

# Pleading and Proving Foreign Law in the Age of Plausibility Pleading

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## INTRODUCTION

Economic and social globalization has increased the volume of globalized litigation, with courts in the United States increasingly called upon to determine questions of foreign law. At best, pleading and proving foreign law<sup>1</sup> in U.S. courts is confusing and cumbersome. At worst, it is incoherent and unpredictable. This is not accidental. The U.S. model draws on two distinct traditions in its approach to questions of foreign law: an adversarial tradition<sup>2</sup> and a court-centered tradition.<sup>3</sup> They do not complement one another. Instead, they mandate different and inconsistent roles for the parties and the court. Under the adversarial model, parties bear the principal responsibilities of pleading and proving foreign law.<sup>4</sup> This model stresses the importance of party autonomy to judicial proceedings.<sup>5</sup> Under the court-centered model, the court supplants the agency of the parties in the interest of arriving at the

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1. The term “foreign law” will be used throughout the Article to denote the law of foreign nations as opposed to that of sister states.

2. The terms “adversarial tradition” and “adversarial model” will be used throughout the Article to define the standards of pleaded foreign law in common law countries, such as England. *See infra* Part III.A.

3. The terms “court-centered tradition” and “court-centered model” will be used throughout the article to define the standards of pleading foreign law in civil law countries, such as Germany. *See infra* Part III.B.

4. *See infra* Part III.A

5. *See infra* Part III.A

“correct” outcome, independent of the actions and intentions of the parties.<sup>6</sup>

Both of these models have much to recommend them. However, by not making a clear choice between the adversarial and court-centered models, the hybrid U.S. approach is running the risk of conceptual incoherence. For example, U.S. courts have traditionally regarded foreign law as *fact*, not law.<sup>7</sup> Parties wishing to rely on foreign law

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6. See *infra* Part III.B

7. See Hans W. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619, 619 (1978) (noting that foreign law traditionally was a fact to be proved by expert testimony); Benjamin Busch, Comment, *When Law Is Fact*, 24 FORDHAM L. REV. 646, 651 (1956) (noting the traditional requirement of proving foreign law as a fact); Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617 (1967) (“Anglo-American courts and commentators historically have characterized a foreign-law issue as a question of fact to be pleaded and proved as a fact . . .”); Arthur Nussbaum, Comment, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60, 60-62 (1954) [hereinafter Nussbaum, *Proving the Law*] (commenting on the State of New York’s shift away from the common law and allowing courts to “explore foreign law on their own motion”); Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1018 (1941) (“During the last century [treating foreign law as fact] has lost much of its popularity in civil law countries, but in America and in other common law jurisdictions it still dominates cases, legislation, and literary discussion.” (footnotes omitted)); Rudolf B. Schlesinger, *A Recurrent Problem in Trans-National Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 3-4 (1973) [hereinafter Schlesinger, *Trans-National Litigation*] (noting that American common law doctrines are based on the fact theory); Otto C. Sommerich & Benjamin Busch, *The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L.Q. 125, 127 (1953) (“The prevailing idea under the common law in England and in the United States has been that foreign law is a fact . . .”); William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL. L. REV. 23, 24 (1957) (“It has previously been indicated that the traditional common law procedure and practice is to treat foreign law as if it were a fact.”); Robert von Moschzisker, *Presumptions as to Foreign Law*, 11 MINN. L. REV. 1, 2 (1926) (“[H]e who claims the foreign law to be different from that of the forum must prove the fact asserted.”); Robert L. Beale, Comment, *Judicial Notice of Foreign Law*, 38 WASH. L. REV. 802, 802-03 (1963) (noting accepted common law rule was to treat foreign law as a fact to be pleaded and proven); Edwin P. Carpenter, Note, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 WASHBURN L.J. 296, 296-97 (1971) (“American courts have traditionally characterized foreign law issues as questions of fact which must be pleaded and proved as any other fact . . .”); Rudy J. Peritz, Comment, *Determination of Foreign Law Under Rule 44.1*, 10 TEX. INT'L L.J. 67, 67 (1975) (“Anglo-American courts and legal scholars

either for defenses or claims had to plead and prove foreign law like other facts.<sup>8</sup> Courts conducted no independent investigations of foreign law, just as they would not conduct independent investigations of any other fact that the parties plead.<sup>9</sup> For a time, some jurisdictions took this approach to its logical extreme, allowing juries to decide questions of foreign law like other facts.<sup>10</sup> This placed important burdens on parties to properly plead and prove foreign law.<sup>11</sup> Failure to do so sometimes led to dismissal of the action.<sup>12</sup> Similarly, even where foreign law clearly applied to a case, the failure of a party to raise the issue would lead to the application of domestic law, whether that made sense or not.<sup>13</sup>

This regime for pleading and proving foreign law as fact was massively transformed in 1966 with the introduction of Rule 44.1 to the Federal Rules of Civil Procedure.<sup>14</sup> Under this new regime, parties and courts have overlapping and ill-defined responsibilities to plead and prove foreign law.<sup>15</sup>

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traditionally have defined issues of foreign law as questions of fact.” (footnote omitted)). See generally RUDOLF B. SCHLESINGER, *COMPARATIVE LAW CASES AND MATERIALS* 32-139 (1950) (discussing techniques of proving foreign law as a fact).

8. Miller, *supra* note 7, at 617.

9. *Id.* at 620-21.

10. See *id.* at 623 (“The fact characterization of foreign law occasionally was carried to the extreme of leaving foreign law issues to the jury for determination.”); Stern, *supra* note 7, at 25 (noting that at one point in the history of the common law, foreign law questions were decided by the jury).

11. See Schlesinger, *Trans-National Litigation*, *supra* note 7, at 4-5. (“[I]t follows with logical necessity that a plaintiff who alleges a cause of action governed by foreign law, but fails to allege and prove the relevant command of the foreign sovereign, has failed to show one of the material ‘facts’ of his case and thus must lose. The same fate befalls a defendant who fails to allege and prove the foreign law on which an affirmative defense is based.” (footnote omitted)).

12. See, e.g., *Cuba R.R. v. Crosby*, 222 U.S. 473, 477-80 (1912) (reversing Third Circuit’s failure to dismiss where foreign law was not pleaded or proven properly at trial).

13. See Nussbaum, *Proving the Law*, *supra* note 7, at 66 (noting that treating foreign law as fact is inefficient, expensive, restrictive, places undue burdens on parties, and can lead to counter-intuitive outcomes).

14. See H.R. DOC. NO. 89-391, at 8 (1966) (adoption of FED. R. CIV. P. 44.1).

15. *Id.* Rule 44.1 governs proceedings in federal courts. However, it is also significant for the many state jurisdictions that follow the non-mandatory but

For example, questions of foreign law are now nominally treated as questions of law, no longer as questions of fact.<sup>16</sup> This suggests that courts are now in exclusive control of shaping the applicability of foreign law, just as they are responsible for applying domestic law independent of the actions and intentions of the parties. And indeed, courts are now empowered to conduct their own investigations of foreign law even where no party has raised a foreign law claim or defense.<sup>17</sup> However, parties nonetheless retain the burden of providing notice to opposing counsel of an intention to raise a foreign law issue.<sup>18</sup> Failure to do so properly can lead to the application of domestic law, though courts retain the power to apply foreign law even where parties do not indicate an intent to rely on foreign law.<sup>19</sup> In

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highly persuasive Federal Rules of Civil Procedure. See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356-58 (2003) (noting states whose procedure systems are similar to the Federal Rules of Civil Procedure); cf. Roger M. Michalski, Essay, *Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109 (2010), <http://yalelawjournal.org/2010/10/27/michalski.html> (noting that federal and state pleading standards are further diverging post-*Iqbal*).

16. FED. R. CIV. P. 44.1 (“The court’s determination must be treated as a ruling on a question of law.”).

17. See, e.g., *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 440 (3d Cir. 1999) (“[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.”); *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 n.10 (9th Cir. 1989) (“Although the court is permitted to take judicial notice of authoritative statements of foreign law, nothing requires the court to conduct its own research into obscure sources.”).

18. See, e.g., *Commercial Ins. Co. of Newark, New Jersey v. Pac.-Peru Constr. Corp.*, 558 F.2d 948, 952 (9th Cir. 1977) (“We choose to apply the law of Hawaii. None of the parties, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, gave written notice of an intent to raise an issue concerning the law of a foreign country. We are, therefore, under no obligation to attempt to apply Peruvian law.”).

19. *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 585-86 (2d Cir. 2005); *Whirlpool Fin. Corp. v. Sevaux*, 96 F.3d 216, 221 (7th Cir. 1996) (“[Defendant] waived any objection to the application of Illinois law by failing to address the choice-of-law issue earlier in the proceedings.”); *Vukadinovich v. McCarthy*, 59 F.3d 58, 62 (7th Cir. 1995) (“[C]hoice of law, not being jurisdictional, is normally, and we think here, waivable.” (citations omitted)); *Pac.-Peru Constr. Corp.*, 558 F.2d at 952 (“We choose to apply the law of Hawaii. None of the parties, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, gave written notice of an intent to raise an issue concerning the

short, the current regime for pleading and proving foreign law tries to have it both ways. It insists on adversarial presentations of fact and law, *and* it relies on courts to resolve questions of foreign law independent of the actions and intentions of the parties.<sup>20</sup>

This puts both litigants and courts in an awkward position. For example, a plaintiff that intends to rely on foreign law faces strong incentives to plead foreign law extensively or fear dismissal for failure to state a claim.<sup>21</sup> However, just how much and what to include in the pleading is not clear. Should the pleading contain expert testimony concerning foreign law?<sup>22</sup> Verbatim statements of the foreign law? Analysis of foreign case law? Affidavits from foreign counsel?<sup>23</sup> Including all of these materials could expand pleadings to the length of treatises on foreign law. Worse, including such material could amount to the impermissible pleading of evidence and conclusions because, after all, the court is responsible for researching, interpreting, and determining foreign law.<sup>24</sup> Also, would including such material violate the mandate in Rule 8 that complaints be “short and plain”?<sup>25</sup> Stranger still, failure to plead foreign law properly does not necessarily lead to a dismissal of the suit (like failure to plead properly does in

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law of a foreign country. We are, therefore, under no obligation to attempt to apply Peruvian law.”); *Ruff v. St. Paul Mercury Ins. Co.*, 393 F.2d 500, 502 (2d Cir. 1968) (“A party must give ‘reasonable written notice’ in the district court proceedings in order to raise an issue concerning the law of a foreign country on appeal.”); *Prime Start Ltd. v. Maher Forest Prods, Ltd.*, 442 F. Supp. 2d 1113, 1119 (W.D. Wash. 2006) (“Defendants’ use of Washington law is a clear acquiescence by application, and Plaintiff’s lack of opposition to Defendants’ citations may be construed as the same.”).

20. See Stephen L. Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97, 98 (1981) (“[U]nder Rule 44.1, foreign law is a mixture of fact and law. Indeed, foreign law is a *tertium genus*, a third category, between fact and law.”).

21. See *infra* Parts I.B.3, II.C.

22. See Baade, *supra* note 7, at 641-42 (discussing the advantages and disadvantages of using expert testimony to prove foreign law).

23. For further discussion of means used to prove foreign law in U.S. courts, see *infra* notes 102-12 and accompanying text.

24. See FED. R. CIV. P. 44.1

25. FED. R. CIV. P. 8(a).

other contexts) but might simply lead to the application of domestic law<sup>26</sup> even where that is nonsensical.

These pre-existing tensions in the doctrine of pleading and proving foreign law have now been heightened, perhaps to a breaking point, by the recent application of “plausibility” pleading to all civil suits. “Plausibility” pleading has its origin in *Ashcroft v. Iqbal*<sup>27</sup> and *Bell Atlantic Corp. v. Twombly*,<sup>28</sup> two recent United States Supreme Court decisions that transformed federal civil litigation by abolishing “notice” pleading<sup>29</sup> in favor of the new heightened pleading regime.<sup>30</sup> This change in pleading standards has had a broad impact on civil litigation in the United States.<sup>31</sup>

One area of impact is private international law cases that rely on pleading and proving foreign law. Under the

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26. *E.g.*, *Pac.-Peru Constr. Corp.*, 558 F.2d at 952.

27. 129 S. Ct. 1937 (2009)

28. 550 U.S. 544 (2007).

29. The old notice pleading standard was established by *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957).

30. *Iqbal*, 129 S. Ct. at 1950 (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”). *Twombly* and *Iqbal* apply to all pleadings in federal court and pleadings in state courts that follow the federal model.

31. *See, e.g.*, *Monroe v. City of Charlottesville*, 579 F.3d 380, 389-90 (4th Cir. 2009) (equal protection); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969-72 (9th Cir. 2009) (First Amendment viewpoint discrimination); *Lopez v. Beard*, 333 F. App’x 685, 687 (3d Cir. 2009) (employment discrimination); *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) (Fourteenth Amendment substantive due process); *S.E.C. v. Cohmad Secs. Corp.*, No. 09-CV-5680, 2010 WL 363844, at \*2 (S.D.N.Y. Feb. 2, 2010) (securities fraud); *Jennings v. Hart*, 602 F. Supp. 2d 754, 758 (W.D. Va. 2009) (negligence); *Thompson v. Cont’l Cas. Co.*, 602 F. Supp. 2d 943, 945 (N.D. Ill. 2009) (Employee Retirement Income Security Act); *Klayman v. Barmak*, 602 F. Supp. 2d 110, 114 (D.D.C. 2009) (breach of contract); *Fraternal Order of Police v. Gates*, 602 F. Supp. 2d 104, 107 (D.D.C. 2009) (Administrative Procedure Act); *Bahl v. County of Ramsey*, 597 F. Supp. 2d 981, 984-85 (D. Minn. 2009) (disability discrimination); *In re Scott*, 403 B.R. 25, 31-32 (Bankr. D. Minn. 2009) (bankruptcy); *see also* Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (employment discrimination); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 102 (2008) (civil rights); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 161 (2010) (civil rights).

new plausibility regime, parties have to allege more than a “short and plain” statement of alleged illegal activities under foreign law.<sup>32</sup> In addition, they must allege specific facts and law that allow a court to determine that the complaint or defense is beyond the realm of the mere possible.<sup>33</sup> It must now be plausible.<sup>34</sup> Broad and non-specific allegations of illegal conduct under foreign law are insufficient under plausibility pleading.<sup>35</sup> Parties that wish to rely on foreign law thus face ever more incentives to include more material in their pleadings. At the same time though, they face the same conceptual and practical barriers that prevent the inclusion of such material.<sup>36</sup>

Predictably, this will make it harder for plaintiffs to survive the pleading stage and gain access to discovery.<sup>37</sup> Defendants will find it easier to resist private international

32. Compare *Twombly*, 550 U.S. at 556-58, with FED. R. CIV. P. 8(a).

33. See, e.g., *Twombly*, 550 U.S. at 570.

34. *Id.*

35. See, e.g., *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 104-12 (2d Cir. 2010), cert. denied, 131 S. Ct. 1502 (2011).

