

# NOTES

## 44.1 LUFTBALLONS: THE COMMUNICATION BREAKDOWN OF FOREIGN LAW IN THE FEDERAL COURTS

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*Foreign law has become an increasingly important element of many cases brought before federal courts. Rule 44.1, which controls determinations of foreign law, is intended to make the process for determining foreign law as painless as possible, but like the regime that preceded it, it has become a procedural minefield for those wishing to rely on foreign law, as courts have declined to apply Rule 44.1 when it should be used, either deliberately or due to uncertainty as to its application. This is in large part due to the lack of concrete standards outlined in the rule. This Note examines the standards associated with the rule and their application in the years immediately after its promulgation and concludes that the reliant party's burden of production with respect to foreign law should vary based on whether statutory text is provided. If a statute is available, the courts should be required to undertake a Rule 44.1 analysis, while if a statute is unavailable, the reliant party should bear the burden of producing substantial evidence of foreign law. This standard, elaborated in the text of Rule 44.1, should ensure that as many foreign law determinations as possible can be resolved on the merits.*

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## INTRODUCTION

While you are on a brief trip to Saudi Arabia, an employee of an American corporation hits you with a vehicle, paralyzing you from the waist down. You sue the corporation in a United States federal court, and the choice-of-law inquiry determines that Saudi law applies exclusively. Because you are required to prove Saudi law as a fact to the jury, your case fails due to jury confusion, even though you have a meritorious claim. On appeal, the circuit court can only review the jury’s finding of Saudi law for clear error and finds none because of the high bar for overturning findings of fact. Until the promulgation of Federal Rule of Civil Procedure 44.1 in 1966, cases implicating foreign law often ran these risks in federal court, if not the risk of being dismissed outright for failure to prove foreign law by a preponderance of the evidence.<sup>1</sup> Once the rule was promulgated, however, advising the court that Saudi law applied afforded parties multiple avenues to demonstrate the law, and the district court could independently research Saudi law and supplement party presentations. This ensured that cases in which foreign law applied were more likely to be determined on their merits rather than on a procedural technicality, as

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<sup>1</sup> This hypothetical was derived from the facts of *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956). Because this case arose before Rule 44.1 was promulgated, the plaintiff’s case was ultimately dismissed in the middle of trial for failing to prove Saudi law. *Id.* at 546. The court held that “the plaintiff deliberately refrained from establishing an essential element of his case,” even though both the plaintiff and the defendant wished to advance under New York law. *Id.*

information governed by Rule 44.1 was typically necessary to undertake a choice-of-law inquiry.<sup>2</sup>

Unfortunately, the rule uses vague language to describe the procedures for determining foreign law.<sup>3</sup> This lack of clarity has led to judges declining to take a permissive and patient approach when litigants raise foreign law issues,<sup>4</sup> creating a more onerous burden on parties wishing to rely on foreign law than the rule's drafters intended.<sup>5</sup> The higher burdens have hurt litigants: Judges often incorrectly choose to apply forum law, which can result in erroneous outcomes<sup>6</sup> inconsistent with principles of comity.<sup>7</sup> Furthermore, pre-1990 application of Rule 44.1 shows that courts clearly can go to great lengths to determine foreign law when sufficient information is provided, suggesting that courts could do so again.<sup>8</sup>

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<sup>2</sup> A federal court will use the choice-of-law rules of the state that it sits in, as under the *Erie* doctrine, choice-of-law questions are considered procedural. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Across the 50 states, there are several different choice-of-law regimes in place, but most if not all require an examination of both authorities. See RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 7–16 (6th ed. 2010). A detailed analysis of how Rule 44.1 interacts with each choice-of-law regime in turn is beyond the scope of this Note, but those relevant to important cases will be briefly discussed when necessary.

<sup>3</sup> See *infra* text accompanying note 24 (quoting ambiguous language); see also *infra* text accompanying note 38 (discussing why Rule 44.1 was deliberately kept relatively short in the face of potential ambiguity).

<sup>4</sup> *Infra* Parts II.A–C.

<sup>5</sup> For example, artificial adherence to a high burden of proof hinders judicial flexibility, which is especially harmful if the foreign law's obscurity and difficulty rightfully leads to an outcome that is much different from the outcome under local law. See *infra* Part II.D (discussing this problem).

<sup>6</sup> See, e.g., *Trafigura Beheer B.V. v. M/T Probo Elk*, 266 F. App'x 309, 311 n.3 (5th Cir. 2007) (dismissing a case based on a forum selection clause (which, under British law, would be invalid) because of a failure to prove British law at the district court level).

<sup>7</sup> While comity can refer to various aspects of international law, at its most basic, it urges legal reciprocity between countries as long as the laws being applied in these rulings are not against the public policy of the country interpreting them. See Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 31 (2010) (describing the Court's focus on comity as "the idea of deference to foreign sovereigns wrapped in reciprocity"). The increasing use of forum law instead of foreign law that should apply runs against this idea. This conception of comity should not be confused with a related use of the word "comity" used primarily for recognizing foreign judgments that comport with domestic public policy. E.g., Lauretta Drake, *Stop the Madness! Procedural and Practical Defenses to Avoid Inconsistent Cross-Border Judgments Between Texas and Mexico*, 9 J. TRANSNAT'L L. & POL'Y 209, 231–33 (1999) (discussing foreign judgments and using "comity" in the sense described immediately above); accord Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 65–67 (1991); Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CALIF. L. REV. 1447, 1452 (1986).

<sup>8</sup> The Fifth Circuit's opinion in *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000 (5th Cir. 1990), is one of the earliest and most influential cases that deviates from Rule 44.1's intent. See *infra* Part II.B (discussing this case and its progeny). Of the cases

While the rule is unclear on how courts should obtain the information necessary for them to make a foreign law determination, correct applications of the rule tend to fall into one of two categories. Judges can use statutory language alone, when it is available, to undertake a Rule 44.1 analysis.<sup>9</sup> On the other hand, when no statute is at issue, parties need to provide other information so that courts can properly determine foreign law.<sup>10</sup> While these are both simple standards of production that would be useful both to judges and litigants, the rule itself outlines neither.<sup>11</sup> Clarification of the text of the rule will allow courts to better realize its purpose: determining foreign-law cases on their merits rather than through implicit procedural bars. I thus advance a two-tiered burden of production based on these findings.<sup>12</sup> This modification to Rule 44.1 will account for the realities of

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cited in Part II that misapply Rule 44.1 in this manner, only two were decided before 1990. See *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854, 860 (2d Cir. 1981); *Clayhill Resources, Ltd. v. MSB Indus., Inc.*, No. 80 CIV 1165(RLC), 1980 WL 267205, at \*1 n.2 (S.D.N.Y. Nov. 3, 1980). While scholars have noted that courts are misapplying the rule, they have not inquired further. Some explain the phenomenon as a valid exercise of discretion. See, e.g., Thomas O. Main, *The Word Commons and Foreign Laws*, 46 CORNELL INT'L L.J. 219, 269 (2013) (discussing a lukewarm judicial response toward foreign law and noting that many courts end up “avoiding most applications of foreign law”); John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT'L L. 3, 6, 84–85 (1983) (discussing the reliance of the federal courts “on the wisdom” of judges in ascertaining foreign law). Others expound Rule 44.1 as an area of confusion. See, e.g., William Ewald, *The Complexity of Sources of Trans-National Law: United States Report*, 58 AM. J. COMP. L. 59, 67 (2010) (discussing the wrinkles involved in the system set up in Rule 44.1 and the lack of a push for their resolution); cf. Kyle P. Sheahen, *I'm Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT'L L.J. 464, 470–72 (2010) (citing similar critiques of procedures under Federal Rule of Criminal Procedure 26.1, the criminal analogue to Rule 44.1). Some even neglect to mention this confusion entirely. See, e.g., Anthony R. Bessette, *Trans-Tec Asia v. M/V Harmony Container: Should American Judges Don Foreign Hats (or Wigs)?*, 8 SANTA CLARA J. INT'L L. 405, 406 (2010) (noting only that “the gulf between the real and the ideal is large” and that “U.S. judges will find a reason to apply forum law to avoid letting foreign law determine the outcome”); Louise Ellen Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COMM. 97 (2003) (discussing many inconsistencies in the application of foreign law, concluding that federal judges should “embrace” the rule). Proposed solutions often address the symptoms of the problem without attempting to determine why they exist. See John Henry Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151, 157–59 (1983) (arguing that the primary reason for foreign law's failure in domestic courts is the lack of impartial court-appointed experts used as proof, approaching the failure from a substantive perspective).

<sup>9</sup> *Infra* note 156 and accompanying text.

<sup>10</sup> *Infra* notes 154–55 and accompanying text.

<sup>11</sup> For an exploration of the reasons behind the brevity of Rule 44.1, see *infra* note 38 and accompanying text.

<sup>12</sup> *Infra* Part III.

the incentives for parties and judges to work toward ascertaining foreign law.<sup>13</sup>

This Note examines the motivations behind both current and pre-1990 practice and proposes a modification to the structure of Rule 44.1 that is aligned with the rule's original purpose, thereby forcing the unification of judicial practice in this area.<sup>14</sup> This analysis requires an examination of standards rather than methods. That is, instead of discussing ways in which foreign law can be determined (the "methods" of determining foreign law),<sup>15</sup> I approach the rule by examining which party carries the burden of determining foreign law and what that party needs to demonstrate (the "standards" of Rule

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<sup>13</sup> The obvious argument against a modification to the rule is that it will be much easier for the Supreme Court to resolve the issue itself without having to go through the process of amending the rule and reestablishing decisional precedent that would guide practice under the new rule. Although the Supreme Court could easily resolve this issue by taking a case on it, the Court has only mentioned Rule 44.1 once, and its citation was in a footnote ostensibly supporting the idea that international arbitrators would have no greater difficulties with divergent legal systems than courts do. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 n.18 (1985). Furthermore, decisional precedent would have to be reestablished after a hypothetical Supreme Court case just as it would be if the Federal Rules were modified. Therefore, an amendment to the rule, as the rules are finite and updated regularly, is a likelier and more realistic option than the Supreme Court certifying the question.

<sup>14</sup> The approach is similar to "choice-influencing considerations," an analytical approach used by Robert Lefflar in the 1960s to transform the choice-of-law theory conversation. Robert A. Lefflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter Lefflar, *Considerations*]; accord Robert A. Lefflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). The basic premise behind choice-influencing considerations is simply that judges make decisions, particularly in choice-of-law determinations, based on a few simple factors, even if the strict rules they must follow do not coincide with these underlying policies. Lefflar, *Considerations, supra*, at 281–82.

<sup>15</sup> See Merryman, *supra* note 8, at 159–70 (arguing for more frequent use of a "non-party expert" in cases dealing with foreign law). Although scholars have been proposing various improvements to the methods for determining foreign law for thirty years, there has been a recent wave of articles advocating for an expanded judicial toolbox for the appraisal of foreign law. See, e.g., Main, *supra* note 8, at 283–84 (exhorting courts to take advantage of their ability to appoint neutral experts and special masters); Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 918–35 (2011) (surveying the potential methods available to courts, including using court-appointed special masters and inviting amicus briefs on the issue); Frederick Gaston Hall, Note, *Not Everything Is as Easy as a French Press: The Dangerous Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution*, 43 GEO. J. INT'L L. 1457, 1466–73 (2012) (using the three panel opinions in *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010), to call for a supplementary scheme to request binding interpretations from foreign law courts); Nicholas M. McLean, Comment, *Intersystemic Statutory Interpretation in Transnational Litigation*, 122 YALE L.J. 303, 312 (2012) (advocating for the increased use of experts in judicial interpretation of foreign law).

44.1).<sup>16</sup> After all, the methods of determining foreign law are irrelevant if the courts can still decide to apply forum law merely because litigants did not meet an artificially constructed hurdle.<sup>17</sup>

This Note proceeds in three parts. Part I explores the original purpose of Rule 44.1, examining case law from before 1990 to determine what practical requirements the rule creates for judges and litigants in trying to force determinations on the merits. Part II then reviews recent Rule 44.1 case law to show why some courts' current treatment of the rule does not comport with this purpose.<sup>18</sup> Finally, I advance the hypothesis in Part III that judicial practice varies based on the presence or absence of a statute and advocate for an amended version of Rule 44.1 that explicitly captures this distinction and creates a responsibility for judges to hear these cases on the merits.

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<sup>16</sup> There are only three pieces of scholarship that mention the balance on the burden of proof between the courts and the litigants as being problematic; all advocate shifting the burden of proof at least partially onto the courts in all cases. Aurora Bewicke, *The Court's Duty to Conduct Independent Research into Chinese Law: A Look at Federal Rule of Civil Procedure 44.1 and Beyond*, 1 CHINESE L. & POL'Y REV. 97, 108–14 (2005); Teitz, *supra* note 8, at 118; Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT'L L. & POL. 1111, 1148–49 (2013). However, each contains merely short gestures at the problem, citing only a smattering of cases that illustrate the uneven standards applied. Bewicke, *supra*, at 106–07; Teitz, *supra* note 8, at 116–17; Wilson, *supra*, at 1148 & n.135.

<sup>17</sup> There is no question of subject-matter jurisdiction in these Rule 44.1 cases, which distinguishes them from *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012). Although *Kiobel* asks whether courts “recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States,” *id.* at 1738, these questions are only for purposes of interpreting the Alien Tort Statute, 28 U.S.C. § 1350 (2012), which deals exclusively with subject-matter jurisdiction. Rule 44.1 necessarily applies only once subject-matter jurisdiction has been properly found.

