v. Zent, Inc., 89 F.R.D. 26 (M.D. Pa. 1980).

214 *See In re* IMB Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 41 (N.D. Cal. 1977); Herbst v. International Tel. & Tel. Corp., 65 F.R.D. 528 (D. Conn. 1975).

formation from nontestifying experts. While the identity of such experts is discoverable,[215] their opinions are subject to discovery only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[216] As a practical matter, a party may be able to discover such expert opinion only if that expert is the only one available or so preeminent in the field that the differing opinion of another expert would be accorded little weight. While the latter situation may occur, it makes little tactical sense to press for discovery on this basis, since to do so would risk admitting that one's own expert is unqualified, particularly given the emphasis placed on the qualifications of foreign-law experts.[217]

The distinction between trial experts and consulting experts is likely to create some confusion in the foreign-law context. Consulting experts are not subject to discovery because their opinions will not be presented to the court.[218] Yet, since expert opinion often is provided through methods other than "testimony" at "trial"—through affidavits,[219] opinion letters,[220] and briefs[221]—the treatment of such experts as mere consultants for discovery purposes flies in the face of the rationale behind the distinction.

2. *Depositions.*

The scope of the discoverability of expert opinion also determines whether an attorney can depose the foreign-law expert of an adverse

215 *See* Baki v. B.F. Diamond Constr. Co., 71 F.R.D. 179 (D. Md. 1976).

216 FED. R. CIV. P. 26(b)(4)(B). By contrast, experts who are consulted informally, rather than "retained" or "specially employed" in connection with the action, are not subject to discovery at all, on the theory that since they have little knowledge about the case, discovery would be abusive. *See Baki*, 71 F.R.D. at 182. Thus, presumably, experts who are consulted informally to determine whether their opinion of foreign law would favor the inquiring party cannot be examined. But to the extent that an attorney in a law firm consults another attorney in the firm who has knowledge of the foreign law involved—a common occurrence in large international law firms—this would be considered consultation of a "retained" expert, subject to at least limited discovery.

217 *See, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1146-50 (E.D. Pa. 1980); *see also infra* text accompanying notes 475-76.

218 The rationale behind allowing discovery of expert opinions in general is that it facilitates preparation for trial, especially for cross examination. *But see IBM Peripheral EDP Devices*, 77 F.R.D. at 41.

219 *See, e.g.*, Conservation Council of W. Australia, Inc. v. Aluminum Co. of America, 518 F. Supp. 270 (W.D. Pa. 1981); *see also* cases cited *infra* note 285.

220 *See, e.g.*, Kalmich v. Bruno, 553 F.2d 549 (2d Cir.), *cert. denied*, 434 U.S. 940 (1977); Bassis v. Universal Line, S.A., 322 F. Supp. 449 (E.D.N.Y.), *aff'd*, 436 F.2d 64 (2d Cir. 1970); Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958).

221 *See, e.g.*, Curtis v. Beatrice Foods Co., 481 F. Supp. 1275 (S.D.N.Y. 1980), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980); Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977).

party. Under Federal Rule of Civil Procedure 26(b), depositions are the normal means to follow up on the initial set of interrogatories and appear to be permitted as a matter of course, so long as the examining party compensates the expert for his time.[222]

Depositions of an opposing foreign-law expert have been allowed in at least two federal actions during the rule 44.1 era. First, in *IIT v. Cornfeld,*[223] the defendant relied primarily on deposition testimony about the law of Luxembourg, given by the foreign-law expert of the plaintiff, to support a motion to dismiss the action. Second, in *Curtis v. Beatrice Foods Co.,*[224] the court apparently ordered the parties to depose each other's expert on Colombian law. Because the plaintiff failed to produce his expert for deposition, he was barred from using a foreign-law expert at trial.[225] State courts likewise have permitted the use of similar depositions.[226]

The location of an adverse expert outside the United States should not pose a difficulty. As *Curtis* indicates, courts have the power to condition the use of an expert's testimony upon his availability for deposition. Further, the provisions governing depositions in foreign countries—usually a commission or letter rogatory arrangement—are becoming increasingly flexible and should be interpreted broadly when a foreign-law expert is involved.[227]

3. *Requests for Admissions.*

Prior to the passage of rule 44.1, requests for admissions were widely accepted as a proper means to secure agreement on the existence of foreign statutes and their translation into English,[228] but it

222 *See Herbst*, 65 F.R.D. at 530-31; *cf.* CAL. CIV. PROC. CODE §§ 2037-2037.8 (West Supp. 1983) (allowing depositions only if the examining party compensates the expert for his time).

223 462 F. Supp. 209 (S.D.N.Y. 1978), *aff'd in part, rev'd in part*, 619 F.2d 909 (2d Cir. 1980).

224 481 F. Supp. 1275 (S.D.N.Y. 1980), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980).

225 *Id.* at 1285 n.7.

226 One commentator has suggested that each side deposed the other's foreign law expert in Hunt v. Coastal States Gas Producing Co., 570 S.W.2d 503 (Tex. 1977), *cert. denied*, 444 U.S. 902 (1979). *See* Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619, 647 n.156 (1978). The decision does not reveal such discovery, but Professor Baade was an expert witness on behalf of the plaintiff, and thus speaks from first-hand information.

227 Thus, for example, the letter rogatory procedure in the federal system was greatly liberalized in 1963 by deletion of the requirement that such a letter be issued only when "necessary or convenient," a passage which had been strictly construed. The court may now issue such a letter whenever it is helpful to do so. Miller, *supra* note 6, at 664.

228 *See, e.g.*, Moumdjis v. S.S. The Ionian Trader, 157 F. Supp. 319 (E.D. Va. 1957). Judge Hoffman approved a request for admissions as to the genuineness of the English translation of a foreign statute and commented:

was unclear whether such requests could call for the application of foreign law to fact.[229] This uncertainty however, was eliminated in the federal system by the 1970 amendment to Federal Rule of Civil Procedure 36, which expressly allows requests concerning the applicability of law to fact, regardless of how foreign law is characterized for purposes of discovery.[230]

Requests for admissions are likely to be of only limited use on questions of foreign law. They are directed primarily to issues over which there is no real dispute and merely facilitate advance agreement on obvious points, so that lengthy and expensive proof can be avoided. Most key foreign law issues, on the other hand, are so controverted that requests for admissions will likely be denied. Moreover, the only possible sanction for noncompliance is to require that the losing party pay the costs of establishing the law on the issues.[231] Yet this sanction applies only when there is no good-faith reason for a refusal to admit. In the foreign law context, however, there almost always will be a good-faith legal argument to be made on any issue; thus sanctions for failure to admit are rare. Requests for admission nevertheless remain useful for securing early agreement about the existence of foreign statutes and their English translations.

4. *Requests for Production.*

No reported decision considers the propriety of a request for production of foreign law. In part, this reflects the paucity of written materials which might be requested. Normally, these materials consist of the expert's written opinion, original and translated copies of foreign legal authorities, and perhaps memoranda on the foreign law prepared by the American attorney. Whether the expert's report and accompanying authorities can be obtained through a request for pro-

> Where a party desires to prove a foreign law without introducing a witness with respect thereto, it would appear that the proper procedure calls for the attachment of recognized documents or laws in the foreign language, together with the English translation of same, thus providing the adverse party with the opportunity of examining the document and its translation. The publication of a foreign law or statute properly may be admitted as a fact . . . .

Id. at 320.

229 *Compare* Fuhr v. Newfoundland-St. Lawrence Shipping, Ltd., Pan., 24 F.R.D. 9 (S.D.N.Y. 1959) (upholding refusal of party to admit various contentions relating to how plaintiff's situation compared with various requirements of the Panama Labor Code), *with* Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955) (upholding trial court's order which treated as admissions the defendant's responses to requests to admit that a shipment violated Brazilian customs laws and regulations).

230 *See supra* note 175.

231 FED. R. CIV. P. 37(c). Such cost could be substantial given the normal expenses needed to establish foreign law.

duction depends primarily on the limitations which a jurisdiction places on the discovery of expert opinions. California and, to a lesser degree, the federal system appear to allow the production of reports by experts under most circumstances, on the theory that this is necessary for effective cross-examination at trial.[232]

In rare instances, the work-product privilege may bar such production. Since a foreign-law expert frequently may be characterized simultaneously as a cooperating foreign attorney, the relevant question in those cases is whether the policy favoring the discovery of expert opinions will prevail over the policy favoring free trial preparation.[233] It makes little sense, however, to insulate the written opinion of an expert from discovery on the theory that it contains "legal" opinions or theories, because the court can compel production of the substantial equivalent of such an opinion simply by requesting a brief on the foreign-law issue.[234]

5. *Discovery of the Opinions of One's Own Experts.*

The extent to which a party may use discovery techniques to establish and perpetuate the opinions of his own expert is wholly distinct from the scope of discovery for the opinions of an adverse expert. The limitations discussed above are not applicable in this context, and depositions[235] and interrogatories[236] have been used for this purpose.

This type of "discovery" was more common when proof of foreign law was confined by the normal rules of evidence.[237] Its usefulness today is questionable. In most jurisdictions, an affidavit can be used to establish foreign law, at a much lower cost. Furthermore, the cost of deposing an expert usually will exceed the cost of producing him

232 *See* Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594, 595 (D. Conn. 1977); CAL. CIV. PROC. CODE §§ 2037-2037.8 (West Supp. 1983). *But see* Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972).

233 In the federal system, a party seeking production of documents prepared for trial by an attorney or consultant must demonstrate a "substantial need" for them and show that he cannot obtain the "substantial equivalent" by other means. FED. R. CIV. P. 26(b)(3). This requirement does not apply to expert opinions, however. *Id.* 26(b)(4).

234 *See infra* text accompanying notes 398-405.

235 *See, e.g.*, Brandon v. S.S. Denton, 302 F.2d 404 (5th Cir. 1962); De Mateos v. Texaco Pan., Inc., 417 F. Supp. 411 (E.D. Pa. 1976), *aff'd*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *cf.* Estate of Johnson, 100 Cal. App. 2d 73, 223 P.2d 105 (1950) (appellant's motion for continuance for the purpose of taking a deposition in Norway on Norwegian law denied on grounds that appellant already had plenty of time to do so).

236 *See, e.g.*, Prudential Lines v. General Tire Int'l Co., 448 F. Supp. 202 (S.D.N.Y. 1978); *In re* Estate of Danz, 444 Pa. 411, 283 A.2d 282 (1971). *But see* Empresa Agricola Chicama Ltda. v. Amtorg Trdg. Corp., 57 F. Supp. 649 (S.D.N.Y. 1944).

237 *See generally* O. SOMMERICH & B. BUSCH, *supra* note 6, at 90-93 (examining such proceedings as a means of "discovery" during the fact era).

as a witness for trial.[238] A deposition might be helpful, however, on the rare occasion when a particularly prestigious expert on foreign law is unable to attend the trial and his credibility would be enhanced by allowing the other side to examine him.

IV. PROOF OF FOREIGN LAW

Unlike the Common Law, modern statutory systems grant the courts great liberties in the use of foreign-law materials,[239] whether proffered by the parties or obtained by the judges themselves.[240] In a field littered with misnomers, the term "proof of foreign-law" is stretched somewhat. Perhaps it would be better to speak of the "ascertaiment of the sources of foreign law" or, a bit more awkwardly, "getting before the court the data from which the foreign law can be derived."

A lawyer dealing with an issue to which foreign law may apply first must determine the content and method of application of the foreign law.[241] Even for major trade partners, the applicable statutes, decrees, proclamations, rules and regulations,[242] and decisional law are "not readily available."[243] Other potentially relevant materials (such as articles, treatises, commentaries, and studies on interpretative methodology, construction of the various laws, legal theories, customary law, trade usage and practice) also may prove elusive. Even if these sources are found, often no English translation will be available. Likewise, access to experts may be a problem. In some instances, an expert simply may not be available.[244] Very often, moreover, access to expertise depends on the resources of the client.[245]

238 *See infra* note 305.

239 *See* Sass, *supra* note 23, at 115.

240 *See, e.g.*, FED. R. CIV. P. 44.1. For a discussion of judicial research, see *infra* text accompanying notes 445–70.

241 *See also* Merryman, *supra* note 1, at 152–59 (discussing the problem of finding foreign law).

242 All written forms of legislative, administrative, and executive authority will collectively be referred to as statutes in this article.

243 Miller, *supra* note 6, at 619. Even in New York, with its extensive libraries and cosmopolitan legal community, at least one judge has felt that the difficulties in locating foreign law materials justified his disinclination to do his own research on foreign law. Télésphore Couture v. Watkins, 162 F. Supp. 727, 730–31 (E.D.N.Y. 1958) (denying judicial notice), *cited in* Miller, *supra* note 6, at 619 n.14. Similarly, it has been argued that judicial notice should not be mandatory because a "judge may not be aware of the existence of such laws and regulations; *moreover, they may not be readily available to him.*" N.Y. CIV. PRAC. LAW § 4511 legislative studies and reports ¶ 4 (McKinney 1963) (emphasis added).

244 *E.g.*, Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487, 505 (S.D.N.Y. 1958).

245 *See infra* text accompanying notes 279–84.

A. *Experts*

1. *The Role of the Expert.*

Both as a consultant and as a witness, an expert serves two primary functions. First, he must find and synthesize the sources of foreign law. Second, he must "translate" the foreign law into terms comprehensible to nonexperts. Since foreign law must undergo a double interpretation—once within its own legal framework and again when it is brought into the American legal system—before it can be applied,[246] the expert must be trained and fluent in both languages and legal cultures.[247]

As part of his synthesizing function, the expert can ascertain and attest to: (1) the authenticity and authoritativeness of a source of foreign law;[248] (2) the most current state of that law;[249] (3) the law which controlled at the pertinent time and place;[250] and (4) other laws which might apply to the situation.[251] The expert also can provide information on the decisional and unwritten law of a foreign country.[252] Additionally, the expert must evaluate and select among conflicting legal doctrines, decisions, statutes, and criticism to determine the law which the appropriate foreign court would most likely apply. He then must determine the appropriate interpretation and application of that law.[253]

Once the expert has ascertained the law to his satisfaction, he must perform a comparative function and explain the foreign-law concepts in terms comprehensible to domestic lawyers and laymen.

246 *See generally* Merryman, supra note 1, at 155–56.

247 This need is especially great because American procedural law or conflict-of-laws principles may require interpretations of the foreign law which the alien system does not provide. *See* Wood & Selick, Inc. v. Compagnie Générale Transatlantique, 43 F.2d 941, 942–43 (2d Cir. 1930); Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 473 (1978). As early as 1844, English courts realized that copies of statutes do not suffice:

> The witness may refer to the sources of his knowledge; but it is perfectly clear that the proper mode of proving foreign law is not by showing to the House [of Lords] the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it.

The Sussex Peerage, 8 Eng. Rep. 1034, 1046 (1844), *quoted in* O. SOMMERICH & B. BUSCH, *supra note* 6, at 14.

248 *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 15.

249 *See id.* at 16.

250 *See* 21 AM. JUR., PROOF OF FACTS 2D, § 12 (1980) [hereinafter cited as P.O.F.2d].

251 *See id.*

252 *See, e.g.*, Mila v. District Director of Denver, Colorado District of the Immigration & Naturalization Service, 494 F. Supp. 998 (D. Utah 1980), *rev'd on other grounds*, 678 F.2d 123 (10th Cir. 1982); O. SOMMERICH & B. BUSCH, *supra* note 6, at 15.

253 O. SOMMERICH & B. BUSCH, *supra* note 6, at 15. *See also* 21 P.O.F.2d, *supra* note 250, § 12.

The expert will need to consider and explain, for example, differences in translations of the law,[254] including the accuracy, potential to mislead, and analogical meaning of the various translations.[255] He must also explain the reasoning that a foreign court would be likely to follow in a given situation[256] and assert how that court would apply such reasoning to the facts.[257]

A testifying expert normally will repeat the translating function for the benefit of the court, which generally is ignorant of the nature and structure of the foreign legal system[258] and often is implicitly biased against it, if only out of excessive zeal for the system in which the court operates.[259] The process of establishing foreign law thus requires the expert to provide basic, fundamental instruction about the foreign legal system. Two types of testimony are helpful in this regard. First, the expert should describe the rules of construction employed in the foreign jurisdiction[260] and the nature and weight of sources used to interpret the law.[261] Second, the expert should integrate his conclusions with the concepts of domestic law familiar to the court.[262] Thus, the ideal expert would have a working knowledge

254 *See* Sommerich & Busch, *The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L.Q. 125, 148 (1953). In the *McClain* decision, the issue remained unresolved whether "*en*" in a Mexican statute meant "in" or "on"—a critical question in deciding whether certain artifacts had been stolen—and the court suggested that such problems of translation required the assistance of experts. United States v. McClain, 545 F.2d 988, 998 n.20 (5th Cir. 1977).

255 *See* United States v. McClain, 593 F.2d 658, 670 n.20 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979); 21 P.O.F.2d, *supra* note 250, § 12.

256 *See* Sommerich & Busch, *supra* note 254, at 148.

257 21 P.O.F.2d, *supra* note 250, § 12.

258 *See* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1053 (N.D. Cal. 1977); Couch v. Mobil Oil Corp., 327 F. Supp. 897, 903 (S.D. Tex. 1971); La Electronica, Inc. v. Electric Storage Battery Co., 260 F. Supp. 915, 917 (D.P.R. 1966).

259 *Cf.* Sommerich & Busch, *supra* note 254, at 126. (attorney must be sensitive to natural prejudice against foreign institutions).

260 Bridgman, *Proof of Foreign Law and Facts*, 45 J. AIR L. & COM. 845, 861 (1980); McKenzie & Sarabia, *supra* note 64, at 370.

261 *See, e.g.*, Gangel v. N. De Groot, P.V.B.A., 41 N.Y.2d 840, 841–42, 362 N.E.2d 249, 250–51, 393 N.Y.S.2d 698, 699 (1977); *see also* authorities cited *supra* note 260. In disputes involving civil-law countries, for example, it may be essential to educate the court about the more limited role of case law in the foreign system and the comparative importance of legal theory or doctrine. *See, e.g.*, Rodriguez v. Gerontas Compania de Navegacion, S.A., 150 F. Supp. 715, 719 (S.D.N.Y. 1957), *aff'd mem.*, 256 F.2d 582 (2d Cir. 1958); *see also* McKenzie & Sarabia, *supra* note 64, at 371 n.68 (importance of treatises in civil-law jurisdictions). One is constantly struck by the tenacity with which American judges rely on foreign-law cases, and even analogous domestic decisions, presumably as the only solid legal ground perceived in the foreign system. *See* Compania de Agvaceros, S.A. v. First Nat'l City Bank, 256 F. Supp. 658, 663 (D.C.Z. 1966).

262 See Domke, *Expert Testimony in Proof of Foreign Law in American Courts* (pt. 2), N.Y.L.J., Mar. 13, 1957, at 4, col. 1, concluding that this is the "basic difficulty" confronting the foreign-law expert. Failure to integrate the foreign law into the American legal system can lead to great confusion. *See* Wood & Selick, Inc. v. Compagnie Générale Transatlantique, 43 F.2d 941, 943 (2d Cir. 1930).

of both the foreign and domestic legal systems, together with the skill to bridge the gap between the two.[263]

The major advantage of expert testimony is that the expert can measure and respond to the sophistication, comprehension, background knowledge, and questions of the court and counsel. A well-framed affidavit or other substitute for testimony is less flexible, although more persuasive than documentary sources of law.[264] Whether in court or by written proxy, an expert can counter opposing information and contentions by explaining the foundations for any conclusions "which can [then] be explored . . . in the presence of the parties, the court and the jury."[265]

2. *Qualifications and Credibility.*

In most matters where the outcome depends on foreign law, there will be some dispute about the substance and application of that law. The opinions of the experts which each side presents probably will conflict. In the resulting "battle of the experts," the side with the better qualified experts usually prevails.[266]

The qualifications of experts vary greatly. At one extreme are experts so clearly qualified that rejection of them as expert witnesses would constitute reversible error.[267] An expert who studied law in the appropriate jurisdiction, practiced the relevant specialty there, and is sufficiently familiar with U.S. law and the English language to interpret the foreign law in terms meaningful to Americans would probably fit this class.[268] At the opposite extreme, there are also "experts" whose qualifications are nearly nonexistent.[269] A useful criterion for a court in deciding to qualify a witness as an expert is

263 Despite the large number of practicing attorneys in the United States who originally were trained in foreign legal systems, it is difficult to find one with a current knowledge of both systems. *Cf. In re* Estate of Ginn, 136 Mont. 338, 347 P.2d 467 (1959) (state's expert has no current firsthand knowledge of Yugoslav law). One solution—when financially feasible—is to use two experts. One would be a practitioner or professor, to do the bulk of the foreign legal analysis, and the other an American law professor knowledgeable in the foreign law, to bridge the gap between the systems.