36. See *infra* Parts I.B.3, II.C.

37. See, e.g., Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1261 (2008) (criticizing *Twombly* for ignoring “information asymmetries”); Randy Picker, *Twombly*, Leegin, and the Reshaping of Antitrust, 2007 SUP. CT. REV. 161, 177 (“*Twombly* shrinks the domain of private plaintiffs.”); Wasserman, *supra* note 31, at 161 (noting that pleading has become a “significant veto-gate through which all claims must pass”); Brian Thomas Fitzsimmons, Note, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 206 (2008) (implying that *Twombly* should be set aside); *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 253 (2009) (“[The *Iqbal*] standard will likely constitute a substantial hurdle to most types of litigation.”); Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10 (“[*Iqbal*] obviously licenses highly subjective judgments . . . . This is a blank check for federal judges to get rid of cases they disfavor.” (quoting Professor Stephen B. Burbank of the University of Pennsylvania Law School)); Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIG., Spring 2009, at 1, 70 (2009). See generally Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) (suggesting that the interpretation of the heightened pleading standard of *Iqbal* may violate the Seventh Amendment).

litigation and will be in a better pre-trial bargaining position during settlement talks.

Beyond shifting the balance of power between plaintiffs and defendants, the new heightened plausibility pleading standard raises important questions about the conceptual coherence of the current regime for pleading and proving foreign law in U.S. courts. If we truly believe in the power of adversarial norms then parties should be the masters of their own fate. Their pleadings should shape the legal action and courts should not be empowered to overcome the intentions of the parties on their own initiatives. Conversely, if we truly believe in the power of courts to arrive at the truth independent of the interplay between adversarial parties, then it makes little sense in foreign law questions to threaten parties with dismissals for failing to meet *Iqbal's* heightened plausibility pleading regime. In the context of pleading foreign law, positions between these two polar opposites are not flexible or pragmatic, but simply incoherent and practically unworkable.

Plausibility pleading as applied to foreign law also raises questions about the new post-*Iqbal* pleading regime. On its face, plausibility pleading applies to all pleadings in federal court.<sup>38</sup> Pleading foreign law is thus included and subject to a plausibility analysis. This means that the plausibility standard applies to questions of fact *and* law.<sup>39</sup> It mandates that judges, at the pleading stage, determine the plausibility of legal interpretations and analyses of complicated facts long before a factual record is developed and long before the parties have had time to articulate legal conclusions. This turns the pleading stage into the summary judgment stage. It also places particularly troublesome burdens on defendants who wish to rely on foreign law. From the moment of being served, they only have twenty-one days to make factual inquiries, research and develop foreign law arguments, and serve a responsive pleading.<sup>40</sup> A consistent application of plausibility pleading

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38. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions.’” (quoting *Twombly*, 550 U.S. at 555-56)).

39. Foreign law is a matter of law for the court to decide, but “[a] party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing.” FED. R. CIV. P. 44.1.

40. FED. R. CIV. P. 12(a)(1)(A).

to foreign law claims is unworkable and usurps the function of summary judgment motions. Pleading foreign law thus exposes inherent difficulties under the new plausibility pleading regime.

Plausibility pleading, in short, sharpens to a breaking point already existing tensions within the current approach of pleading and proving foreign law. As a result, pleading foreign law in U.S. courts may become increasingly unprincipled, unpredictable, and inconsistent. Instead of having the best of both worlds, we are stuck with a conceptually incoherent regime for pleading and proving foreign law that is inconsistent, depending on whether it relies on parties or on courts. The same case before two different judges could thus be handled in very different ways, with one court applying forum law and the other foreign law. This raises concerns about the uneven application of justice.

No scholarship has yet explored the impact of plausibility pleading on pleading foreign law. The rise of plausibility pleading thus provides a fresh opportunity to reexamine doctrinal difficulties with the current regime. Similarly, scholarship has neglected a comparative perspective on variation between the regimes that govern the pleading of foreign law. In combining post-plausibility doctrinal analysis with a comparative perspective, this Article offers novel conceptual tools to reveal shortcomings with the current regime and propose solutions.

This Article proceeds in three parts. Part I explains the current approach to pleading and proving foreign law in U.S. courts. It highlights the tensions between adversarial and court-centered norms in current jurisprudence and practice. These tensions are due to conceptual incoherence that creates unavoidable litigation dilemmas for plaintiffs and courts. Part II explains how recent changes in the federal pleading regime have further sharpened these tensions.

To highlight the tensions within the U.S. regime of pleading foreign law and explore solutions, Part III turns to a comparative analysis of the major schools of thought applied abroad. Most foreign countries either rely on adversarial norms *or* court-centered norms when structuring the pleading of foreign law. The U.S. model utilizes *both* approaches. Seeing these approaches in isolation sharpens an understanding of each and highlights the dangers of trying to combine them. This Part identifies

the divergent normative commitments undergirding different procedural regimes and the practical implications of these commitments. Understanding from both a doctrinal and comparative perspective the sources of inconsistency contributes to focused analysis and clarity. The comparative approach thus sheds light on the tensions in the U.S. system and lays the groundwork for potential improvements.

Part III advocates for a clear choice between the adversarial and court-centered approaches to pleading and proving foreign law. Combining these two approaches has not worked and, this Article argues, cannot work. Either of the conceptually pure alternatives is preferable (despite their shortcomings) to a system that combines both and ends up with the worst of both worlds. A comparative perspective offers new insights for how to strengthen both adversarial and court-centered approaches to pleading and proving foreign law.

#### I. U.S. LAW ON PLEADING FOREIGN LAW

Courts in the United States traditionally followed an adversarial approach to questions of foreign law that stressed party autonomy.<sup>41</sup> More recently, reforms have shifted this approach toward a court-centered regime that gives courts broad powers to find and apply the “correct” law independent of the intentions of the parties.<sup>42</sup> However, the reforms did not do away with all facets of adversarial norms.<sup>43</sup> As a result, the current regime for pleading and proving foreign law is a patchwork of adversarial and court-centered norms. Often these norms stand in tension with one another. This Part lays out where they do. The next Part explains how the recent switch in pleading regimes from notice to plausibility pleading has sharpened these tensions.

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41. *See supra* notes 7-13 and accompanying text.

42. *See supra* notes 14-17 and accompanying text.

43. *See supra* notes 18-20 and accompanying text.

A. *The Demise of Treating Foreign Law as Fact*

Since 1966, Federal Rule of Civil Procedure 44.1 has governed the pleading of foreign law in U.S. federal courts. It reads, in full:

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>44</sup>

As the advisory committee notes to the adoption of Rule 44.1 make clear, the rule is intended "to furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country."<sup>45</sup> Rule 44.1, like much of the jurisprudence on this issue, incorporates both adversarial and court-centered norms.

The first sentence of Rule 44.1 focuses on notice, typically accomplished through pleadings. Notice under Rule 44.1 entails adversarial and non-adversarial elements. Pleading foreign law requires a party who intends to raise an issue of foreign law to give notice thereof to opposing counsel.<sup>46</sup> Parties are in control of pleading foreign law and

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44. FED. R. CIV. P. 44.1; *see also* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4-5 (1975) (per curiam) (directing federal courts sitting in diversity to apply state conflict-of-laws rules even when those rules direct the court to apply the substantive law of a foreign country); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that state conflict-of-laws rules are substantive for *Erie* purposes).

45. H.R. DOC. NO. 89-391, at 51 (1966) (advisory committee's note on Federal Rule of Civil Procedure Rule 44.1 in 1966 adoption). Rule 44.1 has been amended three times since 1966. An amendment in 1973 added the reference to the Federal Rules of Evidence to "free the judge, in determining foreign law, from any restrictions imposed by evidence rules." H.R. DOC. NO. 93-46, at 166 (1973). Amendments in 1987 and 2007 were stylistic in nature and did not affect the substance of the rule. H.R. DOC. NO. 110-27, at 237-38, 541 (2007); H.R. DOC. NO. 100-40, at 52, 153 (1987).

46. This part of Rule 44.1 resolved confusion within the federal courts prior to 1966 concerning whether Rule 8(a) required that foreign law must be pleaded. *Compare* Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1955), and Pedersen v. United States, 191 F. Supp. 95, 97-98 (D. Guam 1961) (not requiring

alleging that notice was not timely.<sup>47</sup> However, courts typically assess whether notice was substantively sufficient, independent of the arguments by the parties.<sup>48</sup>

The second sentence of Rule 44.1 embodies and gives rise to many of the same tensions between adversarial and court-centered norms.<sup>49</sup> The tools for determining foreign law seem to focus on the role of the court independent of the actions and intentions of the parties. Rule 44.1 provides that courts may sample a wide range of materials and are not limited by the material presented by the parties.<sup>50</sup> Courts may engage in their own research and consider any relevant material. The advisory committee notes justify this point by an explicit reliance on non-adversarial norms, noting that court intervention is necessary and desirable because counsel might present material “in a partisan fashion or in insufficient detail.”<sup>51</sup> Both of these possibilities present difficulties to the framework advanced under the Federal Rules of Civil Procedure. Counsel is normally presumed to act in a “partisan fashion” and advocate for her side. Similarly, courts are generally disinclined to assist counsel that present weak arguments or plead with insufficient detail.<sup>52</sup> And indeed, the jurisprudence

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foreign law to be pleaded), *with* *Harrison v. United Fruit Co.*, 143 F. Supp. 598, 599 (S.D.N.Y. 1956) (requiring foreign law to be pleaded).

47. *See infra* Part I.B.

48. *See infra* Part I.B.

49. “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.” FED. R. CIV. P. 44.1.

50. *Id.*

51. H.R. DOC. NO. 89-391, at 51 (1966); *see also* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2444 (3d ed. 2008) (“All too often counsel will do an inadequate job of researching and presenting foreign law or will attempt to prove it in such a partisan fashion that the court is obliged to go beyond their offerings . . . [I]t must be remembered that one of the policies inherent in Rule 44.1 is that whenever possible issues of foreign law should be resolved on their merits and on the basis of a full evaluation of the available materials. To effectuate this policy, the court is obliged to take an active role in the process of ascertaining foreign law.”).

52. One exception to this rule is *pro se* litigation. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (noting that the court holds *pro se* litigants “to less stringent standards than formal pleadings drafted by lawyers”); *Erickson v.*

surrounding the tools used to determine foreign law puts significant burdens and responsibilities on parties in addition to the court.<sup>53</sup> Parties retain the burden of proving foreign law for claims and defenses.<sup>54</sup> Failure to meet this burden may result in the application of local law, whether this makes sense or not.<sup>55</sup> As one court has reminded litigants: “It is not the court’s job to perform the research for the parties.”<sup>56</sup>

This tension between adversarial and court-centered norms inherent in the first two sentences of Rule 44.1 are also apparent in the third sentence. It mandates that the court’s determinations on questions of foreign law be treated as rulings on questions of law, not fact.<sup>57</sup> Yet parties are still required to proffer evidence concerning foreign law.<sup>58</sup> Foreign law under Rule 44.1 is then at once an evidentiary question of fact *and* a doctrinal question of law. The adversarial parties are required to present evidence or risk dismissal—or the application of forum law—*yet* the court retains the power to decide questions of law beyond the evidence offered by the parties.<sup>59</sup>

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Pardus, 551 U.S. 89, 94 (2007) (“A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” (citation and internal quotation marks omitted)).

53. See *supra* notes 7-20 and accompanying text.

54. See *supra* note 18 and accompanying text.

55. See *supra* note 19 and accompanying text.

56. *Anderson v. McAllister Towing & Transp. Co.*, 17 F. Supp. 2d 1280, 1286 n.6 (S.D. Ala. 1998) *aff’d sub nom. Anderson v. McAllister Towing*, 202 F.3d 287 (11th Cir. 1999).

57. FED. R. CIV. P. 44.1 (“The court’s determination must be treated as a ruling on a question of law.”).

58. *Id.* (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing.”).

59. The Restatement (Second) of Conflicts of Laws is not helpful on this point, and merely provides that:

- (1) The local law of the forum determines the need to give notice of reliance on foreign law, the form of notice and the effect of a failure to give such notice.

Part I.B demonstrates this tension, and traces the three sentences of Rule 44.1. Part I.B.1 is concerned with notice. Part I.B.2 examines the role of parties and courts in the determination of foreign law. Part I.B.3 probes the meaning and effect of treating such determinations as rulings of law, rather than fact. In all of these facets of pleading foreign law, adversarial and court-centered norms mingle uneasily side-by-side.

### B. *Tensions: Foreign Law as Fact and Law*

1. *Necessary Notice.* The notice requirement in Rule 44.1 embodies both adversarial and court-centered norms.<sup>60</sup> A party that intends to raise issues of foreign law is required to give notice to opposing counsel.<sup>61</sup> The notice requirement applies to claims as well as defenses.<sup>62</sup> Courts interpret lack of reasonable notice as a waiver of a “foreign law argument”<sup>63</sup> or as implied consent to an application of local

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(2) The local law of the forum determines how the content of foreign law is to be shown and the effect of a failure to show such content.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 (1971).

60. See FED. R. CIV. P. 44.1.

61. *Id.* (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing.”).

62. See WRIGHT & MILLER, *supra* note 51, § 2443 (“Notice normally will be given by the party whose claim or defense is based on foreign law.”).

63. *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 585 (2d Cir. 2005); see also *Whirlpool Fin. Corp. v. Sevaux*, 96 F.3d 216, 221 (7th Cir. 1996) (“[Defendant] waived any objection to the application of Illinois law by failing to address the choice-of-law issue earlier in the proceedings.”); *Vukadinovich v. McCarthy*, 59 F.3d 58, 62 (7th Cir. 1995) (“[C]hoice of law, not being jurisdictional, is normally, and we think here, waivable . . .” (internal citations omitted)); *Commercial Ins. Co. of Newark, New Jersey v. Pac.-Peru Constr. Corp.*, 558 F.2d 948, 952 (9th Cir. 1977) (“We choose to apply the law of Hawaii. None of the parties, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, gave written notice of an intent to raise an issue concerning the law of a foreign country. We are, therefore, under no obligation to attempt to apply Peruvian law.”); *Ruff v. St. Paul Mercury Ins. Co.*, 393 F.2d 500, 502 (2d Cir. 1968) (“A party must give ‘reasonable written notice’ in the district court proceedings in order to raise an issue concerning the law of a foreign country on appeal. . . . No written notice that appellant intended to rely upon Liberian law was given in the district court.” (citation omitted)); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n.3 (2d Cir. 1968) (“Though new Rule 44.1 establishes that courts may, in their discretion, examine foreign legal sources

law.<sup>64</sup> Courts stress that notice is important, in part, because it allows opposing counsel to research issues of foreign law and prepare arguments and evidence.<sup>65</sup>

Reasonable notice has two components. First, notice must be timely.<sup>66</sup> Timeliness is judged under the circumstances of the case.<sup>67</sup> Courts test the circumstances of

independently, it does not require them to do so in the absence of any suggestion that such a course will be fruitful or any help from the parties.”); *Prime Start Ltd. v. Maher Forest Prods. Ltd.*, 442 F. Supp. 2d 1113, 1119 (W.D. Wash. 2006) (“Defendants’ use of Washington law is a clear acquiescence by application, and Plaintiff’s lack of opposition to Defendants’ citations may be construed as the same.”).

64. *See* *Tehran-Berkeley Civil and Env’tl. Eng’rs v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989) (“Iranian law could apply, since the contract was executed and performed in that country. The parties’ briefs, however, rely on New York law. Under the principle that implied consent to use a forum’s law is sufficient to establish choice of law, we will apply New York law to this case.” (internal citations omitted)). Older cases suggest that in these circumstances courts simply apply the only law before them. *See, e.g., Bartsch*, 391 F.2d at 155 n.3.