<sup>18</sup> The consequences of this misinterpretation of foreign law will not be nearly as bad as the near-catastrophe described in the hit song that is the namesake of this Note, which tells the story of a global nuclear war started by a misinterpretation of radar signals. See NENA, *99 Luftballons*, on 99 LUFTBALLONS (Epic Records 1984), translated in Hyde Filippo, *English Translation of “99 Luftballons,”* ABOUT.COM, [http://german.about.com/library/blmus\\_nena99luftbE.htm](http://german.about.com/library/blmus_nena99luftbE.htm) (last visited Sept. 16, 2014), (“People think they’re [UFOs] from space/so a general sent up/a fighter squadron after them/Sound the alarm if it’s so/but there on the horizon were/only 99 balloons.”). Ironically, although an English version of this song was released with the meaning of the lyrics slightly changed to fit within the meter, the American public preferred the German version, which ultimately peaked at number two on the Billboard charts. See *Chart Beat Chat*, BILLBOARD.COM, <http://www.billboard.com/articles/news/61191/chart-beat-chat> (last visited Sept. 16, 2014) (noting the strangeness that “the German-language version was a hit in America” while discussing its peak at number two on the charts); *Interview with Kevin McAlea*, EIGHTY-EIGHTYNINE.COM, <http://www.eightyeightynine.com/music/99luftballons-english.html> (last visited Sept. 16, 2014) (“I think the mistake in the previous attempts [to translate the song] was in trying to adhere to the original meaning. I was more interested in the sound the lyrics were making than anything else.”).

I  
THE PURPOSE OF RULE 44.1 AND ITS  
PROPER APPLICATION

Part I.A discusses Rule 44.1 and its history, particularly focusing on the drafters' intentions that courts should, whenever possible, apply foreign law in order to adjudicate cases on the merits. Part I.B examines more closely the Advisory Committee's thoughts on what circumstances could lead courts to decline to apply Rule 44.1 and finds that the Committee envisioned that courts would do so only when determining foreign law proved prohibitively difficult. Part I.C explores early case law in depth to determine how the courts originally effected these policies. It concludes that before 1990, courts hewed closely to the rule's intentions by proactively interpreting foreign law, even when parties presented incomplete information or the underlying law was ambiguous. Throughout this Note, I will use the phrase "proof of law" to refer specifically to the pre-1966 standards of determining foreign law and to post-1966 interpretations of the law that perpetuate such standards. To refer to the standards as I argue they should be construed under Rule 44.1, I will use the phrase "determination of foreign law."

*A. History of Rule 44.1 and Determinations of Foreign Law*

A short rule outlining liberal standards for the determination of foreign law, Rule 44.1 is increasingly important in an era of flourishing globalization.<sup>19</sup> Although historically not an oft-cited rule,<sup>20</sup> it has utility not only in choice-of-law analyses that implicate the laws of foreign countries<sup>21</sup> but also in analyzing claims of forum non con-

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<sup>19</sup> Cf. Robert M. Pollack, Note, "*Not of Any Particular State*": J. McIntyre Machinery v. Nicastro and Nonspecific Purposeful Availment, 89 N.Y.U. L. REV. 1088 (2014) (discussing jurisdictional consequences to increased globalization of litigation). This is true not just of tort actions, but also international contract cases as well as cases involving multinational corporations, among many others. See, e.g., Childress, *supra* note 7, at 47–59 (discussing the numerous contexts in which foreign law is applied in U.S. courts).

<sup>20</sup> As of August 26, 2014, Westlaw lists 1038 published cases and 277 law review articles that have ever cited Rule 44.1, although more than 700 of these cases were decided in the last twenty years.

<sup>21</sup> Because of its use in the federal courts for this purpose, Rule 44.1 has become a small but indispensable topic in conflict of laws materials. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 125–27 (6th ed. 2010).

veniens,<sup>22</sup> as well as other domestic claims requiring an inquiry into foreign law.<sup>23</sup> Rule 44.1 provides:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.<sup>24</sup>

The second sentence is particularly impactful because it dispenses with the typical methods of proof and allows the court to conduct its own research, bringing the methods of determining foreign law in closer parallel with those of determining domestic law. The title of the rule, "Determinations of foreign law," refers both to inquiries into the substance of the foreign law and the methods and standards for establishing such law.

Before the promulgation of Rule 44.1, foreign law was to be stated in the pleadings and proven to a jury,<sup>25</sup> subject only to a "clearly erroneous" standard on appeal.<sup>26</sup> When Rule 44.1 took effect in 1966, it replaced a common-law tradition that dated back nearly to the origins of the country: the treatment of foreign law as an issue of

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<sup>22</sup> For a discussion of Rule 44.1's impact on forum non conveniens analysis and its current role in these proceedings, see Emily J. Derr, Note, *Striking a Better Public-Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 828–29 & n.78 (2008) ("In federal court, virtually all forum non conveniens questions arise in international cases. Therefore, the 'need to apply foreign law' factor is commonly raised."). Although forum non conveniens analysis does not itself implicate the substance of the foreign law, courts have pointed to the laws of foreign states as evidence that alternative forums are adequate. See, e.g., *Cook v. Champion Shipping AS*, 732 F. Supp. 2d 1029, 1033–34 (E.D. Cal. 2010) (discussing defendants' evidence that Hong Kong law is not "clearly unsatisfactory" for adjudicating the immediate claim and crediting their evidence over plaintiffs' objections due to a proper reading of Rule 44.1).

<sup>23</sup> The Restatement of Conflict of Laws envisions a negligence suit brought against an attorney who failed to ascertain foreign law, which would not directly implicate the choice-of-law analysis or be satisfactorily resolved through an application of foreign law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (2005); see also *Crespo v. United States*, 399 F.2d 191, 192 (Ct. Cl. 1968) ("The Internal Revenue Code of 1954 prescribes that the kind of income earned by plaintiff in 1964 is taxable . . . but local law (in this case the law of Spain) must determine whether plaintiff acquired such rights in that income that it can be said that she 'received' it . . .").

<sup>24</sup> FED. R. CIV. P. 44.1.

<sup>25</sup> See, e.g., Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1018 (1941) (noting in one early critique of treating foreign law as a fact that this practice "dominates cases, legislation, and literary discussion").

<sup>26</sup> Rule 52, which governs appellate review of findings of fact, has stated since its adoption in the original 1938 version of the Federal Rules of Civil Procedure that such findings "must not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a)(6).

fact.<sup>27</sup> At common law, determinations of the content of the laws of other countries were treated as issues of fact to be raised in the pleadings and proven by the parties.<sup>28</sup> As a result, failure to prove foreign law would result in dismissal of the action, and the materials needed to prove foreign law had to be admissible under the evidence rules of the time. Frequently-complex foreign law questions were submitted to juries, and appellate review of these jury determinations was sharply limited by the clear error standard.<sup>29</sup>

The rule instead provides that determinations of foreign law are questions of law, giving judges more freedom to resolve foreign-law questions on their merits by properly determining foreign law and applying it in the instant case, rather than settling for either a workaround or a procedural roadblock for litigants. By shifting to de novo appellate review and allowing foreign law to be raised outside of the pleadings as long as the reliant party provides reasonable written notice, the rule sought to avoid those undesirable results.<sup>30</sup> The intent was to create more predictable outcomes, with judges looking to precedent to determine the law, and to ensure that foreign law would be determined by those trained in interpreting laws, so that neither party was prejudiced by a requirement to prove foreign law as fact.<sup>31</sup> The rule has not been substantively amended since its promulgation in 1966;<sup>32</sup> it provides that “the court may consider any relevant material

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<sup>27</sup> The first American mention of the foreign-law standard dates back to Chief Justice John Marshall’s opinion in *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 187 (1804) (“Foreign laws must be proved like other facts.”).

<sup>28</sup> Arthur R. Miller, *Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 620 (1967) [hereinafter Miller, *Rule 44.1*]. This article is the definitive work in this area, and it explores the underlying policy for the promulgation of Rule 44.1 in much more detail. It was written by the Associate Director of the Columbia Law School Project on International Procedure at the time the organization was responsible for the research and drafting of Rule 44.1. Arthur R. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodations in a Test Tube*, 49 MINN. L. REV. 1069, 1069 n.\* (1965).

<sup>29</sup> Miller, *Rule 44.1*, *supra* note 28, at 622–24.

<sup>30</sup> See FED. R. CIV. P. 44.1 Advisory Committee’s Note [hereinafter Advisory Note] (“[T]he rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.”); see also 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2441 (3d ed. 2008) (discussing adoption of Rule 44.1 in 1966 and changes from the previous common-law standard for proving foreign law).

<sup>31</sup> See Miller, *Rule 44.1*, *supra* note 28, at 666 (discussing the competency of federal judges to interpret and determine the law); *id.* at 718 (discussing the problem of predictability of jury determinations of foreign law).

<sup>32</sup> See 9A WRIGHT & MILLER, *supra* note 30, at CIV Rule 44.1 (discussing the addition of a cross-reference when the Federal Rules of Evidence were created in 1975 and stylistic changes made to the text of the Rule in 1987 and 2007).

or source . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence,”<sup>33</sup> and it specifies that the court’s ruling “must be treated as a ruling on a question of law.”<sup>34</sup> As such, the question of foreign law is no longer given to a jury,<sup>35</sup> and appellate review is no longer subject to the clear error standard.<sup>36</sup>

The policy underlying the development of Rule 44.1 is consistent with a much more elementary rule: Rule 1, which states that the Federal Rules of Civil Procedure “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>37</sup> In fact, those involved with developing the rule deliberately left it short so that courts could set specific standards consistent with Rule 1’s preference toward resolution of cases on the merits.<sup>38</sup> Although resolution of cases under forum law might still be considered a resolution on the merits because the law is being substantively applied to the dispute, the requirement for “just” resolution of claims seems to require that the merits of the case be examined under the *applicable* law, especially if the choice of foreign law decides the outcome.

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<sup>33</sup> FED. R. CIV. P. 44.1.

<sup>34</sup> *Id.*

<sup>35</sup> Although the drafters of Rule 44.1 did not insert a reference to the judge as the arbiter of foreign law, commentators have demonstrated that this is preferable from a policy standpoint. Miller, *Rule 44.1, supra* note 28, at 688 (“A mature system, like prudent people, should entrust the process of examination, diagnosis, and treatment of its problems to a clinician rather than to an ad hoc group of dragooned laymen.” (emphasis omitted)). It is now assumed that foreign law questions are given to the judge and not the jury.

<sup>36</sup> *Id.* at 690 (“Full appellate review of the trial court’s utilization of these powers seems necessary both as a restraint against abuse and as a precaution against the possibility of trial-court error.”).

<sup>37</sup> FED. R. CIV. P. 1.

<sup>38</sup> See Miller, *Rule 44.1, supra* note 28, at 748–49 (concluding the article with a summation that Rule 44.1’s blueprint for handling foreign law “is compatible with the clarion for the ‘just, speedy, and inexpensive’ administration of justice sounded in Federal Rule 1”). There is some irony here: The federal courts were in some sense given an implicit responsibility to innovate that they had apparently been reluctant to take on in the past. Compare *id.* at 749 (“Not surprisingly, the federal courts fell heir to much of the dogma and it was not until the promulgation of the Federal Rules of Civil Procedure that any attempt was made to chip away the encrustation that had formed on judicial habits in this area.”), with *id.* (“If the conceptual underpinnings and *modus operandi* of the Rule are given effect by the federal judiciary, the pleading and proof of foreign law will be modernized and brought into the mainstream of Federal Rule practice.”), and *id.* (“The expectation is that the various lacunae in the Rule will be closed by the courts in ways consistent with the norms established in analogous areas of federal procedure to the extent that the peculiarities of proving foreign law permit.”). Although the rule also mandated a doctrinal shift, that standards failed to emerge is unsurprising and understandable.

B. “Whenever Possible”: The Advisory Committee’s Limits on a Court’s Duty to Apply Foreign Law

When encountering issues involving foreign law, courts cannot be expected to read the rule as a formalistic charge to ensure that *all* questions of foreign law are determined properly on their merits, as this would place a heavy burden on the judiciary. In practice, however, there are few limitations on judicial application of the rule. In this Subpart, I will discuss the Advisory Committee’s approach to why a court may decline to apply Rule 44.1 after a party has given notice that it intends to raise an issue of foreign law.

The 1966 Advisory Committee’s Note to Rule 44.1 is an obvious starting point in the search for limitations on the duty of courts to resolve foreign-law determinations on their merits.<sup>39</sup> The portion of the Advisory Note that discusses the second sentence of the rule,<sup>40</sup> which is the most relevant to the question of standards, provides two pieces of information important to the inquiry into limits. The first explains the expanded resources at the courts’ disposal in determining foreign law:

[T]he new rule provides that in determining this law the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. 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.<sup>41</sup>

The paragraph concludes by declining to require courts to use these resources, but noting that “the court is free to insist upon a complete presentation by counsel.”<sup>42</sup> This appears to suggest that judges have significant discretion to shift the burden of investigating foreign law onto the parties. However, although the court can insist that attorneys conduct the initial research, this does not mean that the court can circumvent Rule 44.1 inquiries afterwards. While the drafters of the rule appeared to be sympathetic to judges’ inability to affirmatively research every instance of foreign law that might arise, the expectation was that the judiciary would resolve the issues on the merits

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<sup>39</sup> Advisory Note, *supra* note 30.