264 *See infra* text accompanying notes 336–59.

265 Sommerich & Busch, *supra* note 254, at 148.

266 Baker, McKenzie Interview, *supra* note 24; *see, e.g.*, Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D. Pa. 1980).

267 R. SCHLESINGER, *supra* note 34, at 93.

268 *Id.* Busch, *supra* note 65, at 439.

269 Professor Schlesinger gives the example of Banco de Sonora v. Bankers' Mut. Casualty Co., 124 Iowa 576, 100 N.W. 532 (1904), in which a party did not present a statute on whether a 17-year-old was a minor under the law of Sonora, but offered a witness who had studied the civil law in general—but not the law of Mexico or Sonora—and presented as evidence the definition from a law dictionary allegedly in common use in civil-law countries. The offer was refused. R. SCHLESINGER, *supra* note 34, at 93.

whether the witness is more familiar with the foreign law than is the court.[270]

The trial court has broad discretion in qualifying a witness as an expert, and its decision will be reversed only for an abuse of that discretion.[271] While the Common Law cared only "whether a lawyer of that jurisdiction or some other person whose familiarity with that law has qualified him to speak as an expert on the subject,"[272] most American jurisdictions still only require that the witness be "learned" or "skilled" in the foreign law.[273] Since foreign law is difficult to ascertain without the help of experts, courts have accepted minimally qualified individuals whose familiarity with the foreign law is limited.[274]

An expert's qualifications will affect the credibility of his opinions.[275] In evaluating expert opinion, courts consider numerous factors, including: (1) the expert's admission to practice law in either the United States or the foreign jurisdiction; (2) the expert's practice as an attorney, academician, or magistrate in either country; (3) the expert's residence in the foreign country or other opportunity to observe firsthand the law and customs of the land; (4) the expert's education in the law of the foreign nation; (5) bias; (6) the legal specialization of the expert; (7) the expert's ability to communicate to the court; (8) the expert's knowledge or ignorance of recent changes in the foreign law; (9) inconsistent statements made by the expert; (10) publications by the expert; (11) the expert's general reputation as a legal scholar or practitioner; (12) prior experience as a testifying expert; and (13) the expert's demeanor at trial.[276] Some of these factors have more relevance than others. Whether an expert has practiced, resided, studied, or taught in the foreign jurisdiction may be beside the point; the true credibility of an "opinion has a significance proportioned to the sources which support it."[277] In-

270 *See* McKenzie & Sarabia, *supra* note 64, at 370.

271 R. SCHLESINGER, *supra* note 34, at 93, *citing In re* Estate of Spoya, 129 Mont. 83, 282 P.2d 452 (1955); Stern, *Foreign Law in The Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 38 & n.101 (1957), *citing* Estate of Schluttig, 36 Cal. 2d 416, 224 P.2d 695 (1950).

272 O. SOMMERICH & B. BUSCH, *supra* note 6, at 15 & n.53. Unlike English Common Law, the U.S. Common Law finds study of the law sufficient to qualify a witness as an expert. Sommerich & Busch, *supra* note 254, at 152 & nn.112, 113; Stern, *supra* note 270, at 38 & n.93.

273 Stern, *supra* note 271, at 38; *see, e.g.*, CAL. EVID. CODE § 460 (West 1966).

274 *See, e.g.*, Massucco v. Tomassi, 78 Vt. 188, 62 A. 57 (1905); McFadden v. Mitchell, 61 Cal. 148 (1882). Despite lack of qualifications, experts rarely are disqualified. *See e.g., In re* Estate of Spoya, 129 Mont. 83, 94, 282 P.2d 452, 458 (1955) (Bottomly, J., dissenting).

275 *See* Sommerich & Busch, *supra* note 253, at 152 & n.114.

276 *See* R. SCHLESINGER, *supra* note 34, at 92–93; O. SOMMERICH & B. BUSCH, *supra* note 6, at 41–47; Stern, *supra* note 270, at 38; 21 P.O.F.2d, *supra* note 250, at § 13.

277 Sommerich & Busch, *supra* note 254, at 150, *quoting* Petrogradsky Mejdunarodny

deed, an American lawyer "learned" in the law of a foreign country may be far better suited than a foreign expert for the comparative function of proving foreign law. Nonetheless, in searching for reasons to prefer the views of one expert over those of others, courts and lawyers often turn to superficial and arguably irrelevant details without investigating the depth of the expert's knowledge.[278] In fact, a court often has no way to evaluate the expert, except perhaps by comparison with other experts.

Where the foreign-law issue cannot be resolved in advance, counsel ought to choose the best qualified experts he can afford and to use them in a way that will assuage any doubts that the court might have about their qualifications. This practice is especially advisable for cases involving judicial notice, where courts naturally tend to refer less explicitly to the source of their determination of foreign law.

3. *Access to Experts*.

Normally, each side must find its own experts. Locating a competent, well-qualified, and well-spoken expert frequently is an immensely difficult and expensive task.[279] The availability and quality of the experts depend on the resources of the client, the resourcefulness of the lawyers, the country whose law is at issue, the area of law in question, and the geographical location of the lawyers, clients, and court. For proving the law of a smaller and more obscure country, for example, the cost may become astronomical if no expert resides in the United States.[280] At the planning stages, at least, an in-house expert carries the least cost, the best quality control, and presumably the highest degree of availability. At trial, however, bias may lead the court to discount the value of the opinion of such an expert.[281]

In the search for experts, lawyers often consider previous contacts of their firm, persons known by fellow attorneys or clients, or acquaintances and friends who are or know experts on the appropriate foreign law. Attorneys also may seek guidance from embassies, consulates, and trade representatives. Law professors—particularly spe-

Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 35, 170 N.E. 479, 483 (1930). Many may have misinterpreted the statement in Usatorre v. The Victoria, 172 F.2d 434, 438–39 (2d Cir. 1949), that a judge is entitled not to rely on the testimony of experts, "especially when" the expert has never practiced in the foreign land. O. SOMMERICH & B. BUSCH, *supra* note 6, at 41–42.

278 For a discussion on demeanor at trial, see *infra* text accompanying notes 300–301.

279 As Professor Merryman indicates, "They are not listed in the yellow pages." Merryman, *supra* note 1, at n.4.

280 Peckham Interview, *supra* note 123; *see, e.g.*, Pancotto v. Sociedade de Safaris de Moçambique, S.A.R.L., 422 F. Supp. 405 (N.D. Ill. 1976).

281 *See generally infra* text accompanying notes 306–11 (discussing bias).

cialists in foreign, international, and comparative law—often serve as consultants or can refer an attorney to experts. Attorneys also might contact the authors of books and articles dealing with the law of the country. Reported cases likewise would seem to be an obvious source for names of experts; however, relatively few opinions identify the experts involved. As a last resort, lawyers often turn to commercial lists, such as *Martindale-Hubbell* or the *International Law List*. These sources, however, may be incomplete and provide no assurance of quality, availability or priceworthiness.

The New York Bar once proposed the compilation of a comprehensive list of experts, but this project never came to fruition, allegedly because members feared that the list would become exclusive.[282] The compilation of such a list, which would indicate the areas and countries of expertise for each entrant, as well as information on their qualifications and publications, is long overdue.[283] Moreover, the development of a code of ethics and the establishment of an accreditation process would help to ensure the uniformity, neutrality, and equality of expert advice available to litigants.[284]

4. *Methods of Providing Expert Opinion.*

The most common means to present expert testimony on foreign law is through an affidavit[285] or similar written statement.[286] Such a statement sets forth the applicable foreign law and analyzes it in the light of the facts of the case. Translated copies of the key legal authorities upon which the expert relied generally are attached.[287] The statement is then filed with the court, usually without cross-examination of its author.

In most jurisdictions, such a statement can be used to establish

282 R. SCHLESINGER, *supra* note 34, at 147.

283 *See* Merryman, *supra* note 1, at 170 .

284 These proposals also suffer from the possible misconstruction of exclusivity. In a conflict between the opinions of "approved" and ordinary experts, a court very well—but perhaps mistakenly—might choose to rely on the former.

285 Apparently, attorneys use affidavits of foreign-law experts more frequently than oral testimony in federal courts. *See, e.g.,* Conservation Council of W. Australia, Inc. v. Aluminum Co. of America, 518 F. Supp. 210 (W.D. Pa. 1981); Bing v. Halstead, 495 F. Supp. 517 (S.D.N.Y. 1980); Mila v. District Director, 494 F. Supp. 998 (D. Utah 1980), *rev'd on other grounds,* 678 F.2d 123 (10th Cir. 1982); Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980), *vacated,* 665 F.2d 515 (5th Cir. 1981); Messinger v. United Canso Oil & Gas, Ltd., 486 F. Supp. 788 (D. Conn. 1980); La Nationale v. Lavan, 2 Misc. 2d 100, 151 N.Y.S.2d 539 (N.Y. City Ct. 1956); *infra* appendix A, question 2.

286 *See e.g.,* Kalmich v. Bruno, 553 F.2d 549 (7th Cir.), *cert. denied,* 434 U.S. 940 (1977); Bassis v. Universal Line, S.A., 322 F. Supp. 449 (E.D.N.Y.), *aff'd,* 436 F.2d 64 (2d Cir. 1970); Sperry, 163 Cal. App. 2d 518, 329 P.2d 728 (1958); United States v. First Nat. Bank of Chicago, 699 F.2d 341 (7th Cir. 1983).

287 *See* Sass, *supra* note 23, at 108.

foreign law at any point in the proceedings, including trial.[288] In jurisdictions which adhere to formal evidentiary rules, the statement must be in the form of an affidavit and will be permissible only when presented as part of a pretrial motion.[289] When the foreign law is reasonably clear, or when the foreign-law issue is a minor part of the dispute, the use of affidavits saves undue expense and delay.[290] Affidavits also open access to experts, since foreign attorneys or law professors can offer written testimony without the inconvenience of leaving their countries.

When a foreign-law issue is complex or actively contested, however, the effectiveness of the affidavit is limited. Even in isolation from the form of proof offered by the adverse party, an affidavit may be less persuasive to the court than oral testimony. The role of the expert is to show the judge how the foreign law meshes with the facts of the case.[291] An affidavit, however, cannot respond to unique questions or concerns of the court which may arise during the proceedings. In addition, judicial predispositions toward the adversary approach may make the court suspicious of any "evidence" which has not been subjected to cross-examination. Finally, use of an affidavit leaves open the possibility that the law may have changed since its preparation.[292]

The problem can be more pronounced when the affidavit is compared to the form of proof used by the adverse party. If both parties rely on affidavits, the court will have few means to determine which interpretation is more accurate, aside from a crude scrutiny of the authorities cited and of the qualifications of the respective experts.[293]

288 *See supra* note 285. *See also infra* text accompanying notes 406–44.

289 *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 57–58.

290 Preparation of an affidavit requires substantially less time than does preparation and examination of an expert witness at trial. *Cf.* Domke, *Expert Testimony in Proof of Foreign Law in American Courts* (pt. 1), N.Y.L.J., Mar. 12, 1957, at 4, col. 2 (New York courts often prefer the use of affidavits due to crowded court calendars). Given the high hourly rates that foreign law experts are likely to charge, affidavits are likely to be much less expensive than oral testimony.

291 *See supra* text accompanying notes 258–65.

292 *Cf.* Domke, *supra* note 290, at 4, col. 2 (changes in laws of civil-law countries are quite frequent and are discoverable only by cross-examination). The importance of this limitation probably turns on the possibility that the law in the foreign jurisdiction will change in the short interval between preparation and presentation; this will be a danger principally when the leadership of the foreign nation is volatile. *See, e.g.,* Couch v. Mobil Oil Co., 327 F. Supp. 897 (S.D. Tex. 1971).

293 *Cf.* Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977) (court complains of difficulty in understanding complex points of French contract law when the experts disagree); Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910 (N.D. Cal. 1977) (divergent reading of Iranian law by opposing experts demonstrates difficulty for court in familiarizing itself with that law), *aff'd,* 588 F.2d 880 (2d Cir. 1978). *But see* Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979).

If, on the other hand, one side employs an affidavit while the other provides oral testimony, the party providing the expert witness in court may reap substantial advantages in persuasiveness.[294]

In a few jurisdictions, the testimony of the foreign-law expert is confined by the evidentiary limitations applicable to other types of experts.[295] In most jurisdictions, however, proof of foreign law through oral testimony is quite flexible and not subject to the evidentiary strictures applicable to proof of facts.[296] Accordingly, direct examination can be somewhat abbreviated.[297]

Courtroom testimony by a foreign-law expert is generally more effective than the use of an affidavit.[298] But this method of presenting expert opinion has some problems of its own. First, it requires the physical presence of the expert and can be costly. Second, oral examination of the expert is a tedious and often inconclusive means of demonstrating propositions as complex as foreign law.[299] While helpful to a jury dealing with a set of concrete facts, the process of direct and cross-examination is an inefficient vehicle for presenting legal arguments to a judge.

Third, cross-examination of the expert retained by the opposing party is unlikely to be effective. The principal function of cross-examination is to test the veracity of an adverse witness, but veracity per se generally is not in question when foreign-law experts testify.[300] Thus, the demeanor of the witness under cross-examination is not

294 *See* Schmertz, *The Establishment of Foreign and International Law in American Courts: A Procedural Overview*, 18 VA. J. INT'L L. 697, 711 n.62 (1978). *But see* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D. Pa. 1980).

295 The usual mode of expert testimony in these jurisdictions is through hypothetical questions which incorporate the facts of the case and ask the expert for his opinion on how the foreign law would apply to these facts. For examples of somewhat simplistic direct examination on foreign law, see 21 P.O.F.2d, *supra* note 250, at 51–56. In the vast majority of cases, such examination will be entirely useless, because foreign law does not lend itself to treatment on direct examination. *See infra* notes 290–300 and accompanying text.

296 *See* appendix B. For example, FED. R. CIV. P. 44.1 allows submission of any relevant material or source "whether or not . . . admissible under the Federal Rules of Evidence." *Id.*

297 *See supra* note 295.

298 A judicial survey strongly suggests that oral testimony is more effective—a conclusion which comports with common sense. All respondents rated affidavits of party experts only "somewhat effective," whereas 33% found oral testimony by experts "most effective," and 67% found it "somewhat effective." *See infra* appendix A, questions 3(a) and 3(b).

299 The problem is most pronounced when the expert is not fluent in English. *See e.g.*, Konstantinidis v. S.S. Tarsus, 248 F. Supp. 280 (S.D.N.Y.), *aff'd mem.*, 354 F.2d 240 (2d Cir. 1965). One suggested solution—the advance drafting, for the purposes of reviewing, of all questions in both the foreign language and English—only increases the inflexibility of the expert. McKenzie & Sarabia, *supra* note 64, at 374. Such an expert would become entirely baffled on cross-examination in any event.

300 Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 474 (1978). Judge Pollack concludes that presentation of foreign law through testimony is useless, because trial procedures are designed to test veracity, which he does not see as an issue in the area; he advocates

likely to be helpful.[301] Further, the attorney undertaking cross-examination will rarely have sufficient background in the foreign legal system to ask meaningful questions.[302] Thus, his major function may well be to confuse the issue through semantic quibbling, rather than to reveal inaccurate testimony. Perhaps more importantly, however, cross-examination does lend itself to the question of the expert's qualifications.[303] The result of cross-examination, therefore, often is to shift the legal battleground from the substance of the testimony to the qualifications of the expert.

Deposition testimony from an expert is rarely used since it combines the disadvantages of both affidavits and oral testimony, with few of their advantages.[304] The absence of the expert from the courtroom limits the persuasiveness of the testimony, yet depositions usually are as expensive as courtroom testimony.[305]

5. *Evaluating the Use of Experts.*

Regardless of the method used, reliance on an expert to establish

treating foreign law just like domestic law, through briefing. *Id.* at 475; *see infra* text accompanying notes 398–405.

301 *But see* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971); Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963), *modified,* 347 F.2d 168 (5th Cir. 1965); Murphy v. Bankers Commercial Corp., 111 F. Supp. 608 (S.D.N.Y. 1953). Such judicial reliance on demeanor probably reflects habit rather than any conscious belief that demeanor is an effective tool in the foreign-law area.

302 *Cf.* Schmertz, *supra* note 294, at 707 n.46 (neither judge nor attorney will know right questions to ask). Of course, this difficulty can be mitigated in the rare instances where a foreign attorney becomes co-counsel in the action. *See, e.g.,* Société Jean Nicolas et Fils v. Mousseux, 123 Ariz. 59, 597 P.2d 541 (1979). For instance when such cross-examination was effective on the merits of the foreign law, see the extensive quotations set forth in Southwestern Shipping Corp. v. National City Bank, 11 Misc. 2d 397, 173 N.Y.S.2d 509 (Sup. Ct.), *aff'd mem.,* 6 A.D.2d 1036, 178 N.Y.S.2d 1019 (1958), *rev'd,* 6 N.Y.2d 454, 160 N.E.2d 717, 190 N.Y.S.2d 65 (1959).

303 Thus, cross-examination may serve to expose such obvious points as the witness' lack of residence in the foreign country, Estate of Johnson, 100 Cal. App. 2d 73, 223 P.2d 105 (1950), or his lack of experience with the foreign law, *In re* Estate of Ginn, 136 Mont. 338, 347 P.2d 467 (1959). As an example of the simplistic approach some have advocated in this complex area, see the almost laughable samples of suggested cross-examination of foreign law experts in 21 P.O.F.2d, *supra* note 250, §§ 30–34.

304 For examples of the use of expert deposition testimony, see Prudential Lines v. General Tire Int'l Co., 448 F. Supp. 202 (E.D. Pa. 1978); De Mateos v. Texaco Pan., Inc., 417 F. Supp. 411 (S.D.N.Y. 1976), *aff'd,* 562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978); Western Assurance Co. v. Bevacqua, 209 N.E.2d 249 (Ohio Ct. Com. Pl. 1964). Texas, however, which takes an independent view of foreign law in general, strictly adheres to the fact approach. *Cf.* Franklin v. Smalldrige, 616 S.W.2d 655, 657 (Tex. Civ. App. 1981) (rejecting use of expert deposition testimony to prove Mexican law: "Expert testimony such as this, standing alone, is not sufficient to prove such foreign laws.").

305 Thus, for example, if the expert is in Venezuela, both sets of attorneys will have to travel to that country to take his deposition, charging their clients on an hourly basis. This procedure would appear to be substantially more costly than oral testimony at trial, involving the expert's trip from Venezuela, unless his fees are extraordinarily high.

foreign law is subject to criticism on a number of grounds. In the first place, a foreign-law expert may be biased—either knowingly or innocently—in favor of the party retaining him.[306] The cases where experts are so well qualified and trustworthy as to dispel all doubts are rare.[307] Reliance by the court on an obviously biased expert witness may constitute reversible error.[308] Corroborating witnesses can mitigate, but probably not obliterate, the doubts cast upon expert testimony by bias.[309]

A number of factors may combine to induce a foreign-law expert to shape his conclusions. The first of these is the belief that there are two sides to any legal argument. Particularly in civil-law jurisdictions, where competing doctrinal approaches flourish, each side may be equally meritorious.[310] Second, the foreign expert may have an

306 *See* Domke, *supra* note 290, at 4, col. 2. *But cf.* Baade, *supra* note 226, at 641–42 (aruging that (1) the court's experience will enable it to identify any bias and (2) experts—at least in the international law area—are normally law professors and are thus reliable); Stern, *supra* note 271, at 39 (arguing that the trial court is adequately equipped to evaluate potential bias, citing *In re* Estate of Krachler, 199 Or. 448, 263 P.2d 769 (1953)). The belief that the court is capable of evaluating the content of foreign-law testimony for indications of bias is highly optimistic at best; as noted above, judicial training does not extend to foreign law, and the court will normally be hard-pressed to decide between competing experts on the merits, much less to evaluate potential bias based on content. Certainly the court can consider the obvious possible source of bias—the amount of the retainer. But this is likely to be helpful only in rare instances. Professor Baade's point that expert witnesses are likely to be law professors applies with less force in the foreign-law area, simply because it is more common to use foreign attorneys as witnesses; the possibility of bias is certainly smaller when an American law professor is the witness. *See also* Byrne v. Cooper, 11 Wash. App. 549, 555, 523 P.2d 1216, 1220 (1974) ("The drawback of the approach requiring counsel to prove foreign law is that it presents the interpretation of the foreign law through an advocate rather than through an impartial interpreter.").