65. *See, e.g., Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venez.*, 575 F.3d 491, 497 (5th Cir. 2009) (“When the applicability of foreign law is not obvious, notice is sufficient if it allows the opposing party time to research the foreign rules.”); *Hodson v. A.H. Robins Co.*, 528 F. Supp. 809, 824 (E.D. Va. 1981) (“The purpose of the notice requirement in Rule 44.1 is simply to avoid surprise.”), *aff’d*, 715 F.2d 142 (4th Cir. 1983), *abrogated on other grounds* by *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988); *Grice v. A/S J. Ludwig Mowinckels*, 477 F. Supp. 365, 367 (S.D. Ala. 1979) (notice is intended “simply to avoid surprise”).

66. *See, e.g., Whirlpool Fin. Corp.*, 96 F.3d at 221 (“The district court was not obliged to consider [a] belatedly submitted affidavit.”); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) (rejecting consideration of foreign law based on a party-submitted “affidavit of German law *after* that court had dismissed the suit, when the plaintiffs moved for reconsideration”).

67. *See, e.g., Stuart v. United States*, 813 F.2d 243, 251 (9th Cir. 1987) (“Absent special circumstances, parties should present issues of foreign law in their appellate briefs at the latest.”), *rev’d on other grounds*, 489 U.S. 353 (1989); *Hidden Brook Air, Inc. v. Thabet Aviation Int’l Inc.*, 241 F. Supp. 2d 246, 277 (S.D.N.Y. 2002) (raising issue concerning foreign law timely under the circumstances even at summary judgment stage); *Thyssen Steel Co. v. M/V Kavoy Yerakas*, 911 F. Supp. 263, 266 (S.D. Tex. 1996) (“[Rule 44.1] is not intended to be a strict time bar to parties attempting to raise a choice of law question.”); *Curtis Mfg. Co. v. Plasti-Clip Corp.*, 933 F. Supp. 107, 122 (D.N.H. 1995) (Patentee was not entitled to an amendment of judgments where “no pleadings, motions, or evidence adduced served to notify the court or counsel that any issue of foreign law was to be litigated”) *rev’d on other grounds*, 135

notice, in part, by considering whether it gives the opposing party “ample opportunity to present its own position.”<sup>68</sup> Typically, notice is timely if accomplished in the initial pleadings,<sup>69</sup> though special circumstances might justify raising foreign law at a later stage in the proceedings.<sup>70</sup>

Second, notice must be sufficiently detailed. Courts have disagreed over what degree of fact-specificity will be enough for parties pleading foreign law. Many have insisted, consistent with the general notice pleading regime pre-*Twombly*, that written notice does not need to be fact-specific.<sup>71</sup> These courts have emphasized that no high degree of specificity is necessary because the “function of the notice is not to spell out the precise contents of foreign law but

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F.3d 778 (Fed. Cir. 1998); H.R. Doc. No. 89-391, at 51 (1966) (advisory committee notes on Rule 44.1) (“The stage which the case has reached at the time of the notice, the reason proffered by the party for his failure to give earlier notice, and the importance to the case as a whole of the issue of foreign law sought to be raised, are among the factors which the court should consider in deciding a question of the reasonableness of a notice.”).

68. *Cunard S.S. Co. v. Salen Reefer Servs.* AB, 773 F.2d 452, 461 (2d Cir. 1985).

69. *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001) (“Although . . . there may be some circumstances in which consideration of foreign law may be appropriate after trial and on appeal . . . , that is not the normal practice consistent with Rule 44.1’s requirement of reasonable notice.”).

70. *See, e.g., Cunard S.S. Co.*, 773 F.2d at 456, 461 (motion to vacate order of attachment); *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 207 (E.D.N.Y. 2007) (motion to compel); *Weiss v. Nat’l Westminster Bank, PLC*, 242 F.R.D. 33, 40 (E.D.N.Y. 2007) (notice in response to document requests, requests for admission, and interrogatories); *Krish v. Balasubramaniam*, No. 1:06-CV-01030, 2006 WL 2884794, at \*3 (E.D. Cal. Oct. 10, 2006) (motion to dismiss); *Ayres Aviation Holding, Inc. v. Davidova*, No. 1:03-CV26-2, 2004 WL 3777539, at \*1-2 (M.D. Ga. Mar. 29, 2004) (pre-trial conference); *Tome Engenharia E. Transportes, Ltda v. Malki*, No. 94-C-7427, 2003 WL 21372466, at \*5-7 (N.D. Ill. June 21, 2003) (motion in limine seeking order recognizing certain principles of foreign law as controlling); *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*, 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995) (motion for summary judgment).

71. *See, e.g., Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580 (2d Cir. 2005); *Phoenix Four, Inc. v. Strategic Res. Corp.*, No. 05-CV-4837, 2006 WL 399396 (S.D.N.Y. Feb. 21, 2006); *Hodson v. A.H. Robins Co.*, 528 F. Supp. 809 (E.D. Va. 1981), *aff’d*, 715 F.2d 142 (4th Cir. 1983), *abrogated on other grounds by Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988); *Grice v. A/S J. Ludwig Mowinckles*, 477 F. Supp. 365 (S.D. Ala. 1979).

rather to inform the court and litigants that it is relevant to the lawsuit.”<sup>72</sup> Under this interpretation of Rule 44.1, parties can successfully plead foreign law when their pleadings “specif[y] the segment of the controversy thought to be governed by foreign law and identif[y] the country whose law is claimed to control.”<sup>73</sup> According to these courts, the notice requirement of Rule 44.1 “falls considerably short of a requirement that, in order to survive a Rule 12(b)(6) motion, a plaintiff must allege the identity and substance of the applicable law.”<sup>74</sup>

However, notice is not accomplished where the pleadings are too general. Such pleadings are insufficient where the pleadings do not provide the opponent with adequate notice of the foreign law at issue in the case.<sup>75</sup> For example, “[g]eneral references to ‘international copyrights’ and ‘sale in various territories of the world’” is not sufficiently specific.<sup>76</sup> Thus, courts are under no obligation to apply foreign law where a party does not assert a specific foreign law or pleads foreign law only generally.<sup>77</sup>

Some courts have required more detailed pleadings, even pre-*Twombly*. For them, notice in the context of pleading foreign law is not a pro forma affair. For proper notice to occur, these courts require more than merely mentioning foreign law.<sup>78</sup> Parties that intend to raise

72. *Rationis Enters. Inc.*, 426 F.3d at 586 (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2443 (2d ed. 1994)).

73. *Phoenix Four, Inc.*, 2006 WL 399396, at \*7 (quoting WRIGHT & MILLER, *supra* note 72, § 2443).

74. *Hodson*, 528 F. Supp. at 824 (quoting *Grice*, 477 F. Supp. at 367).

75. See *Vapac Music Publ'g, Inc. v. Tuff 'N' Rumble Mgmt.*, No. 99-CIV-10656, 2000 WL 1006257, at \*7 (S.D.N.Y. July 19, 2000) (holding that the notice requirement was not fulfilled when the complaint did not “provide the defendants with adequate notice of the foreign law the plaintiff asserts is applicable to this case”).

76. *Id.* at \*7.

77. See, e.g., *Prime Start Ltd. v. Maher Forest Prods., Ltd.*, 442 F. Supp. 2d 1113, 1119 (W.D. Wash. 2006) (“[W]here no specific foreign law is asserted, the Court is under no obligation to apply a general body of foreign law to construe a contract.”).

78. See *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 209 (2d Cir. 2003) (barring a Korean corporation from raising its Korean bankruptcy proceeding as a defense to antitrust claims brought by its competitors because it failed to raise the foreign law issue timely and properly); *DP Aviation v. Smiths*

alternative foreign law arguments may do so, but, again, they must provide proper notice that is sufficiently detailed.<sup>79</sup> Parties have to plead the law applicable at the time of the lawsuit's underlying events and occurrences, not the law currently applicable in the foreign jurisdiction.<sup>80</sup>

Normally, it is the responsibility of the party opposing the use of foreign law to allege that notice was not timely.<sup>81</sup> In contrast, courts typically assess whether notice was substantively sufficient, independent of the arguments by the parties. Party-driven and court-driven norms thus mingle uneasily in the notice requirement under Rule 44.1. The timeliness requirement puts significant burdens on parties to give notice of intent to use foreign law under a party-autonomy framework. Similarly, courts at first sight seem to respect the adversarial nature of notice under Rule 44.1 whether the choices of the parties are coherent or not.<sup>82</sup>

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Indus. Aerospace & Def. Sys. Ltd., 268 F.3d 829, 846-49 (9th Cir. 2001) (requiring that plaintiff "specifically mention" that forum law and foreign law "were materially different"). *But cf. Grice*, 477 F. Supp. at 367 ("[Proper notice] falls considerably short of a requirement that, in order to survive a Rule 12(b)(6) motion, a plaintiff must allege the identity and substance of the applicable law.").

79. *See e.g., Rationis Enters. Inc.*, 426 F.3d at 585 (2d Cir. 2005) ("[W]e must resolve whether [plaintiff] waived the foreign law argument by simultaneously pleading the applicability of English, Swedish, Korean, or Panamanian law, and not settling conclusively on one body of foreign law. . . . We now clarify that alternative theories may well suffice as reasonable notice when, as here, relevant events occurred in multiple foreign locations and legitimately point to several different applicable bodies of law.").

80. *See, e.g., Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L.*, 422 F. Supp. 405, 407 n.1 (N.D. Ill. 1976) (noting that plaintiff was injured on a hunting safari in Mozambique when the country was a territory of Portugal and thus would have applied the Portuguese Civil Code, and that even though the country had since become an independent nation, the law in effect at the time of the wrong would be applied).

81. *See, e.g., Thyssen Steel Co. v. M/V Kavos Yerakas*, 911 F. Supp. 263, 267 (S.D. Tex. 1996) (holding that plaintiffs' notice of intent to rely on foreign law, which was sent to defendant four months after Court of Appeals remanded case, and a full three years and nine months after original complaint was filed, was not barred because the court determined that there was no danger that defendant would have insufficient time to research the issue, or be unfairly surprised, especially where the defendant "does not allege unfair surprise").

82. *See, e.g., Carey v. Bah. Cruise Lines*, 864 F.2d 201, 205-06 (1st Cir. 1988) (noting that where the parties are silent regarding the application of foreign law, courts should apply the law of the forum if the forum state bears a

In contrast, the role of the courts in assessing whether notice was substantively sufficient undercuts the adversarial role of the opposing parties. A court can deny the application of foreign law based on substantively insufficient notice, independent of the parties' intention. A court can thus apply local law even though both parties agree that foreign law should govern. Not surprisingly, courts disagree about the fact-specificity required in the pleading stage. Some courts put a minimal burden on the parties. Doing so minimizes the role of courts in judging the sufficiency of a complaint and allows adversarial proceedings to continue (at least up to the summary judgment phase). Other courts required, even pre-*Twombly*, greater factual specificity. This increased the role of courts in judging the plausibility of a complaint. An increased emphasis on the court correspondingly diminishes the role of the parties. Even incapable or non-motivated parties can be shielded from adversarial proceedings by a court that takes an active role in judging the sufficiency of pleadings.

In short, the jurisprudence surrounding notice of foreign law in pleadings suffers from important conceptual tensions between adversarial and court-centered norms. This was the case pre-*Twombly*. Heightened pleading standards under *Twombly*, as we will see, have sharpened these tensions further. Additionally, many of the same tensions pre-*Twombly* and post-*Twombly* between adversarial norms and court-centered norms arise in other areas of Rule 44.1 jurisprudence.

2. *Tools for Determining Foreign Law: The Intertwined and Conflicting Roles of Courts and Litigants.* Like the notice provision in Rule 44.1, the method of determining foreign law places overlapping burdens and responsibilities on parties and courts with contradictory results.

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reasonable relationship to the dispute and the parties are not attempting to escape a foreign sovereign's policy interests); *McNeilab, Inc. v. Scandipharm, Inc.*, 862 F. Supp. 1351, 1355 (E.D. Pa. 1994) (applying local law, in a patent infringement action, to interpret a licensing agreement which stated that "the Agreement shall interpreted [sic] according to the laws of the Federal Republic of Germany," where "[n]either party refer[red] to German law in any proceeding before the court except when the court raised the issue at oral argument"), *aff'd in part, rev'd in part*, 95 F.3d 1164 (Fed. Cir. 1996).

Rule 44.1 gives courts wide discretion to consider any relevant material or source when determining foreign law.<sup>83</sup> Courts may consider “any relevant material, or source including testimony,” without regard to whether the material considered would be admissible under the Rules of Evidence.<sup>84</sup>

Judges, in short, are authorized under Rule 44.1 to undertake any relevant research they desire.<sup>85</sup> This is a sharp departure from long-standing common law rules that interdicted judicial research on questions of foreign law.<sup>86</sup> The court may consider any evidence submitted by parties, but it is not bound by such evidence or by the testimony of expert witnesses.<sup>87</sup> Courts may even reject uncontradicted expert testimony and reach their own decisions based on independent research.<sup>88</sup>

Courts may thus rely on their own research of foreign law to any extent they choose.<sup>89</sup> When doing so, courts may<sup>90</sup>

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83. See WRIGHT & MILLER, *supra* note 51, § 2444 (“The judge’s freedom to engage in research gives the court maximum flexibility about the material to be considered and the methodology to be employed in determining foreign law in a particular case.”).

84. FED. R. CIV. P. 44.1.

85. *E.g.*, *Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613, 615 (11th Cir. 1992) (“The district 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.” (citing FED. R. CIV. P. 44.1)).

86. See *supra* notes 7-13 and accompanying text.

87. *Chantier Naval Voisin v. M/Y Daybreak*, 677 F. Supp. 1563, 1567 (S.D. Fla. 1988) (noting that the court could accept evidence regarding the substance of foreign law, but was in no way bound or limited by the evidence presented (citing FED. R. CIV. P. 44.1)).

88. *Faggionato v. Lerner*, 500 F. Supp. 2d 237, 244 (S.D.N.Y. 2007) (citing *Rutgerswerke AG v. Abex Corp.*, No. 93-CV-2914, 2002 WL 1203836, at \*16 (S.D.N.Y. June 4, 2002)). *But cf.* *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999) (rebuking district court for not considering un rebutted expert testimony where the district court did not conduct its own research as to relevant law).

89. *HFGL Ltd. v. Alex Lyon & Son Sales Managers and Auctioneers, Inc.*, 264 F.R.D. 146 (D.N.J. 2009) (holding that the court may rely on its own research in addition to any submissions from the parties when considering foreign law (citing *Nat’l Grp. for Commc’ns & Computers, Ltd. v. Lucent Techs. Int’l*, 331 F. Supp. 2d. 290, 294 (D.N.J. 2004))).

take judicial notice of the “decisional, constitutional and statutory law” of a foreign jurisdiction,<sup>91</sup> or “authoritative statements of [its] law.”<sup>92</sup> This typically involves a court researching the code of another country and taking judicial notice of specific features within it.<sup>93</sup> However, even though courts are free to conduct such research, they may deny application of foreign law where the parties did not give sufficient direction to the court.<sup>94</sup> This is true even for a foreign jurisdiction whose law is similar to U.S. law and is easily researched.<sup>95</sup>

Rule 44.1, as interpreted by the courts, gives judges wide latitude in deciding whether to consider foreign evidence.<sup>96</sup> Where a particular issue of foreign law has not yet been addressed by the courts of the foreign jurisdiction,

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90. *Wachs v. Winter*, 569 F. Supp. 1438, 1442 (E.D.N.Y. 1983) (noting that the court is not *required* to take judicial notice of laws of foreign countries (emphasis added)).