<sup>40</sup> The rule provides: “In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible by the Federal Rules of Evidence.” FED. R. CIV. P. 44.1.

<sup>41</sup> Advisory Note, *supra* note 30.

<sup>42</sup> *Id.*

“whenever possible.”<sup>43</sup> Ultimately, this “whenever possible” wording appears to set a high bar for Rule 44.1 applications: Courts, it seems, are only excused from attempting to resolve foreign law determinations on the merits when doing so would be impossible.

A second mention of limitations appears in the Advisory Committee’s explanation for their reluctance to use the phrase “judicial notice” in the text of Rule 44.1.<sup>44</sup> In addition to concerns over the term itself, the Advisory Committee states that requiring judicial notice (or something akin to it) “would put an extreme burden on the court in many cases.”<sup>45</sup> While this does limit the situations in which Rule 44.1 is applicable, as no formalistic requirement is placed on the judiciary, it mirrors the aforementioned prohibition, implying perhaps uncontroversially that an extreme burden on the court is an “impossible” case. These two instructions together create an exemption that may be invoked in cases where an incorrect or unjust determination on the merits is plausible.<sup>46</sup>

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<sup>43</sup> Compare Miller, *Rule 44.1*, *supra* note 28, at 660 (“[The judge’s] right to insist upon a complete presentation by counsel on the foreign-law issues has been preserved.”), *with id.* at 661 (“[I]t must be remembered that one of the policies inherent in Rule 44.1 is that, whenever possible, foreign-law issues should be resolved on their merits and on the basis of a full evaluation of the available materials.”), *and id.* (“[A] judicial practice of automatically refusing to engage in research or to assist or direct counsel would be inconsistent with one of the Rule’s basic premises.”).

<sup>44</sup> Advisory Note, *supra* note 30. “Judicial notice” is a concept designed originally to ensure a judge’s familiarity with the applicable laws in the jurisdiction in which he or she sits. Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 271 & n.2 (1944). A judge taking judicial notice of a fact is similar; the judge will take certain indisputable facts as true. *See id.* at 273 (“Just as the court cannot function unless the judge knows the law . . . so it cannot . . . fulfill the sole purpose of its creation if it permits the parties to take issue on, and thus secure results contrary to, what is so notoriously true as not to be the subject of reasonable dispute . . . .”); *see also* Murl A. Larkin, Commentary, *Article II: Judicial Notice*, 20 HOUS. L. REV. 107, 107 (1983) (“[J]udicial notice authorizes the factfinder, under the guidance of the trial judge, to accept the truth of certain facts without the necessity of formal proof.”). In this context, it would seem that the latter, facts-based concept of judicial notice is more analogous to the procedures ideal for the courts to follow, but because Rule 44.1 itself provides that the ruling should be “treated as a ruling on a question of law,” FED. R. CIV. P. 44.1, the Advisory Committee appears to be justifiably worried that using the phrase in the rule might imply that the former, law-based definition attaches.

<sup>45</sup> Advisory Note, *supra* note 30.

<sup>46</sup> This formulation of this standard, while it may not perfectly encompass the guidance provided by the Advisory Committee’s Note, is also favorable because of its consistency with Rule 1. *Supra* note 37 and accompanying text. Although Rule 1 provides for the “just, speedy, and inexpensive” resolution of every proceeding, FED. R. CIV. P. 1, and this standard elevates the first of these considerations at the expense of the other two, the result seems consistent with the intent of the drafters, who wished to create “just” outcomes based on the elimination of rigid technical standards and the elevation of determinations on the merits. *See* Robert G. Bone, *Improving Rule 1: A Master Rule of the Federal Rules*, 87 DENV. U. L. REV. 287, 290 (2010) (noting that the solution of Rule 1, and

### C. *Pre-1990 Judicial Precedent and Institutional Ability*

Although the Advisory Committee's Note is informative, judicial opinions helpfully illustrate the application of the rule in real cases. While the courts did not always apply Rule 44.1 consistently with its purpose between its passage and the *Banque Libanaise* decision in 1990,<sup>47</sup> the vast majority of cases decided during this period took to heart the principles that underlie the rule. These opinions suggest a few conclusions about the intended result of Rule 44.1. First, Rule 44.1 can be applied even when the material presented to the court does not provide a complete picture of foreign law. Second, Rule 44.1 can be applied proactively and powerfully, with lower courts preemptively tackling the issue when it is raised and appellate courts conducting in-depth reviews of the lower courts' analyses. Third, Rule 44.1 can be applied by the court *sua sponte*. Fourth, there are only a few special cases in which courts can correctly eschew Rule 44.1. These conclusions are not only consistent with the Advisory Committee's Note, but they also embrace the expansive view of Rule 44.1 its drafters envisioned.

#### 1. *Partial Demonstration of Foreign Law Acceptable*

Courts can successfully apply Rule 44.1 even when the material provided by parties does not provide a complete picture of foreign law. For example, in *Kalmich v. Bruno* the Northern District of Illinois took as true statutes provided by plaintiffs "in the form in which they have been pleaded."<sup>48</sup> The complaint set forth a Yugoslavian statute of limitations, which stated in relevant part that a civil statute of limitations would be borrowed from a criminal statute of limitations "if the conduct complained of in the civil action could subject the defendant to a criminal prosecution."<sup>49</sup> Although the court undertook this analysis on a motion to dismiss (a context in which

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the Federal Rules of Civil Procedure more broadly, was aimed at solving the problem of the hypertechnicality of litigation and the codes before the promulgation of the Rules).

<sup>47</sup> 915 F.2d 1000 (5th Cir. 1990); *see also supra* note 8 and accompanying text (contrasting earlier cases with those influenced by *Banque Libanaise*).

<sup>48</sup> 404 F. Supp. 57, 61 (N.D. Ill. 1975), *rev'd on other grounds*, 553 F.2d 549 (7th Cir. 1977).

<sup>49</sup> *Id.* The district court construed this provision in light of other Yugoslavian statutes under the specificity test, asking whether the statute of limitations was meant to be specific to the liability in question. *See* *The Harrisburg*, 119 U.S. 199, 214 (1886) (stating that "the limitations of the remedy are . . . to be treated as limitations of the right" if the same statute created both the liability and the remedy); *see also* *Davis v. Mills*, 194 U.S. 451, 454 (1904) (noting that the result should be the same if a new statute created a limitation directed toward the liability in question).

pleadings are construed favorably to the plaintiff),<sup>50</sup> the court was still able to interpret the foreign statute for its purposes without difficulty, showing that having a possibly-incomplete picture of the foreign law did not impose the sort of “extreme burden” referenced in the Advisory Committee’s Note.<sup>51</sup> Ultimately, the court found that the Yugoslavian statute did not apply,<sup>52</sup> but importantly, its decision to apply forum law rested on an analysis of Yugoslavian law that was consistent with the intent of Rule 44.1: The court carefully examined the statute and related provisions of Yugoslavian law instead of displaying any predisposition toward local law.

Although the Seventh Circuit ultimately reversed the district court,<sup>53</sup> this reversal was not based on whether the district court was correct in proceeding to interpret the foreign statute, but rather on the fact that the lower court’s interpretation reached the wrong conclusion.<sup>54</sup> The appellate court noted that it could disagree with the lower court because the matter of the Yugoslavian statutes was “purely a ‘question of law,’ as it is characterized in Rule 44.1, the resolution of which we are free to arrive at on the basis of our own independent research and analysis.”<sup>55</sup>

Rule 44.1 can even be applied in cases in which the statutes provided have unresolved ambiguities. In *First National City Bank v. Compania de Aguaceros, S.A.*,<sup>56</sup> the court noted uncertainties in Article 989 of the Panama Commercial Code that stemmed from vague language referring to time periods in which bank statements could be furnished.<sup>57</sup> However, the court determined that these ambiguities would not affect the outcome of the case and thus disregarded them, stating that it would “not discard the plain substance of a statute

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<sup>50</sup> *Kalmich*, 404 F. Supp. at 61.

<sup>51</sup> *Id.* at 63–68 (discussing with ease, with respect to the relevant Yugoslavian statutes, not only the choice-of-law question but also equitable estoppel issues and an alternative choice of statute of limitations argument).

<sup>52</sup> *See id.* at 63 (discussing the statute of limitations question and determining that the Yugoslavian statute of limitations was insufficiently substantive to apply, instead applying the Illinois statute of limitations).

<sup>53</sup> *Kalmich v. Bruno*, 553 F.2d 549, 555 (7th Cir. 1977).

<sup>54</sup> *See id.* (“The limitations provisions of Yugoslavia were sufficiently and specifically part and parcel of the substance of the Yugoslavian statutory right, and the district court erred in refusing to apply them.”).

<sup>55</sup> *Id.* at 552 (quoting FED. R. CIV. P. 44.1).

<sup>56</sup> *First Nat’l City Bank v. Compania de Aguaceros, S.A.*, 398 F.2d 779, 783 (5th Cir. 1968), *rev’g* 256 F. Supp. 658, 663 (D.C.Z. 1966).

<sup>57</sup> *See First Nat’l City Bank*, 398 F.2d at 783 (stating the relevant provisions of Article 989, which required banks to furnish accounts current to depositors “at least eight days after the end of each quarter or liquidation period agreed upon” and that depositors’ comments concerning these accounts would have to be presented “within five days”).

because of theoretical and irrelevant ambiguities”<sup>58</sup> and implying that the lower court was attempting to make a policy judgment by failing to interpret it.<sup>59</sup> A case construing a Japanese statute of limitations took a similar position: In response to an argument that the defendant had not proven the application of the statute provided, the court stated that it was “entitled to assume that the words ‘arising from general average’ in the authorized English translation of the Commercial Code of Japan would mean the same thing in a Japanese court that they do here.”<sup>60</sup>

## 2. *Proactive Application Encouraged*

Rule 44.1 has also been applied proactively. In *Bamberger v. Clark*, the D.C. Circuit reversed interpretations of two sections of the German Civil Code.<sup>61</sup> In determining the amount of a debt the United States owed to a plaintiff due to the government’s takeover of the plaintiff’s German employer during World War II, the court needed, under German law, both to determine the proper exchange rate between German and American currency and the proper place of performance.<sup>62</sup> Germany was a civil law jurisdiction, but the appeals court rejected the lower court’s reasoning that since no German precedent supported a particular interpretation, that interpretation was invalid.<sup>63</sup>

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<sup>58</sup> *Id.* at 783–84.

<sup>59</sup> *See id.* at 785 (“Although we may question the equities in a five-day notice requirement, we cannot assume a legislative role and deny the statute’s vitality. To do so would be to violate Article 9 of the Civil Code of Panama . . . as well as to ignore prior court decisions.” (citation omitted)).

<sup>60</sup> *Argyll Shipping Co. v. Hanover Ins. Co.*, 297 F. Supp. 125, 128 (S.D.N.Y. 1968). The suit was brought in admiralty to recover extra unforeseen costs of a shipping voyage; the court, on the motion to dismiss, ruled that Japanese law applied, but that laches did not, and therefore denied the defendants’ motion. *Id.* at 129.

<sup>61</sup> 390 F.2d 485, 488 (D.C. Cir. 1968).

<sup>62</sup> *Id.* at 487. While the administrative decision in *Bamberger* was handed down in 1965 and the appeal filed soon after, *id.*, the appellate court decided to apply Rule 44.1 to the instant case because “it would not work an injustice.” *Id.* at 488 n.6. This language is derived from the Supreme Court’s announcement of the 1966 amendments. 383 U.S. 1031, 1031 (1966) (“[These amendments] shall take effect on July 1, 1966, and shall govern all proceedings . . . except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice . . .”). The language is also referenced in *First Nat’l City Bank*, another 1968 opinion in which the action was commenced before July 1, 1966. 398 F.2d at 783.

<sup>63</sup> *See Bamberger*, 390 F.2d at 488 (“It seems strange to hear this argument asserted with respect to a foreign jurisprudence that is traditionally said to focus on statutory language rather than decisional precedent. Even in precedent-oriented Anglo-American law, the lack of a precedent doing something is hardly a precedent that it may not lawfully be done.”).

Similarly, the Seventh Circuit conducted a *de novo* review of a district court order in *Twohy v. First National Bank of Chicago*, a shareholder suit against a third-party bank over funding for a Spanish corporation.<sup>64</sup> The court reasoned that “[i]n determining . . . questions of law [under Rule 44.1], both trial and appellate courts are urged to research and analyze foreign law independently.”<sup>65</sup> The court found significant defects in the materials the parties had offered to illustrate Spanish law,<sup>66</sup> but instead of dismissing the case or automatically applying local law, the court conducted its own inquiry.<sup>67</sup> In arriving at the same conclusion as the lower court, the Seventh Circuit cited seven secondary sources to establish that Spanish law precluded the suit from proceeding.<sup>68</sup>

District courts have also gone to great lengths to apply 44.1 proactively. Moreover, in many cases, district courts have conducted their own independent research into the substance of foreign law to supplement—and often confirm—extensive party testimony on the topic.<sup>69</sup> In a case construing Italian law involving “one of Italy’s most distinguished legal experts, whose reputation extends beyond its borders,”<sup>70</sup> the court ruled against said expert based on the authority the

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<sup>64</sup> 758 F.2d 1185, 1187 (7th Cir. 1985).