An interesting problem arises when the best qualified or only available expert is one of the parties or one of the attorneys. Although this may not pose a legal problem, Baker, McKenzie Interview, *supra* note 24, the attorneys involved certainly will lose some credibility on account of presumed bias.

307 In IIT v. Cornfeld, 462 F. Supp. 209, 215 n.12 (S.D.N.Y. 1978), *aff'd in part, rev'd in part,* 619 F.2d 909 (2d Cir. 1980), the deposition of one of the plaintiffs as an expert was not precluded because he was also a recognized authority on the law of Luxembourg.

308 *See* United States v. McClain, 545 F.2d 988, 1000, 1004 n.36 (5th Cir. 1977). On the other hand, unsubstantiated allegations of bias do not justify a conclusion contrary to the testimony of an expert. *See* Berdo v. Immigration & Naturalization Serv., 432 F.2d 824 (6th Cir. 1970).

309 In United States v. McClain, 593 F.2d 658 (5th Cir.), *cert. denied,* 444 U.S. 918 (1979), the Government used testimony of a Mexican attorney with a large U.S. clientele, a professor from the University of Texas, and an ordinary Mexican woman to support the contentions of a Mexican Government attorney, whose testimony at an earlier stage had resulted in a reversal. Nevertheless, the court believed the defendant's expert, whose opinions reconciled apparent inconsistencies in the Mexican law for which the Government witnesses could not account. *Id.* at 667–68.

310 *See, e.g.,* Nicholas Eustathiou & Co. v. United States, 154 F. Supp. 515 (E.D. Va. 1957); *see also* Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910 (S.D.N.Y. 1977), *aff'd,* 588 F.2d 880 (2d Cir. 1978) (completely divergent readings of Iranian law). *See infra* note 351.

imperfect understanding of the American adversary system. Consequently, he may believe that he must advocate a certain position, even if he does not agree with it. An expert also may innocently be biased due to inadequate information about the nature of his responsibilities as an expert witness. A foreign attorney—or even an American law professor removed from active participation in litigation—may be unaware of his ethical obligation to disclose legal authorities directly adverse to his position.[311] Sound judicial practice would require the court to ensure that the expert is aware of this responsibility.

A second criticism of the use of experts is that the mechanisms for establishing foreign law through them are inefficient. As noted above, the affidavit is too limited and lifeless to be an effective tool of persuasion in a system geared to advocacy, and oral testimony is infected by practices designed to present simple facts to a jury for evaluation in light of witness demeanor. One method to reduce this inefficiency would be to combine the best elements of both methods. One commentator has suggested that foreign-law testimony be presented in a two-step fashion.[312] First, each party, in consultation with its expert, would prepare a memorandum on the applicable law, which would be filed with the court and served on the opposing party. The memorandum would ensure that each party's analysis is presented in a clear, complete fashion, and would allow the court and the parties due time for analysis. As a second step, the experts would appear in court to supplement the written opinion with oral testimony devoted solely to responding to questions from the court and opposing counsel. Cross-examination would be substantially more effective than usual, as the examining attorney would be able to prepare questions based on his expert's evaluation of the memorandum prepared by the adverse expert.

The two-step method of presenting expert testimony could be im-

311 In an unusual display of candor upon cross-examination, one American foreign-law expert witness admitted that he had sought only authorities "which would support his view that foreigners could not inherit under Rumanian law." Estate of Chichernea, 66 Cal. 2d 83, 93 n.24, 424 P.2d 687, 694 n.24, 57 Cal. Rptr. 135, 142 n.24 (1967). Foreign attorneys who generally will have no knowledge about ethical restraints in this regard would appear to be even more susceptible to such conduct.

312 *See* Baade, *supra* note 226, at 643. According to Professor Baade, the two-step system was the standard method for presenting such testimony to the Indian Claims Commission, which dealt with claims by American Indians against the United States (the Commission expired Sept. 31, 1978). *See also* Schmertz, *supra* note 294, at 708–12 (offering alternatives to full-scale oral testimony). A comparable process was used before a special master in Corporacion Salvadoreña de Calzado v. Injection Footware Corp., 533 F. Supp. 290 (S.D. Fla. 1982). *See also* Jeanneret v. Vichey, 541 F. Supp. 80 (S.D.N.Y. 1982) (involving a combination of expert testimony and briefing).

posed easily by most jurisdictions. Most courts have clear power to require the filing of briefs on any matter and the discretion to limit testimony, particularly under the flexible standards embodied in rule 44.1. In addition, there are ways to increase the efficacy of this process. First, discovery proceedings might be an effective intermediate step to flesh out the memoranda or opinions. Each side initially could test the opposing opinion with interrogatories, so that eventual courtroom testimony would be substantially more focused. Second, it might be possible to avoid having the expert actually appear in court. For example, the expert could be asked supplemental questions by a conference call with counsel and the court, a procedure currently used to a limited degree in other pretrial proceedings.[313]

A third criticism is that the use of competing foreign-law experts often leads to deadlock rather than resolution. Since each party inevitably will select an expert who agrees with its view of the foreign law, the testimony of the experts ordinarily will conflict.[314] Moreover, the normal means for resolving disagreements among experts—such as cross-examination—are less effective in the foreign-law context. To the extent that foreign law is treated as law, the usual method of evaluating the legal contentions proffered by each side—judicial research of the key authorities—is quite difficult. All too often, then, the court will be forced either to turn to the qualifications of the experts[315] or to find an answer wholly independent of reliance on the experts.[316]

Finally, the use of foreign-law experts is expensive, giving inherent advantages to the party with substantial financial resources. The

313 For example, California now used telephone conferences in lieu of formal appearances for various law and motion matters. *See* CAL. CIV. PROC. CODE §§ 575.5, 1006.5 (West Supp. 1983).

314 *See, e.g.,* Esso Standard Oil, S.A. v. The S.S. Gasbras Sul, 387 F.2d 573 (2d Cir.), *cert. denied,* 391 U.S. 914 (1968); Royal Exch. Assurance v. Brownell, 146 F. Supp. 563, 576 (S.D.N.Y. 1956), *aff'd,* 257 F.2d 582 (2d Cir. 1958); Corporation Salvadoreña de Calzado v. Injection Footware Corp., 533 F. Supp. 290 (S.D. Fla. 1982) (court notes that affidavits of experts were contradictory in every respect); cases cited *infra* note 364. One federal judge commented in response to the authors' survey: "The foreign law experts I have heard are just about as contentious and slanted as any other experts." *But see In re* Estate of Strauss, 75 Misc. 2d 454, 347 N.Y.S.2d 840 (Sur. Ct. 1973).

315 *See, e.g.,* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D. Pa. 1980). The same theme comes through in the authors' judicial survey. One judge noted: "As in most instances, the effectiveness of an expert on foreign law turns on his qualifications. Is he well qualified to speak with authority on the subject of his testimony?" *But cf.* Instituto Per Lo Sviluppo Economico v. Sperti Products, Inc., 323 F. Supp. 630, 635 (S.D.N.Y. 1971) (deciding for plaintiff on motion for summary judgment, while acknowledging that defendant's expert was "one of Italy's most distinguished legal experts").

316 *See, e.g., Esso Standard*, 387 F.2d at 581; *see also* cases cited *infra* notes 480-81.

cost of expert testimony may be prohibitive to a person of modest means.[317] Not only can the wealthier party employ more experts, but he can afford better qualified experts.

6. *Court-Appointed Experts.*

Courts have the power to appoint their own experts, either by their inherent powers or by statutory authority. Judicial notice statutes frequently imply or expressly grant permission to appoint experts. California, for instance, allows appointment on motion of the parties or by the judge *sua sponte*, when "required in order to enable the court to take judicial notice."[318] Nevertheless, courts rarely do appoint their own experts.[319] Resistance from the practicing bar is a major concern.[320] Many lawyers apparently fear that court-appointed experts take on the "aura of impartiality" of the court and turn into judges rather than resources.[321] Yet so long as the court permits the litigants to learn the opinions of the court experts—which is an ethical, if not a statutory, duty[322]—the fear that attorneys will be unable to challenge erroneous determinations of the foreign law seems baseless. This procedure, however, may prove complicated and costly, since both sides undoubtedly will want to examine the court witness and perhaps reexamine their own experts.[323]

Court-appointed experts appear most valuable to judges when irreconcilable conflicts arise among the party experts. This creates exactly the situation that attorneys fear most, however—that the "neutral" expert appointed by the court will act as a tiebreaker without having been examined, prodded, or discredited in conference or on direct and cross-examination. The obvious solution is to allow the litigants access to the court expert.

A court also may wish to appoint its own experts in order to pre-

317 *See* Walton v. Arabian-American Oil Co., 233 F.2d 541, 546 n.16 (2d Cir.) (Frank, J., dissenting in part), *cert. denied,* 352 U.S. 872 (1956); *cf.* Wall Street Traders v. Sociedad Española de Construcción Naval, 236 F. Supp. 358 (S.D.N.Y. 1963) (substantial size of damages in disputes means expense of proving foreign law is not disproportionate).

318 CAL. EVID. CODE § 460 (West 1966).

319 There appears to be only one published federal case in which the court explicitly turned to experts, and even there it is unclear from the opinion whether the experts ever appeared in court. *See* Callwood v. Kean, 189 F.2d 565, 574 n.8 (3d Cir. 1951).

320 *See* Merryman, *supra* note 1, at 166 .

321 Interview with Ralph Gampell, Director of the California Council (Oct. 1, 1981) [hereinafter cited as Gampell Interview]; Coudert Interview, *supra* note 46.

322 *See, e.g.,* CAL. EVID. CODE § 454(b) (West 1966); MODEL CODE OF JUDICIAL CONDUCT Canon 3(A)(4) (1980).

323 *See* Graham & James Interview, *supra* note 42.

vent injustice. A logical situation would be when one of the parties has not found an expert or cannot afford experts of a caliber comparable to those of the other parties. The difficult question in this situation is: Who should pay for the court-appointed experts? In his partial dissent in *Walton v. Arabian-American Oil Co.,*[324] Judge Frank acknowledged the prohibitive cost of experts and Arthur Nussbaum's suggestion that the losing party pay.[325] He noted, however, that although the Government bears the expense in federal criminal trials,[326] assessing the loser for expert fees in a civil suit may—in the absense of statute—exceed the powers of the court.[327] The expert, moreover, may never be paid if the loser becomes insolvent or unavailable.[328] This problem can be avoided by requiring the parties to advance costs or post a bond. In the case of indigent defendants, public funds could be provided, though this expense would place a burden on the treasury. While statutes control the compensation of court-appointed witnesses in many jurisdictions,[329] they may not provide for the high fees which many experts demand.[330]

Although some lawyers worry that the court will appoint an expert from a list or on the advice of friends—with no assurance of quality or neutrality—judges prefer the parties to handle the selection of the court expert, much as in arbitrations where each side nominates experts until they agree on one.[331] If this procedure fails to produce an expert acceptable to all, the court could pick someone proposed by one side or someone entirely new to the process.

Although the use of court-appointed experts might create additional confusion and expense,[332] it also could prevent injustice to the parties and misapplication of the foreign law.[333] Accordingly, the role of court-appointed experts should be expanded. Delegating for-

324 233 F.2d 541 (2d Cir.) (Frank, J., dissenting in part), *cert. denied,* 352 U.S. 872 (1956).

325 *Id.* at 546 n.16; *see* Nussbaum, *supra* note 22, at 63-64.

326 *See* FED. R. CRIM. P. 28.

327 *See* 233 F.2d at 546 n.16.

328 *See Id.*

329 *See, e.g.,* UNIF. R. EVID. 706(b), 13 U.L.A. 320 (1980).

330 *Cf.* R. SCHLESINGER, *supra* note 34, at 146 (suggesting that one way to avoid the problem of compensating a court expert in the absence of statutory authority is to appoint an expert under the guise of a special master or referee).

331 Coudert Interview, *supra* note 46; Gampell Interview, *supra* note 320; Graham & James Interview, *supra* note 42.

332 On the other hand, court-appointed experts may, in the long run, reduce the overall cost of litigation. Merryman, *supra* note 1, at 163.

333 "The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail." FED. R. CIV. P. 44.1 advisory committee note (1966).

eign-law questions to experts is a good idea, whether done by using special masters or referees, by assigning foreign-law cases to judges knowledgeable in the field, or by creating special courts to handle foreign-law issues.[334] Court-appointed experts represent an underutilized tool for facilitating the speedy and just resolution of foreign-law issues. Their use may increase as American legal systems progress toward true judicial notice.[335]

B. *Documentary Sources of Law*

Although experts can explain to a court the law of a foreign nation, they are not widely available.[336] Copies of statutes, cases, and commentaries are often cheaper and easier to obtain.[337] The Common Law developed complex procedures for admitting documentary evidence of foreign law.[338] American Common Law did not allow oral testimony about the contents of foreign statutes and other written law.[339] If an official copy of the law was not available, an elaborate certification process was required to authenticate the materials.[340] Some courts, however, considered treatises to be admissible evidence,[341] on the ground that they are a source of law.[342]

Most jurisdictions have relaxed the rules on admitting copies of documents, removing them from the umbra of the Best Evidence Rule.[343] These rules are not as economical and simple as judicial notice, however, so it is advisable to resort to them only when judicial notice has been refused or is not available in the jurisdiction. Moreover, such rules typically reverse the burden of producing evidence,

334 For a discussion of the special court that rules on conflict of laws in Hamburg, Germany, see Tueller, *supra* note 37, at 136–37.

335 That is, toward a doctrine of *iura novit curia*. *See supra* text accompanying notes 36–38.

336 Coudert Interview, *supra* note 46; Baker, McKenzie Interview, *supra* note 24.

337 Coudert Interview, *supra* note 46.

338 *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 13–15; *see also* 21 P.O.F.2d, *supra* note 250, §§ 10–11.

339 Peritz, *supra* note 115, at 74.

340 Miller, *supra* note 6, at 621–22; *see* Ennis v. Smith, 55 U.S. 399 (1852). Failure to follow this procedure often resulted in serious setbacks, including dismissal. *See, e.g.,* Barber v. Tadayasu Abo, 186 F.2d 775, 777 (9th Cir. 1951). Such a process of authentication is still used in many jurisdictions. *See, e.g.,* FED. R. CIV. P. 44(a)(2). Even so, some states continue to admit as evidence only an official copy of a foreign law. *See, e.g.,* TEX. REV. CIV. STAT. ANN. art. 3718 (Vernon 1925).

341 See, e.g., Instituto Per Lo Sviluppo Economico v. Sperti Products, Inc., 323 F. Supp. 630 (S.D.N.Y. 1971); Estate of Leefers, 127 Cal. App. 2d 550, 274 P.2d 239 (1954). In cases where countries have borrowed or relied heavily on the law of another nation, courts have even admitted commentaries from the donor country. *See* Usatorre v. The Victoria, 172 F.2d 434 (2d Cir. 1949).

342 Stern, *supra* note 271, at 35, 46–47.

343 *See, e.g.,* FED. R. EVID. 902(4); CAL. EVID. CODE § 1506 (West 1966).

so that the party opposing admission of the documentary source of foreign law must challenge the authority of the material.[344] Under judicial notice, the court, with the help of the parties, can usually determine whether a document is authentic, even if not official.[345]

Failure to submit at least documentary evidence of foreign law may constitute a failure to plead and prove foreign law and result in a dismissal or application of the law of the forum.[346] On the other hand, documentary sources of law often may suffice to dispose of a case. Especially when the parties do not dispute the foreign law, presentation of documents alone may be sufficient. When there is some dispute over the substance or application of a foreign law, however, counsel should be prepared to rely on more than naked documents.[347] Written evidence of foreign law may be useless when confronted by expert testimony. Documents work best when supplemented by some form of expert opinion,[348] which can explain their contents and applicability and put them in terms more easily understood by American jurists.

Statutes in particular require interpretation in order to be applied to the facts at bar, because the public policy embodied in them is rarely clear on their face.[349] Consequently, courts sometimes have

344 The Uniform Proof of Statutes Act, still on the books in 19 states, makes publications purportedly official on their face, or commonly recognized in the courts of the foreign jurisdiction, prima facie evidence. UNIFORM PROOF OF STATUTES ACT § 1, 9B U.L.A. 628 (1957) (withdrawn 1966); *see* UIIPA, *supra* note 131, § 5.03, 13 U.L.A. 504 (action in adopting jurisdictions). The UIIPA, which applies to "statutes, codes, written laws, executive acts, or legislative or judicial proceedings," requires only that the materials be "commonly accepted as proof" in the appropriate jurisdiction. *Id.* § 5.03, 13 U.L.A. 503. The UIIPA has been adopted in seven jurisdictions. 13 U.L.A. 459. Under the federal rules, "[a] foreign official record . . . may be evidenced by an official publication thereof; or [an attested and certified] copy thereof;" or, in the discretion of the court, "for good cause shown," without certification. FED. R. CIV. P. 44(a)(2). Thus, "a document that, on its face, appears to be an official publication, is admissible, unless a party . . . shows" that it is not official. FED. R. CIV. P. 44 advisory committee note. In Chicago Pneumatic Co. v. Ziegler, 151 F.2d 784, 794 n.13 (3d Cir. 1945), for example, a Swiss publication commonly accepted in the Belgian courts was admitted as an official Belgian reporter.

California follows a similar rule but calls the document prima facie proof, reversing the burden of production. CAL. EVID. CODE § 1530 (West Supp. 1983). New York makes purportedly official or commonly admitted publications prima facie evidence. N.Y. CIV. PRAC. R. 4511(d) (McKinney 1963).

345 *See, e.g.,* Ramirez v. Autobuses Blancos Flecha Roja, 486 F.2d 493, 497 n.11 (5th Cir. 1973).

346 *See, e.g.,* Prol v. Holland-America Line, 234 F. Supp. 530, 536-37 (S.D.N.Y. 1964); *see supra* text accompanying notes 131-54; *infra* text accompanying notes 482-516.

347 Coudert Interview, *supra* note 46.

348 The "most frequently utilized method of informal proof is the use of affidavits by experts submitted with a copy of the relevant foreign law in the original, as well as in English translation." Sass, *supra* note 23, at 108 n.53; *see infra* appendix A, questions 2(b), 2(f).

349 *See* Graham & James Interview, *supra* note 42.

been willing to look beyond the commonly accepted notion that precedent carries no weight in civil-law systems and have relied on decisions from the foreign jurisdictions.[350] Where admissible as evidence, treatises and other scholarly commentaries on the law can help fill the gaps between statutes and reality. In many legal cultures—especially among nations of the civil law tradition—tribunals give great weight to commentaries.[351] Unfortunately, doctrinal clashes among scholars are quite common and untrained American jurists probably will be unable to evaluate and select among them.

Nor is case law free from ambiguity and multiple interpretations.[352] American lawyers, unversed in the foreign law, may be unable to clarify the written materials, to distill their significance, and to draw distinctions of consequence concerning the alien system. Thus, experts are needed to interpret the cases and place them in proper context for the court. Indeed, one appellate court so valued expert opinion that it decided that the trial court could adopt the opinion of the expert, even though it contradicted the findings in prior court decisions.[353]

Courts, however, often interpret documentary sources of law without—or in spite of—any assistance proffered by experts of the parties. When documentary sources are before it, a court may and sometimes does arrive at its own construction of the foreign law,[354] even when unanimous expert opinion favors a different construction.[355] The inherent danger in this practice is that the unguided interpretation of foreign-law sources may not result in the proper outcome, especially since documents do not make manifest on their faces the public policies and theoretical and historical underpinnings of the foreign law. In addition, documents may present problems of cultural bias or contrary public policy.[356] Further, documents may not always make bias manifest.[357]

350 *See, e.g.,* Usatorre v. The Victoria, 172 F.2d 434, 439 (2d Cir. 1949).

351 *See generally* J.H. MERRYMAN, THE CIVIL LAW TRADITION 59-64 (1969).

352 For instance, in a case involving Singapore (i.e., British Commonwealth) law, an argument allegedly broke out at trial as to whether a statement read by one attorney to the court was the holding of a British case, the opinion of a single judge, or merely a contention proffered by counsel in the quoted case. Graham & James Interview, *supra* note 42.