91. *Liew v. Official Receiver and Liquidator (H.K.)*, 685 F.2d 1192, 1197 (9th Cir. 1982).

92. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1165 n.2 (C.D. Cal. 2006) (“[T]he court is permitted to take judicial notice of authoritative statements of foreign law.” (citing *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 n.10 (9th Cir. 1989)), *aff’d in part, rev’d in part*, 580 F.3d 1048 (9th Cir. 2009)).

93. *E.g., In re Fotochrome, Inc.*, 377 F. Supp. 26, 29-34 (E.D.N.Y. 1974) (noting that judicial notice may be taken of articles of the Japanese Code of Civil Procedure that provides for deposits of arbitral awards in Japanese courts), *aff’d* 517 F.2d 512 (2d Cir. 1975).

94. *In re Petrol Shipping Corp.*, 37 F.R.D. 437, 439-40 (S.D.N.Y. 1965), *aff’d* 360 F.2d 103 (2d Cir. 1966).

95. *See, e.g., Boutin v. Cumbo*, 259 F. Supp. 12, 14 (S.D.N.Y. 1966) (holding that an applicable Canadian statute of limitations could be disregarded in view of a lack of citation of authority).

96. *Cf. Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1322 (S.D. Fla. 2009) (holding that whether a foreign judgment should be recognized, to a large extent, is a question about the laws of a foreign nation, and the court has broad discretion to consider any relevant material or source, including testimony in determining foreign law, irrespective of whether such materials would be admissible under the Federal Rules of Evidence), *aff’d*, 635 F.3d 1277 (11th Cir. 2011).

federal courts may predict what the courts of the foreign forum would determine the law to be.<sup>97</sup>

The broad discretion courts are given in determining foreign law means that their determinations can easily overpower any showing made by the parties. However, courts are under no obligation to inquire into foreign law *sua sponte*—although they may do so.<sup>98</sup> The litigating parties thus will never know, *ex ante*, to what extent the court will be involved in determining questions of foreign law. This creates unclear and incompatible burdens for the litigating parties.

Even though courts have broad discretion to determine foreign law, parties nevertheless retain powerful incentives to litigate the issue of foreign law to the fullest extent and present ample evidence. The burden of proving foreign law remains with the litigating parties, just as the burden of providing notice remains with them.<sup>99</sup> Where a party fails to

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97. *See, e.g.*, *Anglo Am. Ins. Grp., P.L.C. v. CalFed, Inc.*, 899 F. Supp. 1070, 1077 (S.D.N.Y. 1995) (holding that for purposes of federal courts making determinations of foreign law as a matter of law, if the issue has not been addressed by courts of foreign jurisdiction, then federal courts must engage in a two-step process of determining what the courts of the forum state would predict that courts of foreign jurisdiction would find (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1002 n.10 (2d Cir. 1989))).

98. *See, e.g.*, *Integral Res. Ltd. v. Istil Grp., Inc.*, 155 F. App'x 69, 73 (3d Cir. 2005) (finding that the district court was not required to consider the law of Pakistan *sua sponte*); *Bel-Ray Co. v. Chemrite Ltd.*, 181 F.3d 435, 440 (3d Cir. 1999) (“[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.”); *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 n.10 (9th Cir. 1989) (“Although the court is permitted to take judicial notice of authoritative statements of foreign law, nothing requires the court to conduct its own research into obscure sources.”); *Loebig v. Larucci*, 572 F.2d 81, 85 (2d Cir. 1978) (“Rule 44.1 of the Federal Rules of Civil Procedure permits parties to present information on foreign law, and the court may make its own determination of foreign law based on its own research, but it is not mandatory that it do so.”); *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n.3 (2d Cir. 1968) (“Though new Rule 44.1 establishes that courts may, in their discretion, examine foreign legal sources independently, it does not require them to do so in the absence of any suggestion that such a course will be fruitful or any help from the parties.”).

99. *See, e.g.*, *Bel-Ray Co.*, 181 F.3d at 440 (noting that it is incumbent upon the parties to “carry both the burden of raising the issue that foreign law may apply in an action, and the burden of adequately proving foreign law to enable the court to apply it in a particular case”); *Mzamane v. Winfrey*, 693 F. Supp. 2d

meet a burden of proving foreign law, a court may presume that the foreign law is the same as local law.<sup>100</sup>

Again, as one court has reminded litigants: “It is not the court’s job to perform the research for the parties.”<sup>101</sup>

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442, 469 (E.D. Pa. 2010) (finding that where the parties do not satisfy both the burden of raising issues and proving foreign law, the law of the forum will apply); *In re Vivendi Universal, S.A. Sec. Litig.*, 618 F. Supp. 2d 335, 340 (S.D.N.Y. 2009) (“The court may examine a wide array of materials to determine foreign law, but it is under no obligation to do so if the party whose burden it is fails to produce sufficient evidence that foreign law applies.” (citation omitted)).

100. *See, e.g.*, *Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1321-22 (11th Cir. 2004) (rejecting application of foreign law because plaintiff “never offered citations to substantive [foreign] law”); *Nameh v. Muratex Corp.*, 34 Fed. App’x 808, 810 (2d Cir. 2002) (“[N]ew York law properly governed the agreement because [plaintiff], despite advocating application of Polish law, failed to produce sufficient evidence of Polish contract law to demonstrate that the law of contract formation in Poland conflicted with the law of the forum state.”); *Fairmont Shipping Corp. v. Chevron Int’l Oil Co.*, 511 F.2d 1252, 1261 n.16 (2d Cir. 1975) (“We have not considered whether choice of law rules would require application of Dutch law because, in view of the fact that neither party has suggested that the foreign law would differ from United States law, we are not required to conduct an independent investigation of foreign law.”); *Bartsch*, 391 F.2d at 155 n.3 (“From all that appears, it would seem that this first assignment was negotiated in Germany and that German law would apply in its interpretation. Since neither party has suggested that German law differs from New York law in any relevant respect, we have not embarked on an independent investigation of the matter.”); *In re Parmalat*, 383 F. Supp. 2d 587, 595 (S.D.N.Y. 2005) (“Where, as here, there is a failure of proof of foreign law, the court may presume that it is the same as local law.”); *Haywin Textile Prods., Inc. v. Int’l Fin. Inv. & Commerce Bank Ltd.*, 152 F. Supp. 2d 409, 413 (S.D.N.Y. 2001) (applying New York law where defendant “has not demonstrated that Bangladeshi law regarding successor liability is significantly different from New York law”), *aff’d*, 38 F. App’x 96 (2d Cir. 2002); *Indep. Order of Foresters v. Donaldson, Lufkin & Jenrette, Inc.*, 919 F. Supp. 149, 152 (S.D.N.Y. 1996) (“In New York, it is required that a party wishing to apply the law of a foreign state show how that law differs from the forum state’s law. Failure to do so results in the application of New York law.”); *Riffe v. Magushi*, 859 F. Supp. 220, 223 (S.D. W. Va. 1994) (noting that where parties have failed to demonstrate that applicable foreign law is different from the law of the forum state, courts apply local law); *Bowman v. Grolsche Bierbrouwerij B.V.*, 474 F. Supp. 725, 730 (D.C. Conn. 1979) (“Defendants have filed an appropriate notice that they rely on the law of the Kingdom of the Netherlands in this case, and now argue that [plaintiff] has failed to establish the existence of a contract that would be valid and enforceable under the law of the Netherlands. Neither party, however, has briefed or produced evidence of the substance or effect on this case of the Netherlands law. Under such circumstances, the Court will assume that the law of the Netherlands is the same as the law of Connecticut.” (citation omitted)).

Depending on the court and judge, the parties might thus be in complete control of developing foreign law in their pleadings as part of their claims or defenses.

The evidence of foreign law offered by parties and considered by a witness or by the parties does not need to be formally authenticated under the Federal Rules of Evidence.<sup>102</sup> Parties may present evidence and testimony in a variety of formats. For example, counsel may present unsworn statements representing their understanding of foreign law.<sup>103</sup> Counsel may also present affidavits that indicate points of foreign law.<sup>104</sup> Such affidavits may be signed by counsel, foreign counsel,<sup>105</sup> or by a party.<sup>106</sup>

Beyond sworn and unsworn statements, courts typically consider expert testimony on issues of foreign law.<sup>107</sup>

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101. *Anderson v. McAllister Towing & Transp. Co.*, 17 F. Supp. 2d 1280, 1286 n.6 (S.D. Ala. 1998), *aff'd sub nom. Anderson v. McAllister Towing*, 202 F.3d 287 (11th Cir. 1999).

102. FED. R. CIV. P. 44.1; *see also* *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1322 (S.D. Fla. 2009) (holding that whether a foreign judgment should be recognized, to a large extent, is a question about the laws of a foreign nation, and the court has broad discretion to consider any relevant material or source, including testimony in determining foreign law, irrespective of whether such materials would be admissible under the Federal Rules of Evidence), *aff'd*, 635 F.3d 1277 (11th Cir. 2011).

103. *See, e.g., United States v. First Nat'l Bank of Chi.*, 699 F.2d 341, 343-44 (7th Cir. 1983) (holding that a sworn statement by an attorney is not a prerequisite to proving foreign law when an issue concerning the law of a foreign country arises).

104. *See, e.g., Whallon v. Lynn*, 230 F.3d 450, 458 (1st Cir. 2000) (holding an affidavit of a Mexican attorney concerning Mexican child custody law was an acceptable form of proof in determining issues of foreign law).

105. *See, e.g., id.*; *see also Wheelings v. Seatrade Groningen, BV*, 516 F. Supp. 2d 488, 499 (E.D. Pa. 2007) (allowing for consideration an affidavit from attorney admitted to Rotterdam Bar that interpreted crew management contract between owner and agent under Dutch law).

106. *See, e.g., First Nat'l Bank of Chi.*, 699 F.2d at 344-45 (holding that, in determining whether an IRS summons would be enforced, district court could consider letters, affidavits, and translations provided by defendant on issue of whether disclosure of information sought would subject bank's employees to criminal penalties in Greece, even if there was no sworn statement by taxpayer's Greek counsel).

107. *See, e.g., Winn v. Schafer*, 499 F. Supp. 2d 390, 396 n.28 (S.D.N.Y. 2007) (holding that the district court could consider opinion of English law expert as to ultimate legal conclusion concerning shareholder's standing); *United States v.*

Appellate courts frequently rebuke district courts for not considering expert testimony.<sup>108</sup> Where expert testimony is considered, the role of expert witnesses is to “aid the court in determining the content of the applicable foreign law—not to apply it to the facts of the case.”<sup>109</sup> Experts are typically lawyers or judges, but competent non-lawyers may also be considered as experts on foreign law.<sup>110</sup>

Courts are also “free to insist on a complete presentation [of the issue concerning foreign law] by counsel.”<sup>111</sup> At times, appellate courts have even reprimanded district courts for not demanding a more complete presentation by counsel on the issue of foreign law where parties failed to address the issue of foreign law at all or in conclusory fashion.<sup>112</sup>

The parties thus may present evidence and arguments concerning applicable foreign law. At first sight, these interpretations of Rule 44.1 respect party autonomy and an adversarial understanding of pleading foreign law.

Jurado-Rodriguez, 907 F. Supp. 568, 574 (E.D.N.Y. 1995) (“A court may seek the aid of expert witnesses in interpreting law of foreign state or international law.”); *see also* Curtis v. Beatrice Foods Co., 481 F. Supp. 1275, 1285 (S.D.N.Y.) (“Expert testimony is no longer an unavoidable necessity to establish the content of foreign law.”), *aff’d*, 633 F.2d 203 (2d Cir. 1980).

108. *See, e.g.*, Universe Sales Co. v. Silver Castle, Ltd., 182 F.3d 1036, 1037-38 (9th Cir. 1999) (rebuking district court for not considering the declaration of a Japanese attorney who specialized in Japanese trademark and contract law and who stated that Japanese contract law, not trademark law, was applicable in the case at hand).

109. Minebea Co. v. Papst, 444 F. Supp. 2d 68, 182-83 (D.D.C. 2006).

110. *See, e.g.*, A/S Kreditt-Finans v. Cia Venetico De Navegacion S.A. of Panama, 560 F. Supp. 705, 709-10 (E.D. Pa. 1983) (allowing consideration of foreign officer of a bank whose interest it was to insure compliance with Norwegian law even though he was not a lawyer, when his professional position made him competent to testify as to validity of transaction), *aff’d sub nom.* Cia Venetico De Navegacion S.A. of Panama v. Presthus, 729 F.2d 1446 (3d Cir. 1984).

111. Nicor Int’l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357, 1367 n.6 (S.D. Fla. 2003) (quoting Advisory Committee Notes to Rule 44.1 (alteration in original)).

112. *See, e.g.*, Twohy v. First Nat’l Bank of Chi., 758 F.2d 1185, 1193 (7th Cir. 1985) (holding that the district court should have demanded more complete presentation by counsel on Spanish law where plaintiff’s experts failed to address the issue and defendant’s experts addressed the issue in conclusory fashion).

However, courts also often consider evidence put on by parties that is unsworn<sup>113</sup> and not cross-examined,<sup>114</sup> thereby undermining adversarial norms and privileging court authority unguided by the interplay between opposing counsel.<sup>115</sup> No matter how little or much evidence the parties present, courts are authorized to conduct their own investigations and rely on them to any extent they see fit.

The division of labor between the parties and the court in determining foreign law thus is not clearly defined. In practice, the tools used by courts to determine foreign law may vary as widely as complete reliance on evidence presented by the parties in one suit, and complete reliance on its own research—despite party representations—in another suit. Potential and actual litigants have no way to predict how foreign law will be handled in their case. This is the result of conceptual incoherence built deeply into Rule 44.1.

3. *Determinations of Foreign Law are Treated as Questions of Law, Not Fact.* Traditionally, determinations of foreign law were treated in U.S. courts as fact.<sup>116</sup> Prior to the Federal Rules of Civil Procedure and *Conley v. Gibson's*<sup>117</sup> liberal pleading standard, courts required specificity in pleading foreign law, marked by fact-specific, non-conclusory statements.<sup>118</sup> This changed with the adoption of

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113. See *supra* notes 84-85 and accompanying text.

114. See *supra* notes 84-85 and accompanying text.

115. See, e.g., *Kalmich v. Bruno*, 553 F.2d 549, 555 n.4 (7th Cir. 1977) (holding that an opinion letter of plaintiff's Yugoslavian law expert, although unsworn and not cross-examined, was relevant to question as to Yugoslavian law and was properly offered in support of plaintiff's motion to alter judgment and properly considered both in district court and in court of appeals).

116. Miller, *supra* note 7, at 617.

117. 355 U.S. 41 (1957).