<sup>65</sup> *Id.* at 1193 (citing *Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir. 1977)); *see also* *Banco de Credito Indus., S.A. v. Tesoreria General de la Seguridad Social de Espana*, 990 F.2d 827, 834 n.14 (5th Cir. 1993) (noting that Rule 44.1 allowed the court to consider an explanatory appendix that was omitted from the record).

<sup>66</sup> *See Twohy*, 758 F.2d at 1193 (finding that the defendant’s experts did not cite any specific provisions of Spanish law and merely made claims that the case was barred, while the plaintiffs did not address the issue and simply claimed that the defendant’s characterization of foreign law was inadequate).

<sup>67</sup> *See id.* at 1194 (“Our inquiry . . . must focus on whether, as defendant’s experts suggest, the law of Spain utilizes the same general rule regarding stockholder actions and whether similar or broader exceptions to the rule exist under Spanish law.”).

<sup>68</sup> *See id.* at 1194–95 (citing three treatises, one law review article, and two reports prepared by large accounting firms about international corporations). While the opinion does not expressly state that these were the fruits of original research undertaken by the Seventh Circuit, the strong implication was that no authority existed in the record, making these sources necessarily original.

<sup>69</sup> *See, e.g., L. Orlik Ltd. v. Helme Prods. Inc.*, 427 F. Supp. 771, 774 n.3 (S.D.N.Y. 1977) (“The plaintiff gave notice of its intention to raise English law. Both parties briefed the legal issues with respect to English law, and the Court has supplemented these presentations with its own research.”); *In re Bethlehem Steel Corp.*, 435 F. Supp. 944, 947 (N.D. Ohio 1976) (noting the agreement of the Canadian law experts of both parties as to the lack of legal precedent on the issue of limits on the liability of the vessel owner in an admiralty action and adding that “the independent research of this Court” had not resolved the controversy).

<sup>70</sup> *Instituto Per Lo Sviluppo Economico Dell’ Italia Meridionale v. Sperti Prods., Inc.*, 323 F. Supp. 630, 635 (S.D.N.Y. 1971). *Sperti* arose out of a loan guaranty when the money for the loan was never delivered. *Id.* at 631. The court granted summary judgment in part, denying only plaintiff’s request for attorney’s fees and other reasonable expenses incurred

court had assembled, including information about the structure of the Italian courts<sup>71</sup> and judicial opinions.<sup>72</sup>

### 3. *Sua Sponte Application*

Rule 44.1 can—and perhaps should—be raised sua sponte by courts once they are alerted to the possibility that foreign law may apply. Additionally, the court can decide, even though Rule 44.1 does not require it, to take judicial notice of the foreign statute. In *Henry v. Richardson-Merrell, Inc.*,<sup>73</sup> a thalidomide case involving competing statutes of limitations, the court carried out an exhaustive choice-of-law analysis under the governmental-interest theory, which requires analysis of each forum’s laws and the policies behind them.<sup>74</sup> In order to facilitate this analysis, the court took judicial notice of relevant Quebec statutes<sup>75</sup> and interpreted significant portions of Canadian case law<sup>76</sup> to fill in the gaps relating to Quebec’s governmental

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by the defendant’s prior opposition in bad faith to a previous request for summary judgment. *Id.*

<sup>71</sup> See *id.* at 635–36 (“Under Italian law creditors have no power to make arrangements for the cancellation of liens or the sale of a bankrupt’s property. That power is vested solely in the Bankruptcy Court.”).

<sup>72</sup> See *id.* at 636 (discussing a case raised by the defendant’s foreign law expert that supported the court’s position in siding with the plaintiffs, noting that “[w]hile we are not bound, under Italian practice, by the *Edoardo* case, we are entitled to consider it in reaching our conclusion” (citations omitted)).

<sup>73</sup> 366 F. Supp. 1192, 1193 (D.N.J. 1973), *rev’d on other grounds*, 508 F.2d 28 (3d Cir. 1975). The facts of *Henry* are not unusual for a thalidomide case, describing several birth defects of the infant plaintiff, including “malformed ears, deafness, left facial paralysis, bilateral cranial nerve palsy, micrognathia, psychic damage, and severe disfiguring cosmetic abnormalities, all of which are apparently permanent.” *Id.* at 1194. The specific matter at hand was a summary judgment motion brought by defendants. *Id.*

<sup>74</sup> See *id.* at 1196 (noting that New Jersey’s choice-of-law rules select the laws of the “jurisdiction having the most substantial governmental interest in, or the most significant relationship to, or the closest contacts with, the subject matter or the parties in an action”); see also Symeon Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549, 556–58 (1985) (describing the policy behind the development of governmental-interest analysis of the choice-of-law question).

<sup>75</sup> See *Henry*, 366 F. Supp. at 1194 & n.3 (citing FED. R. CIV. P. 44.1) (commencing the merits discussion by “taking judicial notice of several relevant statutory provisions contained in the Civil Code of Quebec, Canada”).

<sup>76</sup> See *id.* at 1202 (“An examination of the relevant Canadian case law indicates that the short prescription period of Quebec C.C. art. 2262 is primarily directed toward preserving the ‘public order.’” (citing *City of Montreal v. McGee* (1900), 30 S.C.R. 582, 585 (Can.))); see also *id.* (“This Quebec ‘protective’ policy outlook is further evidenced in that Quebec courts are *required* to dismiss an action on the ground of prescription whether or not the prescription is raised by the defendant.” (citing *Marquis v. Lussier*, [1960] S.C.R. 442 (Can.))). It is unclear whether the parties raised these cases or the court independently researched them.

interest. The Third Circuit ultimately reversed the district court,<sup>77</sup> but it did so based on its own analysis of Quebec law, noting that “the trial court properly concluded that Quebec C[ivil] C[ode] Article 2262 was directed toward ‘protecting Quebec citizens and the Quebec courts from excessive and tardy litigation.’”<sup>78</sup> The Third Circuit instead found that the purpose of Article 2262, which the lower court had properly determined, mandated the opposite result.<sup>79</sup> The Southern District of New York similarly determined in a loan negotiation fee dispute that its own law should govern through its choice-of-law analysis,<sup>80</sup> but the court raised the law of Saskatchewan on its own to demonstrate that applying foreign law would not change the outcome of the case.<sup>81</sup> Under both New York and Saskatchewan law, the plaintiff would be blocked from asserting his claim to the fee because his unlicensed partner took part in the loan negotiation.<sup>82</sup>

Perhaps the strongest language affirming that courts can apply Rule 44.1 *sua sponte* comes from *In re Minnesota Kicks, Inc.*, a bankruptcy case involving significant contacts with multiple states and countries.<sup>83</sup> The judge, in rejecting the trustee’s argument that Rule

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<sup>77</sup> *Henry*, 508 F.2d at 31.

<sup>78</sup> *Id.* at 38 (citation omitted) (quoting *Henry*, 366 F. Supp. at 1202).

<sup>79</sup> *See id.* (“The protection afforded by the Quebec limitation was aimed at defendants like Richardson-Merrell acting within the territorial limits of Canada. Thus in refusing to apply the statute on these facts, the district court did in fact frustrate a policy of Quebec.”).

<sup>80</sup> *Meltzer v. Crescent Leaseholds, Ltd.*, 315 F. Supp. 142, 146–47 (S.D.N.Y. 1970). The dispute was over a \$280,000 commission for negotiating a loan. *Id.* at 143. The court granted summary judgment for the defendants in this case because under New York law, the plaintiff could not have negotiated the loan with his partner, who was not properly licensed. *Id.* at 152.

<sup>81</sup> *Id.* at 147.

<sup>82</sup> *Id.* Since the outcome in this case rested on the requirement under New York law that all negotiators of real estate contracts be licensed, showing the existence of a similar provision in Saskatchewan law could be easily seen as dispositive, and the court did just that. *See id.* at 147 (noting a definitional section and a requirement for all brokers and agents to be licensed, and even quoting a section which noted that actions “for commission or for remuneration for services in connection with a trade in real estate” were barred “unless at the time of rendering the services the person bringing the action was licensed as an agent”). Although plaintiff’s licensing in this case was not in dispute because, as an attorney, he was not required to be licensed as a real estate broker under New York law, *see id.* at 145, he was indeed not licensed, and thus his suit likely would have been dismissed under Saskatchewan law as well.

<sup>83</sup> *In re Minnesota Kicks, Inc.*, 48 B.R. 93, 100 (Bankr. D. Minn. 1985). The court noted that wading into this choice-of-law “quagmire” was necessary because of the “possible multiple combinations and permutations available from this non-exclusive list of possible forums.” *Id.* at 100–01. Neither party had raised the question of foreign law at the time of this order, *see id.* at 101 (“[T]he choice of law issue was raised *sua sponte* rather than by the parties . . .”), and previous attempts that the court had made to order the parties to ascertain foreign law had resulted in only “unsubstantiated opinions via affidavit or letter.” *Id.* at 101 n.5.

44.1 required notice from a party rather than the bench,<sup>84</sup> said, “I do not think this precludes me from raising the question nor does it relieve me of my responsibility to apply the appropriate law in deciding a case.”<sup>85</sup> This articulation of the court’s duty is entirely consistent with the intended scope of the rule’s applicability.

#### 4. Rule 44.1 Properly Eschewed

There are two situations in which courts may correctly choose not to apply Rule 44.1. The first is when insufficient information is available to allow the determination of foreign law, and it should only occur in the rarest of circumstances. The second set of cases is those in which the parties provide little information other than the bare “reasonable written notice” required by Rule 44.1. *Fairmont Foods Co. v. Manganello* illustrates the special circumstances required for the first scenario, as the court attempted to run a choice-of-law analysis under the center-of-gravity test,<sup>86</sup> which asks which jurisdiction had the most contacts with the action and which had the most interest in it.<sup>87</sup> However, factual uncertainty made it impossible to definitively answer the forum contacts query in favor of either New York or Canada, with the court noting that “on such a readily ascertainable matter probabilities are not enough.”<sup>88</sup> The court thus defaulted to forum law because an inquiry into governmental interest would not by itself be enough to determine the outcome of the choice-of-law inquiry.<sup>89</sup>

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<sup>84</sup> *Id.* at 100 & n.4.

<sup>85</sup> *Id.* at 100 n.4. The judge ultimately found that Minnesota law was the proper law to apply in this case and inquired only briefly into foreign law of the jurisdictions mentioned. *See id.* at 101 (“Collectively I believe these events and circumstances indicate that the parties intended that Minnesota law apply to their transactions. Because this choice appears to be for reasons other than committing a fraud on the law, this intention will prevail . . .”).

<sup>86</sup> 301 F. Supp. 832, 835–36 (S.D.N.Y. 1969).

<sup>87</sup> New York’s center-of-gravity test favored the jurisdiction “most intimately concerned with the outcome of the particular litigation,” *Auten v. Auten*, 308 N.Y. 155, 161 (1954) (internal quotation marks omitted), and “the law of the place ‘which has the most significant contacts with the matter in dispute,’” *id.* at 160 (citation omitted); *see also* Harvey Couch, *Is Significant Contacts a Choice-of-Law Methodology?*, 56 ARK. L. REV. 745, 752 (2004) (describing *Auten*’s approach in crediting both contacts and governmental interest).

<sup>88</sup> *Fairmont Foods*, 301 F. Supp. at 835–36 (“Counsel for one of the defendants at oral argument hazarded his guess that ‘[a]s far as I can determine, all negotiations probably took place in Canada’ . . . . As the facts stand now, New York and Canada are equally likely loci of the purported agreement.” (alteration in original)).

<sup>89</sup> *Id.* at 836 (progressing under New York law). Although there are many reasons to favor the law of a foreign country in a choice-of-law framework, when a choice-of-law inquiry ends in a tie, most presumptions point toward applying the law of the forum. *See* Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1047–48 (1987) (describing possible tiebreaking procedures including using the law of the forum or

While cases like *Fairmont Foods* are relatively rare and easy to identify and resolve, cases with inadequate support for a foreign-law claim are more common. In distinguishing these cases from others with sufficient information to move forward, line drawing can be incredibly difficult. Although courts can research these issues on their own, the rule does not provide guidance for situations in which there is insufficient information about the foreign law. In *Heath v. American Sail Training Ass'n*, for example, the plaintiffs merely pled the existence of a claim “under the laws of the United Kingdom, and in particular, Lord Campbell’s Act of 1846,” without explaining how the foreign law “grant[ed] to them a right of action applicable to the facts of this case.”<sup>90</sup> The court had already permitted the plaintiffs additional time on multiple occasions for extra briefing,<sup>91</sup> an important reason for its refusal to conduct independent research: “It is not the court’s duty, unaided by the plaintiffs, to scour the annals of the law of the . . . United Kingdom in an effort to locate or to fashion a hook upon which [the complaint] can be hung.”<sup>92</sup>

Just as it seems outside of the courts’ institutional ability to construe a foreign-law claim based simply on the name of a statute,<sup>93</sup> applying foreign law without a statute is similarly unworkable. In *De Mateos v. Texaco Panama, Inc.*, a wrongful death suit with many factual disputes, the court found that Panamanian law applied.<sup>94</sup> Yet although a cause of action based on the same facts had already been litigated in Panama, neither party discussed the issue of Panamanian *res judicata* in depth or provided any Panamanian authority on the matter.<sup>95</sup> While independent research is always possible even when

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using another choice-of-law method to break the tie); see also Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (describing the governmental interest theory with presumptions installed at various points in the inquiry to default to the forum state’s law).