353 Biddle v. Commissioner, 86 F.2d 718, 720 (2d Cir. 1936), *aff'd,* 302 U.S. 573 (1938).

354 *See, e.g.,* Daniel Lumber Co. v. Empresas Hondureñas, S.A., 215 F.2d 465, 469-70 (5th Cir. 1954).

355 *See* Annot., 31 AM. JUR. 2D 757 & n.5 (1967), *citing* Finney v. Guy, 189 U.S. 335 (1903).

356 *See, e.g.,* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 433 F.2d 686, 700 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971).

357 This issue normally arises in connection with official certificates. *See infra* text accompanying notes 368-70.

The greatest disadvantage to documentary sources of foreign law is their lack of power to persuade and explain. A statute usually cannot answer questions about its meaning. Expert testimony can guide the court through the vagaries and contortions of the process by which a foreign court would derive and apply its law. If one party employed an expert, the other side would be imprudent to rely on documents alone. Unopposed testimony, even though it does not bind the court, can be very convincing.[358]

Although documents might be cheaper and easier to obtain than expert opinions, they often prove less useful than an expert. When foreign-law materials are not available in English,[359] for example, a party may be compelled to hire a translator. In addition to the expense and delay of translation, concepts which have a special meaning in the specific foreign legal context may not come through in the translation. Even a published and acknowledged translation may have its faults: It may not reflect the most current state of the law, or it may contain an intentional or subconscious bias of the translator.

C. *Alternative Methods of Proof*

Despite the primacy of experts and documentary sources in the process of establishing foreign law, other less frequently utilized methods also are available. Some, like stipulations, stare decisis, and official certificates, serve to supplement the more traditional methods. In contrast, the concept of briefing foreign law presents a completely new approach to the area.

1. *Stipulations.*

Stipulations can be useful in establishing foreign law since they narrow the range of issues in dispute.[360] Like requests for admissions, they can lay a foundation of agreed-upon legal principles upon which the disputed issues may be examined, saving time and expense for all parties. It is common for parties to stipulate to the existence of foreign statutes,[361] although they may take conflicting positions as to

358 *See* Noto v. Compagnia Secula di Armanento, 310 F. Supp. 639 (S.D.N.Y. 1970).

359 This is not a rare situation. Coudert Interview, *supra* note 46. One commentator noted that "there is no civil code country whose codes and commentaries have been completely and fully translated into English." Busch, *supra* note 65, at 439.

360 *See* 2 S. GARD, JONES ON EVIDENCE § 14.52 (6th ed. 1972).

361 *See, e.g.,* First Nat'l City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779 (5th Cir. 1968); Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963), *modified,* 347 F.2d 168 (5th Cir. 1965); Atwood Vacuum Mach. Co. v. Continental Casualty Co., 107 Ill. App. 2d 248, 246 N.E.2d 882 (1969); Ochoa v. Evans, 498 S.W.2d 380 (Tex. Civ. App. 1973); Witt v. Realist, Inc., 18 Wis. 2d 282, 118 N.W.2d 85 (1962). Similarly, a party may enter into

their proper interpretation.[362] For example, in *Erazo v. M/V Cuidad de Neiva,*[363] an action by a seaman against his employer for personal injuries, the parties stipulated that Colombian labor law provided an equivalent to workmen's compensation.[364] This stipulation allowed the court to focus on the question of negligence.

The importance of stipulations to proving foreign law has diminished with the fall of the traditional proof approach. Previously, stipulations provided a means to avoid the formal, detailed evidentiary showing required to prove foreign law. Given the increasing flexibility in the process of establishing foreign law, it would appear that stipulations could largely be abandoned. Increasingly liberal discovery procedures also have made stipulations less necessary.[365]

2. *Official Certificates.*

At one time, the use of official statements or certificates from foreign governmental authorities was a common method of establishing foreign law.[366] This practice—common in Europe—was implicitly validated by the United States Supreme Court in *United States v. Pink,*[367] where the Court relied on the certificate of a Soviet Commissar to establish Soviet law. Later decisions considered certificates from foreign diplomatic or consular authorities.[368]

During the "fact" era, this practice was severely criticized on four

a de facto stipulation by failing to deny the existence or text of a foreign statute quoted in, or attached to, a pleading.

362 One commentator has noted that stipulations to the existence and text of foreign statutes pose the danger that such a stipulation may inadvertently preclude the use of later statutes and sources which conflict with it. Domke, *supra* note 262, at 4, col. 2. In addition, the existence of a stipulation as to the key statute may lull the litigants, when any dispute remains, into a false sense of security about the intent or interpretation of the section; neither side can shift its burden of offering further authorities to buttress its own viewpoint. The court will not attempt to understand the statute in a vacuum. *See, e.g., In re* Chase Manhattan Bank, 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd,* 297 F.2d 611 (2d Cir. 1962).

363 270 F. Supp. 211 (D. Md. 1967).

364 *Id.* at 213; *see also* Ezekiel v. Volusia S.S. Co., 297 F.2d 215 (2d Cir. 1961) (parties stipulated that Liberia had adopted nonstatutory maritime law of the United States), *cert. denied,* 369 U.S. 843 (1962); Tsakonites v. Transpacific Carriers Corp., 246 F. Supp. 634 (S.D.N.Y. 1965), *aff'd,* 368 F.2d 426 (2d Cir. 1966) (stipulation that Greek law provided rights to a Greek seaman injured on a Greek vessel), *cert. denied,* 386 U.S. 1007 (1967); *cf.* Autobuses Modernos, S.A. v. The Federal Mariner, 125 F. Supp. 780 (E.D. Pa. 1954) (parties apparently stipulated that assignment is valid under Cuban law).

365 *See supra* text accompanying notes 176-234.

366 For a general discussion of the use of official certificates, see O. SOMMERICH & B. BUSCH, *supra* note 6, at 55-57.

367 315 U.S. 203 (1941).

368 *See, e.g., In re* Estate of Feierman, 202 Cal. App. 2d 552, 20 Cal. Rptr. 883 (1962); Estate of Blak, 65 Cal. App. 2d 232, 150 P.2d 567 (1944); *In re* Estate of Hosova, 143 Mont. 74, 387 P.2d 305 (1963); *cf.* Birch v. Birch, 136 Cal. App. 2d 615, 289 P.2d 53 (1955) (refusing to accept certificate from Chinese Consul General).

grounds: (1) The author of the certificate might not know all the facts; (2) the author was not available for examination in court; (3) the qualifications of the author were unknown; and (4) the opinion might be influenced by nationalistic considerations.[369] These criticisms, however, have little validity today. The potential lack of factual knowledge or unavailability for examination does not bar the use of an expert's affidavit on foreign law and there is no reason why a foreign official could not be asked to state his qualifications. The possibility of national bias is of more concern, but poses less of a problem than the bias expected in an opinion by a party expert. Indeed, the key advantage of an official certificate over an expert opinion is that courts can measure the possible bias in such a certificate, based on the extent to which governmental interests are involved. A further advantage of official certificates is that they ordinarily are less expensive than expert witnesses.[370]

In most instances, a certificate by itself should not serve to establish foreign law. As the product of an overworked bureaucracy, the depth of analysis supporting the opinion may be shallow and easily subject to attack by the adverse party. Moreover, a certificate normally will not contain background information on the foreign legal system, focusing only on the narrow question of law involved.[371] It certainly will not translate the conclusion or reasoning into concepts familiar to an American court.[372] Although a certificate may suffice when the foreign-law issue is minor or extremely simple, in most instances it must be used in combination with more detailed sources.

3. *Stare Decisis.*

A third source sometimes relied upon by domestic courts to deter-

369 *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 145-47; *see also* Stern, *supra* note 271, at 37-38 (agreeing with criticism that such a certificate may not be impartial). *But cf. In re* Estate of Ginn, 136 Mont. 338, 347 P.2d 467 (1959) (allowing the Yugoslav Consul General to testify as to the inheritance law of Yugoslavia in an action involving potential Yugoslav heirs despite the state's claim that he is an "interested witness," noting that any such bias can be evaluated by the court). Of course, there may be nations whose prevailing world view is so at odds with that of the United States that such a certificate would be treated with skepticism. Thus, one commentary suggested—during the height of the Cold War—that the Soviet certificate relied on in United States v. Pink, 315 U.S. 203 (1941), would have been given little weight had it been produced after World War II. *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 56-57.

370 *Cf.* O. SOMMERICH & B. BUSCH, *supra* note 6, at 146 (flat fee often charged for official certificates).

371 *See, e.g.,* the short, conclusory declaration provided on Soviet law in United States v. Pink, 315 U.S. 203, 219-20 (1941).

372 *See id.* Perhaps even by definition, a foreign official will be unfamiliar with the American legal system and thus unable to explain the law of his country in terms familiar here.

mine foreign law is past American decisions on foreign-law questions. This practice is of questionable propriety, however, since the conventional wisdom has been that decisions on a point of foreign law by a domestic court do not have any precedential value.[373] The same factors underlying the treatment of foreign law as fact historically justified this limitation: Judicial unfamiliarity with foreign law, lack of access to foreign-law sources, and the cost and inconvenience of proving foreign law were believed to yield at best a crude approximation of the foreign law.[374] Similarly, as it was unusual for the same foreign law question to arise frequently, it was considered likely that the law would change between decisions, making stare decisis inappropriate.[375]

The absence of stare decisis, however, has sometimes resulted in judicial inconsistency. For example, six California decisions, all rendered within a seven-year period, split evenly on the issue of whether American citizens could inherit under German law.[376]

This example belies the assumption that foreign-law questions rarely are repeated.[377] Allowing at least some precedential effect to prior domestic decisions would facilitate stability and prevent glaring inconsistencies. The use of stare decisis would avoid duplication of proof of common questions. In addition, it would serve to provide at least limited access to relevant foreign-law materials, reducing the

373 *See* Nussbaum, *supra* note 168, at 1034–35; *see also* Bridgman, *supra* note 260, at 849–50 & nn.19–20 (use of stare decisis when foreign law is treated as question of law and as question of fact).

374 *See* Note, *Proof of the Law of Foreign Countries: Appellate Review and Subsequent Litigation*, 72 HARV. L. REV. 318, 324 (1958); *cf.* Domke, *supra* note 262, at 4, col. 2 (defending the rule against stare decisis effect because the quality of proof in a series of decisions on the same foreign-law issue is likely to improve over time); Stern, *supra* note 271, at 28–29 (similarly supporting the rule because "the proof of foreign law may have been insufficient in the earlier case, the foreign law may not have been fully available in earlier litigation, or because courts may disagree concerning the credibility of witnesses or the value of their conclusions").

375 *See* Note, *supra* note 374, at 425–26.

376 *Compare In re* Estate of Leefer, 127 Cal. App. 2d 550, 274 P.2d 239 (1954), Estate of Peters, 110 Cal. App. 2d 723, 244 P.2d 88 (1952), *and In re* Estate of Miller, 104 Cal. App. 2d 1, 230 P.2d 667 (1951) (all finding that German law did allow Americans to inherit), *with In re* Estate of Schluttig, 36 Cal. 2d 416, 224 P.2d 695 (1950); *In re* Estate of Knutzen, 31 Cal. 2d 573, 191 P.2d 747 (1948), and *In re* Estate of Thramm, 80 Cal. App. 2d 756, 183 P.2d 97 (1947) (all finding that German law did not allow such inheritance). While not recognizing the earlier decisions as precedents, the later courts clearly were uncomfortable with the inconsistencies, and attempted to escape this difficulty by suggesting that German law might have changed in the intervals between deaths; however, this claim is not supported by the time sequences involved. *See also In re* Estate of Krachler, 199 Or. 448, 263 P.2d 769 (1953) (analyzing the California decisions in dealing with the same issue and essentially giving them limited precedential effect).

377 In fact, it appears that there was a surge of such cases across the nation after World War II, most of which are unreported. To a large extent, the same experts testified in each, presumably presenting the same testimony on each occasion. *See* cases cited *supra* note 376.

barrier between foreign and domestic law and facilitating the planning of future conduct.[378] Perhaps because of these concerns and judicial inertia, in recent years the traditional rule has been ignored more often than followed.[379]

Ironically, the high-water mark of stare decisis in the foreign-law context came during the waning days of the fact approach in the federal system. In *In re Chase Manhattan Bank,*[380] the court rejected expert testimony that the production of bank records from a branch office in Panama would violate Panamanian law, and instead followed a Second Circuit decision[381] which had determined that Panamanian law did not bar such production.[382] Similarly, in *Nicholas E. Vernicos Shipping Co. v. United States,*[383] the court found that conflicting expert testimony concerning sovereign immunity in Greek courts was "exceedingly unsatisfactory"[384] and relied on a district court decision[385] that dealt with the same question. Decisions from a variety of other jurisdictions under the fact approach demonstrate a similar willingness to consider prior domestic decisions in establishing foreign law.[386]

Although rarely discussed, reliance on domestic foreign-law decisions appears to be acceptable in jurisdictions using either a judicial notice or a rule 44.1 approach.[387] Courts generally can take judicial notice of decisions from the forum state or from other states. Although such decisions are not technically binding under the rubric of

[378] *See* Bridgman, *supra* note 260, at 850.

[379] The tenacity with which American judges attempt to rely on domestic decisions to establish foreign law, viewing them as familiar landmarks in a foreign legal wilderness, is striking. Indeed, courts sometimes have done so to absurd extremes. For example, in Rodriguez v. Gerontas Compania de Navegación, S.A., 150 F. Supp. 715 (S.D.N.Y. 1957), *aff'd,* 256 F.2d 582 (2d Cir. 1958), the court relied on a prior American decision involving Argentine labor law to resolve a question dealing with Panamanian labor law.

[380] 191 F. Supp. 206 (S.D.N.Y. 1961), *aff'd,* 297 F.2d 611 (2d Cir. 1962).

[381] First Nat'l City Bank v. IRS, 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960).

[382] 191 F. Supp. at 208-09.

[383] 349 F.2d 465 (2d Cir. 1965).

[384] *Id.* at 467.

[385] Nicholas Eustathiou & Co. v. United States, 154 F. Supp. 515 (E.D. Va. 1957). The *Vernicos* court commented that the court in this earlier decision "apparently received more assistance from experts than was rendered here." 349 F.2d at 468.

[386] *See, e.g.,* Tsakonites v. Transpacific Carriers Corp., 246 F. Supp. 634 (S.D.N.Y. 1965), *aff'd,* 368 F.2d 426 (2d Cir. 1966), *cert. denied,* 386 U.S. 1007 (1967); Rodriguez v. Gerontas Compania de Navegación, 150 F. Supp. 715 (S.D.N.Y. 1957), *aff'd,* 256 F.2d 582 (1958); Biddle v. Commissioner, 33 B.T.A. 127 (1935), *aff'd,* 86 F.2d 718 (2d Cir. 1936), *aff'd,* 302 U.S. 573 (1937); *In re* Estate of Ginn, 136 Mont. 338, 347 P.2d 467 (1959); *In re* Estate of Spoya, 129 Mont. 83, 282 P.2d 452 (1955).

[387] *See* R. SCHLESINGER, *supra* note 34, at 74; Nussbaum, *supra* note 168, at 1034-35.

stare decisis,[388] the judicial notice mechanism implicitly recognizes that sources and analysis contained in other decisions may be useful in reaching an informed result. Similarly, rule 44.1 emphasizes the power of the court to consider any relevant source or material in determining the content of foreign law, which certainly encompasses prior domestic decisions.

Ironically, while authorizing courts to consider the contents of other decisions, the judicial notice and the rule 44.1 approaches reject a strict stare decisis rule, in contrast to some decisions rendered under the fact approach. While rule 44.1, for example, notes that a decision on foreign law is to be treated as a "ruling on a question of law," the advisory committee note explains that this provision was inserted only to expand the scope of review on appeal.[389] To impose a strict stare decisis standard, however, would limit potential sources of proof, not expand them.[390]

Most decisions relying on domestic opinions have utilized them to establish incidental foreign-law points, not for substantive analysis which would outweigh expert testimony. Thus, some decisions have cited domestic opinions to establish the content of a foreign statute, using the authorities set forth in the opinion rather than its reasoning or result.[391] Other decisions have used domestic opinions to establish minor points of foreign law which the parties have failed to address.[392] In each instance, however, the court has treated the prior

388 In California, courts are permitted to take judicial notice of the decisional law of any state. CAL. EVID. CODE § 452(a) (West 1966). In addition, courts are required to take judicial notice of the "decisional . . . law of th[e] state." *Id.* § 451(a). It could be argued, of course, that a judicial decision which is not intended to have stare decisis effect is not "law" in the strict sense of the term. In any event, a California court may take judicial notice of the "records" of any court in the United States. *Id.* § 452(d). This latter category is sufficiently broad to encompass decisions on foreign law.

389 *See* FED. R. CIV. P. 44.1 advisory committee note (1966).

390 *See id.* Few would argue that a court should be bound by prior decisions in this area, unless the process for establishing foreign law someday approaches perfection, an unlikely prospect. Such decisions are entitled to some weight—but only together with other sources of proof adduced in the action. Yet, particularly where the parties have failed to address a particular point or to make any effort to establish foreign law for some good faith reason, it makes more sense to rely on such prior decisions as a crude approximation of foreign law than to consider the consequences of a failure of proof.

391 *See, e.g., In re* Ta Chi Tii, 416 F. Supp. 371 (S.D.N.Y. 1976).

392 *See, e.g.,* Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1969); Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980), *vacated*, 665 F.2d 515 (5th Cir. 1981); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978); Michael v. S.S. Thanasis, 311 F. Supp. 170 (N.D. Cal. 1970); *In re* Spitzmuller, 279 A.D. 233, 109 N.Y.S.2d 1 (1951), *aff'd,* 304 N.Y. 608, 107 N.E.2d 91 (1952). In addition, several cases have used past domestic characterizations of specific foreign laws as substantive or procedural for conflicts purposes. *See, e.g.,* Henry v. Richardson-Merrell, Inc., 366 F. Supp. 1192 (D.N.J. 1973), *rev'd on other grounds,* 508 F.2d 28 (3d Cir. 1975); *see also In re* Bethlehem Steel Corp., 435 F. Supp. 944 (N.D. Ohio

opinion without comment, making it impossible to determine whether the opinion is being given limited stare decisis effect or merely being judicially noticed.

The number of reported decisions involving foreign-law issues is comparatively small and the question of their precedential value has generated little attention. Some repeating patterns are discernible, however.[393] With the increasing number of foreign-law disputes confronting American courts, the use of prior domestic decisions is likely to expand. At least some weight should be given to these decisions. Indeed, in the typical situation where the opinions of the party experts conflict, the careful reasoning of an earlier court confronting the same issue may be quite helpful.[394]

In determining the weight to be accorded a prior domestic decision, four factors should be considered. First, the court should note the extent and sources of the foreign-law materials relied upon in the earlier decision.[395] Second, the court should consider the extent to which the parties have developed the foreign law, since the use of prior decisions is more acceptable when compelled by an inadequate or inconclusive presentation. Third, the court should consider the importance of the foreign-law issue in the case as a whole, according more weight when the issue is minor.[396] Finally, the court should consider the nature of the foreign legal system.[397] Generally, the

1976) (court assumes that domestic decisions are applicable in determining character of Canadian shipping statute).

393 This repetition is especially evident in cases involving the overtime rights of Panamanian seamen, *see, e.g.,* Bassis v. Universal Line, S.A., 322 F. Supp. 449 (E.D.N.Y.), *aff'd,* 436 F.2d 64 (2d Cir. 1970), and the personal injury rights of Greek seamen. *See, e.g.,* Zorgias v. S.S. Hellenic Star, 370 F. Supp. 591 (E.D. La. 1972), *aff'd,* 487 F.2d 519 (5th Cir. 1973); Tsakonites v. Transpacific Carriers Corp., 246 F. Supp. 634 (S.D.N.Y. 1965), *aff'd,* 368 F.2d 426 (2d Cir. 1966), *cert. denied,* 386 U.S. 1007 (1967).

394 *See, e.g.,* Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465, 467-68 (2d Cir. 1965). The reasoning in an earlier case may shed new light on the dispute, enabling the court to understand the nature of the respective contentions. In addition, it may facilitate resolution of the issue to the extent that it determines arguments similar to those at hand. Indeed, the manner in which the prior court translates the dispute into common-law concepts may be invaluable to a court struggling to understand the foreign system. At the very least, such a decision can provide the court with solid background information for examining the experts of the respective parties. It also offers a source of foreign-law information against which partisan submissions can be measured.