118. See, e.g., *The Jean Jadot*, 14 F. Supp. 161, 162 (E.D.N.Y. 1935) (pleading held insufficient, where plaintiff "failed to plead the substance of the foreign law relied upon"); *Christie v. Carlisle*, 11 F.2d 659, 661 (E.D. La. 1926) (noting that foreign law must be proven by evidence and cannot be pleaded by exception); *Coronet Phosphate Co. v. U.S. Shipping Co.*, 260 F. 846, 847 (S.D.N.Y. 1917) (noting that in pleading a foreign law or ordinance, it is not sufficient to state the pleader's conclusion as to its effect, but the pleader must set out the substance of the foreign law). Some state courts went further, requiring that the foreign law be pleaded *in haec verba*. See, e.g., *Swing v. Karges Furniture Co.*, 131 S.W. 153, 154 (Mo. Ct. App. 1910) (noting that foreign law must be pleaded

Rule 44.1 in 1966.<sup>119</sup> A federal court's determinations of foreign law must now be treated as rulings on a question of law.<sup>120</sup>

This puts courts and litigants in an awkward position. They must present evidence and plead with particularity as if foreign law was fact, yet their actions (unlike in other determinations of fact) can always be overpowered by the courts' own investigations. Litigants, in short, have no way of knowing whether they have to plead with particularity or not. If they include too little information, they risk dismissal. If they include too much, they risk interpreting

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*in haec verba* or at least substantially); *Minneapolis Harvester Works v. Smith*, 54 N.W. 973, 974 (Neb. 1893) (suggesting that it is safer practice to set out in the pleading a copy of the foreign statute). *But see* *St. Louis, I.M. & S. Ry. Co. v. Haist*, 72 S.W. 893, 894 (Ark. 1903) ("It was not necessary that [the complaint] set out the Louisiana statute in *haec verba* in pleading the statute.").

119. FED. R. CIV. P. 44.1; *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24, 27 (D. Mass. 1993) ("By clearly characterizing the determination of foreign law as a question of law rather than one of fact as it had previously been treated, the adoption of Rule 44.1 in 1966 marked a watershed with respect to the method or manner of proving foreign law."). Though Rule 44.1 did not impose any mandatory obligations on state courts, many states mirror Rule 44.1 in part or whole. *See, e.g.*, ALA. R. CIV. P. 44.1 (Alabama); ARK. R. CIV. P. 44.1 (Arkansas); ARIZ. R. CIV. P. 44.1 (Arizona). Additionally, the Uniform Judicial Notice of Foreign Law Act (adopted by numerous states) provides for determination of foreign law to be an issue for the court. *See, e.g.*, COLO. REV. STAT. § 13-25-106 (1999) (Colorado); IND. CODE ANN. §§ 34-38-4-1 to -7 (2010) (Indiana); MD. CODE ANN. CTS. & JUD. PROC. §§ 10-501(a) to -507 (LexisNexis 2006) (Maryland).

120. *See, e.g.*, *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) ("[T]he meaning of foreign law is no longer treated as a strict question of fact to be proved in the same manner as other questions of fact . . ."); *Bamberger v. Clark*, 390 F.2d 485, 488 (D.C. Cir. 1968) (holding that a question of foreign law is treated in the federal courts as calling for a ruling on a question of law rather than fact); *Anglo Am. Ins. Grp., P.L.C. v. CalFed Inc.*, 940 F. Supp. 554, 558 (S.D.N.Y. 1996) ("The court's determination [of an issue of foreign law] is treated as [a] ruling on a question of law."); *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 508 (E.D.N.Y. 1974) ("The determination of such a question [of foreign law] is now treated as a ruling on a question of law."). Treating determinations of foreign law as questions of law rather than fact is also in keeping with a long-standing aversion that a jury is not equipped to determine issues of foreign law. *See* JOSEPH STORY, CONFLICT OF LAWS § 638 (8th ed. 1883); 1 SIMON GREENLEAF, LAW OF EVIDENCE § 486 (16th ed. 1899); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2558 (3d ed. 1940).

law and revealing too much about their trial strategy to opposing counsel. Expanding a pleading might seem safer but runs the risk of prolixity.

Rule 8 mandates that complaints be “short and plain.”<sup>121</sup> Similarly, “[e]ach allegation must be simple, concise and direct.”<sup>122</sup> Courts have not defined clear thresholds of prolixity, leaving plaintiffs to guess when their pleadings become too lengthy and run the risk of dismissal.<sup>123</sup> The commandments of Rule 8 thus clash with incentives to include as much material about foreign law in a complaint as possible. Few complaints are dismissed with prejudice for prolixity.<sup>124</sup> Instead, lengthy complaints are typically allowed to be modified to conform with Rule 8.<sup>125</sup> However, this does not resolve the underlying tension between incentives to include abundant factual detail in a complaint to pass the requirements of Rule 44.1 and incentives under Rule 8 to write a complaint that is “short and plain.”

Should parties that intend to rely on foreign law for claims and defenses then include affidavits or expert testimony in their pleadings? Jurisprudence surrounding Rule 44.1 provides no clear answer. The wrong decision means that the plaintiff runs the risk of dismissal, revealing trial strategy, and self-limiting rights of recovery.

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121. FED. R. CIV. P. 8(a).

122. FED. R. CIV. P. 8(d)(1). Prior to the 2007 changes to the Federal Rules of Civil Procedure, the relevant language concerning this provision of Rule 8 was present in Rule 8(e)(1) and stated that “[e]ach averment of a pleading shall be simple, concise, and direct.” H.R. DOC. NO. 110-27, at 438-40 (2007) (advisory committee’s notes on 2007 changes). The 2007 changes in Rule 8 were stylistic only. *Id.*

123. *See, e.g., Newman v. Massachusetts*, 115 F.R.D. 341, 342-43 (D. Mass. 1987) (dismissing a twenty-one page complaint as “argumentative, prolix, and verbose”).

124. *See, e.g., Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (“Prolixity is a bane of the legal profession but a poor ground for rejecting potentially meritorious claims.”).

125. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1217, at 178 (2d ed. 1990) (“Permission to file an amended complaint complying with Rule 8(a)(2) usually is freely given because the federal rules contemplate a decision on the merits rather than a final resolution of the disputes on the basis of technicalities.”). *But cf. Rosa v. Goord*, 29 F. App’x 735, 735 (2d Cir. 2002) (affirming dismissal of § 1983 case where plaintiff’s amended complaint remained prolix).

Beyond the practical concerns of how to plead successfully, treating determinations of foreign law as questions of law exposes inherent tensions in Rule 44.1. If proving foreign law was truly a question of law, then parties could not determine what law a court applies and how it interprets such law, just as the actions of the parties in, for example an ERISA action, cannot change the underlying and applicable substantive law. Similarly, if proving foreign law was truly a question of fact, then courts could not conduct their own investigations just as they are not authorized to investigate crime scenes or supplement pleadings with their own knowledge of facts. Pleading foreign law under Rule 44.1 tries to have it both ways.<sup>126</sup> Rule 44.1 relies on adversarial presentations of fact and law, *and* it grants courts broad powers to resolve the issues independent of the actions or intentions of the parties.

Treating determinations of foreign law as questions of law also impacts appellate review.<sup>127</sup> Instead of inquiring whether determinations of law were sufficiently proven,<sup>128</sup> appellate courts now probe whether the determinations of law were accurate, typically under a *de novo* standard.<sup>129</sup>

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126. See *United States v. Pre-Columbian Artifacts*, 845 F. Supp. 544, 546 (N.D. Ill. 1993) (“While any determination as to foreign law is a legal question, any relevant material or source, including testimony, may be considered in establishing foreign law.”).

127. See, e.g., *Kalmich v. Bruno*, 553 F.2d 549, 552 (7th Cir. 1977) (“Irrespective of the deference to which a district court judge’s determination of the local law is entitled, we regard the matter of foreign country law as 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.”).

128. See, e.g., *Remington Rand Inc. v. Societe Internationale Pour Participations Industrielles et Commerciales S.A.*, 188 F.2d 1011, 1013 (D.C. Cir. 1951) (considering whether trial court decision was “clearly erroneous”); *In re Estate of Schluttig*, 224 P.2d 695, 700 (Cal. 1950) (considering whether there was “substantial evidence” to support the trial judge’s decision).

129. See, e.g., *Lamour v. Peake*, 544 F.3d 1317, 1321 (Fed. Cir. 2008) (“Foreign law and its interpretation are questions of law, which we review *de novo*.”); *United States v. First Nat’l Bank of Chi.*, 699 F.2d 341, 344 (7th Cir. 1983) (holding that the determination concerning the law of a foreign country, is freely reviewable as it is a question of law and not of fact); *Liew v. Official Receiver and Liquidator (H.K.)*, 685 F.2d 1192, 1195-98 (9th Cir. 1982); *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 856 (2d Cir. 1981); *Kalmich*, 553 F.2d at 552; *Ramsay v. Boeing Co.*, 432 F.2d 592, 599 n.11 (5th Cir. 1970); *First Nat’l City Bank v. Compagnia de Aguaceros*, 398 F.2d 779, 781-83 (5th Cir. 1968); *cf.*

Such a review acts without regard to anything the parties intended or did when litigating the case. As such it is another element that undermines adversarial norms when pleading foreign law.

## II. THE EFFECTS OF PLAUSIBILITY PLEADING: SHARPENED TENSIONS AND PROBLEMS

The tensions between adversarial and court-centered norms that existed under the pre-*Iqbal* pleading regime still exist under the post-*Iqbal* regime. In fact, *Iqbal*'s heightened pleading<sup>130</sup> regime has heightened them.

### A. *Allocating New Burdens on Parties and Courts*

Pleading and proving foreign law imposes burdens on both parties and courts, which are structurally at tension with each other.<sup>131</sup> Parties have a burden to research foreign law, plead it, and prove it. However, courts are also encouraged to find the appropriate law for the dispute at hand: they may raise it sua sponte and they may rely on their own research of foreign law to any extent they choose.<sup>132</sup> Party decisions and intentions might thus shape

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United States v. McClain, 593 F.2d 658, 669-70 & n.17 (5th Cir. 1979) (holding that determining foreign law is a matter of law for a judge to decide under Federal Rule of Criminal Procedure 26.1—which structurally mirrors Federal Rule of Civil Procedure 44.1).

130. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”). This requirement of “plausibility” created a heightened standard of pleading compared to the old *Conley v. Gibson* standard. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice . . . . Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of each claim and defense and to define more narrowly the disputed facts and issues.” (footnotes and internal quotation marks omitted)); see also *supra* notes 27-31 and accompanying text.

131. See *supra* Part I.

132. E.g., HFGL Ltd. v. Alex Lyon & Son Sales Managers & Auctioneers, Inc., 264 F.R.D. 146, 147 (D.N.J. 2009) (citing Nat’l Grp. for Commc’ns and Computers, Ltd. v. Lucent Techs. Int’l., 331 F. Supp. 2d 290, 294 (D.N.J. 2004)).

the use of foreign law. Or they may not. The court can always overpower adversarial norms to ascertain the “correct” law to the dispute at hand. There is, in short, no way for the parties to predict how many of the burdens of determining foreign law the court will take on and how many burdens it will leave with the parties.

Plausibility pleading has sharpened this tension between the allocation of determining foreign law to the court and the parties. Courts under the new heightened plausibility pleading regime might be more inclined to hold parties to a higher standard for pleading foreign law.<sup>133</sup> This raises the burdens on the party that intends to rely on foreign law. Alternatively, courts might take on this burden themselves. Courts committed to applying the correct law to a case might find it less likely that the adversarial interplay between the parties will accomplish this under the more difficult to meet heightened pleading standard of *Iqbal*. Instead, they might implicitly take on this burden themselves, thereby further undermining the role of the parties in pleading and proving foreign law.

*Iqbal* thus might put a greater burden on parties *or* on the courts. This effect could vary from case to case (or perhaps even different phases of the same case). In one instance, the adversarial parties might be burdened more with the task of proving foreign law. In another case, courts might take on those burdens. This tension, between burdens placed on parties and the court, existed before *Iqbal*. However, plausibility pleading under *Iqbal* further intensifies this tension. Heightened pleading pushes the tension to both extremes, placing more burdens on courts *or* parties.

Beyond raising tensions in the allocation of burdens between the court and parties, *Iqbal* also unsettles and intensifies tensions inherent in the allocation of burdens between the litigating parties. The notice requirements of Rule 44.1 apply to claims and defenses that rely on foreign law.<sup>134</sup> Typically plaintiffs give notice of their intention to

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133. Early cases post-*Iqbal* suggest as much. See, e.g., *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 113-17 (2d Cir. 2010).

134. FED. R. CIV. P. 44.1 (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing.”); See WRIGHT & MILLER, *supra* note 51, § 2443 (“Notice normally will be given by the party whose claim or defense is based on foreign law.”).

rely on foreign law in their pleadings. In the pre-*Iqbal* era, this placed significant burdens on defendants who had, from the moment of being served, only twenty-one days to make factual inquiries, research and develop foreign law arguments, and file responsive pleadings.<sup>135</sup> It appears that the responsive pleadings of the defendant must now meet this new heightened pleading standard.<sup>136</sup> This significantly increases the burden on defendants. However, courts in the post-*Iqbal* era, just as in the pre-*Iqbal* era, have the option to exercise leniency and give the party opposing the use of foreign law more time to make their arguments.<sup>137</sup> Thus, court-centered norms concerned with finding and applying the appropriate law to the case at hand have long clashed with the adversarial norms inherent in a strict application of pleading rules. Heightened pleading has not eliminated this tension but exacerbated it.

B. *The Application of Plausibility Pleading to Facts and Laws*

Beyond intensifying tensions inherent in the allocation of burdens between parties and the court, heightened

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135. FED. R. CIV. P. 12(a)(1)(A).

136. This assumes that *Iqbal* and *Twombly* apply to defenses. Currently, there is significant disagreement among the courts on this issue. For an example of a court that does not apply heightened pleading standards to defenses see *Holdsbrook v. Saia Motor Freight Line, LLC*, No. 09-CV-02870, 2010 WL 865380, at \*2 (D. Colo. Mar. 8, 2010) (“[I]t is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses.”). For an example of a court that does apply heightened pleading standards to defenses see *Palmer v. Oakland Farms*, No. 10-CV-00029, 2010 WL 2605179, at \*5 (W.D. Va. 2010 June 24, 2010) (“By applying the *Twombly-Iqb[a]l* heightened pleaded standard to affirmative defenses, a plaintiff will not be left to the formal discovery process to find-out whether the defense exists and may, instead, use the discovery process for its intended purpose of ascertaining the additional facts which support a well-pleaded claim or defense.”). For a middle path between these positions see *Kaufmann v. Prudential Ins. Co. of Am.*, No. 09-CV-10239, 2009 WL 2449872, at \*1 (D. Mass. Aug. 6, 2009) (holding that defendants are required to allege a factual basis only for those affirmative defenses not listed in Rule 8(c)(1)).

137. *Cf. Francis v. City of New York*, 262 F.R.D. 280, 283 (S.D.N.Y. 2009) (court denying defendant’s request for a sixty-day extension to respond to a civil-rights complaint, yet granting a seven-day extension instead of finding defendant in default).

pleading standards also intensify tensions in the interplay between pleading facts and law. Under current Rule 44.1 jurisprudence, questions of foreign law are questions of law, no longer questions of fact.<sup>138</sup> This suggests that courts are in exclusive control of determining what foreign law applies to the controversy, just as a court would be in exclusive control of determining what domestic law should apply. The pleadings of the parties cannot alter that. However, even pre-*Iqbal* courts have put significant burdens on parties to plead questions of foreign law properly.<sup>139</sup> *Iqbal* has complicated this tension between treating questions of foreign law as fact or law. A court could hold that *Iqbal* simply does not apply to the pleading of foreign law because that is a question of law, not fact. Under a strict reading of *Iqbal*, the parties must plead only facts with particularity.<sup>140</sup> The law remains for the courts to determine. However, if we take Rule 44.1 jurisprudence seriously, then the parties have some influence in shaping the application of foreign law through their pleadings. This suggests that a court could apply *Iqbal*'s plausibility pleading regime to all facets of pleading foreign law: facts and law. Under such a reading, the parties would have to plead facts and foreign law with particularity. In short, *Iqbal* has intensified the conceptual and practical puzzles surrounding the treatment of foreign law as questions of law rather than facts. Courts post-*Iqbal* may apply plausibility pleading only to facts and leave the pleading of foreign law untouched. Or courts may apply plausibility pleading to all party representations. This ambiguity fuels the pre-existing tensions between adversarial and court-centered norms inherent in treating questions of foreign law as law.