<sup>90</sup> 644 F. Supp. 1459, 1461, 1467 (D.R.I. 1986). The lawsuit contained several claims arising out of a ship sinking near Bermuda, including seventeen domestic law claims and one foreign law claim, which is the relevant portion at issue here. *Id.* at 1461.

<sup>91</sup> *Id.* at 1462.

<sup>92</sup> *Id.* at 1471.

<sup>93</sup> See *id.*; see also *United States v. Klimavicius*, 620 F. Supp. 667, 668 n.2 (D. Me. 1985) (“The court can conduct its own research on foreign law when an issue is raised. Defendant, however, by not even citing current texts of the foreign law on which he relies, has not made enough of a showing for the Court to invest its limited resources in its own inquiry.” (citations omitted)).

<sup>94</sup> 417 F. Supp. 411, 413–14, 419–20 (E.D. Pa. 1976) (basing the choice-of-law analysis on the fact that Texaco Panama was a separate entity from Texaco, its 100% shareholder, noting that “[p]iercing a corporate veil cannot be equated to the exotics of Salome’s dance; we cannot cast veils aside at will”).

<sup>95</sup> See *id.* at 420 (“[A]lthough this action arises out of the same incident which was the basis of the suit in Panama . . . we will not dismiss this action under the doctrine of res

the parties are unhelpful in carrying out the Rule 44.1 analysis,<sup>96</sup> the court in *De Mateos* was not confident that it could properly determine the ins and outs of Panamanian *res judicata*,<sup>97</sup> implicitly acknowledging the expected difficulty of determining the state of the law through independent research.<sup>98</sup>

## II

### THE PRACTICAL SHORTCOMINGS OF RULE 44.1

The cases discussed immediately above illustrate the potential expansiveness of Rule 44.1 inquiries.<sup>99</sup> Without more detailed instruction on how to delve into foreign law, courts have become confused about the scope of their authority and have read the rule more narrowly than intended. The first three Subparts below discuss three common ways in which courts have departed from the original intent of Rule 44.1: exercising judicial discretion to avoid the foreign-law inquiry altogether; following outdated precedent and treating the substance of foreign law as a question of fact, a practice in flagrant contradiction with not only the spirit but the letter of Rule 44.1; and importing heavier burdens of proof from inapplicable sources of law.

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*judicata*; the parties have not supplied us with the information necessary to make such a determination.”).

<sup>96</sup> *Id.* at 420 n.14.

<sup>97</sup> *Id.* (“[W]e think any resolution of this matter according to a Panamanian doctrine of *res judicata* is best relegated to the courts of that nation.”). Since the American form of *res judicata* is based on common law (and more indirectly, the Seventh Amendment), there is likely no individual statute or set of statutes that would cover Panamanian *res judicata*. For a more thorough discussion on the origins of the *res judicata* doctrine in the United States, see 18 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 2002).

<sup>98</sup> Although a public policy exception, which allows a court to decline to apply Rule 44.1 because of the domestic policy implications of applying foreign law, might seem like a viable third case, this is unlikely to arise independently of public policy concerns with the law itself. *See, e.g., Couch v. Mobil Oil Corp.*, 327 F. Supp. 897, 900–01, 903 (S.D. Tex. 1971) (declining to apply Libyan law ostensibly because of “complexities of interpreting [sic] the laws of a country that is in political upheaval and unrest” but ultimately applying local law only after discussing the substance of four relevant Libyan statutes). While it is possible to imagine not even ascertaining foreign law because it might be poor public policy, perhaps, for example, in the case of a failed state or a state with which we are actively at war, such policy concerns are usually tangential to the rights at stake in the suit, and the legal right to redress should not hinge on changed circumstances or a shift in diplomatic relations.

<sup>99</sup> However, the cases that were instrumental in the development of Rule 44.1 do not clearly indicate the proper standard of proof, which may have been intentional. *See Miller, Rule 44.1, supra* note 28, at 656–63 (characterizing the new proof requirement with no reference to the burdens on the parties). This seems less surprising when read in conjunction with the concluding remarks on what Rule 44.1 left open when promulgated, that “Rule 44.1 does not deal explicitly with . . . the allocation of proof functions,” and that “the various lacunae in the Rule will be closed by the courts.” *Id.* at 749. Although this restraint was sensible, the undesirable result of this hands-off approach was foreseeable.

Part II.D then concludes by demonstrating the effect these departures have not only on litigants, but also on judges attempting to decipher what the rule requires of courts and parties.

A. *Narrow Readings of Rule 44.1: Vishipco Line and the Second Circuit*

Judges are conscious of the considerable latitude they have in determining foreign law.<sup>100</sup> However, judges exercising particular discretion will often try to avoid these complex and difficult questions, reasoning their way around Rule 44.1 by either offering policy justifications or reading the requirements of the rule as narrowly as possible.<sup>101</sup> For example, the Second Circuit in *Vishipco Line v. Chase Manhattan Bank, N.A.* noted the requirements of Rule 44.1 and determined under choice-of-law principles that Vietnamese law should apply.<sup>102</sup> However, the court declined to apply Vietnamese law because “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.”<sup>103</sup> Both scholars and judges have harshly criticized this approach.<sup>104</sup> It is also directly in conflict with the expansive nature of Rule 44.1 that was evidenced by its early application.<sup>105</sup>

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<sup>100</sup> See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628–29 (7th Cir. 2010) (discussing the variety of sources of law and methods to ascertain foreign law that are at the court’s disposal); *id.* at 632 (Posner, J., concurring) (discussing the methods used to ascertain foreign law and the weight that the court can or should give to each); *id.* at 639 (Wood, J., concurring) (discussing the positive effects of using multiple sources and methods to determine foreign law); John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 MAR. LAW. 179, 180 (1984) (discussing the large amount of judicial discretion allowed in ascertaining foreign law).

<sup>101</sup> See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1303–04 (2007) (“Courts . . . have tended either to interpret [Rule 44.1 and related state-level] provisions narrowly or to find ways to avoid the foreign law issue altogether.”).

<sup>102</sup> 660 F.2d 854, 859–60 (2d Cir. 1981).

<sup>103</sup> *Id.* at 860 (emphasis added).

<sup>104</sup> 9A WRIGHT & MILLER, *supra* note 30, at § 2441 (“Any language in decisions that appear to determine the content of foreign law based on the proponents’ failure of proof ignores that the duty rests with the judges to determine foreign law once notice has been given . . . .”); see also Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 583 (1995) (“It is strange indeed for a court to consciously apply the wrong law, based on the position taken by the parties, while acknowledging a discretionary authority to apply the right law. Such an approach with regard to questions of domestic law would be highly unusual.”).

<sup>105</sup> See *supra* Parts I.C.1–2 (giving examples of the early application of Rule 44.1).

The precedential value of overly restrictive standards is usually limited.<sup>106</sup> Therefore, while this trend is troubling, it is less so than cases that cite inapposite precedent that works against the purpose of Rule 44.1, as do both of the next two examples.

*B. Outdated Precedent and Closed Records: Banque Libanaise and the Fifth Circuit*

Although the drafters did not clearly discuss the existence or allocation of a burden of proof, many courts, including *Vishipco Line*, have held that the promulgation of Rule 44.1 did away with virtually all such burdens on the parties.<sup>107</sup> However, other courts still rely on pre-1966 cases to determine what burdens should be imposed on parties proving foreign law.<sup>108</sup>

A line of cases in the Fifth Circuit demonstrates the divergent practices that exist in determining foreign law. The Fifth Circuit decided *Symonette Shipyards v. Clark*<sup>109</sup> six weeks after Rule 44.1 went into effect. The case arose out of a crane accident at a port in the Bahamas, with plaintiffs prevailing under American law at trial.<sup>110</sup> The defendants had claimed Bahamian law applied, but the appellate court ruled that the appellants had failed to prove Bahamian law and

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<sup>106</sup> See *Ngoc Quang Trinh v. Citibank, N.A.*, 850 F.2d 1164, 1175 (6th Cir. 1988) (“[T]he *Vishipco* court cursorily construed the deposit contract under *New York law* and held that the contract rendered Chase liable to its Saigon branch depositors . . .”).

<sup>107</sup> See, e.g., *Vishipco Line*, 660 F.2d at 859 (overturning the district court’s contention, relying on *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956), that foreign law must be proved as a fact, since the promulgation of Rule 44.1 means that *Walton* “no longer governs the manner in which questions of foreign law are to be dealt with in the federal courts”).

<sup>108</sup> One important case in the common-law doctrine is *Walton*, 233 F.2d 541. The Second Circuit was immediately repudiated and harshly criticized for the seeming injustice of the decision, which became an example of the need for choice-of-law reform. See, e.g., Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958) (devoting an entire sixty-five-page article to criticism of the *Walton* decision). In *Walton*, neither party attempted to rely on foreign law, but the court dismissed the case for failure to prove Saudi law, as choice-of-law considerations indicated that Saudi law controlled. 233 F.2d at 546. Although *Walton* is widely considered a misguided decision today, several cases still cite it for the idea that a preponderance of the evidence is necessary for foreign law to be proven. See *Bonsu v. Holder*, 646 F. Supp. 2d 273, 276 (D. Conn. 2009) (“When a party’s claim rests on the existence or application of foreign law, the Second Circuit has dismissed those claims if that party failed to provide evidence of the contents of the foreign law.”); *Munsell v. La Brasserie Molson Du Quebec Limitee*, 623 F. Supp. 100, 102 (E.D.N.Y. 1985) (relying on *Walton* to claim that foreign law “must be pleaded and proved by counsel”); cf. *Michael v. SS Thanasis*, 311 F. Supp. 170, 176 (N.D. Cal. 1970) (relying on *Walton* to support the incorrect claim that foreign law is still a fact).

<sup>109</sup> 365 F.2d 464 (5th Cir. 1966).

<sup>110</sup> *Id.* at 466–67.

thus could not apply it.<sup>111</sup> Because the case had been decided at the trial level before the effective date of the rule, *Symonette* did not apply Rule 44.1 in its analysis.<sup>112</sup> More importantly, though, the court did not acknowledge Rule 44.1 or observe that the new rule would change how the court would analyze such cases in the future.<sup>113</sup>

The Fifth Circuit did recognize for a time that Rule 44.1 superseded the *Symonette* approach and applied the rule correctly, starting in *First National City Bank v. Compania de Aguaceros, S.A.*<sup>114</sup> First National was a case filed in the now-defunct District of the Canal Zone in which the parties simply provided the relevant Panamanian statutes in a fraud action.<sup>115</sup> The district court found the statute inconclusive,<sup>116</sup> but the Fifth Circuit declined to accept the “clearly erroneous” standard of review for findings of fact<sup>117</sup> and exercised the authority granted by Rule 44.1 to find that the Panamanian statute was clear.<sup>118</sup>

However, when presented with the issue once more in 1990, the same court came to a contrary conclusion that conflicted with the rationale of Rule 44.1. In *Banque Libanaise Pour Le Commerce v. Khreich*,<sup>119</sup> a French bank operating in Abu Dhabi sued to recover a

<sup>111</sup> *Id.* at 468 & n.5 (“[T]he District Judge correctly applied American maritime law in light of his finding, amply supported by the record, that *Symonette* had failed to prove the pertinent principles of Bahamian law.”).

<sup>112</sup> *Symonette* was up on appeal for the second time, after having first come up in 1964. *Clark v. Symonette Shipyards, Ltd.*, 330 F.2d 554 (5th Cir. 1964). The case was remanded, *id.* at 557, and the 1966 appeal was based on the district court’s redetermination on remand, *Symonette*, 365 F.2d at 466. As such, the case was clearly decided before Rule 44.1’s promulgation: The trial court sat in admiralty, a procedure that was discontinued after the same 1966 amendments that brought Rule 44.1 into effect. 330 F.2d at 555; *see also* 4 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007 (3d ed. 2002) (discussing the March 1964 proposed changes that became effective on July 1, 1966 (the effective date of Rule 44.1) and noting that at this time admiralty was merged with law).

<sup>113</sup> Although the *Symonette* opinion does not mention the newly-promulgated rule, it implied that the decision likely would have come out similarly had the Rule 44.1 standard been in place, since the choice-of-law factors otherwise weighed in favor of applying forum law. *Symonette*, 365 F.2d at 468 n.5.

<sup>114</sup> 398 F.2d 779, 782 n.1 (5th Cir. 1968). Although litigation in the case began in 1964, the trial proceeded until July 5, 1966. *Id.* at 783. The court noted that, because applying Rule 44.1 would not work injustice in this case and because the case was still pending when the rule was promulgated on July 1, the Federal Rules mandated that Rule 44.1 be applied. *Id.*; *see also* FED. R. CIV. P. 86 (noting that rules are effective upon promulgation).

<sup>115</sup> 398 F.2d at 781.

<sup>116</sup> *Id.*

<sup>117</sup> FED. R. CIV. P. 52(a)(6) (“Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

<sup>118</sup> *First Nat’l City Bank*, 398 F.2d at 781–83 (noting that Rule 44.1 treated the determination of foreign law as a question of law and finding that the relevant Panamanian statute “clearly precludes” recovery).