395 A detailed opinion also will aid later courts in determining whether a subsequent change in the foreign law has rendered the decision obsolete. *See* Bridgman, *supra* note 260, at 850 n.19.

396 Indeed, if a prior decision is used to resolve a significant and disputed point, the court should permit all parties to challenge its accuracy, since the original court may have erred due to reliance on incorrect expert opinion or inadequate judicial analysis, or the foreign law may have changed since the earlier decision was rendered. *See infra* text accompanying notes 466-71.

397 One commentator has suggested an additional consideration—that the persuasiveness

more alien the foreign legal system, the less helpful a prior domestic decision is likely to be.

4. *Legal Memoranda.*

With the increasing treatment of foreign law as law rather than as fact in American courts, some commentators have advocated the presentation of foreign legal authorities through legal memoranda.[398] Milton Pollack, an experienced federal trial court judge, has gone so far as to suggest that foreign-law authorities be presented exclusively through legal memoranda and argument.[399] He argues that the presentation of oral expert testimony is inefficient and that courts are competent to handle foreign-law issues without this kind of aid if provided careful, detailed memoranda. Specifically, he states:

> Of course, arguing foreign law is more complex than when the law is domestic. More of the steps must be spelled out, more assumptions made explicit, less taken for granted. Yet, if what is relied upon is law and not some primitive religion or the whim of a tyrant, the form of reasoning will be familiar.[400]

Although several decisions have followed this approach,[401] absent exceptional circumstances, some distinction should remain between the treatment of foreign and domestic law. The principal rationale for this distinction is that the court is presumed to be ignorant of foreign law and thus unable to evaluate the legal arguments presented by

of prior decisions should vary directly with the extent of independent participation by an appellate court. *See* Note, *supra* note 374, at 325. This point deserves little weight. The normal supremacy of an appellate decision over the trial court decision on the same question of law is premised upon equal access to legal sources. But in the foreign-law context, the trial judge will often be in a better position to assess the content of such law, based upon his more immediate participation in the process.

398 Under rule 44.1, this method certainly is proper. *See, e.g.,* United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981). Since they allow for a flexible presentation of foreign law, judicial notice jurisdictions presumably would also allow it.

399 "When the time comes to marshall the authorities—to show the judge what they require him to do in the particular case, the law should be briefed and argued from the counsel table, not sworn to from the witness stand." Pollack, *supra* note 300, at 475; *cf.* Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979) (defending ability of Texas judges to understand and interpret foreign legal authorities).

400 Pollack, *supra* note 300, at 474.

401 *See, e.g.,* Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y 1977); *see also* Curtis v. Beatrice Foods Co., 481 F. Supp. 1275, 1285 (S.D.N.Y.) (urging that foreign-law questions be briefed), *aff'd mem.,* 633 F.2d 203 (2d Cir. 1980). *But see* Loebig v. Larucci, 572 F.2d 81 (2d Cir. 1978). Contrary to Judge Pollack's suggestion, however, the court cannot always confine its determinations to actions involving legal reasoning which reflects either common- or civil-law approaches. *See, e.g.,* Mila v. District Director of Denver, Colorado District of the Immigration & Naturalization Service, 494 F. Supp. 998 (D. Utah 1980), *rev'd on other grounds,* 678 F.2d 123 (10th Cir. 1982).

the parties.[402] This situation stands in sharp contrast to judicial decisions under domestic law, where the training and experience of the court allow a lucid evaluation of the most complex questions. Given the inevitable conflict between the legal memoranda which the parties would submit, the court would have no ready means for deciding the dispute.[403]

A briefing system presents two further difficulties. First, it necessitates the use of experts to prepare the legal memoranda. It thus offers no savings in time or expense over affidavits and is subject to similar defects—neither the court nor opposing counsel can ask clarifying questions of the expert. Second, this approach presumes that the experts will be anonymous, thus depriving the court of the ability to consider their qualifications.

Despite these shortcomings, briefing and argument can serve a valuable supplemental role in proving foreign law. A number of cases have used this method together with more traditional forms of proof.[404] Particularly in complex cases involving intricate issues or the testimony of several experts, memoranda can help to integrate the diverse presentations in a format which is more easily understood by the court.[405]

V. THE DECISION-MAKING PROCESS

A. *Procedures for Determining Foreign Law*

Foreign-law issues may be decided at a variety of points in the life of an action. With the decline of the fact approach, the focus for

[402] The court generally has no training in the foreign law, is unfamiliar with foreign languages, and has only limited access to foreign legal materials. *See supra* text accompanying notes 198–200.

[403] In Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 924 (S.D.N.Y. 1977), *aff'd,* 588 F.2d 880 (2d Cir. 1978), for example, the court expressed reluctance to deal with Iranian law. Certainly, the efficacy of briefing foreign law would have been increased if the court had selected its own expert to review the briefs submitted and to report his conclusions. It would be an overstatement, however, to suggest that an American judge could not resolve some foreign-law issues under a briefing system. American judicial training lends itself to deciding questions of English law, for example, because the legal tradition is familiar, language is not a problem, and legal sources generally are available. To a lesser degree, the same holds true with respect to other English-speaking, common-law nations. Indeed, a number of the decisions in which briefing has been used involved such jurisdictions. *See, e.g.,* Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977); Gadd v. Pearson, 351 F. Supp. 895 (M.D. Fla. 1972).

[404] *See, e.g.,* Windsor Industries, Inc. v. Eaca Int'l Ltd., 548 F. Supp. 635 (E.D.N.Y. 1982); Loebig v. Larucci, 572 F.2d 81 (2d Cir. 1978); Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487 (S.D.N.Y. 1958).

[405] Many judges have actually requested briefs on foreign-law issues. *See, e.g.,* Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474 (D.N.J. 1977); Miller v. Wells Fargo Bank Int'l, 406 F. Supp. 452 (S.D.N.Y. 1975), *aff'd,* 540 F.2d 548 (2d Cir. 1976).

determining such issues has shifted from trial to other stages of litigation. Thus, courts have resolved foreign-law issues on motions to dismiss, on motions for summary judgment, and through special proceedings to determine the content of foreign law. Pretrial conferences can also play a vital role in shaping the issues for resolution.

1. *Motion to Dismiss.*

Under the fact approach, the failure to plead foreign law in sufficient detail constituted a failure to state a cause of action, which was grounds for dismissal.[406] The increasing tendency to treat foreign law as a question of law, however, created some confusion as to how it should be treated in the pretrial stages of an action. In the federal system this question was left open with the passage of rule 44.1. The phrasing of the rule suggests that either: (1) foreign law will be determined through the methods applicable to questions of law, or (2) the result of the decision-making process will be treated as law. The advisory committee note makes clear that the latter interpretation was intended, since the purpose of the rule was to ensure that appellate review would not be confined by the "clearly erroneous" standard applicable to findings of fact under Federal Rule of Civil Procedure 52(b).[407] In practice, courts faced with motions to dismiss—usually accompanied by affidavits on the foreign law[408]—have uniformly treated the foreign law question as a pure issue of law.[409] This result apparently is based on the belief that rule 44.1 mandates the characterization of foreign law as law for all purposes in the action.[410]

[406] *See, e.g.,* Philp v. Macri, 261 F.2d 945 (9th Cir. 1958); Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y 1956).

[407] "Under the third sentence, the court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact,' so that appellate review will not be narrowly confined by the 'clearly erroneous' standard of Rule 52(a)." FED. R. CIV. P. 44.1 advisory committee note. Contending that the broad impact of rule 44.1 is to analogize the treatment of foreign law to that of domestic law, Professor Miller has argued that, in the context of a summary judgment motion, the rule should be interpreted to authorize the trial court to process foreign-law questions in any manner which ensures proper appellate review—and thus as law upon such a motion. *See* Miller, *supra* note 6, at 671. He does not, however, expressly argue that the same rationale should be applied to motions to dismiss.

[408] Such "speaking" motions under rule 12 are treated as summary judgment motions in any event. *See* FED. R. CIV. P. 12(b).

[409] *See, e.g.,* Conservation Council of W. Australia v. Aluminum Co. of America, 518 F. Supp. 270 (W.D. Pa. 1981); Kirstinus v. H. Stern Com. E Ind., S.A., 463 F. Supp. 1263 (S.D.N.Y. 1979); IIT v. Cornfeld, 462 F. Supp. 209 (S.D.N.Y. 1978), *aff'd,* 619 F.2d 909 (2d Cir. 1980); Société Jean Nicolas et Fils v. Mousseux, 123 Ariz. 59, 597 P.2d 541 (1979). *But see* Kalmich v. Bruno, 404 F. Supp. 57, 61 (N.D. Ill. 1975), *rev'd,* 553 F.2d 549 (7th Cir.), *cert. denied,* 434 U.S. 940 (1977).

[410] The court seems to assume this, for example, in Fleischmann Distilling Corp. v. Distillers Co., 395 F. Supp. 221 (S.D.N.Y. 1975), *But see* Chance v. E.I. Du Pont de Nemours & Co., 57 F.R.D. 165 (E.D.N.Y. 1972).

The resolution of foreign-law questions upon motions to dismiss is subject to criticism. First, allowing these motions in foreign-law actions opens the way for an immediate attack on the pleadings, a practice that rule 44.1 was designed to preclude. Consequently, a party may be discouraged from giving prompt notice of his intention to rely on foreign law in a pleading, thus keeping the adverse party in the dark about the applicability of such law. Second, foreign-law issues often raise complex questions ill-suited to determination on a limited record.[411] This problem is most apparent when the motion is made based only on legal memoranda about the foreign law. Even where the moving party does provide an affidavit, it sometimes is unfair to require a full presentation at such an early stage in the action: The applicable provisions of the law may vary depending on factual developments which occur during discovery. In addition, allowing litigation on the merits of the issues during the initial stages of the action often will be a tedious task, since the areas of legal dispute have not yet been narrowed through discovery.

Many courts—apparently recognizing the difficulties posed by motions to dismiss—have given the responding party generous extensions of time within which to file opposing documents.[412] Usually this will not go far enough, however. Unless the resolution of the foreign-law issue is unusually clear, the better practice would be to deny the motion without prejudice, allowing it to be raised on a motion for summary judgment when the action has matured.[413]

411 A prime example of such a situation is Atwood Vacuum Mach. Co. v. Continental Casualty Co., 107 Ill. App. 2d 248, 246 N.E.2d 882 (1969). The plaintiff attached to its complaint copies of the Venezuelan statutes upon which it relied, both in Spanish and translated into English. *See id.* at 256, 246 N.E.2d at 887. The trial court granted defendant's motion to dismiss for failure to state facts sufficient to state a cause of action based only upon the face of the statutes; no supplemental information was provided by either party. *See id.* at 256–57, 246 N.E.2d at 887. The court of appeal reversed, noting that a trial court should not decide foreign-law questions without expert testimony or other materials which would serve to interpret the statutes involved. *See id.* at 262, 246 N.E.2d at 890. This decision makes good sense; generally, the court will have little understanding of a foreign statute without background data. *See In re* Chase Manhattan Bank, 191 F. Supp. 206, 209 (S.D.N.Y. 1961), *aff'd*, 297 F.2d 611 (2d Cir. 1962).

412 *See, e.g.*, Gadd v. Pearson, 351 F. Supp. 895, 906 (M.D. Fla. 1972); *cf.* Allianz Versicherungs-Aktiengesellschaft v. S.S. Eskisehir, 334 F. Supp. 1225 (S.D.N.Y. 1971) (motion to dismiss on forum non conveniens grounds). *See generally* FED. R. CIV. P. 12(b) (providing a reasonable opportunity for all parties to present materials pertinent to a summary judgment motion).

413 *See* Grice v. A/S J. Ludwig Mowinckels, 477 F. Supp. 365, 367 (S.D. Ala. 1979); Hodson v. A.H. Robins Co., 528 F. Supp. 809 (E.D. Va. 1981). The difficulties in presenting foreign-law authorities quickly are well demonstrated in Enterprises & Contracting Co. v. Plicoflex, Inc., 529 S.W.2d 805 (Tex. Civ. App. 1975), an action to enforce a Lebanese judgment. Immediately upon the filing of the complaint, defendant sought summary judgment. *Id.* at 807. Plaintiff requested a continuance to allow him to procure materials from his client

2. *Motion for Summary Judgment.*

Prior to the enactment of rule 44.1, summary judgment rarely was granted on the foreign-law issues, generally on the theory that foreign-law disputes raised a question of fact.[414] Since then, the federal courts have unanimously agreed that foreign law should be treated as law for summary judgment purposes.[415] State courts following the modern approach to foreign-law issues also have recognized the propriety of utilizing summary judgment motions to resolve foreign-law issues.[416]

The increasing use of summary judgment to resolve foreign-law issues is desirable. In some instances, decision of the foreign-law issue alone may preclude the necessity for a full trial. Even the partial granting of a summary judgment motion will reduce the issues to be resolved at trial.

Unlike complex factual issues which may require the examination of many witnesses and hundreds of exhibits at trial, a foreign-

in Lebanon in order to respond to the motion, citing the time lag in correspondence which made a normal response difficult, but was denied. *Id.* at 807–08. After the responding materials—including affidavits on the law of Lebanon—were received, plaintiff sought reconsideration of the summary judgment motion, but again was denied. *Id.* at 809. Fortunately, the appellate court reversed, directing the trial court to consider the new materials. *Id.* at 810.

[414] *See, e.g.,* Pisacane v. Italia Societá Per Azioni di Navigazione, 219 F. Supp. 424 (S.D.N.Y. 1963); Steward v. Culey-Separ, 153 F. Supp. 544 (S.D.N.Y. 1957); Lynch v. Plesch, 15 Misc. 2d 746, 179 N.Y.S.2d 557 (Sup. Ct. 1958), *aff'd mem.,* 10 A.D. 2d 573, 197 N.Y.S.2d 409 (1960). For a thorough discussion of federal law in this area prior to rule 44.1, see O. SOMMERICH & B. BUSCH, *supra* note 6, at 81–89; Miller, *supra* note 6, at 669–72.

[415] This result is in line with Arthur Miller's conclusions. *See supra* note 407. Accordingly, many decisions have interpreted rule 44.1 as requiring that foreign law be treated as law in the decision-making process. *See, e.g.,* Alosio v. Iranian Shipping Lines, S.A., 426 F. Supp. 687 (S.D.N.Y. 1976), *aff'd mem.,* 573 F.2d 1287 (2d Cir. 1977); First Nat'l Bank v. British Petroleum Co., 324 F. Supp. 1348, 1355 (S.D.N.Y. 1971); Instituto Per Lo Sviluppo Economico v. Sperti Prods., Inc., 323 F. Supp. 630 (S.D.N.Y. 1971). *But see* D'Angelo v. Petroleos Mexicanos, 398 F. Supp. 72, 85 (D. Del. 1975). Accordingly, federal courts have allowed summary judgment in a number of areas. *See, e.g.,* Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980), *vacated,* 665 F.2d 515 (5th Cir. 1981); Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977). State decisions reflect a similar pattern. *See* Apodaca v. Banco Longoria, S.A., 451 S.W.2d 945 (Tex. Civ. App. 1970). At the same time, however, many decisions have denied summary judgment based on an inadequate presentation of the foreign law, suggesting that trial would afford the court a better opportunity to evaluate the merits of the competing claims. *See, e.g.,* Kalmich v. Bruno, 450 F. Supp. 227 (N.D. Ill. 1978); Prudential Lines v. General Tire Int'l Co., 440 F. Supp. 556 (S.D.N.Y. 1977); McPherson v. S.S. S. African Pioneer, 321 F. Supp. 42 (E.D. Va. 1971); *cf.* Weiler v. Weiler, 201 N.Y.S.2d 216 (Sup. Ct. 1960) (summary judgment denied for inadequacy of cited authorities although only moving party provided affidavit on foreign law).

[416] *See, e.g.,* Société Jean Nicolas et Fils v. Mousseux, 123 Ariz. 59, 597 P.2d 541 (1979); La Nationale v. Lavan, 2 Misc. 2d 100, 151 N.Y.S.2d 539 (City Ct. 1956). *But cf.* Lynch v. Plesch, 15 Misc. 2d 746, 179 N.Y.S.2d 557 (Sup. Ct. 1958) (court interprets conflicting affidavits on foreign law as creating a question of fact, and thus denies summary judgment), *aff'd mem.,* 10 A.D.2d 573, 197 N.Y.S.2d 409 (1960).

law question is quite manageable in a summary fashion. The procedures for establishing foreign law lend themselves to pretrial hearings. Often affidavits will be adequate to set forth the contentions of the parties.[417] When necessary, the parties can present oral expert testimony to supplement written presentations. Normally, however, the amount of information presented to the court will be limited, and each party's experts will testify.[418] In short, a foreign-law issue can be examined on summary judgment with all the care which would be taken at trial.

Given the benefits inherent in pretrial disposition and the general manageability of foreign-law issues, it is not sound practice for courts to evade the merits of a foreign-law issue based on the fiction that the matter can be heard more fully at trial.[419] The court has the power to request supplemental materials and to conduct supplemental hearings as necessary to resolve fully the question prior to trial.[420]

3. *Special Hearings to Determine Foreign Law.*

Many modern courts have used *sui generis* hearings to determine the content of foreign law, normally on the motion of a party.[421] These hearings examine the nature of the applicable foreign law in general terms, anticipating possible factual developments at trial. This procedure is justified by the inherent power of the court to bifurcate individual issues for trial,[422] and seems to be implicitly au-

417 *See, e.g.,* Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829 (E.D.N.Y. 1981) (at least eight affidavits presented from foreign law experts in summary judgment motion involving complex issues of German law, leading to a well-reasoned opinion granting the motion).

418 *See supra* notes 295–97 and accompanying text.

419 For comments on the tendency of courts follow such a practice during the era before rule 44.1, See Miller, *supra* note 6, at 671.

420 *See, e.g.,* Morse Electro Prods. Corp. v. S.S. Great Peace, 437 F. Supp. 474, 487 (D.N.J. 1977); Gadd v. Pearson, 351 F. Supp. 895, 906 (M.D. Fla. 1972).

421 *See, e.g.,* Messinger v. United Canso Oil & Gas, Ltd., 486 F. Supp. 788 (D. Conn. 1980); United States v. Molt, 452 F. Supp. 1200 (E.D. Pa. 1978), *rev'd in part and remanded,* 599 F.2d 1217 (3d Cir. 1979); Pancotto v. Sociedade de Safaris de Moçambique, S.A.R.L., 422 F. Supp. 405 (N.D. Ill. 1976); First Nat'l Bank v. British Petroleum Co., 324 F. Supp. 1348 (S.D.N.Y. 1971); Hunt v.Coastal States Gas Prod. Co., 583 S.W.2d 322 (Tex.), *cert. denied,* 444 U.S. 992 (1979); *see also* United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981) (hearing apparently held by trial court on content of Swiss law); Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (judicial notice of Mexican law taken; separate trial held on whether Mexican or California law applied to wrongful death damages); Ehret v. Ichioka, 247 Cal. App. 2d 637; 55 Cal. Rptr. 869 (1967) (court of appeal requested that trial court, on remand, first determine Japanese law).

422 This justification was used in *First Nat'l Bank*, 324 F. Supp. at 1361. In the federal courts, such a proceeding similarly could be premised on the power of the court to conduct pretrial conferences on "such other matters as may aid in the disposition of the action." FED. R. CIV. P. 16(6).

thorized by the broad power of modern courts to regulate the manner in which foreign law is established.[423]

Special hearings are beneficial in two respects. First, they help make the eventual trial quicker and more efficient. In most instances, the facts to be proven will differ according to the content of the applicable law. A determination of the governing law at the pretrial stage thus serves to isolate the factual issues remaining for trial and simplify trial preparation. Similarly, the judge at a special hearing may determine that there is no real conflict between the parties on certain issues and either formally resolve them or procure stipulations from the parties. Second, the procedural context of special hearings allows the court to receive information bearing on the foreign-law issues in concentrated form. This enables the court to consider the information adduced by both sides without distractions and to compare the competing presentations carefully. In addition, it may give the court an opportunity to question the experts for all the parties at the same time, which may improve the chances of resolving the inevitable conflict between them.