### C. *Expanding Pleadings to Treatises on Foreign Law?*

For quite some time, litigants wishing to invoke foreign law had to balance the degree of specificity in their

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138. FED. R. CIV. P. 44.1 (“The court’s determination must be treated as a ruling on a question of law.”).

139. See *supra* notes 78-80 and accompanying text.

140. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient *factual* matter, accepted as true, to “state a claim to relief that is plausible on its face.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (emphasis added)).

pleadings. Under Rule 44.1, a party that intends to rely on foreign law must present evidence and plead foreign law. If they include too little information they run the risks of dismissal or application of domestic law. If they include too much information they run the danger of revealing their trial strategy, foreclosing viable theories of discovery, and increasing the danger of a dismissal for prolixity.<sup>141</sup>

As noted previously, there is a tension between pleading foreign law and the mandate to write a concise complaint under Rule 8.<sup>142</sup> Plausibility pleading heightens this tension. It widens the gap between incentives to include the bare minimum of information in the pleadings and stuffing the pleadings with affidavits and expert testimony. If the pleadings must be plausible and questions of foreign law are subject to such plausibility determinations, then the parties have even stronger incentives to expand their pleadings to the point where they might resemble treaties on foreign law.

#### D. *More Discretion and Less Predictability*

Another tension inherent in Rule 44.1 is the disparate treatment of foreign law depending on the origin of the law and the judge assigned to the case. In cases where the foreign law is written in English, from a common law country, and is easily available, courts are more likely to conduct their own research and override the adversarial interplay between the parties.<sup>143</sup> In contrast, in cases that rely on foreign law in a language the judge cannot read and originate from a system of law that seems alien to the judge, courts are far more likely to let adversarial norms govern

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141. FED. R. CIV. P. 8(a)(1) (mandating that complaints must be “short and plain”); FED. R. CIV. P. 8(d)(1) (“Each allegation must be simple, concise, and direct.”).

142. *See supra* notes 121-25 and accompanying text.

143. *See* *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 631-33 (7th Cir. 2010) (Posner, J., concurring) (noting that a court’s preference for overriding party intentions and actions might depend, in part, on whether the court is dealing with a “major country” where “a modern legal system” has spawned a well-developed secondary literature).

the shape of the proceedings and the determination of foreign law.<sup>144</sup>

This discretion is built into Rule 44.1.<sup>145</sup> Parties are burdened by this discretion because it creates unpredictability in what they will be required to produce in the pleadings and at trial and what the court will determine on its own, independent of the parties. A judge's degree of familiarity with a foreign legal system could make the difference between the judge determining questions of foreign law herself or letting the adversarial interplay between the parties determine the applicability and content of foreign law.

*Iqbal* has increased the discretion afforded to judges in determining the plausibility of pleadings. As the Supreme Court made clear in *Iqbal*, determining whether a complaint states a plausible claim for relief is now a highly "context-specific task."<sup>146</sup> The Court instructed district courts to use "judicial experience and common sense" when applying *Iqbal's* plausibility standard.<sup>147</sup> Under *Iqbal*, plausibility determinations are thus driven by the subjective experiences and evaluations of the judge.<sup>148</sup>

Courts post-*Iqbal* are thus given greater license to let their intuitions shape whether to conduct their own research under court-driven norms or let adversarial norms determine the content and applicability of foreign law. This contributes to giving courts greater discretion and making outcomes less predictable.

144. See *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 496 (7th Cir. 2009) (Posner, J.) (noting that courts may rely more on party representations "when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn"). This might contribute to reinforcing a Eurocentric and Anglophone bias.

145. FED. R. CIV. P. 44.1 ("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." (emphasis added)).

146. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

147. *Id.*

148. See Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009); Wasserman, *supra* note 31, at 159 ("*Iqbal* is about increased judicial discretion to inquire into and parse the details of complaints, almost certainly producing more 12(b)(6) dismissals, as well as wide variance from case to case, even within the same court.>").

### E. *Early Summary Judgment*

Another long-standing tension inherent in Rule 44.1 centers on the adequacy of providing notice to opposing counsel and the court of an intent to rely on foreign law.<sup>149</sup> Courts have judged the substantive sufficiency of this notice by a variety of factors. Some have taken the language in Rule 44.1 literally and just require minimal “notice.”<sup>150</sup> Other courts have required much more, even pre-*Iqbal*. For these courts, notice is accomplished when a party pleads foreign law with specificity.<sup>151</sup> Courts typically judge whether notice was substantively sufficient, independent of the motions of the parties.<sup>152</sup> This power gives courts great influence early in the proceedings by allowing or denying parties to develop the record and present adversarial positions based on a foreign law theory.<sup>153</sup> Decisions on questions of foreign law could have a dispositive effect on a claim (or encourage unfavorable settlements). After all, deciding which law to apply to a case, local or foreign, could determine whether the plaintiff has a cause of action and the extent to which recovery is possible.

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149. FED. R. CIV. P. 44.1 (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing.”).

150. See, e.g., *Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580, 586 (2d Cir. 2005) (“[T]he function of the notice is not to spell out the precise contents of foreign law but rather to inform the court and litigants that it is relevant to the lawsuit.” (quoting WRIGHT & MILLER, *supra* note 72, § 2443)); see also *supra* notes 71-73 and accompanying text.

151. See *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 208-09 (2d Cir. 2003) (barring a Korean corporation from raising its Korean bankruptcy proceeding as a defense to antitrust claims brought by its competitors because it failed to raise the issue properly); *DP Aviation v. Smiths Indus. Aerospace and Def. Sys. Ltd.*, 268 F.3d 829, 846-49 (9th Cir. 2001) (requiring that plaintiff specifically mention that forum law and foreign law are “materially different”); see also *supra* notes 78-80 and accompanying text. *But cf.* *Grice v. A/S J. Ludwig Mowinckels*, 477 F. Supp. 365, 367 (S.D. Ala. 1979) (“[Proper notice] falls considerably short of a requirement that, in order to survive a Rule 12(b)(6) motion, a plaintiff must allege the identity and substance of the applicable law.”).

152. For further discussion of notice and the tensions inherent in the U.S. system, see *supra* Part I.B.1.

153. See *Magnetic Audiotape Antitrust Litig.*, 334 F.3d at 209 (“[W]e decline to allow SKM an opportunity to further develop the record because of its failure to comply with [Rule 44.1’s] requirement of reasonable notice.”).

The court-centered emphasis on judging the substantive sufficiency of notice under Rule 44.1 thus chafes against the adversarial norms inherent in pleading and developing a case based on the interplay between the parties. Again, *Iqbal* has heightened this tension. It allows (or even requires) courts to judge the plausibility of a lawsuit at the beginning of formal proceedings, long before discovery.<sup>154</sup> As a consequence, pleading evaluations increasingly resemble summary judgment decisions.<sup>155</sup>

Challenging pleadings under Rule 12 and moving for summary judgment under Rule 56 used to be completely different procedural devices. Rule 12(b)(6) regulates access to pre-trial discovery while summary judgment controls access to trial. These different functions dictated, traditionally, different forms and standards. Under Rule 12, a party can move to dismiss a case for “failure to state a claim upon which relief can be granted.”<sup>156</sup> Under the pre-*Iqbal* standard, pleadings survived a motion to dismiss “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>157</sup>

In contrast, under Federal Rule of Civil Procedure 56(a), “[t]he court shall grant summary judgment if the movant shows that that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>158</sup> Traditionally this is a high standard. No

154. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007))).

155. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 17 (2010).

156. FED. R. CIV. P. 12(b)(6); cf. FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”).

157. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

158. FED. R. CIV. P. 56(a); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor.”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (“[T]he burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is ‘an absence of evidence to support the nonmoving party’s case.’”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56(c), its opponent must do more than

genuine issue for trial exists if, when looking at all of the evidence, “a rational trier of fact” could not find for the non-moving party.<sup>159</sup> The nonmoving party need only demonstrate that there is “evidence from which a jury might return a verdict in his favor.”<sup>160</sup>

Plausibility pleading under *Iqbal* and *Twombly* erodes this difference between summary judgment and motions to dismiss for failure to state a claim.<sup>161</sup> Under both standards, courts now determine the plausibility of a claim and rely on their own expertise. In effect, this can turn pleading evaluations into summary judgment motions. It does so before parties have time to develop the factual record or build legal analyses. This difference is crucial and heightens the tensions inherent in pleading and proving foreign law. Summary judgment functions to siphon claims and entire cases out of the system before the court and parties have to incur the heavy costs of trial. This is justified because the parties had ample opportunity for discovery prior to a summary judgment motion.<sup>162</sup> Substantiated claims will

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simply show that there is some metaphysical doubt as to the material facts.” (footnote omitted)).

159. *Zenith Radio Corp.*, 475 U.S. at 587.

160. *Anderson*, 477 U.S. at 257.

161. See Thomas, *supra* note 155, at 28-31. For arguments that summary judgment might be unconstitutional, see John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 551 (2007) (arguing summary judgment is “unfair” and “inefficient”); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007) (arguing that summary judgment violates the right to a jury trial). For arguments that summary judgment is overused see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1133 (2003) (questioning the broad use of summary judgment); Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1898 (1998) (“Summary judgment has assumed a much larger role than its traditional image portrays or even than the text of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake.”). But see Edward Brunet, *Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625-51, (2008) (arguing, using a historical perspective, that summary judgment does not violate the Seventh Amendment); Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 863, 906 (2007) (arguing that motions for summary judgment have not increased as dramatically as many presume).

162. See, e.g., *Celotex Corp.*, 477 U.S. at 326 (“The parties had conducted discovery, and no serious claim can be made that respondent was in any sense

survive summary judgment; unsubstantiated claims will not. However, at the pleading stage many parties have only a partially developed factual record.<sup>163</sup> Often, they cannot plead with particularity facts that are under the defendant's control.<sup>164</sup>

Courts, under *Iqbal*, thus have more discretion to judge the adequacy of a claim that relies on foreign law prior to discovery. They have to determine whether the claim is sufficiently strong to warrant access to court-sanctioned discovery. This widens the gap between different standards for judging whether notice is substantively adequate under Rule 44.1. This gap creates tensions for courts and litigating parties and increases the unpredictability of the outcome.

#### F. *The Role of Experts*

The contested and conflicted role of experts in proving foreign law further illustrates the tensions created by a comingling of court-centered and adversarial norms. When considering the content of foreign law, courts may consider expert testimony submitted by the parties.<sup>165</sup> However, they are not limited to submissions by the parties. Courts “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”<sup>166</sup>

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‘railroaded’ by a premature motion for summary judgment.”); *Int’l Shortstop, Inc. v. Rally’s, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (granting the non-movant additional time under Rule 56(f) because “the district court should be generous in its allowance of discovery requests aimed at uncovering evidence of the moving party’s state of mind”).

163. See generally Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010) (exploring pre-suit discovery as a possible response to *Iqbal*).

164. For example, many plaintiffs in employment discrimination suits under Title VII, 42 U.S.C. § 2000e (2006), must establish an employer’s discriminatory intent. See, e.g., *Gilhooly v. UBS Securities, LLC*, 772 F. Supp. 2d 914, 915-17 (N.D. Ill. 2011) (dismissing complaint that failed to plead facts to support a plausible inference of discriminatory intent). Without the benefit of discovery, these plaintiffs find it difficult to plead this element with particularity. See Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 136-37 (2010) (“Establishing an employer’s discriminatory intent in a case can be the most difficult hurdle for the employee to overcome.”).

165. FED. R. CIV. P. 44.1.

166. *Id.*

Sometimes courts lean heavily on expert testimony as submitted by adversarial party presentations to determine the content of foreign law. Sometimes they do not, instead relying predominantly on their own research.

Recently, some courts have explicitly rejected the use of experts as undesirable aspects of the party-driven approach to foreign law questions. The complex interplay between adversarial and court-centered norms is well-illustrated by a web of divergent and overlapping rationales in two recent Seventh Circuit opinions.

In *Bodum USA, Inc. v. La Cafetière, Inc.*, the Seventh Circuit discounted expert testimony because it “adds an adversary’s spin” to questions of foreign law.<sup>167</sup> The court declared that “published sources” do not have this danger.<sup>168</sup> Print material, researched by the court independent of the parties, thus has a claim to be “objective” that is preferable “to the parties’ declarations.”<sup>169</sup>

In the same case, Judge Posner provided a more ambiguous analysis as to when courts should take the lead in determining questions of foreign law. He filed a concurring opinion to “express emphatic support for, and modestly to amplify, the court’s criticism of a common and authorized but unsound judicial practice.”<sup>170</sup> The practice is that “of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses . . . .”<sup>171</sup> Judge Posner argued that expert testimony is inherently unreliable because experts are “paid for their testimony.”<sup>172</sup> They are “selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client.”<sup>173</sup> Language barriers, according to this argument, should not deter a court from conducting its

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167. 621 F.3d 624, 629 (7th Cir. 2010).

168. *Id.*

169. *Id.*

170. *Id.* at 631 (Posner, J., concurring).

171. *Id.*

172. *Id.* at 633.

173. *Id.*

own research.<sup>174</sup> However, Judge Posner allowed that this preference for court-driven inquiries might only apply if the court is dealing with a “major country” that “has a modern legal system.”<sup>175</sup> The case for court-driven inquiries is also stronger where there is a well-developed (English) literature on that country’s laws.<sup>176</sup>

In the same case, Judge Wood filed a concurrence to express her disagreement with the court’s view that expert testimony is “categorically inferior to published, English-language materials.”<sup>177</sup> Judge Wood argued that given the difficulties of understanding the nuances in the foreign law, experts can efficiently help the court,<sup>178</sup> which is fully capable of testing the objectivity of the experts.<sup>179</sup> This view of experts provided by parties does not necessarily advocate them as integral to an adversarial presentation of facts and interpretations. Instead, it justifies experts only insofar as to provide the court with insights and nuances of foreign law that might be missed through review of written sources alone.<sup>180</sup>

Similarly, in *Sunstar, Inc. v. Alberto-Culver Co.*, the outcome of the case depended on the meaning of a Japanese technical legal term.<sup>181</sup> There, the Seventh Circuit emphasized that “judges are experts on law” and should undertake their own research independent of experts.<sup>182</sup> The

174. *Id.* (“[O]ur linguistic provincialism does not excuse intellectual provincialism.”).

175. *Id.*

176. *Id.*

177. *Id.* at 638 (Wood, J., concurring).

178. *Id.* at 638-39 (“Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country’s law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not.”).

179. *Id.* at 639 (“It is hard to see why the [expert’s] views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party.”).

180. *Id.* (“It will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources.”).

181. 586 F.3d 487, 495 (7th Cir. 2009).

182. *Id.* at 496.

court considered reliance on paid witnesses as “spoon feed[ing] judges” foreign law.<sup>183</sup> However, it also allowed that such a practice is justifiable in instances “when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn.”<sup>184</sup>

How responsibilities for developing questions of foreign law are divided between courts and parties thus remains an open question. Some jurists, including Judges Posner and Easterbrook,<sup>185</sup> urge courts to take on a greater role, while others are skeptical of a court’s ability to do so reliably. Even staunch critics of the adversarial model, however, allow for a greater role for parties where the foreign law is obscure or difficult to ascertain through English-language sources.