<sup>119</sup> 915 F.2d 1000 (5th Cir. 1990).

sum of money used as an indirect advance to a third party debtor.<sup>120</sup> Both at trial and on appeal, the bank argued that Abu Dhabi law should apply, with significant additional proof available on appeal.<sup>121</sup> The Fifth Circuit, however, relied instead on *Symonette* to support its dismissal of the foreign law claim due to insufficient proof:

While it is true that an appellate court is free to review questions of foreign law on appeal, this argument does not, however, negate the Bank's burden of proof of the foreign law *at trial*. The law clearly states that absent sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the district court should apply the law of the forum.<sup>122</sup>

Perhaps the most troubling aspect of the reasoning in *Banque Libanaise* is that the court, while granting that the rule required it to treat the district court's determination of foreign law as a ruling on a question of law,<sup>123</sup> still considered the materials presented on appeal as if foreign law were a fact found by the district court. Instead of allowing in additional materials on appeal so as to conduct the searching analysis that would be consistent with the proactive style Rule 44.1 demands, the appellate court instead cited *Symonette*,<sup>124</sup> thus elevating a procedural approach that had been invalid for over twenty years.

*Banque Libanaise*—and by extension, *Symonette*—has displaced *First National City Bank* and Rule 44.1 as the state of the law in the Fifth Circuit, which now treats the question of foreign law as a fact to be proven by the parties, particularly with regard to the parties' burdens at trial, as well as the standard of review on appeal.<sup>125</sup> A prime

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<sup>120</sup> *Id.* at 1002.

<sup>121</sup> *See id.* at 1006 (noting that the district court received a translation of an Abu Dhabi statute and several secondary sources while the appellate record included extensive translations of the relevant law and a letter from an Abu Dhabi lawyer).

<sup>122</sup> *Id.* (emphasis added) (citing *Symonette Shipyards v. Clark*, 365 F.2d 464, 468 n.5 (5th Cir. 1966)). Perhaps most interestingly, there was no need to apply Rule 44.1 in the first place; no party had given reasonable written notice of the applicability of foreign law before trial. *See* Brief of Appellee at 34, *Banque Libanaise*, 915 F.2d 1000 (No. 89-1799), 1990 WL 10085820, at \*34 (“Based on these factors [in the Advisory Committee’s Note to Rule 44.1], a party should not normally be able to raise the issue of foreign law on the eve of trial, particularly in a case that is already two and one-half years old.”).

<sup>123</sup> *See Banque Libanaise*, 915 F.2d at 1006 (“[A] trial court’s determination of foreign law is viewed as a ruling on a question of law and therefore is fully reviewable by this court. Because foreign law is a question of law, the Bank argues that it should be permitted to present new foreign-law materials on appeal.” (citations omitted) (citing FED. R. CIV. P. 44.1)).

<sup>124</sup> *See id.* (citing *Symonette*, 365 F.2d at 468 n.5).

<sup>125</sup> *See, e.g.,* *McGee v. Arkel Int’l, LLC*, 671 F.3d 539, 546 (5th Cir. 2012) (citing *Banque Libanaise* to support the high burden of proof while citing directly to Rule 44.1 to support other claims about foreign-law procedure); *Karim v. Finch Shipping Co.*, 265 F.3d 258, 272 (5th Cir. 2001) (determining that, under *Banque Libanaise*, the moving party had met its

example of this doctrine in action is *Trafigura Beheer B.V. v. M/T Probo Elk*, a case arising out of a shipping dispute concerning competing contractual agreements.<sup>126</sup> The Fifth Circuit refused to entertain an appellant's assertions of British law, noting that the plaintiff's failure to "prove" British law in the lower court precluded any argument in the appellate court.<sup>127</sup> The *Trafigura* opinion misapplies Rule 44.1 to two arguments. First, the court refused to reconsider British law in light of the plaintiffs' claim that British law rendered the forum selection clause unenforceable.<sup>128</sup> Second, the court refused to entertain the British statute of limitations simply because foreign law had not been factually proven.<sup>129</sup> While the court had an independent rationale for rejecting the second claim,<sup>130</sup> the plaintiffs cited three British court cases in their supplemental brief with regard to the first claim,<sup>131</sup> all of which were reasonably related to the provision of foreign law at issue. While three cases may not automatically trigger a Rule 44.1 analysis,<sup>132</sup> the court erred in failing to consider these cases to determine whether they were in fact sufficient.

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burden of proof); *Banco de Credito Indus., S.A. v. Tesoreria General de la Seguridad Social de Espana*, 990 F.2d 827, 836 (5th Cir. 1993) (citing *Symonette*, 365 F.2d at 468).

<sup>126</sup> 266 F. App'x 309 (5th Cir. 2007). Plaintiffs redirected a ship carrying a defective product to the United States, where they commenced an in rem action. *Id.* at 310. In exchange for various concessions, defendants agreed to appear, but then successfully moved to dismiss for improper venue. *Id.*

<sup>127</sup> *Id.* at 311–12 & n.3.

<sup>128</sup> *Id.* at 311 n.3 ("Trafigura filed a supplemental brief arguing for the first time that, under British law, the forum selection clause . . . was not part of the contract. Because Trafigura did not prove the content of British law in the district court, these arguments are waived, and we do not consider them." (citing *Banque Libanaise*, 915 F.2d at 1006)).

<sup>129</sup> *Id.* at 312 ("[U]nder British law, its claim would be time barred in London. But Trafigura's failure to plead and prove foreign law below is fatal to its claim." (citing *Banque Libanaise*, 915 F.2d at 1006)).

<sup>130</sup> See *id.* ("Even if this were not the case, Trafigura's claim would fail. . . . Trafigura filed this suit in Houston two days before the American statute of limitations—alleged to be identical to the British one—would have run. It is thus disingenuous for Trafigura to accuse defendants of delaying so as to deny it a forum . . .").

<sup>131</sup> Supplemental Brief of Appellant at 1–2, *Trafigura*, 266 F. App'x 309 (No. 06-20576), 2006 WL 5003193, at \*1–2. One of these cases is from the Queen's Bench, an intermediate court, and two are from the Court of Appeal, which at the time usually functioned as the highest court in England. See Delmar Karlen, *The Court of Appeal in England*, 72 *YALE L.J.* 266, 267 (1962) ("For most civil cases, the Court of Appeal is both the first and the final appellate court for England and Wales. Above it is the House of Lords, but very few cases go that far; and below it are the Divisional Courts of the High Court, but their civil jurisdiction is relatively narrow." (citations omitted)).

<sup>132</sup> See *infra* note 171 and accompanying text (discussing *Karim v. Finch Shipping Co.*, 265 F.3d 258 (5th Cir. 2001), in which the circuit court held that Bangladeshi law was properly ascertained by looking to English and Indian precedent because only two indirectly relevant Bangladeshi cases existed). Although the three cases the plaintiffs cited appear to be much more relevant than the Bangladeshi cases in *Karim*, it is unclear

Worse yet, numerous courts in other circuits have cited this language in *Banque Libanaise* when imposing a burden of proof on the reliant party, propagating the historical proof standard.<sup>133</sup> As such, many litigants are now required to “establish [foreign law] with reasonable certainty,”<sup>134</sup> which seems to be a much higher standard than the one envisioned when Rule 44.1 was drafted. If litigants are unable to do so, courts have generally applied the law of the forum, which may or may not be similar to the foreign law on which the party wished to rely.

### C. *Comments Inapplicable to Federal Courts: Restatement § 107 and the Third Circuit*

Some courts have relied on comments in the Restatement (Second) of Conflict of Laws to justify their own lack of inquiry. These comments use “burden of proof” and “failure to prove” language in referring to determinations of foreign law generally.<sup>135</sup> However, the Restatement comments assume that forum law will clearly specify the applicable burdens,<sup>136</sup> but Rule 44.1, which is the

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whether they alone would be enough for the court to determine the foreign law. However, as in *Karim*, they could provide a starting point for inquiring into British law.

<sup>133</sup> See, e.g., *SEC v. Jackson*, 908 F. Supp. 2d 834, 858–59 n.15 (S.D. Tex. 2012) (“Here, however, Nigerian law is not the decisional law. Rather, the contents of Nigerian law are relevant as *facts*; whether granting TIP extensions is discretionary under Nigerian law is a fact relevant to determining if a violation of the FCPA has been pled.”); *Palischak v. Allied Signal Aerospace Co.*, 893 F. Supp. 341, 349 (D.N.J. 1995); *Riffe v. Magushi*, 859 F. Supp. 220, 223–24 (S.D.W. Va. 1994); see also Asa Markel, *American, English and Japanese Warranty Law Compared: Should the U.S. Reconsider Her Article 95 Declaration to the CISG?*, 21 PACE INT’L L. REV. 163, 177 n.86 (2009) (“In American courts, foreign law is now a question of law, but still requires its proponent to prove its requirements.”).

<sup>134</sup> *Banque Libanaise*, 915 F.2d at 1006.

<sup>135</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. f (1971) (“Frequently, the local law of the forum will provide that the party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law.”); *id.* § 136 cmt. h (“When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum.”).

<sup>136</sup> Interestingly enough, this relates to one of the primary concerns that many prominent conflicts scholars have raised about both versions of the Restatement of the Conflict of Laws, particularly around the time of the release of the second Restatement: the idea that competing sources of law might cause judicial confusion and lead to bad law as laws are applied in jurisdictions where they are inapplicable. See, e.g., Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963) (describing the second Restatement as a distillation of only one of a number of competing ideas); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1230 (1965) (“[I]t took a whole generation of scholars to destroy [the first Restatement], out of whose ‘wreckage’ . . . today’s judge still ‘must chop his own way through.’ And it will be some time yet until the rubble—*judicial language based on false doctrine*—will have been cleared away.” (emphasis added) (quoting Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 234)).

applicable provision in the federal courts,<sup>137</sup> does not do so.

The Third Circuit was the first court to adopt the “burden of proof” language from the Restatement in *Bel-Ray v. Chemrite (Pty) Ltd.*, a case in which defendants tried to avoid arbitration ordered by the lower court.<sup>138</sup> In language that has been quoted widely, the court noted that Rule 44.1 “provides courts with broad authority to conduct their own independent research to determine foreign law but imposes no duty upon them to do so. . . . The parties therefore generally carry . . . the burden of adequately proving foreign law to enable the court to apply it in a particular case.”<sup>139</sup> The court in *Bel-Ray* had reasonable written notice that South African law applied to the issue of successor liability in the case.<sup>140</sup> However, the court claimed that it needed additional proof of the foreign law.<sup>141</sup> This insistence on proof from the parties, which ultimately led to an adverse judgment, clearly runs contrary to the intent of the drafters of Rule 44.1 and is inconsistent with early applications of Rule 44.1.<sup>142</sup> The provisions of the Restatement, taken together, ensure that the court, if it pleases, can find in any circumstance that the parties have not proven foreign law. Furthermore, the language of “proof” of foreign law, while not used problematically in *Bel-Ray*, has come up in other cases as a reason to treat foreign law as a fact.<sup>143</sup>

Courts in other circuits have relied on these Restatement comments either directly or indirectly in order to eschew independent determinations of foreign law.<sup>144</sup> While uncertainty as to the rule’s

<sup>137</sup> Under *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), Federal Rule 44.1 will be considered procedural law in the federal courts and thus control over state law unless the rule is “so bound up with [a] state-created right or remedy that it defines the scope of that substantive right.” *Id.* at 1450 (Stevens, J., concurring). Considering the treatment of the Federal Rules after *Shady Grove*, it is highly unlikely that a court will choose to apply a state statute over Rule 44.1. 19 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4508 n.74 (2d ed. 1996).

<sup>138</sup> 181 F.3d 435, 439 (3d Cir. 1999).

<sup>139</sup> *Id.* at 440–41 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. f (1971)); see also *id.* at 441 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h) (“Where parties fail to satisfy either burden the court will ordinarily apply the forum’s law.”).

<sup>140</sup> *Id.* at 441 n.2.

<sup>141</sup> *Id.*

<sup>142</sup> *Supra* Part I.C.1–2.

<sup>143</sup> See, e.g., *Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1321–22 (11th Cir. 2004) (using similar language to determine that the district court “did not err” in applying local law).

<sup>144</sup> See, e.g., *Baker v. Booz Allen Hamilton, Inc.*, 358 F. App’x 476, 481 (4th Cir. 2009) (using Restatement comments to apply forum law without allowing the reliant party a chance to prove foreign law); *Minebea Co. v. Papst*, 444 F. Supp. 2d 68, 185 (D.D.C. 2006) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971)) (refusing to interpret German statute because proof of interpretation offered by expert was too specific

burden of proof is troubling in itself, the courts' position here is potentially damaging to litigants, as it may allow courts to revert to forum law upon any doubt at all as to the substance of the foreign law.<sup>145</sup>

#### D. *Uncertainty for Litigants and Judges*

Despite these departures from the principles of Rule 44.1, many courts—even within the same jurisdictions—have still held true to the approach outlined above in Part I.<sup>146</sup> As interpretations similar to *Banque Libanaise* often fail to mention Rule 44.1 in discussing burdens of proof and vice versa,<sup>147</sup> it is possible that judges may only come across one of two lines of precedent in conducting research on Rule 44.1. One court has cited Rule 44.1 for the proposition that “proof of foreign law is a fact to be alleged and proved,”<sup>148</sup> which, as discussed above, is exactly the belief that the rule was attempting to dispel.<sup>149</sup> The Ninth Circuit, when faced with precedent predating

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to the case at hand). It is worth noting that the courts in *Bel-Ray* and *Minebea* offered directly conflicting reasons for deciding not to interpret foreign statutes.