4. *Special Masters to Determine Foreign Law.*

Probably the most underused method of determining foreign law—yet potentially the most valuable—is reference to a special master.[424] While masters have long been used in other areas, their potential applicability in the foreign-law arena appears to have gone without notice.[425] In the federal system, this reluctance may stem

423 The goal of rule 44.1 is to provide a "uniform and effective procedure" for determining foreign law in the federal court system. *See* FED. R. CIV. P. 44.1 advisory committee note (1966). Thus, the rule provides "flexible procedures for presenting and utilizing material on issues of foreign law." *Id.* The spirit of the Rule dictates that the trial court exercise discretion in structuring procedures for determining foreign law in the most effective way.

424 The leading case in this regard is Corporacion Salvadoreña de Calzado v. Injection Footware Corp., 533 F. Supp. 290 (S.D. Fla. 1982), where a Spanish-speaking professor from the University of Miami School of Law was appointed as a special master to resolve a series of procedural questions under the law of El Salvador relevant to determining whether to enforce a Salvadoran judgment. The court noted that the issues were "extremely complex." *Id.* at 293. The court in Heiberg v. Hasler, 1 F.R.D. 735, 737 (E.D.N.Y. 1941), referred to a special master the question of the applicability of a French statute of limitations to a motion for summary judgment; the court justified its use of Federal Rule of Civil Procedure 53 by characterizing the issues as "complicated." *Id.*; *cf.* Grice v. A/S Ludwig Mowinchels, 477 F. Supp. 365, 367 (S.D. Ala. 1979) (motion to dismiss for failure to allege law of Saudi Arabia referred to a magistrate); Stephen v. Zivnostenka Banka, 128 N.Y.L.J. 1574, col. 7 (N.Y. Sup. Ct., Dec. 23, 1952) (summary judgment motion referred to referee to determine foreign law).

425 The use of special masters has largely been ignored by the many commentators in this area. The authors' judicial survey demonstrates that the use of masters in determining foreign law is rare. Only one judge of the 18 responding to that question indicated that he had even occasionally used a master for this purpose. He rated the procedure as a "most effective" measure of determining foreign law. *See infra* appendix A, questions 2(e) and 3(e).

from an overly narrow reading of Federal Rule of Civil Procedure 53(b), which allows the appointment of a master in a nonjury action "only upon a showing that some exceptional condition requires it."[426] The normal difficulties encountered in resolving foreign-law questions—lack of foreign legal training, language barriers, and limited foreign legal sources—would seem to constitute exceptional conditions in all but the clearest of cases.[427]

A proceeding involving a special master would be similar to a special hearing to determine foreign law, except that the trier of fact would be different. The use of a master could be initiated either by a motion of the parties or by the court *sua sponte*. The court would then select the master—usually an impartial, eminent authority, such as an American law professor specializing in the field—in consultation with the litigants. Ideally, the master would participate in the conference held to define the scope and nature of the foreign law to be determined.

Initially, the special master would request the parties to provide and exchange written opinions from their respective experts for review. He would then establish a schedule for further discovery and hearings, through which the experts' opinions would be analyzed and challenged. Thus, the master would be fully familiar with the legal positions of the parties before the start of the hearing, which would facilitate his own questioning of the experts.[428] Upon the completion of proceedings, the master would submit a report to the court.[429]

There are two possible reasons for the reluctance of courts to use special masters in the foreign-law context. First, courts traditionally have viewed the principal role of a master as one of determining complex issues of fact, leaving the resolution of questions of law to the court.[430] Second, attorneys may be hesitant to use a master due to

426 FED. R. CIV. P. 53(b). However, in actions to be tried by a jury, reference to a master may be made upon a substantially lesser showing, i.e., that "the issues are complicated." *Id.*

427 *See supra* text accompanying notes 198–201. *But see* Gutierrez v. Collins, 583 S.W.2d 312, 321 (Tex. 1979).

428 A similar procedure was followed in Corporacion Salvadoreña de Calzado v. Injection Footware Corp., 533 F. Supp. 290 (S.D. Fla. 1982), in that the parties first provided the master with affidavits from their foreign law experts and later provided oral expert testimony at two hearings. *Cf. infra* text accompanying notes 445–70 (independent research by judges).

429 *See* FED. R. CIV. P. 53(e). Under federal standards, the court must accept the master's findings on questions of fact unless "clearly erroneous," *id.* 53(e)(2), but decisions on questions of law are fully reviewable. Most federal courts treat foreign law during the determination process as a question of law. See cases cited *supra* notes 409, 415. Accordingly, it should be subject to challenge. *See* Corporacion Salvadoreña de Calzado v. Injection Footware Corp., 533 F. Supp. 290 (S.D. Fla. 1982) (treating master's conclusions on law of El Salvador as determination of law, not binding on court).

430 *See, e.g.,* Webster Eisenlohr v. Kalodner, 145 F.2d 316, 319 (3d Cir. 1944), *cert. denied,*

their lack of familiarity with the process, the added expense, and fear that a master might recognize the weaknesses in their positions more easily than would a judge.[431]

The principal advantage of special masters over the special hearing is that, unlike the court, the master selected will be familiar with the foreign legal system, will read its language, and will have more immediate access to foreign legal materials. In a sense, this method is a variation on the use of a court-appointed expert. Admittedly, a master may be unfamiliar with litigation practices, generally unattuned to evidentiary details, and inexperienced in measuring the demeanor of witnesses; however, these attributes have little importance in the determination of foreign law.

5. *Pretrial Conferences.*

Despite the lack of attention given to special hearings and special masters, there is wide agreement among scholars that pretrial conferences can play a valuable role in simplifying the process of establishing foreign law at trial.[432] The pretrial conference often will be the last point prior to the trial itself at which foreign law can be invoked.[433] In an action where foreign law apparently is applicable, but has not been invoked, the court should affirmatively raise the issue at the pretrial conference in order to ensure that any failure to raise foreign law is deliberate.[434]

When foreign law has been invoked, the pretrial conference should serve to delimit the methods by which that law will be established. If it has not already done so, the court should raise the possibility of a special hearing or a special master as a vehicle for proof, since either normally will be more efficient than resolving the issue at trial.[435] If trial will be the forum, however, the court should attempt

325 U.S. 867 (1944). In fact, there is some merit to limiting the use of a special master to instances in which the foreign law in issue is either central to the action or not clear-cut. Since the use of masters imposes costs, normally on the parties, the procedure should be limited to cases where the question is not easily determined.

431 Furthermore, if the master has some expertise in the foreign law, the attorneys for the parties may see their roles reduced. The master will naturally focus his attention on the competing experts and pay little attention to the attorneys. In the normal courtroom setting, attorneys package and present their respective experts to the court; they act, in a sense, as intermediaries between the experts and the court. However, when the trier of fact is more knowledgeable than the attorneys, their role as intermediaries is unavailing.

432 *See* Miller, *supra* note 6, at 672–73; Nussbaum, *supra* note 24, at 354; Schlesinger, *supra* note 44, at 25.

433 *See supra* text accompanying notes 92–104 (timing for pleading foreign law).

434 *See supra* text accompanying notes 58–60.

435 There seems to be no reason why the court should not raise the possibility of using such a method. The parties often will be unaware of the procedural flexibility which now

to procure stipulations regarding the content of the law.[436] In addition, the court should set the outer limits for inquiry into the foreign law, establish the methods of proof to be used,[437] limit the number of expert witnesses as necessary, and consider the use of a court-appointed expert. As part of its effort to regulate the methods of proof, the court should require that the parties comply with the two-stage sequence of proof.[438]

6. *Trial.*

A question which now is rarely raised is whether foreign law must be decided by a jury. At common law, the trier of fact determined the foreign law just as it decided other questions regarded as factual.[439] The federal rules, however, are silent on this point. They

> refrain from allocating functions as between the court and the jury. It has long been thought, however, that the jury is not the appropriate body to determine issues of foreign law. The majority of states have committed such issues to determination by the court. And federal courts that have considered the problem in recent years have reached the same conclusion without reliance on statute.[440]

Despite this silence, rule 44.1 is thought to have strengthened the earlier practice of making the determination of foreign law the task of the judge rather than the jury.[441] Once the determination of foreign law is made the task of the judge, the exclusive rules of evidence,

characterizes proof of foreign law in many jurisdictions and of the broad range of judicial freedom which it offers. The court can thus contribute to the efficient resolution of the action by ensuring that the parties are aware of these methods. In some instances, especially where the issues are complex or the means of establishing foreign law are cumbersome (e.g., an unusually large number of experts), the court may find it necessary to impose a pretrial conference upon the parties.

436 *See* Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222, 230 (N.D. Tex. 1963), *modified,* 347 F.2d 168 (5th Cir. 1965).

437 *Cf.* Curtis v. Beatrice Foods Co., 481 F. Supp. 1275, 1285 (S.D.N.Y.) (refusing to permit expert testimony at trial when party failed to comply with pretrial order to submit to depositions), *aff'd mem.,* 633 F.2d 203 (2d Cir. 1980).

438 *See supra* text accompanying notes 312–13.

439 *See* N.Y. CIV. PRAC. R. 4511 legislative studies and reports (McKinney 1963); *see also* CAL. EVID. CODE § 310(b) and comment (West 1966) (determination of foreign law is for the court).

440 FED. R. CIV. P. 44.1 advisory committee note (citations omitted); *see, e.g.,* Crespo v. United States, 399 F.2d 191, 192 (Ct. Cl. 1968); Daniel Lumber Co. v. Empresas Hondureñas, S.A., 215 F.2d 465, 468 (5th Cir. 1954); Atwood Vacuum Mach. Co. v. Continental Casualty Co., 107 Ill. App. 2d 248, 246 N.E.2d 882 (1969); Byrne v. Cooper, 11 Wash. App. 549, 523 P.2d 1216 (1974); Sass, *supra* note 23, at 97; *cf.* United States v. McClain, 593 F.2d 658, 669–70 (5th Cir.) (foreign law determined by judge in criminal cases under Federal Rule of Criminal Procedure 26.1), *cert. denied,* 444 U.S. 918 (1979).

441 *Daniel Lumber Co.*, 215 F.2d at 468; *see also McClain*, 593 F.2d at 670 & n.18 (indicating that, in some unspecified instances in criminal cases, the question of foreign law as a question

meant to protect a jury from being misled, are not necessary.[442] As Stephen Sass has observed, these rules hinder judges who wish to grasp not just the substantive law of a foreign nation but also its flavor and character so that they may apply it as the courts of that country would.[443]

While the use of a jury to decide foreign-law issues is largely archaic, many courts still refuse to decide foreign law issues during pretrial proceedings on the theory that the questions will be more fully developed at trial.[444] This tendency is understandable, but unfortunate. The traditional devices utilized to assess the credibility of witnesses on factual issues have little efficacy in resolving foreign-law issues. Presumably, the judicial tendency to delay the resolution of such issues stems from a mindset which rigidly relegates everything which is not a pure question of law to decision at trial. Realization that foreign law is a hybrid and merits special treatment would do much to facilitate more effective adjudication.

B. *The Role of Judicial Research*

Under the fact approach, the court relied entirely upon counsel to present the applicable foreign-law authorities.[445] This role was dictated by the assumption that the court was unable to evaluate foreign law on its own because American judges were not trained in foreign legal systems,[446] lacked foreign language skills,[447] and had no

of fact may require its submission to the jury); *cf.* Sass, *supra* note 23, at 107–08 (judge can rely on "inadmissible" forms of evidence in determining foreign law).

442 Sass, *supra* note 23, at 97.

443 *Id.*

444 *See, e.g.,* Kalmich v. Bruno, 450 F. Supp. 227, 230–31 (N.D. Ill. 1978); Prudential Lines v. General Tire Int'l Co., 448 F. Supp. 202, 204 (S.D.N.Y. 1978); McPherson v. S.S. S. African Pioneer, 321 F. Supp. 42, 49 (E.D. Va. 1971).

445 But there are notable exceptions, in which far-sighted courts conducted independent research despite the lack of any theoretical justification for doing so. *See, e.g.,* Bostrum v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963), *modified,* 347 F.2d 168 (5th Cir. 1965); *cf.* Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465 (2d Cir. 1965) (relying on prior domestic case involving Greek law).

446 *See, e.g.,* Walton v. Arabian-American Oil. Co., 233 F.2d 531 (2d Cir.), *cert. denied,* 352 U.S. 872 (1956).

447 This point is well illustrated by an amusing series of decisions. In The Prahova, 38 F. Supp. 418 (S.D. Cal. 1941), a group of Rumanian seamen sued for back wages. The court innocently commented that its fortuitous knowledge of the Rumanian language made it easier to understand the Rumanian law which governed. *See id.* at 421. Later, in Kontos v. The S.S. Sophie C., 184 F. Supp. 835 (E.D. Pa. 1960), *vacated,* 288 F.2d 437 (3d Cir. 1961), the court touched on the difficulty which would confront a judge in understanding the applicable Greek law. In ruling on a similar forum non conveniens motion, it lightheartedly cited *The Prahova*, and commented: "We do not, of course, consider the possibility of a federal district court judge being fluent in Greek, although one can never tell." 184 F. Supp. at 838 n.6. Finally, concerned with justifying his decision granting a forum non conveniens motion based

ready access to foreign legal material.[448]

These obstacles have not disappeared, but most jurisdictions now grant the court discretion to research foreign law on its own. Rule 44.1, for example, specifies that the court may consider "any relevant material or source . . . whether or not submitted by a party." The advisory committee note attributes this freedom to the "peculiar nature" of foreign law, emphasizing that the court may choose between engaging in research and "insisting on a complete presentation by counsel."[449] Similarly, New York and California courts have discretion to take judicial notice of foreign law even without a request from the parties.[450]

There is no consensus on when the court should conduct independent research on foreign law. The advisory committee note to rule 44.1 appears to contemplate two basic situations in which the court might exercise its discretion to conduct such an inquiry: (1) when the court has access to better legal materials than counsel has provided and (2) when the presentations by counsel are deficient

on *Kontos*, but involving Dutch law, the court in Samaras v. The S.S Jacob Verolme, 187 F. Supp. 406, 410 n.8 (E.D. Pa. 1960) noted, "so that the appellate courts will not be under any misconception," that he did not speak Dutch or understand Dutch law, even though his surname (Van Husen) revealed that his ancestors had originally come from Holland.

448 *See, e.g.,* Telesphore Couture v. Watkins, 162 F. Supp. 727 (E.D.N.Y. 1958), in which the court refused to take judicial notice (under New York law) because it lacked access to legal materials:

> Although this court has the power to take judicial notice of a foreign statute it does not have the facilities with which to do so. Only recently has this court begun to establish and maintain a central law library. Unfortunately, due to circumstances beyond the control of the court, this library does not contain, nor will it contain for some time to come, the statutes of the several states of the Union, much less the statutes of any foreign country.

Id. at 730-31. Writing in 1978, Judge Pollack similarly noted that even the federal district court for the Southern District of New York—by far the most active court in deciding foreign-law questions—had only "two dozen books" on foreign law in the library. *See* Pollack, *supra* note 300, at 471.

449 FED. R. CIV. P. 44.1 advisory committee note. Interestingly, the tone of the note suggests that the court's discretion to conduct independent research is completely unfettered, in which case the failure to undertake such research could never be considered an abuse of discretion. It seems unlikely, however, that such an extreme position was intended.

Judge Pollack, moreover, is emphatic in his argument that such research is an inefficient use of judicial time: "We have quite a few things to do besides decoding the Código Civil." Pollack, *supra* note 300, at 472. He essentially argues that, given limited time and resources, the public interest is best served by limiting judicial research to domestic actions, as foreign law research would require a disproportionate amount of effort, to the detriment of the vast majority of domestic actions. *See also* Arams v. Arams, 182 Misc. 328 45 N.Y.S.2d 251 (Sup. Ct. 1943) (vigorously contending that such research should be limited to rare occasions when necessary to prevent injustice).

450 *See* CAL. EVID. CODE § 455(b) (West 1966); N.Y. CIV. PRAC. R. 4511(b) (McKinney 1963); Schlesinger, *supra* note 44, at 25.

in substance or overly biased.[451] Professor Miller expands on the first situation by noting that a judge not only may have access to better legal resources,[452] but he also may have personal background in the law of the particular country involved.[453] Additionally, a judge may possess helpful foreign language skills.[454] A liberal approach to judicial research is easily justified in those rare situations where the court has special resources or talents.

It is more difficult to set guidelines for the vast majority of judges who lack special materials and skills. Miller has suggested that in determining whether to conduct independent research the court should consider the importance of foreign-law in the action, the complexity of the foreign-law issue, and the best method "to meet the needs of and be fair to both litigants."[455] More recently, it has been suggested that the courts weigh several criteria, including the extent of the presentation by the parties, the expertise of the court, the importance of the issue, and the extent of the burden which independent research would impose on the court.[456] Both approaches attempt to reconcile the conflict between the need for such research and the resulting burden on the court. The decisions that have considered the propriety of judicial research focus exclusively on two factors: the extent of the presentation by the parties and the similarity of the foreign legal system to the American system.

Courts generally have been reluctant to engage in independent research, preferring to rely on presentations by counsel. Nevertheless, many courts have undertaken to examine the legal authorities cited by the parties.[457] This review is sometimes helpful in resolving

451 FED. R. CIV. P. 44.1 advisory committee note.

452 In all likelihood, the court will have better access to legal authorities (statutes, decisions, treatises, and the like) than the parties only on rare occasions. *See supra* note 448. The court may, however, have much better access to experts on foreign law than do the parties, particularly if the foreign-law questions are frequently litigated before it. The case for judicial research is much stronger when it is combined with the court's own consultation of experts.

453 *See* Miller, *supra* note 6, at 660.

454 One of these instances is chronicled in *The Prahova*, 38 F. Supp. 418 (S.D. Cal. 1941).

455 Miller, *supra* note 6, at 660. These factors do not constitute a helpful test because the final element, "how best to meet the needs of and be fair to both litigants," swallows the other sections. Kadota v. Hoagai, 125 Ariz. 131, 608 P.2d 68 (1980). In *Kadota*, these factors were mentioned as considerations in deciding whether to perform independent research in Japanese law, but were never applied; rather, the court refused to perform such research because (1) the parties had made no efforts to prove the foreign law and (2) such proof would be fruitless in any event, as the case was resolved on a related treaty issue. *See id.* at 136–37, 608 P.2d at 71–73.

456 *See* Peritz *supra* note 115, at 79–80.

457 *See, e.g.,* Curtis v. Beatrice Foods Co., 481 F. Supp. 1275 (S.D.N.Y.), *aff'd mem.,* 633 F.2d 203 (2d Cir. 1980); Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970).

apparent conflicts; the greatest potential problem is the court's lack of familiarity with the foreign legal system.

Many decisions involve limited independent research by the court to supplement the presentation by the parties.[458] A few courts have engaged in foreign-law research even absent an attempt at proof by the parties.[459] Normally, however, courts undertake this research only when the parties have made a good-faith effort to establish the foreign law but have failed to provide sufficient information[460] or inadvertently have neglected to address an issue which the court finds relevant.[461] This limitation makes sense, since a party unwilling to make at least some effort to establish foreign law has in effect acquiesced in the use of domestic law.[462]

The extent to which the foreign legal system resembles the American system is an approximate measure of the burden imposed on the court in conducting research. Thus, courts perform judicial research most frequently in cases which involve the law of an English-speaking, common-law jurisdiction.[463] This phenomenon hardly is surprising, given the similarities in systems and language, and the greater access to legal materials. Judicial research has been done to a lesser extent in cases involving the law of civil-law jurisdictions—usually through reliance on translated secondary sources such as treatises.[464]

458 *See, e.g.,* Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977); *In re* Bethlehem Steel Corp., 435 F. Supp. 944 (N.D. Ohio 1976); Gallegos v. Union-Tribune Publishing Co., 195 Cal. App. 2d 791, 16 Cal. Rptr. 185 (1961). *But see* De Mateos v. Texaco Panama, Inc., 417 F. Supp. 411 (E.D. Pa. 1976), *aff'd,* 562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

459 *See, e.g.,* Kearney v. Savannah Foods & Indus., Inc., 350 F. Supp. 85 (S.D. Ga. 1972); Michael v. S.S. Thanasis, 311 F. Supp. 170 (N.D. Cal. 1970); *see also* Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955) (independent research on English law even though plaintiff failed to plead it).

460 *See, e.g.,* Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977).

461 *See, e.g.,* Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980), *vacated,* 665 F.2d 515 (5th Cir. 1981).

462 *Cf.* Industrial Graphics, Inc. v. Asahi Corp., 485 F. Supp. 793, 800 n.8 (D. Minn. 1980) (failure of parties to agree that another state or nation's law governs the transaction results in application of Minnesota law under statute). In some instances, of course, expense may preclude even the most modest showing in this regard.