These cases illustrate the tensions built into Rule 44.1 which arise out of the comingling of court-centered and adversarial norms. The U.S. model tries to have it both ways: it tries to rely on the adversarial interplay of parties to shape the applicability and content of foreign law *and* it relies on court-centered norms to ascertain that the correct law is applied to the controversy at hand. These two approaches can yield different results. They also suggest different procedural approaches. As illustrated above, the instability created by conflicting procedural approaches to questions of foreign law contributes to uncertainty, unpredictability, and unfair results. The new heightened pleading regime exacerbates these tensions.

### III. A COMPARATIVE VIEW ON ADVERSARIAL AND COURT-CENTERED REGIMES

This Part utilizes a comparative approach to shed light on the U.S. pleading regime and lay the groundwork for potential improvements. It finds that most countries either rely on adversarial norms *or* court-centered norms when structuring the pleading of foreign law. In adversarial systems, courts may only consider questions of foreign law if

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183. *Id.*

184. *Id.*

185. Judge Easterbrook wrote the majority opinion in *La Cafetière*. *La Cafetière*, 621 F.3d at 624.

the parties plead them.<sup>186</sup> In court-driven systems, the courts are obligated to apply foreign law where appropriate even if no party pleads it and the parties never intended to apply foreign law to this dispute.<sup>187</sup> Similarly, in adversarial systems, judges rely on the representations of the parties concerning the content of foreign law, where it is treated as fact.<sup>188</sup> Courts in adversarial systems are typically prohibited from conducting their own research.<sup>189</sup> In contrast, in court-driven systems foreign law is a question of law, and judges are authorized or obligated to conduct their own research to ascertain the applicability and content of foreign law.<sup>190</sup>

The U.S. model utilizes *both* approaches. Seeing these approaches in isolation sharpens an understanding of each and the dangers of trying to combine them.

Unlike when courts face questions of jurisdiction (for example in the European Union under the Brussels Regulation<sup>191</sup>), there are no international treaties that govern when a court must apply foreign law or determine how to ascertain the content of the foreign law.<sup>192</sup> Some European courts have suggested that the Rome Convention governs the procedure for pleading foreign law in contract

186. See O. KAHN-FREUND, *GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW* 276-77 (1976); MARTIN WOLFF, *PRIVATE INTERNATIONAL LAW* § 208 (2d ed. 1950); Stephen L. Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 AM. J. COMP. L. 332, 338-40 (1968); see also *infra* Part III.A.

187. See SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION* 50-52 (2004); KAHN-FREUND, *supra* note 186, at 276-77; WOLFF, *supra* note 186, § 207; see also *infra* Part III.B.

188. See KAHN-FREUND, *supra* note 186, at 276-77; WOLFF, *supra* note 186, § 208; Sass, *supra* note 186, at 338-40.

189. See KAHN-FREUND, *supra* note 186, at 276-77; WOLFF, *supra* note 186, § 208; Sass, *supra* note 186, at 338-40.

190. See GEEROMS, *supra* note 187, at 50-52; KAHN-FREUND, *supra* note 186, at 276-77; WOLFF, *supra* note 186, § 207.

191. Council Regulation 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC).

192. See, e.g., Convention of the Law Applicable to Contractual Obligations 80/934, tit. 2, art. 3, § 1, 1980 O.J. (L 266) 1 (EC) [hereinafter 1980 Rome Convention] (“A contract shall be governed by the law chosen by the parties.”); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 88/892, tit. 2, § 2, art. 5, 1988 O.J. (L 319) (EC).

cases throughout the Union.<sup>193</sup> Other courts have disagreed even with this narrow attempt of standardization.<sup>194</sup>

In the absence of clear overarching regulations, countries have developed and refined the adversarial and court-centered models of pleading and proving foreign law. In this Part, I focus on the regimes in Germany and France as representative systems of the court-centered model and on England as an example of the adversarial model.<sup>195</sup> The fundamental procedural differences in these countries reflect, in part, notably divergent normative commitments.

### A. *The Adversarial Model*

1. *England.* England is one of the purest examples of a court system that relies on adversarial norms in pleading and proving foreign law. In England, questions of foreign law are questions of fact.<sup>196</sup> This is a legal fiction. Foreign law, after all, is law, not fact.<sup>197</sup> However, courts have found

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193. See 1980 Rome Convention, *supra* note 192, tit. 1, art. 1, § 1 (“The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.”).

194. Trevor C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 INT’L & COMP. L.Q. 271, 290-91 (1996) (arguing that the Rome convention does not apply to rules of “evidence and procedure” and are therefore inapplicable to questions of pleading or proving foreign law).

195. For example, questions of pleading and proving foreign law are treated in Austria, Portugal, the Netherlands, and the Scandinavian countries roughly like in Germany. See Carlos Esplugues et al., *General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities*, in APPLICATION OF FOREIGN LAW 3, 10 (Carlos Esplugues et al. eds., 2011). Spain used to follow the English approach until recently. See New Spanish Code of Civil Procedure (Ley de Enjunciamiento Civil) (enacted January 1, 2000) (effective January 8, 2001).

196. *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (Ct. Com. Pl.) 1028; see also Elizabeth B. Crawford & Janeen M. Carruthers, *United Kingdom*, in APPLICATION OF FOREIGN LAW, *supra* note 195, at 391, 391-93; Hartley, *supra* note 194, at 282-85.

197. English courts seem to recognize this tension to some degree. In appellate proceedings, English appellate courts are usually bound by the factual findings of the lower courts. Crawford & Carruthers, *supra* note 196, at 393 (“In England, Scotland, and Northern Ireland, an appellate court always is slow to interfere with a trial court’s finding of fact . . . .”); Hartley, *supra* note 194, at 284 (“Appellate courts in England are reluctant to interfere with findings of fact made by the trial judge.”). However, as far as foreign law is concerned, appellate courts may overrule a judgment on the ground that the lower court erred in its

it useful to treat foreign law as fact for evidentiary reasons.<sup>198</sup> Treating foreign law as fact allows the application of a regime of proof that favors adversarial norms.

Consistent with these norms, parties bear the principal burden of raising and proving foreign law. Pleading foreign law is entirely party-driven.<sup>199</sup> A party that intends to rely on foreign law must plead it in the same way as any other fact.<sup>200</sup> If neither party pleads foreign law then the court will not consider it, however clear the foreign element may be.<sup>201</sup> The choice of whether to introduce foreign law arguments, therefore, rests entirely with the parties. The judge does not have the obligation nor the power to raise foreign law *sua sponte*.<sup>202</sup> For example, in one famous English case, the parties were arguing over a contract that contained an express and clear governing law provision.<sup>203</sup> That provision specified that Dutch law should govern this dispute.<sup>204</sup> However, neither party invoked Dutch law in their

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use of foreign law. *See, e.g.*, DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 9-010, at 256 (Sir Lawrence Collins et al. eds., 14th ed. 2006) [hereinafter DICEY, MORRIS & COLLINS].

198. *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (Ct. Com. Pl.) 1028 (“The way of knowing foreign law is, by admitting them to be proven as facts, and the Court must assist the jury in ascertaining what law is.”).

199. In England, pleadings are sometimes referred to as “statement of the case.” *See, e.g.*, Supreme Court of England and Wales County Courts: The Civil Procedure Rules 1998 (No. 3132 (L.17)).

200. *See, e.g.*, DICEY, MORRIS & COLLINS, *supra* note 197, ¶ 9-003, at 256.

201. *Hartley*, *supra* note 194, at 282-83 (“[F]oreign law is treated as a question of fact. If it is not pleaded by a party, the court will not apply it, even if it would appear to be applicable according to the relevant choice of law rule.”).

202. *See, e.g.*, *Fremoult v. Dedire*, (1718) 24 Eng. Rep. 458 (Ch.) 459; *see also* *Ascherberg, Hopwood & Crew Ltd. v. Casa Musicale Sonzogno di Pietro Ostali S.N.C.*, (1971) 1 W.L.R. 1128 (C.A.) 1131; *Crawford & Carruthers*, *supra* note 196, at 391 (“A UK court generally does not take notice of foreign law; the judge is treated as neither knowing, nor being able to know of his own volition, the content of the foreign law to be applied, and cannot investigate and apply foreign law *ex officio*.”).

203. *Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd.*, (1976) 1 W.L.R. 676 (C.A.).

204. *Id.* at 684.

pleadings.<sup>205</sup> The English court thus decided the dispute entirely based on English domestic law without reference to Dutch law.<sup>206</sup>

Beyond notice of a foreign law element, the parties are also responsible for providing evidence of the foreign law as fact. Unless the other party stipulates to the foreign law, it must be proven by the party who pleads it.<sup>207</sup> The judge relies entirely on the parties for evidence concerning the content of the applicable foreign law.<sup>208</sup>

Parties may utilize a broad range of methods to prove foreign law, including expert witnesses.<sup>209</sup> Such experts may refer to the foreign sources of law.<sup>210</sup> If experts disagree about the content of a foreign statute or case the court must resolve the issue.<sup>211</sup> However, the court is not authorized to independently research foreign sources of law that have not been introduced by the parties.<sup>212</sup>

2. *Australia*. Like most common law jurisdictions, Australia largely follows the British adversarial approach to pleading and proving foreign law. Under Australian law, foreign law is a question of fact.<sup>213</sup> It is presumed to be the same as the law of the forum.<sup>214</sup> The parties that wish to rely on foreign law and claim that it differs from local law bear the burden of proving the content of foreign law.<sup>215</sup> To do so they must “plead foreign law relied on in [a] claim or defence [and] give full particulars of the precise statute,

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205. *Id.* at 687-88.

206. *Id.*

207. Hartley, *supra* note 194, at 282-83.

208. *Id.* (“[F]oreign law is treated as a question of fact. If it is not pleaded by a party, the court will not apply it, even if it would appear to be applicable according to the relevant choice of law rule.”).

209. *Id.* at 283.

210. *Id.* at 284.

211. *Id.*

212. *Bumper Dev. Corp. v. Comm’r of Police of Metropolis* (1991) 1 W.L.R. 1362 (C.A.), *rev’d*.

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

214. *Id.* at 431-40.

215. *Id.*

code, rule, regulation, ordinance or case law relied on, with the material section, clauses or provisions thereof.”<sup>216</sup> The parties do not need to plead the evidence by which foreign law will be proven or plead particular interpretations of foreign law.<sup>217</sup> Foreign law is a question of fact eventually to be proven by expert witnesses.<sup>218</sup> Under recent Australian decisions, the pleading and proof of foreign law now extends to encompass foreign choice of law rules in addition to foreign substantive law.<sup>219</sup>

An Australian court recently highlighted the adversarial foundations of the Australian approach to pleading foreign law:

It is for the parties and their advisers to decide the ground upon which their battle is to be fought. The trial is not an inquisition into the content of relevant foreign law any more than it is an inquisition into other factual issues that the parties tender for decision by the court.<sup>220</sup>

The court continued, “this is adversarial litigation, and the outcome of such litigation is commonly influenced by the way in which the parties have chosen to conduct their respective cases. Decisions about such conduct may have been based on tactical and other considerations which are unknown to a trial judge or an appellate court.”<sup>221</sup> Adhering to adversarial norms implies deferring to such decisions, whether they lead to the application of the correct law to the facts or not. Party autonomy, under the adversarial model, trumps accuracy.

### B. *The Court-Driven Model*

Most European countries reject the adversarial model espoused by England and other common law countries.

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216. *Regie Nationale Renault v Zhang* (2002) 210 CLR 491, 517-18 (Austl.).

217. *McComish*, *supra* note 213, at 408-12.

218. *Id.* at 427-29.

219. *See Neilson v Overseas Projects Corp. of Victoria Ltd.* (2005) 233 CLR 331, 387-88 (Austl.).

220. *Id.* at 370.

221. *Id.* at 338.

Instead of relying on the parties to plead and prove foreign law, they place the principal responsibility on courts to find and apply foreign law correctly, independent of the actions and intentions of the parties.

1. *Germany*. Under German procedures, foreign law is treated as law, not fact.<sup>222</sup> Courts, if aware of a foreign law claim or defense, must apply foreign law independent of the intentions and actions of the parties.<sup>223</sup> If a German conflict-of-laws rule refers to foreign law then it must be applied by the court.<sup>224</sup> The pleadings of the parties are largely irrelevant to this determination.<sup>225</sup> For example, the German rules of civil procedure (“Zivilprozessordnung”) explain that courts are not limited by the pleadings of the parties or their evidence.<sup>226</sup>

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222. See Ivo Bach & Urs Peter Gruber, *Austria and Germany*, in APPLICATION OF FOREIGN LAW, *supra* note 195, at 101, 101-113; John Brown, *44.1 Ways to Prove Foreign Law*, 9 MAR. LAWYER 179, 184 & n.33 (1984) (noting that Germany favors an “active approach” that “require[s] the judge to raise, on his own motion, the applicability of foreign law and to research the issue to the extent possible”); Hartley, *supra* note 194, at 273 (noting that in Germany “foreign law is regarded as law, its application is determined *ex officio* by the court and its proof is in principle a matter for the court”); George Yates, *Foreign Law Before Domestic Tribunals*, 18 VA. J. INT’L L. 725, 728-29 & n.19 (1977).

223. See Menashe Shava, *Proof of Foreign Law in Israel: A Comparative Study*, 16 N.Y.U. J. INT’L L. & POL. 211, 219 (1984) (“The German approach requires the judge to make every effort to ascertain the pertinent foreign law by referring to all appropriate sources . . . .”); see also Bach & Gruber, *supra* note 222, at 101-03.

224. Bach & Gruber, *supra* note 222, at 101-02.

225. *Id.* at 105.

226. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 9, 1950, BUNDESGESETZBLATT [BGBl] 80, as amended, § 293 (“Das in einem anderen Staat geltende Recht, die Gewohnheitsrechte und Statuten bedürfen des Beweises nur insofern, als sie dem Gericht unbekannt sind. Bei Ermittlung dieser Rechtsnormen ist das Gericht auf die von den Parteien beigebrachten Nachweise nicht beschränkt; es ist befugt, auch andere Erkenntnisquellen zu benutzen und zum Zwecke einer solchen Benutzung das Erforderliche anzuordnen.”) (“Proof of the applicable law of another state, including customary law and statutes, is only required insofar as it is not known to the court. The court is not limited in ascertaining foreign law to the submissions of the parties. The court is authorized to use other sources to ascertain foreign law.”). Notice, however, that courts must notify the parties that German private international law points to a foreign law if the parties were previously not aware of this. ZPO § 139(2) (“Auf einen Gesichtspunkt, den eine Partei

Similarly, the task of ascertaining the content of foreign law rests with the court.<sup>227</sup> Courts may utilize a broad range of means to ascertain foreign law.<sup>228</sup> One tool at the court's disposal is to ask the parties for assistance.<sup>229</sup> If both the plaintiff and defendant are nationals of the foreign country in question and they agree that the law of that foreign country applies to the case at hand, then the court may, in its discretion, accept this view without further inquiries.<sup>230</sup> Similarly, both parties may agree that German law applies and courts may, again in their own discretion, follow this stipulation or conduct their own research.<sup>231</sup> Where both parties plead only German law, courts often regard this as an implicit choice of German law (though, again, courts are not bound by this choice).<sup>232</sup>

More commonly, parties have little input into questions of foreign law.<sup>233</sup> Instead, courts conduct their own

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erkennbar übersehen oder für unerheblich gehalten hat, darf das Gericht, soweit nicht nur eine Nebenforderung betroffen ist, seine Entscheidung nur stützen, wenn es darauf hingewiesen und Gelegenheit zur Äußerung dazu gegeben hat.") ("The court may base an opinion only on material points that the court pointed out to the parties and gave them opportunity to comment assuming that they were not aware of the material point to begin with.").