<sup>145</sup> Although the argument may be raised that procedure is generally left to the discretion of the trial judge and that the judiciary is competent to make these determinations with an eye toward justice, there are two strong counterarguments to this point. First, the Advisory Committee's Note on Rule 44.1 strongly implies that the judiciary's conduct in these cases in particular was not intended to be within their discretion, *supra* notes 41–46 and accompanying text, perhaps through no fault of their own: Because of the sprawling nature of any individual judge's docket and the increasing number of suits filed in federal courts today, more guidance may be necessary in order to ensure that the policies that underlie the Federal Rules are effected. Second, without more guidance for trial judges, precedent may splinter on the issue, perpetuating the current situation. Creating more guidance will also lead to more predictability in determinations under Rule 44.1.

<sup>146</sup> *See, e.g.,* APL Co. Pte. v. UK Aerosols Ltd., 582 F.3d 947, 955–56 (9th Cir. 2009) (reversing lower court for abuse of discretion in not allowing sufficient reasonable notice when raising issue of foreign law and thus incorrectly holding that Singapore law could not apply). *Compare* Nordwind v. Rowland, No. 04-9725, 2007 WL 2962350, at \*6–9 (S.D.N.Y. 2007) (discussing the sources used in determining German law once notice was given, including German administrative court decisions), *aff'd*, 584 F.3d 420 (2d Cir. 2009), *with supra* Parts II.A–B.

<sup>147</sup> *Cf. Nuove Industrie Elettiche di Legnano S.p.A. v. United States*, 739 F. Supp. 1567, 1571 (Ct. Int'l Trade 1990) (noting that foreign law was treated as a fact before 1966). Most references to proof in these cases simply note that Rule 44.1 renders the determination of foreign law a question of law and not a question of fact. *See, e.g.,* Thyssen Steel Co. v. M/V Kavos Yerakas, 911 F. Supp. 263, 266–68 (S.D. Tex. 1996) (discussing the purpose behind the lower standards used in the approach taken by Rule 44.1 as opposed to the common-law approach).

<sup>148</sup> *Clayhill Resources, Ltd. v. MSB Indus., Inc.*, No. 80 CIV 1165(RLC), 1980 WL 267205, at \*1 n.2 (S.D.N.Y. Nov. 3, 1980) (“Moreover, [the licensing agency's] authority would be governed by the law of the Soviet Union, and proof of foreign law is a fact to be alleged and proved . . . .” (citing FED. R. CIV. P. 44.1)).

<sup>149</sup> *See supra* Part I.A (discussing the pre-1966 practices and how the drafters of the rule viewed them as improper).

Rule 44.1, even directly stated, “We are uncertain whether a plaintiff bears the burden of establishing the content of foreign law . . . .”<sup>150</sup> This question could be resolved with a simple articulation of the standard within the text of Rule 44.1. Although this approach would take discretion away from the courts, which the rule may have been designed to confer,<sup>151</sup> the divergence in precedent shows that granting judges this discretion allows them to reach erroneous conclusions about whether foreign law can be ascertained and then to incorrectly employ local law over foreign law.

The effect that this uncertainty has on litigants should be obvious: Perhaps based only on the panel of judges you will be assigned on appeal several years in the future, the amount of information you have to provide at, or even before, trial might vary wildly. Although one could argue that parties are incentivized to fully prove foreign law as a result, such a system again contravenes Rule 44.1 and its original purpose of encouraging as many merits determinations as possible.

### III

#### REWRITING RULE 44.1 TO REFLECT THE COURTS’ INSTITUTIONAL ABILITY

Part III proceeds in four parts. The first Subpart discusses the pre-1990 case law and the standards that can both approximate the original purpose of Rule 44.1 and capture more recent cases that were decided incorrectly. It concludes that access to statutory language is critical to courts’ ability to determine foreign law and that different standards should apply depending on whether a statute is available. The second proposes a reformulation of the rule based on these conclusions and briefly discusses the changes. The final two Subparts discuss in more depth and defend the two different standards in the proposed rule.

##### A. *Toward the Original Purpose of 44.1*

If Rule 44.1 application is required once determination of the foreign law is realistic, how much information on foreign law does a court need in order to trigger this requirement? The answer cannot be “any

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<sup>150</sup> *Tobar v. United States*, 639 F.3d 1191, 1200 (9th Cir. 2011) (vacating the district court’s ruling that documents submitted by plaintiffs were insufficient to establish reciprocity due to its failure to recognize its own ability to inquire further into the matter); *cf. Acosta Orellana v. CropLife Int’l*, 711 F. Supp. 2d 81, 88 (D.D.C. 2010) (applying District of Columbia law and doing so directly in conflict with Rule 44.1 without even referencing Rule 44.1 or undertaking analysis under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), to determine whether to follow federal or state statute).

<sup>151</sup> *Supra* note 30–37 and accompanying text.

nonzero amount” if *Heath* applies Rule 44.1 properly.<sup>152</sup> However, proof by a preponderance of the evidence appears to leave out an entire range of cases where the parties only partially elucidate foreign law, with the courts filling in the gaps.<sup>153</sup> Because the presentation of facts and the types of foreign legal principles being applied diverge wildly, I propose an approach that requires two different standards in different situations.

When examining the correctly decided cases above, it is evident that an important factor in how the inquiry proceeds is the presence of a statute. Of the cases discussed above where courts properly applied Rule 44.1, only five, including *Twohy* and *De Mateos*, were missing statutory language.<sup>154</sup> Of these five cases, only *Twohy* and *In re Minnesota Kicks* ultimately applied foreign law, and both courts were forced to conduct independent research.<sup>155</sup> On the other hand, where statutory language was available, courts always used foreign law.<sup>156</sup> Encouraging the application of Rule 44.1 when a statute exists comports with both early precedent and the function of the judiciary.<sup>157</sup> It is too burdensome on the courts to mandate research when statutes are unavailable, but parties in this situation must have a chance to present their case. Otherwise, any application of nonstatutory foreign law would be excluded.<sup>158</sup>

While not every incorrectly decided case has turned on the presence of a statute, these do make up the majority of the cases discussed

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<sup>152</sup> *Heath v. Am. Sail Training Ass'n*, 644 F. Supp. 1459, 1461 (D.R.I. 1986); see also *supra* note 90 and accompanying text (noting that plaintiffs merely provided the name of the relevant British act, Lord Campbell's Act of 1846, in pleading a foreign-law claim).

<sup>153</sup> See, e.g., *supra* notes 56–59 and accompanying text (discussing the court's gap-filling in *First National City Bank v. Compania de Aguaceros, S.A.*, 398 F.2d 779, 782 n.1 (5th Cir. 1968), where ambiguities in the foreign law presented were not enough to block its application by the court).

<sup>154</sup> *Twohy v. First Nat'l Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985); *De Mateos v. Texaco Panama, Inc.*, 417 F. Supp. 411 (E.D. Pa. 1976); see also *Heath*, 644 F. Supp. at 1461, 1467; *United States v. Klimavicius*, 620 F. Supp. 667 (D. Me. 1985); *In re Minnesota Kicks, Inc.*, 48 B.R. 93 (Bankr. D. Minn. 1985). For purposes of this analysis, *Heath* does not count as a case where a statute was supplied since the parties mentioned only the name of the foreign statute and never supplied the relevant text. *Heath*, 644 F. Supp. at 1461, 1467.

<sup>155</sup> See *supra* notes 64–68, 83–85 and accompanying text (discussing the independent research undertaken by the courts in *Twohy* and *Minnesota Kicks*).

<sup>156</sup> While *Couch v. Mobil Oil Corp.*, 327 F. Supp. 897 (S.D. Tex. 1971), might be seen as an exception, this is a successful use of Rule 44.1 that was ultimately discarded because of public policy concerns that arose later in the inquiry. For a more detailed explanation of this claim, see *supra* note 98.

<sup>157</sup> *Infra* Part III.D.

<sup>158</sup> For a fuller discussion of potential cases where readily available statutory law is not applicable to a foreign law inquiry, see *infra* notes 170 and 183.

above, including *Banque Libanaise*.<sup>159</sup> A standard that is more permissive when statutes are available is not only consistent with properly decided precedent, but also with the idea that cases like *Banque Libanaise* are incorrectly decided on the basis of Rule 44.1.

### B. *Preserving the Framework, Changing the Standards*

Because of the dichotomy between cases where statutes are available and cases where they are unavailable, the Rule 44.1 inquiry should abandon a one-size-fits-all approach and lay out distinct standards for these two scenarios. As such, I propose a rule that reads as follows:

- (a) A party who intends to raise an issue about a foreign country's law must give notice by a pleading or some other writing.
- (b) A party wishing to rely on foreign law must either:
  - (i) produce any relevant statutes to the Court, or
  - (ii) produce substantial materials demonstrating the substance of that law.
- (c) In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not admissible under the Federal Rules of Evidence. The court may consider such materials as they are provided by the parties under Rule 44.1(b) or discovered through independent research.
- (d) The court must allow the reliant party an opportunity to correct any defects in presentation before considering the claim waived.
- (e) The court's determination must be treated as a ruling on a question of law.

Subsections (a) and (e) preserve the language from the first and last sentence of current Rule 44.1.<sup>160</sup> Foreign law cannot be restricted to the pleadings; this is one of the core motivations behind Rule 44.1.<sup>161</sup> The preservation of the question-of-law clause seems self-evi-

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<sup>159</sup> See *supra* note 121 (discussing the materials available to the *Banque Libanaise* court both in the lower court and on appeal). Statutes might be likely to dominate this discussion since most foreign countries at this point rely in large part on statutory law, though common-law and mixed jurisdictions do still exist and can create bodies of nonstatutory common law relevant to Rule 44.1. Cf. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 701-07 (2000) (discussing differences in the sources, application, and interpretation between civil law and common law). For further discussion on why statutes are set apart, see *infra* Part III.D.

<sup>160</sup> FED. R. CIV. P. 44.1.

<sup>161</sup> See Miller, *Rule 44.1, supra* note 28, at 620-24 (noting three major problems with the pre-Rule 44.1 standard, including the concern that foreign law had to be raised in the pleadings along with evidentiary standards, the interaction of foreign law with the jury, and the limited ability to correct issues on appellate review). Particularly considering the sprawling nature of litigation today, there are many legitimate reasons for a foreign-law issue to arise for the first time long after the pleading stage.

dent.<sup>162</sup> Subsection (c) contains the second sentence of the current rule,<sup>163</sup> but adds a sentence to ensure that courts are aware that they are still allowed to conduct independent research whether or not a statute has been provided.

Subsection (b) lays out the two-tiered standard. As discussed in more detail below, the burden in subsection (b)(2) is characterized as a burden of production so that courts are not tempted to characterize the inquiry in any way as a question of fact. The “substantial materials” language is less onerous than the current practice even in the absence of statutes. The language also distinguishes the standards governing the determination of foreign law from standards that imply the existence of facts, such as the preponderance of the evidence standard, and from standards that require compliance with the Federal Rules of Evidence. Finally, in order to ensure that judges do not simply apply forum law just because the parties provide insufficient initial evidence, subsection (d) requires judges to allow parties to correct defects in their presentations of foreign law before judges can consider the claim waived.<sup>164</sup>

Although it is not affirmatively mentioned in the text of the proposed new rule, it is implied—and should be reiterated—that these requirements are still simply a floor and not a ceiling for the procedures that a court can follow in determining foreign law. If a court determines that a foreign country’s law applies and wishes to research the law on its own, it is still free to do so.<sup>165</sup> If a party does not provide substantial materials but the other parties do not contest the evidence that the first party has raised, the court can proceed with the information provided if it believes that the amount given is sufficient to make a determination in the instant case or that it can do enough independent research to make a determination.<sup>166</sup>

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<sup>162</sup> See *id.* at 623–24 (noting the problem of treating the judge’s determination of foreign law as a fact on appeal).

<sup>163</sup> FED. R. CIV. P. 44.1.

<sup>164</sup> Under the old Rule 44.1, this is a distinct but important way that courts might decline to resolve Rule 44.1 questions on the merits. There are many cases where the courts have asked for more specific briefing on individual questions. See, e.g., *Willemijn Houdstermaatschaap BV v. Apollo Computer Inc.*, 707 F. Supp. 1429, 1448 (D. Del. 1989) (“[T]he Court finds that each of these jurisdictions has at least some varying degree of attorney-client privilege . . . . [T]he parties are directed to provide the Court with further information on the privilege applicable in the countries in question.”). However, many cases where proof is deemed insufficient do not mention whether the parties were given an opportunity to correct deficiencies.

<sup>165</sup> See *supra* Part I.C.3 (discussing courts’ sua sponte applications of Rule 44.1).