463 *See, e.g.,* Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex. 1980), *vacated,* 665 F.2d 515 (5th Cir. 1981); Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977); *In re* Bethlehem Steel Corp., 435 F. Supp. 944 (N.D. Ohio 1976). It makes no sense, however, to limit judicial research to such instances. *See* O. SOMMERICH & B. BUSCH, *supra* note 6, at 69.

464 *See, e.g.,* Volkswagenwerk Aktiengesellschaft v. Superior Court, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); Gallegos v. Union-Tribune Publishing Co., 195 Cal. App. 2d 791, 16 Cal. Rptr. 185 (1961); *cf.* Bostrom v. Seguros Tepeyac, S.A., 225 F. Supp. 222 (N.D. Tex. 1963) (where expert testimony is rejected and no statutes are offered into evidence, court assumes that the laws of Mexico and Texas are the same), *modified,* 347 F.2d 168 (5th Cir. 1965).

The value of such research is questionable, however, particularly given the competing doctrinal interpretations and technical legal terminology characteristic of civil-law systems. Judicial research outside the common- and civil-law systems is rare.[465]

Judicial research probably is helpful in most instances. It indicates a concern on the part of the court that the parties may have failed to explain adequately the foreign law. The parties hardly can object if the court is willing to undertake independent efforts to fill this gap, so long as they can be assured that the court's lack of talents and skills in evaluating foreign law will not produce an unjustified conclusion.

Fairness to the parties, however, demands that the fruits of independent judicial research be made available to the parties for review and, if necessary, rebuttal.[466] Thus, California requires the court to inform the parties of any source of information not received in open court which is of substantial importance in determining the matters to be judicially noticed and to allow them a reasonable opportunity to respond to such information before judicial notice is taken.[467] Rule 44.1, however, does not impose such a requirement.[468] The advisory committee note nevertheless suggests that the court "ordinarily" should inform the parties of new authorities which it has found and give them an opportunity to reply.[469]

While not necessarily required by due process, giving the parties an opportunity to review the court's research makes sense.[470] The

[465] In fact, a court is likely to go to great pains to avoid deciding a matter under such law. *See, e.g.,* Couch v. Mobil Oil Corp., 327 F. Supp. 897 (S.D. Tex. 1971).

[466] *See* Bridgman, *supra* note 260, at 853; Schlesinger, *supra* note 44, at 24.

[467] For "any matter" as to which judicial notice is to be taken, which is of "substantial consequence" to the determination of the action, the California Evidence Code provides that:

> If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

CAL. EVID. CODE § 455(b) (West 1966); *cf.* N.Y. CIV. PRAC. R. 4511(b) (McKinney 1963) (notice to parties required only when another party requests the court to take judicial notice).

[468] This omission has been defended on the ground that it is necessary to avoid a blanket rule which would mandate extensive disclosure proceedings even as to trivial research. *See* Miller, *supra* note 6, at 660-61. But this analysis makes little sense, since it is easy to devise a limitation to exclude minor instances. The California statute, for example, applies only to matters of "substantial consequence." *See* CAL. EVID. CODE § 455(b) (West 1966). Moreover, the omission has been attacked as a violation of the guarantees to due process. *See* Schlesinger, *supra* note 44, at 24.

[469] FED. R. CIV. P. 44.1 advisory committee note.

[470] Any claim of mandatory review by the parties verges on the extreme. Certainly it could not be contended that a court has any obligation to disclose authorities from domestic legal sources. On the other hand, all would agree that due process does require such disclo-

court sometimes will rely heavily on its own research, under the perhaps mistaken impression that its quality surpasses that of the presentations of the parties.[471] The need to correct any errors which might be caused by such reliance far outweighs the inconvenience which disclosure would create. In order to avoid an overly broad rule which would include even trivial judicial research, however, disclosure should be required only for significant, disputed issues.

C. *Judicial Approaches to the Resolution of Conflicts Regarding Foreign Law Issues*

Many potential foreign-law disputes are filtered out of the judicial system through the application of conflict-of-laws principles, by which the use of domestic law increasingly is justified.[472] In addition, a substantial number of foreign-law issues are decided on their merits, with careful analysis based exclusively on foreign legal authorities.[473] In those cases involving foreign law which remain, however, often there is diametrically opposed testimony about the applicable foreign law. When confronted with this situation, judges take a number of different approaches to reach their decisions.[474]

Many judges seem to base their decision on the qualifications of the foreign-law experts.[475] Unable to assess the substantive merits of

sure as to information on questions of fact. The increasing propensity to treat foreign law as "law" rather than as "fact" would thus suggest that the Constitution does not mandate such disclosure. *But see* Schlesinger, *supra* note 44, at 24.

471 Not surprisingly, most judges consider their own research highly reliable. Of those judges responding to the authors' survey, 62% said that such independent research was a "most effective" method to establish foreign law; the remaining 38% indicated that it was only "somewhat" effective. *See infra* appendix A, question 3(g). This belief is accurate at least to the extent that this research is free of a partisan bent.

472 *See supra* text accompanying notes 44-45.

473 *See, e.g.,* Ramsey v. Boeing Co., 432 F.2d 592 (2d Cir. 1970); Curtis v. Beatrice Foods Co., 481 F. Supp. 1275 (S.D.N.Y.), *aff'd mem.,* 633 F.2d 203 (2d Cir. 1980); Orlik, Ltd. v. Helme Prods., Inc., 427 F. Supp. 771 (S.D.N.Y. 1977). It is impossible to second-guess the decisions so rendered, in contrast to decisions rendered under the law of the forum. The outside observer cannot know what information on the foreign law was presented to the trial court, and thus cannot evaluate the extent to which the decision corresponds with the foreign law. With a few exceptions, even decisions rendered on the merits appear to be more a repetition of the testimony of the expert selected by the winning side than a critical analysis of each position.

474 As noted above, the American judiciary's lack of training in foreign legal systems renders the normal method for evaluating legal arguments—analysis of legal authorities on an independent basis—largely inapplicable. *See supra* text accompanying notes 314-16. Judicial research is possible in many cases, but its efficacy often is limited by reliance on secondary sources. *See* cases cited *supra* note 464 and accompanying text. Additionally, the normal means of testing the accuracy of facts—the oath, demeanor, and cross-examination—generally are ineffective in selecting between the testimony of competing experts. *See supra* text accompanying notes 300-03.

475 *See, e.g.,* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125 (E.D.

the competing legal positions, they implicitly rely on the proposition that the best qualified expert is most likely to be correct.[476] But the qualifications of an expert do not guarantee accuracy. Except in the rare situation where the qualifications of an expert are overwhelming, reliance on expert qualifications is not sound.

Some courts, frustrated by their inability to resolve the claims of the parties on the merits, declare that the parties have presented insufficient information on the foreign law.[477] This approach is of questionable logic, as it implicitly defines "sufficient" information as that level of data which makes clear which side should prevail, rather than as the amount of information from which the court can reason to a result. The fact that party experts disagree on foreign-law issues should not in itself constitute a failure of proof so as to justify avoiding the foreign-law issue. If the court truly believes that the information presented is inadequate, it is always free to request supplemental information.

A number of courts politely listen to the conflicting testimony of experts and then ignore the experts' analyses of the foreign law. These courts analyze the law entirely on their own, using common-law methods of statutory interpretation.[478] Further, some courts entirely bypass the conflict by avoiding discussion about the substance of foreign law and instead rely on domestic law. Apparently, the unspoken rationale for this practice is a belief that domestic law is applicable by analogy.[479] This practice can hardly purport to produce accurate results.

Finally, many courts react to the difficulty of resolving conflicts about the foreign law by declaring the controversial issue to be moot following the disposition of a preliminary issue under domestic law.[480] This result leaves one with the sense that the decision on the preliminary issue is prompted by the inability of the court to deal

Pa. 1980); *In re* Estate of Chichernea, 66 Cal. 2d 83, 424 P.2d 607, 57 Cal. Rptr. 135 (1967); *In re* Estate of Larkin, 65 Cal. 2d 60, 416 P.2d 473, 52 Cal. Rptr. 441 (1966). Carried to an extreme, this practice would convert all foreign-law actions into a race between the parties to secure the best qualified experts.

476 *See supra* text accompanying note 310.

477 *See, e.g.,* Esso Standard Oil, S.A. v. The S.S. Gasbras Sul, 387 F.2d 573 (2d Cir.), *cert. denied,* 391 U.S. 914 (1968); Boutin v. Cumbo, 259 F. Supp. 12 (S.D.N.Y. 1966).

478 *See, e.g.,* Bamberger v. Clark, 390 F.2d 485 (D.C. Cir. 1968); Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465 (2d Cir. 1965); Royal Exch. Assurance v. Brownell, 146 F. Supp. 563 (S.D.N.Y. 1956), *aff'd,* 257 F.2d 582 (2d Cir. 1958).

479 *See, e.g.,* First Nat'l City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779 (5th Cir. 1968); De Vargas v. Panama Canal Co., 495 F. Supp. 779 (D.C.Z. 1980).

480 *See, e.g.,* Kalmich v. Bruno, 450 F. Supp. 227 (N.D. Ill. 1978); De Mateos v. Texaco Pan., Inc., 417 F. Supp. 411 (E.D. Pa. 1976), *aff'd,* 562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

with the foreign law. To be sure, the difficulty which the court faces is real. As Judge Friendly commented more than twenty years ago:

> [T]ry as we may to apply the foreign law as it comes to us through the lips of experts, there is an inevitable hazard that, in those areas, perhaps interstitial but far from inconsequential, where we have no clear guides, our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.[481]

This frank admission is even more valid today, as the complexity of foreign-law issues increases. The very process of establishing foreign law deprives the court of "clear guides" by which to render its decision. Instead, the court must grapple with unfamiliar legal concepts and assumptions which, all too often, have been imperfectly provided and thus are imperfectly understood.

D. *Failure To Prove Foreign Law*

Whereas failure to plead foreign law typically leads to the application of the law of the forum, insufficient proof of foreign law usually will result in dismissal of the action.[482] Failure to prove foreign law can occur in several ways. First, even if the parties properly raise the foreign-law issues, ascertainment of the law may be impossible.[483] Second, the attorneys may deliberately fail to prove the foreign law for tactical reasons.[484] Third, the expense of proving the foreign law

[481] Conte v. Flota Mercante del Estado, 277 F.2d 664, 667 (2d Cir. 1960).

[482] Sass, *supra* note 23, at 112. It may once have been true that courts, hampered by the rules of evidence and problems of access to materials and expertise, frequently were unable to ascertain the foreign law in a case. *See* CLRC Judicial Notice Recommendation, *supra* note 7, at I-6. Professor Sass maintains, however, that failure to invoke foreign law will be much more common than failure to prove it, because of the ease of proof under judicial notice. Sass, *supra* note 23, at 111; *see* Miller, *supra* note 6, at 695. Sass found only two federal cases since the enactment of rule 44.1 which arguably involved insufficient proof of foreign law. In Esso Standard Oil, S.A. v. The S.S. Gasbras Sul, 387 F.2d 573, 580 (2d Cir.), *cert. denied,* 391 U.S. 914 (1968), the court of appeals refused to allow the application of strict liability under a Guatemalan statute for which conflicting expert testimony, but no cases, was submitted. Sass states that the American court had enough information to interpret the statute itself. Sass, *supra* note 23, at 111. In Gates v. P.F. Collier, Inc., 256 F. Supp. 204, 213 (D. Hawaii 1966), *aff'd,* 378 F.2d 888 (9th Cir. 1967), *cert. denied,* 389 U.S. 1038 (1968), the court dismissed the suit for failure to prove the applicability of Japanese statutes under which the executive branch could grant exemptions. The use of official certificates should have solved this problem. *See supra* text accompanying notes 366–72.

[483] In a case involving a plane crash in the short-lived nation of Biafra, for instance, the judge dismissed the case because there was no way to determine the relevant Biafran law. The attorneys, however, believed that the judge was simply trying to dispose of what he deemed a "bad case." Graham & James Interview, *supra* note 42; *cf.* Walton v. Arabian-American Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied,* 352 U.S. 872 (1956) (determining that the only law in Saudi Arabia was the word of the ruler).

[484] A party may want the court either to apply local law or to dismiss the claim. The

may be prohibitive.[485] Finally, the court may find that the proffered proof provides an inadequate basis for a determination of the foreign law.[486] These situations rarely arise,[487] however, since courts usually have enough information to draw a conclusion about the substance of the foreign law.[488]

If the court decides that the material presented does not provide an adequate basis for a determination of foreign law, the judge has three options: (1) dismiss the claim; (2) compel the production of further material by threatening dismissal, summary judgment, or the use of a presumption; or (3) preserve the claim by use of a presumption or the application of forum law.[489]

The locally prevailing conflict-of-laws theory usually determines which option the court will choose. Under the "vested rights" theory,[490] a cause of action exists solely by virtue of the foreign law and, therefore, if the missing element is not proved, the claim must be dismissed. This is the approach that the Common Law took.[491] The "local law" theory,[492] which developed later, makes forum law applicable unless the applicable foreign law is properly proved.

possibility that a presumption will be utilized if proof is inadequate also allows a party to place the burden and expense of proof on his opponent if the domestic law is unfavorable. Similarly, the attorneys may not want the foreign law applied at all if it is adverse. Courts do not always indulge in presumptions, however, so that an attorney using these tactics may be gambling with his client's case.

485 On some occasions, the court may raise the issue itself, *see infra* appendix A, question 5, but the parties will not respond with offers of information, either for tactical reasons or from practical or financial inability.

486 *See, e.g.,* Amdur v. Zim Israel Navigation Co., 310 F. Supp. 1033 (S.D.N.Y. 1969).

487 *See supra* note 482. Where dismissal does occur for failure of proof, appellate courts often will remand for further presentation of foreign-law materials. *See, e.g.,* Charbonnages de France v. Smith, 597 F.2d 406, 415 & n.8 (4th Cir. 1979); United States v. McClain, 551 F.2d 52 (5th Cir. 1977); Barber v. Tadayasu Abo, 186 F.2d 775 (9th Cir. 1951); Lauro v. United States, 162 F.2d 32 (2d Cir. 1947); United States *ex rel.* Zdunic v. Uhl, 137 F.2d 858 (2d Cir. 1943); United States *ex rel.* Jelic v. District Director of Immigration & Naturalization, Ellis Island, New York Harbor, 106 F.2d 14 (2d Cir. 1939).

488 Indeed, the judge more frequently will have conflicting information from the experts. Whether he properly construes the foreign law based on that information presents a question for appeal. *See infra* text accompanying notes 517–30.

489 *See* Schlesinger, *supra* note 44, at 11; *see also* Miller, *supra* note 6, at 635 (presumption that some principles are so basic as to be universal). Court research is another possibility, but judges rarely resort to it. *See supra* text accompanying notes 457–62.

490 *See* 3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS app. § 73 (1935).

491 Justice Holmes wrote the vested rights classics, Cuba R.R. v. Crosby, 222 U.S. 473 (1912), and Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). For other decisions utilizing the vested rights approach, see Walton v. Arabian-American Oil Co., 233 F.2d 541 (2d Cir.); *cert. denied,* 352 U.S. 872 (1956); Riley v. Pierce Oil Corp., 245 N.Y. 152, 156 N.E. 647 (1927) (per curiam).

492 *See* A. EHRENZWEIG, CONFLICT OF LAWS 360 (1962); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

1. *Dismissal.*

A court may dismiss claims for lack of adequate proof either with or without prejudice. Few courts have dismissed cases with prejudice,[493] and they probably do so only as a punitive measure against parties who refuse to comply with court requests for additional information on the foreign law.[494] As one commentator noted, "[A] wise judge normally will dismiss 'without prejudice' " so that the aggrieved party might eventually get its day in court.[495] Since automatic dismissal or application of a conclusive presumption often produces inequitable results, legislatures in some jurisdictions have given courts the power to choose between dismissal and the application of local law.[496]

Surprisingly, the federal rules offer no guidance for courts to determine whether to dismiss a case or apply domestic law when proof is insufficient. Professor Miller, one of the drafters of the federal rules dealing with proof of foreign law, suggests two reasons for this omission. First, the drafters feared that such a provision would exceed the rulemaking power of the Supreme Court.[497] Second, under the federal judicial notice regime, failure to prove foreign law will be rare.[498]

If the court has the choice of applying the law of the forum or deciding against the moving party, Rudolf Schlesinger suggests that the judge consider several criteria: (1) the interest of the public; (2) the accessibility of the foreign law to the parties; (3) the possibility that the decision will encourage forum shopping; (4) the nature of the foreign legal system—that is, whether it seems sufficiently similar to the American system to justify a presumption; and (5) the nature of the foreign law issue.[499] The Chief Judge of the Northern District of California recommends that the court also consider the relative sophistication of the parties and their attorneys and their respective

493 *See* Riley v. Pierce Oil Corp., 245 N.Y. 152, 156 N.E. 647 (1927) (per curiam); Miller, *supra* note 6, at 633.

494 *See, e.g.,* Gates v. P.F. Collier, Inc., 256 F. Supp. 204 (D. Hawaii 1966), *aff'd,* 378 F.2d 888 (9th Cir. 1967), *cert. denied,* 389 U.S. 1038 (1968).

495 R. SCHLESINGER, *supra* note 34, at 155 n.* (referring to Industrial Export & Import Corp. v. Shanghai Banking Corp., 302 N.Y. 342, 98 N.E.2d 466 (1951)).

496 *See* CLRC Judicial Notice Recommendation, *supra* note 7, at I-6, which led to the adoption of section 311 of the California Evidence Code, which states in part: "[If the applicable foreign law] cannot be determined, the court may, as the ends of justice require, either apply the law of the state [if constitutionally permissible] or dismiss the action without prejudice. . . ." CAL. EVID. CODE § 311 (West 1966). New York considered, but did not follow, California's approach, leaving the matter for development in the courts. *See* N.Y. CIV. PRAC. R. 4511 legislative studies and reports (McKinney 1963).

497 Miller, *supra* note 6, at 695; *see* Schlesinger, *supra* note 44, at 19.

498 Miller, *supra* note 6, at 695.

499 Schlesinger, *supra* note 44, at 14-16.

resources.[500]

2. *Further Inquiry.*

A seldom considered alternative is for the court to inquire further into the foreign law. In judicial notice jurisdictions, the court usually may perform its own investigation.[501] The judge also may request more information from the parties and can compel adequate performance.[502] Professor Miller views judicial notice as a new framework for the determination of foreign law, a joint task of the court and the litigants which "does not involve burdens of production and persuasion in any classical sense [but gives] the trial court discretion to allocate the workload in establishing foreign law . . . ."[503] In this view, there would never be reason to dismiss a foreign-law issue or rely on a presumption, unless proof was literally impossible.

3. *Presumptions.*

When there is a failure to prove foreign law sufficiently, the use of presumptions allows the application of domestic law to foreign-law issues.[504] There are several types of presumptions. The New Jersey Supreme Court described the possibilities at Common Law in *Leary v. Gledhill*.[505] First, a court could presume that the Common Law prevails in the foreign country. Some early courts engaged in this fantasy, which was a predecessor to the local law theory, even for countries where the presumption was patently untrue.[506] Second, a court could presume that domestic statutory law as well as Common Law exists in the foreign nation. Third, a court could presume that certain fundamental principles of law exist in all civilized nations.[507] Fourth, a court could apply as much of the local law as seems to be

500 Peckham Interview, *supra* note 123.

501 *See supra* text accompanying notes 449–56; *infra* appendix A, question 2(g).

502 *E.g.,* Boutin v. Cumbo, 259 F. Supp. 12, 14 (S.D.N.Y. 1966); *see* Schlesinger, *supra* note 44, at 10 n.49.

503 Miller, *supra* note 6, at 698.

504 This use of presumptions should not be confused with their utilization when there is a failure to invoke foreign law. *See supra* text accompanying notes 134–54.

505 8 N.J. 260, 266, 84 A.2d 725, 728 (1951).

506 *E.g.,* Walter v. Netherlands Mead N.V., 514 F.2d 1130, 1137 n.14 (3d Cir.), *cert. denied,* 423 U.S. 869 (1975); Bowman v. Grolsche Bierbrouwerij B.V., 474 F. Supp. 725, 730 (D. Conn. 1979); Diamond Mining & Management, Inc. v. Globex Minerals, Inc., 421 F. Supp. 70, 73 (N.D. Cal. 1976).

507 *E.g.,* Tidewater Oil Co. v. Waller, 302 F.2d 638, 641 (10th Cir. 1968). The classic cases on assumption of common fundamental principles are: Compagnie Generale Transatlantique v. Rivers, 211 F. 294 (2d Cir. 1914), and Parrot v. Mexican Cent. Ry., 207 Mass. 184, 93 N.E. 590 (1911). The lower court had applied this presumption in *Leary*. 8 N.J. at 269, 84 A.2d at 730.

consistent with the foreign law.[508] At least one court has applied local law on an "acquiescence" theory, stating that if the foreign government, which was a party, did not prove its own law, that law must be unfavorable to its case.[509] Finally, under either an acquiescence or local law theory, the judge could apply domestic law without resorting to fictions.[510]

Litigants cannot always ensure the application of forum law by failing to prove the foreign law.[511] The adverse parties may prove the foreign law or rebut a presumption by showing, for example, that the foreign law differs significantly.[512] Alternatively, in jurisdictions so permitting, a court might elect to take judicial notice of the foreign law.[513] The court also may refuse to indulge in a presumption if there is little chance that the foreign law bears any similarity to the local law.[514] In some cases, moreover, use of a presumption would create a tautology and logically could not apply.[515] Finally, there are constitutional limitations on the use of presumptions favoring the application of domestic law.[516]

VI. APPEALS

Unlike the situation prevailing at Common Law, most American jurisdictions have made foreign law susceptible to appeal by statute, rule, or case law.[517] The federal rules expressly remove foreign law

508 Loebig v. Larucci, 572 F.2d 81, 86 (2d Cir. 1978).

509 Iran v. Boeing Co., 15 Av. Cas. (CCH) 18,189, 18,193 (W.D. Wash. 1980).

510 The Supreme Court of New Jersey decided that failure to prove the foreign law adequately amounted to "acquiescence" in the application of local law in *Leary,* 8 N.J. at 269-70, 84 A.2d at 730. *See also* Industrial Graphics, Inc., v. Asahi, 485 F. Supp. 793, 797 n.2 (D. Minn. 1980) (defendant "waived" its defense under Japanese law by not proving it); Gangel v. N. DeGroot P.V.B.A., 41 N.Y.2d 840, 842, 362 N.E.2d 249, 251, 393 N.Y.S.2d 698, 699 (1977) (absent proof of contrary applicable foreign law, forum law applied).

511 *See* 21 P.O.F.2d, *supra* note 250, § 3.

512 *Id.*

513 A court could conduct "cursory independent research", at least to check whether the foreign law differs so radically as to render a presumption unjustified. Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 275, 265 N.E.2d 739, 742, 317 N.Y.S.2d 315, 319 (1970), *cited in* Schlesinger, *supra* note 44, at 15.

514 *See, e.g.,* Seguros Tepeyac, S.A. v. Bostrom, 347 F.2d 168, 174 n.3 (5th Cir. 1965).

515 *See, e.g.,* Lauro v. United States, 162 F.2d 32 (2d Cir. 1947); *In re* Estate of Knutzen, 31 Cal. 2d 573, 191 P.2d 747 (1948). Schlesinger cites the annulment of a marriage celebrated abroad as an example of a logically impossible situation for a presumption. Schlesinger, *supra* note 44, at 11 n.57. This is a poor illustration, since U.S. courts feel free to annul foreign marriages on grounds similar to those employed to annul marriages performed in this country. Interview with Judge Donald King of the San Francisco Municipal Court (Oct. 30, 1981).

516 *See* Home Ins. Co. v. Dick, 281 U.S. 397, 410-11 (1930).

517 O. SOMMERICH & B. BUSCH, *supra* note 6, at 60; *see supra* text accompanying notes 12-13.

from the realm of the "clearly erroneous" standard applicable to issues of fact by treating it as a matter of law.[518]

Appeals on questions of foreign law fall into four general categories. First, a party may contend that the court did not apply the law of the correct jurisdiction. This issue can arise as a matter of conflict of laws or on the related matter of presumptions, and includes the question of whether the parties or court properly invoked the foreign law. Second, a party may seek review of the judge's decision to dismiss the action—either with or without prejudice[519]—or to apply local law as a result of inadequate proof of the foreign law. However, determinations about the sufficiency of the materials presented, the taking of judicial notice,[520] and the qualification and credibility of experts[521] are matters within the discretion of the court and in most jurisdictions the judge will be reversed only for an abuse of that discretion. Third, a party may appeal the court's determination of the substance of the foreign law. Finally, a party may seek review of the application of the foreign law to the facts of the case.

When an appeal concerns the interpretation of foreign law, the reviewing court has four options. It can: (1) affirm the construction placed on the foreign law by the lower court;[522] (2) remand the case to the lower court for a new evaluation of the foreign law;[523] (3) redetermine the law based on the materials sent up on appeal;[524] or (4) where judicial notice applies, seek and consider new sources of information to make a *de novo* determination of the foreign law.[525] Indeed, since foreign law embodies the rules by which decisions are

518 FED. R. CIV. P. 44.1 advisory committee note (1966); Sass, *supra* note 23, at 98.

519 Rudolph Schlesinger suggests that the failure of the judge even to consider dismissal without prejudice should be considered reversible error for failure to exercise discretion. R. SCHLESINGER, *supra* note 34, at 155. It is difficult to see how any competent attorney would neglect to suggest that the court dismiss without prejudice.

520 Professor Schlesinger also suggests that the failure of a court to inform the parties "whether, to what extent, and under what circumstances, it will take judicial notice of the foreign law," should constitute reversible error. Schlesinger, *supra* note 44, at 25. Otherwise the parties will not be able to ready themselves properly except by "preparing for the worst," which could involve a considerable waste of resources. *Id.*

521 *See, e.g.,* Duluz v. Alaska Packers' Ass'n, 177 Cal. 465, 170 P. 1133 (1918); authorities cited *supra* note 271. The evaluation of experts necessarily includes the decision as to which expert's opinion the court should heed. *See, e.g., In re* Estate of Leefers, 127 Cal. App. 2d 550, 274 P.2d 239 (1954); Estate of Miller, 104 Cal. App. 2d 1, 230 P.2d 667 (1951).

522 The court can affirm based either on the materials submitted at trial, or on additional materials submitted on appeal. *Cf. infra* notes 524–25 and accompanying text.

523 *E.g.,* United States v. McClain, 545 F.2d 988, 997–98 & n.20 (5th Cir. 1977).

524 *See, e.g.,* First Nat'l City Bank v. Compania de Aguaceros, S.A., 398 F.2d 779 (5th Cir. 1968); Bamberger v. Clark, 390 F.2d 485 (D.C. Cir. 1968); CLRC Judicial Notice Recommendation, *supra* note 7, at I-S.

525 *See, e.g.,* United States v. First Nat'l Bank of Chicago, 699 F.2d 341 (7th Cir. 1983); Marcoux v. United States, 405 F.2d 719, 721 n.2 (9th Cir. 1968); Esso Standard Oil, S.A. v.

made, it ought to be freely subject to review and redetermination on appeal.[526] The inaccessibility of foreign law and the lack of judicial familiarity with foreign-law systems make it necessary, however, that the parties play a greater than normal role at the appellate level to help the reviewing court find the applicable foreign law.

According to Professor Miller, appellate courts may be better suited than trial courts for construing foreign law, because of their superior resources and their expertise "in determining the existence, relevance and applicability of rules of law."[527] He recommends that appellate courts remand only where there are conflicts in the oral testimony, so that deference to the judgment of the trial court on "credibility and demeanor" becomes necessary.[528] Unless all the additional materials can be presented and disputed on paper, however, this recommendation places too many demands on the time and structure of the appellate court. The trial court is the better place for new information—even in judicial notice jurisdictions—when the materials sent up on appeal are not complete enough for a redetermination in the higher court.[529]

Appellate courts must become more sensitive to the peculiar problems of foreign law, which, because of their hybrid nature, are more difficult to ascertain than problems of local or sister-state law. They ought to remain alert to the possibility that foreign law may have been incorrectly determined or applied. Higher courts as well as lower courts need to keep in mind the additional difficulties presented by foreign legal systems, cultures, languages, and problems of access.

CONCLUSION AND PROPOSALS

Foreign law is increasingly treated as law rather than fact in the

The S.S. Gasbras Sul, 387 F.2d 573 (2d Cir.), *cert. denied,* 391 U.S. 914 (1968); CAL. EVID. CODE § 459 (West 1966).

526 Professor Sass urges that, since foreign law is law, appellate courts should be free to consider all materials which would be available to the trial court. Sass, *supra* note 23, at 114-15. Professor Schlesinger, however, cautions that an original determination on appeal would violate due process if all parties do not receive an opportunity to examine and contest the new information. R. SCHLESINGER, *supra* note 34, at 182 & n.5; *accord* Miller, *supra* note 6, at 692 & n.305.

527 Miller, *supra* note 6, at 689. *But see infra* note 529 and accompanying text.

528 Miller, *supra* note 6, at 689-90; *see, e.g.,* Estate of Eng, 228 Cal. App. 2d 160, 39 Cal. Rptr. 254 (1964), *cert. denied,* 381 U.S. 902 (1965). For a discussion of the irrelevance of expert demeanor, see *supra* text accompanying notes 299-300.

529 "If a second trial is held, experts will have an opportunity to correct any misconstruction of which this Court may have been guilty in venturing forth in the arcane field on the Mexican law of Pre-Colombian artifacts." United States v. McClain, 551 F.2d 52, 54 (5th Cir. 1977).

American legal system. Most jurisdictions now allow proof of foreign law through judicial notice, or its equivalent under Federal Rule of Civil Procedure 44.1. Yet many vestiges of the "fact" approach to foreign law remain, even within judicial notice jurisdictions. Plagued by language difficulties, limited resources, inadequate aid by counsel, and the fundamental hardship of comprehending alien legal concepts, American courts have often produced decisions which comport with foreign law more in myth than in reality. Even when it functions properly, the system is expensive and cumbersome.

This article has examined the functioning and flaws of the American system for pleading and proving foreign law. Based on this review, a number of recommendations for improvement of that system can be made.

Proper and timely notice of the intent to use foreign law is essential to adequate preparation by the opponent. Giving parties the right to challenge the content or the timing of notice prior to trial would reduce the likelihood of a last-minute surprise. In addition, the specificity of the required notice should be determined by a sliding-scale approach: The more alien the relevant foreign legal system, the more detail that should be provided concerning the foreign law. The timing of notice also should remain flexible, based on the circumstances of the particular case. But once a substantial legal issue has been decided under domestic law, the court should be reluctant to allow the use of foreign law. Finally, attorneys should recognize their ethical duty to raise the applicability of foreign law. If the parties do not raise a foreign-law issue, the court should do so.

Not only are notice requirements susceptible to reform, but a number of foreign-law sources could be used more effectively. The reliability of experts—the principal source of foreign-law information—could be increased through an accreditation procedure and a code of ethics. Moreover, expert testimony could be provided more efficiently through a two-step process: It could be provided initially in the form of a memorandum, for examination by the opposing side and by the court, followed by oral testimony confined to specific issues. American courts also should increase their reliance on past domestic decisions. Finally, further application of discovery proceedings to foreign-law authorities would do much to avoid surprise and narrow the scope of disputes.

Innovative procedures also could do much to facilitate proof of foreign law. Foreign law should be established through pretrial proceedings conducted for that purpose, initiated either by counsel or by the court. Since a special master can provide valuable background

information about the foreign law, one should supervise these proceedings when the foreign-law issue is complex. The court also should recognize its own ability to perform research. Finally, it might be desirable to assign all actions involving foreign law to a specific judge or group of judges in each judicial district, thus facilitating expertise in handling foreign-law issues.

These proposals are not intended to be a panacea for the problems involved in pleading and proving foreign law in the United States. Problems will persist as long as American judges continue to decide foreign-law questions without adequate language training, resources, and background in foreign law. Many have argued persuasively for a restructuring of the process which would remove foreign-law questions from the hands of judges. Nevertheless, as American judges increasingly come into contact with foreign-law questions, they necessarily will become more sophisticated in dealing with foreign legal systems. Consequently, improvement of the system is inevitable. Implementation of these proposals could accelerate that process.

APPENDIX A

To secure empirical data to aid in evaluating the American system for establishing foreign law, questionnaires were sent to a representative sampling of federal judges—to all district court judges in the Southern District of New York and the Northern and Central Districts of California. Twenty-five judges responded, although not every respondent answered all the questions. The questions asked and the answers received are set forth below. Each figure represents the number of respondents taking the indicated position, with the percentage of respondents taking that position shown in parentheses. Total percentages may not equal one-hundred percent due to rounding.

1. Approximately how many cases involving foreign law do you handle each year?

none	1-5	5-10	10-40	more	total
3 (14%)	15 (68%)	3 (14%)	1 (5%)	0	22 (101%)

2. How often was foreign law proved by:

		never	rarely	sometimes	usually	always	total
a.	party experts as witnesses?	7(35%)	4(20%)	3(15%)	5(25%)	1(5%)	20(100%)
b.	party experts' affidavits?	1(5%)	3(15%)	8(40%)	8(40%)	0	20(100%)
c.	court-appointed experts as witnesses?	16(89%)	1(6%)	1(6%)	0	0	18(101%)
d.	court-appointed experts' affidavits?	16(84%)	1(5%)	2(11%)	0	0	19(100%)
e.	appointment of special master/ referee?	17(94%)	0	1(6%)	0	0	18(100%)
f.	party-submitted documents (e.g. treatises, statutes)?	1(5%)	2(11%)	7(37%)	9(47%)	0	19(100%)
g.	court research?	4(20%)	1(5%)	4(20%)	9(45%)	2(10%)	20(100%)

3. How effectively was foreign law proved by:

		ineffective	somewhat effective	most effective	total
a.	party experts as witnesses?	0	4(67%)	2(33%)	6(100%)
b.	party experts' affidavits?	0	9(100%)	0	9(100%)
c.	court-appointed experts as witnesses?	0	1(50%)	1(50%)	2(100%)
d.	court-appointed experts' affidavits?	0	1(50%)	1(50%)	2(100%)
e.	appointment of special master/ referee?	0	0	1(100%)	1(100%)
f.	party-submitted documents (e.g., treatises, statutes)?	0	6(86%)	1(14%)	7(100%)
g.	court research?	0	3(38%)	5(62%)	8(100%)

4. How effective do you think the following reforms would be?

	ineffective	-	somewhat effective	-	most effective	total
a. Freer discovery and/or mandatory disclosure of foreign-law authorities	3(19%)	0	10(62%)	0	3(19%)	16(100%)
b. Directory of experts and their fields of expertise	1(8%)	3(23%)	6(46%)	0	3(23%)	13(100%)
c. Code of ethics and accreditation procedure for experts	4(29%)	3(21%)	3(21%)	0	4(29%)	14(100%)
d. Treaty for the exchange of information with foreign governments	5½(37%)	½(3%)	4(27%)	1(7%)	4(27%)	15(101%)
e. Consortium of research institutes at American law schools that would issue opinions on foreign-law questions for a fee	4½(28%)	2½(16%)	6(38%)	0	3(19%)	16(101%)
f. Centralized research institute which would issue such opinions	4½(25%)	2½(14%)	5(28%)	3(17%)	3(17%)	18(101%)

5. If foreign law clearly is applicable in a case, but not raised by the parties, should the court:

ignore the foreign law	suggest that counsel raise the foreign-law issue	raise the foreign-law issue *sua sponte*	total
1 (6%)	8 (44%)	9 (50%)	18 (100%)

APPENDIX B

The following list sets forth the type of system used in each state for establishing foreign law. States characterized as rule 44.1 jurisdictions have adopted the federal approach to foreign law, either verbatim or with modifications. States listed as using a judicial notice approach employ some form of judicial notice as to foreign law. States listed as using the Uniform Act maintain a pure common-law approach to the area, except that the foreign-law decision is made by the judge, not by a jury.

Alabama—rule 44.1 [ALA. R. CIV. P. 44.1]
Alaska—judicial notice [ALASKA R. EVID. 202]
Arizona—rule 44.1 [ARIZ. R. CIV. P. 44.1]
Arkansas—modified rule 44.1 [ARK. R. CIV. P. 44.1]
California—judicial notice [CAL. EVID. CODE § 452(f) (West 1966)]
Colorado—rule 44.1 [COLO. R. CIV. P. 44.1]
Connecticut—limited judicial notice [CONN. GEN. STAT. ANN. §§ 52-163-164 (West 1960 & Supp. 1982)]
Delaware—rule 44.1 [DEL. SUPER. CT. CIV. R. 44.1.]
Florida—judicial notice [FLA. STAT. ANN. § 90.202(4) (West 1979)]
Georgia—limited judicial notice [GA. CODE ANN. § 24-1-4 (1982)]
Hawaii—rule 44.1 [HAWAII R. CIV. P. 44.1; *see also* HAWAII R. EVID. 202(c)(5)]
Idaho—judicial notice [IDAHO R. CIV. P. 44(d)]
Illinois—Uniform Act [ILL. ANN. STAT. ch. 110, ¶ 8-1008 (Smith-Hurd Supp. 1982)]
Indiana—rule 44.1 [IND. R. TRIAL P. 44.1(A)]
Iowa—common law [IOWA CODE ANN. §§ 622.59, 622.61 (West 1950)]
Kansas—judicial notice [KAN. CIV. PROC. CODE ANN. § 60-409(b)(2) (Vernon 1965)]
Kentucky—Uniform Act [KY. REV. STAT. ANN. § 422.085 (Baldwin 1981)]
Louisiana—Uniform Act [LA. CODE CIV. PROC. ANN. art. 1391 (West 1960)]
Maine—rule 44.1 [ME. R. CIV. P. 44A]
Maryland—Uniform Act [MD. CTS. & JUD. PROC. CODE ANN. § 10-505 (1980)]
Massachusetts—rule 44.1 [MASS. R. CIV. P. 44.1]
Michigan—modified rule 44.1 [MICH. STAT. ANN. § 27A.2114(1) (Callaghan 1976)]

Minnesota—rule 44.1 [MINN. R. CIV. P. 44.04]
Mississippi—judicial notice [MISS. CODE ANN. § 13-1-149 (1972)]
Missouri—Uniform Act [MO. ANN. STAT. § 490.120 (Vernon 1952)]
Montana—rule 44.1 [MONT. R. CIV. P. 44.1]
Nebraska—Uniform Act [NEB. REV. STAT. § 25-12, 105 (1979)]
Nevada—rule 44.1 [NEV. R. CIV. P. 44.1]
New Hampshire—common law
New Jersey—judicial notice [N.J. R. EVID. 9(2)(c)]
New Mexico—rule 44.1 [N.M. DIST. CT. R. CIV. P. 44(b)]
New York—judicial notice [N.Y. CIV. PRAC. R. 4511(b) (McKinney 1963)]
North Carolina—judicial notice [N.C. GEN. STAT. § 8-4 (1981)]
North Dakota—rule 44.1 [N.D. R. CIV. P. 44.1]
Ohio—rule 44.1 [OHIO R. CIV. P. 44.1(B)]
Oklahoma—judicial notice [OKLA. STAT. ANN. tit. 12, § 2201(B)(2) (West 1980)]
Oregon—judicial notice [OR. REV. STAT. § 40.090(6) (1981)]
Pennsylvania—modified rule 44.1 [42 PA. CONS. STAT. ANN. § 5327 (Purdon 1981)]
Rhode Island—Uniform Act [R.I. GEN. LAWS § 9-19-7 (1970)]
South Carolina—Uniform Act [S.C. CODE § 19-3-160 (1977)]
South Dakota—rule 44.1 [S.D. COMP. LAWS ANN. § 15-6-44.1 (Supp. 1982)]
Tennessee—Uniform Act [TENN. CODE ANN. § 24-6-205 (1980)]
Texas—common law [TEX. R. CIV. P. 184a]
Utah—common law [UTAH R. CIV. P. 44(f)]
Vermont—rule 44.1 [VT. R. CIV. P. 44.1]
Virginia—judicial notice [VA. CODE § 8.01-386 (1977)]
Washington—modified rule 44.1 [WASH. SUPER. CT. CIV. R. 44.1]
West Virginia—rule 44.1 [W. VA. R. CIV. P. 44.1]
Wisconsin—Uniform Act [WIS. STAT. ANN. § 902.02(5) (West 1975)]
Wyoming—rule 44.1 [WYO. R. CIV. P. 44.1]