<sup>166</sup> These considerations, while important, are not typically written into the Federal Rules. However, if an amendment is made, they should be included in the Advisory Committee’s Note. These notes are instrumental in providing guidance for early judicial decisions after a rule is amended or created. See, e.g., *First Nat’l City Bank v. Compania de*

C. *Statutory Language Unavailable: Toward Burdens,  
Away from Proof*

When statutes are unavailable, requiring parties to find other relevant information is consistent with the original purpose of Rule 44.1. Although the trend is toward increased availability of foreign statutes,<sup>167</sup> there are still many situations when the law to be determined does not originate from a foreign statute or its text is unavailable.<sup>168</sup> When this occurs, courts will likely need more information.<sup>169</sup> While judicial opinions may be available and even helpful in some cases, judicial interpretations of law can vary in practical value.<sup>170</sup> A single statement in a judicial opinion may not ensure sufficient accuracy in decisionmaking; even when multiple relevant judicial opinions have been available, courts have sometimes turned to other sources.<sup>171</sup>

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Aguaceros, S.A., 398 F.2d 779, 782 (5th Cir. 1968) (citing Advisory Note, *supra* note 30) (discussing how Federal Rules deem issues concerning the law of a foreign country to be questions of law, not of fact).

<sup>167</sup> Even as early as ten years ago, online resources for foreign and international law were readily available. See Thomas R. French, *Internet Resources for Researching International and Foreign Law*, 52 SYRACUSE L. REV. 1167, 1175 (2002) (discussing government, educational, and private databases that have compiled “statutes, court decisions, treaties, reports, regulations or other information” that are often available for free). In the intervening years, the trend has generally been toward legal materials from other countries being made available online. See *Nations*, LIBR. CONGRESS, <http://www.loc.gov/law/help/guide/nations.php> (last visited Sept. 16, 2014) (providing links to free databases of constitutional, statutory, and judicial materials from 197 countries). While there will still be materials to which judges may have exclusive access, this simply means that judges should still be allowed to conduct their own research.

<sup>168</sup> In addition to the potential reasons listed in note 183, a country’s legal system might not rely on statutory law or might not codify its statutes.

<sup>169</sup> This is not only because the judiciary is particularly well positioned to interpret statutes, but also because the absence of a statute often represents a lack of a definitive and official statement of the law.

<sup>170</sup> Many foreign countries are civil law jurisdictions, and judicial opinions are not treated as binding. If a domestic court is to construe these decisions as a foreign court would, it would take note of this fact and not treat a judicial interpretation of a statute as a definitive characterization of the law. See, e.g., *Instituto Per Lo Sviluppo Economico Dell’Italia Meridionale v. Sperti Prods., Inc.*, 323 F. Supp. 630, 636 n.6 (S.D.N.Y. 1971) (“Basically precedent is not binding in Italian law. Historically there has been a distrust of the judiciary and the resultant attitude has been that lawmaking—which is a product of precedent—should not be practiced by the judges.”). Furthermore, judicial opinions, while usually published officially, can occasionally contain outdated or even erroneous statements of the law, which is one of the reasons our own court system has multiple levels of appeals. Cf. Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 YALE L.J. 1168, 1193–94 (2012) (noting that Justice Black’s statement of the law in his opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970), likely induced the ensuing constitutional amendment overruling *Mitchell*); *supra* Part II (outlining various inaccuracies in domestic courts’ interpretations of foreign law).

<sup>171</sup> See, e.g., *Karim v. Finch Shipping Co.*, 265 F.3d 258, 272 (5th Cir. 2001) (“There were only two published Bangladeshi tort cases available to the district court, and neither was directly relevant . . . . [Additionally,] experts informed the court that Bangladeshi courts

Therefore, when no statute is available, imposing a burden on the reliant party to produce the required information is the solution most consistent with the original purpose of Rule 44.1.

Although this approach may seem like an about-face from the policies underlying the rule that I have outlined above, for several reasons, this standard will still allow as many reliable merits determinations to occur as possible. First, this standard will not require “clear proof” from the reliant party, as the court did in *Banque Libanaise*.<sup>172</sup> Instead, the standard will be one of production.<sup>173</sup> Second, instead of using the typical “preponderance of the evidence” standard that applies to civil cases, a lower “substantial materials” standard will be used.<sup>174</sup> Third, although this standard requires more of the parties than the drafters intended, circumstances have changed over the last forty years, particularly with regard to legal research. While the drafters of Rule 44.1 sought to encourage judges to conduct independent research out of concern that counsel’s resources may have been inadequate or the judge’s resources may have been superior,<sup>175</sup> the

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would look to Indian and British cases for guidance. . . . Therefore, the district court did not err in . . . applying English and Indian precedent.”). It is true that this opinion can be read to imply that two tort cases, or even one, on point might have sufficed. Nevertheless, in setting a minimum standard for application for Rule 44.1, it is likely undesirable to require, and not just allow, courts to undertake a Rule 44.1 analysis solely on the strength of one judicial opinion.

<sup>172</sup> *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1006 (5th Cir. 1990) (“If the Bank wanted to rely on Abu Dhabi law, it was obligated to present to the district court clear proof of the relevant Abu Dhabi legal principles.”).

<sup>173</sup> The language is focused on “demonstration” instead of on “burden of proof” or the “preponderance of the evidence.” This creates a less restrictive standard for the parties; the phrasing used here is intentionally divergent from any language that might imply that the determination of foreign law is a question of fact to be proved. While in theory, any “burden of proof” language would be negated by the admonition that already exists in Rule 44.1 to treat the court’s determination “as a ruling on a question of law,” FED. R. CIV. P. 44.1, there are numerous court decisions that still treat foreign law as a fact to be proven even though the rule contains no burden-of-proof language, e.g., *McGee v. Arkel Int’l, LLC*, 671 F.3d 539, 546 (5th Cir. 2012); *Trafigura Beheer B.V. v. M/T Probo Elk*, 266 F. App’x 309, 311–12 & n.3 (5th Cir. 2007).

<sup>174</sup> This is meant to mirror the “substantial evidence” standard, used primarily in administrative law, which is characterized as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The articulation of this standard sounds very much like the institutional-ability standard outlined above in Part I.B. However, the rule here uses different wording so that the two standards are not treated as identical, since the term in the administrative context has become a term of art.

<sup>175</sup> See *Miller, Rule 44.1, supra* note 28, at 660 (“On occasion, the trial judge will have better foreign-law resources than counsel or, because of his personal background or prior exposure to a particular country’s law, have greater expertise in research and applying foreign law than the attorneys.”).

Internet has opened up attorney and party access to foreign law resources that previously were only available in law libraries.<sup>176</sup>

*D. Statutory Language Available: Rule 44.1  
Automatically Prompted*

If a statute is available, it is axiomatic that a court should be able to interpret it. One of the most fundamental judicial statements in American law comes from *Marbury v. Madison*: “It is emphatically the province and duty of the [judiciary] to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.”<sup>177</sup> While foreign law at the time was not considered “law,”<sup>178</sup> Chief Justice Marshall’s message still applies: If there are laws that pertain to a particular action, judicial interpretation of that law is not only necessary, but inevitable. Since foreign law is now considered “law” under Rule 44.1,<sup>179</sup> courts can also apply Rule 44.1 when starting with a statute that is unambiguously relevant to the instant action, even if no other information is available.<sup>180</sup> In other words, an authenticated statute on its own serves as sufficient information for a court to undertake a Rule 44.1 analysis.<sup>181</sup>

Of course, simply providing that judicial notice be taken of any statute parties insert into their filings is risky and potentially unworkable, particularly if the standard is meant to encourage reliable decisions.<sup>182</sup> However, there are two safeguards that should prevent courts from taking inapplicable statutes as good law. First, absent extenu-

<sup>176</sup> *Supra* note 167.

<sup>177</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.).

<sup>178</sup> *See* *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 187 (1804) (“Foreign laws must be proved like other facts.”).

<sup>179</sup> *See* FED. R. CIV. P. 44.1 (“The court’s determination must be treated as a ruling on a question of law.”).

<sup>180</sup> This is, to be sure, a slight expansion of what Chief Justice Marshall intended to say, particularly because his ultimate conclusion concerned conflicting language between the statute and the Constitution and was not directed at ensuring that the judiciary interpret the laws on the books. *Marbury*, 5 U.S. (1 Cranch) at 176.

<sup>181</sup> Several cases already mentioned above support this point. *See, e.g.,* *Kalmich v. Bruno*, 404 F. Supp. 57, 61 (N.D. Ill. 1975) (interpreting statutes in the form in which they had been pleaded), *rev’d on other grounds*, 553 F.2d 549 (7th Cir. 1977); *Argyll Shipping Co. v. Hanover Ins. Co.*, 297 F. Supp. 125, 128 (S.D.N.Y. 1968) (noting that the court was free to interpret the statute as it saw fit due to the absence of any extra guidance on how to interpret the provided statute).

<sup>182</sup> This concern is mentioned in the Advisory Committee’s Note. Advisory Note, *supra* note 30; *see also supra* notes 44–45 and accompanying text (describing the Advisory Note’s framing of this concern). In Professor Miller’s article, however, a distinction is drawn between the concept of judicial notice in domestic law and its application to foreign law: While judicial notice generally refers to bypassing any methods of proof for facts the court knows to be true, judicial notice within the context of foreign law “is merely a shorthand description—perhaps an unfortunate one—for rationalizing the process of proving foreign

ating circumstances, litigants themselves should provide official records of statutes.<sup>183</sup> Second, instead of guaranteeing that the court will take notice of the statute, the rule provides that the court will only undertake the Rule 44.1 analysis once the other parties to the action have a chance to respond. This change will allow these parties to introduce competing statutes, which might carve exceptions out of the original statute or even supersede it entirely; foreign case law,<sup>184</sup> which adds value by speaking to the treatment of the statute in the foreign state's courts; and other information that might potentially inform the instant inquiry into foreign law.<sup>185</sup> In addition, if the court wishes to request more information from the parties, it can do so within this framework. Although a *Marbury*-esque reinterpretation of foreign laws may result in discrepancies between the way domestic and foreign courts treat the same statute, particularly when the foreign country uses a common-law system, our judicial system already runs that risk at the interstate level.<sup>186</sup>

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law." Miller, *Rule 44.1*, *supra* note 28, at 630. While this form of judicial notice is closer to the structure envisioned here, it is still too permissive.

<sup>183</sup> A seldom-invoked rule provides the basis for this provision. See FED. R. CIV. P. 44(a)(2)(A) ("Each of the following evidences a foreign official record—or an entry in it—that is otherwise admissible: (i) an official publication of the record; or (ii) the record—or a copy—that is attested by an authorized person and is accompanied [by proper certification]."). Although this can also function as a requirement in the new rule, there are cases where Rule 44 proof is not feasible. The two most likely scenarios in which a party will not be able to obtain Rule 44 proof of a valid statute are lack of access to official publications of statutes (a difficulty pro se litigants in particular may encounter) and lack of a current official code from a country due to political upheaval or poor relations with the United States. In virtually all other circumstances, though, inability to obtain Rule 44 proof should be seen as troubling. While requiring a high evidentiary standard unless official copies are unavailable was one concern that the drafters had when crafting Rule 44.1, see Miller, *Rule 44.1*, *supra* note 28, at 622 ("[D]eviation from [the best-evidence standard] was permitted only when an authenticated copy of the foreign law could not be obtained."), supplemental information here will not be subject to heightened evidentiary standards and the courts will not penalize parties if obtaining an official copy of the statute is impossible. Furthermore, the transformation of legal research in the last forty years makes this a lighter burden on the parties than it likely was in 1966. For more on the effect of changes in legal research, see *supra* note 176 and accompanying text.

<sup>184</sup> Domestic judicial decisions interpreting the statute are, of course, important if they exist, but these do not require Rule 44.1 to be raised.

<sup>185</sup> Rule 44's official record requirement would similarly be strongly preferred for any foreign materials that might be raised in response. See *supra* note 183 (discussing this rule and its requirements).

<sup>186</sup> See *Mason v. Am. Emery Wheel Works*, 241 F.2d 906, 909 (1st Cir. 1957) (affirming an interpretation of a Mississippi statute directly contrary to the Mississippi Supreme Court's interpretation). Although *Mason*, a products liability case against a Rhode Island corporation, was likely decided in this way because the Mississippi Supreme Court had recently mentioned in an opinion that their controlling holding might have to be reexamined in the near future, *id.* (citing *E.I. Du Pont de Nemours & Co. v. Ladner*, 73 So. 2d 249 (Miss. 1954)), this illustrates the wide range of precedent available to the judge and

## CONCLUSION

While Rule 44.1 has functioned well in some cases, increasing workloads on the federal courts have often resulted in incorrect interpretations of rules and precedent. Avoiding these outcomes can prevent confusion and potential inefficiency, both from incorrect application and from costs of amendment. Especially considering that precedent and practice under Rule 44.1 is still being established,<sup>187</sup> the former cost—that of incorrect application—is a continuing one that a simple amendment now can mitigate. With cross-border disputes likely to continue increasing in prevalence, this change will ensure that foreign-law cases can be resolved properly on the merits rather than decided using inapplicable local law.<sup>188</sup>

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the parties. Furthermore, this emphasizes that judicial bodies' differences in interpretation are recognized and accepted. It is also worth noting that the existence of Rule 44.1 itself seems to similarly recognize that American courts will have to construe foreign material, and because of the nature of civil actions today, these potential discrepancies are unavoidable.

<sup>187</sup> For a summary of the citation rate of Rule 44.1, see *supra* note 20.

<sup>188</sup> As with the military forces misreading the ninety-nine balloons, we should not allow the courts to simply interpret the foreign-law questions in the way that is most convenient to them. Although the courts are trained to dispense with questions that they are used to seeing, their presumptions cannot be functionally irrebuttable in the increasingly common cases where foreign law is involved.