227. Burkhard Bastuck & Burkard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMP. L. REV. 609, 622 (1994) ("German courts have the duty to determine the applicable foreign law."); see also ZPO § 293.

228. Bach & Gruber, *supra* note 222, at 105-07.

229. See *id.*; Hartley, *supra* note 194, at 275 ("[The Court] may ask the parties for assistance, particularly if they have access to the relevant information."); Shava, *supra* note 223, at 219 (noting that the judge may ascertain foreign law by "all appropriate sources" including "the parties themselves").

230. See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES, TEXT, MATERIALS* 61-63, 224-25 (5th ed. 1988).

231. This situation typically arises in the fields of contract and tort where courts recognize an increased degree of party autonomy even though, here as elsewhere, that autonomy is very limited. See Hartley, *supra* note 194, at 276 (noting the special rules for contract and tort questions).

232. See Hartley, *supra* note 194, at 275 ("If both parties are nationals of the country in question and agree on what the foreign law is, the court may accept their view without further investigation, though it is not bound to do so." (footnote omitted)).

233. See, e.g., Brown, *supra* note 222, at 184 & n.33 (noting that the judge must "raise, on his own motion, the applicability of foreign law"). There is one slight complication to this general rule: while a court may renounce any

investigation of the foreign law in question or consult directly with an expert.<sup>234</sup> If the court relies on an expert, it will call for an expert opinion (“Gutachten”).<sup>235</sup> The expert providing such an opinion is often given full access to the records of the case.<sup>236</sup> Based on this information, the expert does not only answer broad questions of foreign law but often also suggests how the law applies to the fact at hand (or that, alas, it does not).<sup>237</sup> The expert opinion is not binding on the court, though it is normally followed.<sup>238</sup> The court’s ultimate assessment of the application of foreign law thus is often made twice removed from the parties.

Beyond their own research and the use of an expert opinion, courts may also consult with a German or foreign diplomatic mission to ascertain foreign law, informally ask foreign lawyers for information, or inquire with comparative law institutes (typically situated at universities).<sup>239</sup>

The role of the parties in pleading or proving foreign law in Germany is thus marginal. Parties do not bear the burden to raise or prove foreign law, and the court may simply disregard the evidence they offer, the law they suggest, and the admissions they make.

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procedure of taking evidence and rely exclusively on the court’s own investigation of foreign law, once that court does allow evidence, the court is no longer allowed to reject expert opinions offered by the parties but must consider such opinions in its reasoning. *See* Bach & Gruber, *supra* note 222, at 103. *See generally* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 9, 1950, BUNDESGESETZBLATT [BGBl] 53-54, as amended, §404-411 (regulating the use of experts in judicial proceedings).

234. *See* ZPO §404-411; Bach & Gruber, *supra* note 222, at 105-06 (explaining that a judge is obligated to determine the content of foreign law, but the judge may rely on auxiliary means, including expert testimony, to do so).

235. *See* ZPO §404-411; Bach & Gruber, *supra* note 222, at 106-07 (explaining process of obtaining an expert opinion in Germany).

236. *See* ZPO §404-411; Bach & Gruber, *supra* note 222, at 107 (“Usually, the court will send the entire case to the expert.”).

237. *See* ZPO §404-411.

238. *See* ZPO §404-411; *cf.* Bach & Gruber, *supra* note 222, at 107 (“Where a court has obtained an expert opinion, it may rely on that opinion as long as the opinion is not manifestly inconsistent.”).

239. *See* Hartley, *supra* note 194, at 275-76.

2. *Austria and Switzerland.* Both Austria and Switzerland largely follow the German approach, with only minor variations.

In Austria, raising and proving foreign law is governed by the Austrian International Private Law Act of 1978.<sup>240</sup> Under it, courts are instructed to determine foreign law *sua sponte*, independent of party intentions.<sup>241</sup> In determining foreign law, courts may rely on expert opinions, information provided by the Federal Ministry of Justice, and information provided by the parties.<sup>242</sup>

Similarly, Switzerland puts the primary responsibility of raising and proving foreign law on courts, not parties. Under the Federal Private International Law Act of 1987, the courts determine the content of foreign law on their own, though courts may request the aid of the parties.<sup>243</sup> The

240. BUNDESGESETZ: INTERNATIONALES PRIVATRECHT [Austrian International Private Law Act] BUNDESGESETZBLATT [BGBL] No. 304/1978, Federal Law Gazette No. 304/1978, available at <http://www.ris.bka.gv.at/>.

241. *Id.* § 4(1) (“Das fremde Recht ist von Amts wegen zu ermitteln.”) (“Foreign law is to be established by the court.”). However, in a few areas of law the parties’ choice of law carries more weight. *Id.* §2. (“Die für die Anknüpfung an eine bestimmte Rechtsordnung maßgebenden tatsächlichen und rechtlichen Voraussetzungen sind von Amts wegen festzustellen, soweit nicht nach verfahrensrechtlichen Vorschriften in einem der Rechtswahl zugänglichen Sachgebiet tatsächliches Parteivorbringen für wahr zu halten ist.” (citation omitted)) (“The court must determine the applicability and content of foreign law on its own, insofar no other statutes provide that the court must accept as true party representations.”). See generally Bach & Gruber, *supra* note 222, at 101-13; Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. OF INT’L & COMP. L. 225, 234 n.47 (1995) (“[F]oreign applicable law must be applied *ex officio*.”).

242. BUNDESGESETZ: INTERNATIONALES PRIVATRECHT § 4(1)-(2) (Austria) (“Das fremde Recht ist von Amts wegen zu ermitteln. Zulässige Hilfsmittel hiefür sind auch die Mitwirkung der Beteiligten, Auskünfte des Bundesministeriums für Justiz und Sachverständigengutachten. Kann das fremde Recht trotz eingehendem Bemühen innerhalb angemessener Frist nicht ermittelt werden, so ist das österreichische Recht anzuwenden.”) (“Foreign law is to be established by the court. The court may rely on the submissions of the parties, on information from the Federal Ministry of Justice or on expert reports. If, despite considerable efforts, foreign law cannot be established within the stipulated time, Austrian law is then applicable.”).

243. BUNDESGESETZ UBER DAS INTERNATIONALE PRIVATRECHT [IPRG] Dec. 18, 1987, art. 16 cl. 1 (Switz.) (“Der Inhalt des anzuwendenden ausländischen Rechts ist von Amtes wegen festzustellen. Dazu kann die Mitwirkung der Parteien verlangt werden.”) (“The court must determine the content of the

court may place the burden of proving foreign law on the parties in one limited area of law: patrimonial matters.<sup>244</sup> Should the court choose to place this burden on the parties, their failure to meet the burden will result in the application of Swiss law.<sup>245</sup>

3. *France*. When dealing with foreign law issues, France, like Germany, places the principal responsibility on the court. French courts are generally required to apply foreign law on their own accord, independent of the actions of the parties.<sup>246</sup> The mandatory nature of this command is reflected in Article 12, section 1 of the Nouveau Code de Procédure Civile (“N.C.P.C.”). It provides that “the judge must decide the case according to the rules of law applicable to it.”<sup>247</sup> Under applicable French law, parties cannot dispose of most of their rights and are bound by the court’s determination that foreign law applies.<sup>248</sup>

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applicable foreign law. The court can require the parties to help in this determination.”), available at <http://www.admin.ch/ch/d/sr/291/index.html>. See generally Dolinger, *supra* note 241, at 234 n.51 (“This orientation had already been followed by Swiss case law.”); Hartley, *supra* note 194, at 277-78 (discussing the Swiss approach to pleading and proving foreign law under the Federal Private International Law Act).

244. IPRG art. 16 cl. 1 (“Bei vermögensrechtlichen Ansprüchen kann der Nachweis den Parteien überbunden werden.”) (“If the claims involve patrimonial matters, the court may place the burden of proving foreign law on the parties.”).

245. See *id.* art. 16 cl. 2 (“Ist der Inhalt des anzuwendenden ausländischen Rechts nicht feststellbar, so ist schweizerisches Recht anzuwenden.”) (“Where the content of the applicable foreign law is not ascertainable, forum law must be applied.”), available at <http://www.admin.ch/ch/d/sr/291/index.html>.

246. Samuel Fulli-Lemaire & Daniel Rojas, *France, in APPLICATION OF FOREIGN LAW*, *supra* note 195, at 185, 185-96; Hartley, *supra* note 194, at 278-82; Brigitte Herzog, *Proof of International Law and Foreign Law Before a French Judge*, 18 VA. J. INT’L L. 651, 652-53 (1978).

247. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 12 cl. 1 (Fr.) (“Le juge doit trancher le litige conformément aux règles de droit qui lui sont applicables.”) (“The judge settles the dispute in accordance with the rules of law applicable thereto.”), available at, <http://www.legifrance.gouv.fr/>.

248. See Fulli-Lemaire & Rojas, *supra* note 246, at 187-88. They may, in short, not dispose of “droits indisponibles” (“inalienable rights”). *Id.* However, where a court intends to consider foreign law, it must inform the parties and give them opportunity to comment. N.C.P.C. art. 16 cl. 3 (Fr.) (“Il [le juge] ne peut fonder sa décision sur les moyens de droit qu’il a relevés d’office sans avoir au préalable

Generally this obligation is absolute, and parties have no input into questions of foreign law.<sup>249</sup> However, like their German counterparts, French courts have allowed small deviations from this rule in areas of law where party autonomy looms large.<sup>250</sup> There, courts consider the position of the parties, though they are not bound by them.<sup>251</sup>

Under the French model, parties cannot bind the court to apply French law, but they may, in limited circumstances, release a judge from the obligation to apply foreign law *sua sponte*.<sup>252</sup>

4. *Italy*. As in France, Italy tasks courts with the responsibility of raising and determining foreign law. Traditionally, Italian civil procedure conceived of foreign law as fact, to be plead and proven by the parties.<sup>253</sup> The modern approach to pleading and proving foreign law is governed by the Italian Private International Law Act No. 218 of 1995.<sup>254</sup> It provides that courts must ascertain applicable foreign law on their own motion.<sup>255</sup> The parties

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invité les parties à présenter leurs observations.”) (“He [the judge] shall not base his decision on legal arguments that he has raised *sua sponte* without having first invited the parties to comment thereon.”), *available at* <http://www.legifrance.gouv.fr/>.

249. See *generally* Dolinger, *supra* note 241, at 226-31 (describing the fluctuating history in French Courts on these points).

250. Fulli-Lemaire & Rojas, *supra* note 246, at 186-88.

251. However, the parties may, by express agreement, exclude the application of foreign law and bind the judge to decide the case based on French substantive law. N.C.P.C. art. 12 cl. 3 (Fr.) (“Toutefois, il [le juge] ne peut changer la dénomination ou le fondement juridique lorsque les parties, en vertu d’un accord exprès et pour les droits dont elles ont la libre disposition, l’ont lié par les qualifications et points de droit auxquels elles entendent limiter le débat.”) (However, he [the judge] may not change the denomination or legal ground where the parties, pursuant to an express agreement and in the exercise of such rights that they may freely alienate, have bound him by legal definitions and legal arguments to which they intend to restrict debate.”), *available at* <http://www.legifrance.gouv.fr/>.

252. *Id.*

253. Dolinger, *supra* note 241, at 232.

254. Legge 31 maggio 1995, n. 218 (It.).

255. *Id.* art. 14 cl. 1 (“L’accertamento della legge straniera e compiuto d’ufficio dal giudice.”) (“[T]he judge has to ascertain the applicable foreign law *ex officio*.”), *translated in* Andrea Giardina, *Italy: Law Reforming the Italian*

are in no way obligated to plead or prove the content of foreign law.<sup>256</sup> Foreign law is thus treated largely like domestic Italian law. The judge is presumed to know its content or be capable of ascertaining it. As in Germany, the judge may consult with experts at specialized institutions and, as in Austria, the judge may also rely on information obtained through the Ministry of Justice.<sup>257</sup>

5. *Spain*. Like Italy, Spain traditionally conceived of questions of foreign law as questions of fact, to be plead and proven by the parties.<sup>258</sup> However, also like Italy, Spain switched to a system that places the principal responsibility of raising foreign law on courts and shares responsibilities for proving foreign law between the parties and the court. Questions of foreign law are now governed by the New Spanish Code of Civil Procedure of 2001.<sup>259</sup> It provides that it is no longer necessary for the parties to plead foreign law. Instead, courts will consider and apply it *ex officio*.<sup>260</sup>

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*System of Private International Law*, 35 INT'L LEGAL MATERIALS 760, 765-82 (1996). See Andrea Bonomi, *The Italian Statute on Private International Law*, 27 INT'L J. LEGAL INFO. 247, 256 (1999).

256. See Bonomi, *supra* note 255, at 256 (noting the limited role of the parties in pleading or proving foreign law).

257. L. n. 218/1995 art. 14 cl. 1 (It.) (“A tal fine questi può avvalersi, oltre che degli strumenti indicate dalle convenzioni internazionali, di informazioni acquisite per il tramite del Ministero di grazia e giustizia; può altresì interpellare esperti o istituzioni specializzate.”) (“[To ascertain foreign law], he [the judge] may use in addition to the instruments referred to in international conventions, information obtained through the Ministry of Justice, or from experts or specialized institutions.”), translated in Giardina, *supra* note 255, at 765-82; see Bonomi, *supra* note 255, at 256 (noting that Italian judges may seek assistance from the Ministry of Justice when ascertaining foreign law).

258. See CÓDIGO CIVIL, art. 12 cl. 6 (1974) (Spain); see also José Luis Iglesias et al., *Spain*, in APPLICATION OF FOREIGN LAW, *supra* note 195, at 355, 355-76.

259. LEY DE ENJUICIAMIENTO CIVIL, [L.E. CIV.] (Spain) (enacted Jan. 1, 2000) (in force Jan. 8, 2001).

260. Iglesias et al., *supra* note 258, at 356; see L.E. CIV. art. 281.2 (Spain) (“El derecho extranjero deberá ser probado en lo que respecta a su contenido y vigencia, pudiendo valerse el tribunal de cuantos medios de averiguación estime necesarios para su aplicación.”) (“Foreign law must be examined by the court with regard to content and validity. To do so, the court may use all means of inquiry it deems necessary.”).

The picture becomes more complicated when it comes to proving foreign law. Here, the parties and the courts both play a role. Foreign law must be proven, even where the parties are in agreement on the content of foreign law.<sup>261</sup> Either the parties or the court may furnish such proof. Where the parties prove foreign law, they may utilize public documents<sup>262</sup> or expert opinions.<sup>263</sup> Courts may utilize any means to ascertain the content of foreign law.<sup>264</sup> Thus, in practice, the shared burden of proving foreign law places the responsibility of offering evidence on the party favored by the foreign law.

### C. *The View from Abroad*

A comparative perspective on pleading foreign law shows that there are two basic families of approaches to divide responsibilities between the parties and the court. One tradition focuses on adversarial norms and allocates the obligations for raising and proving foreign law on the parties. Under this approach the parties determine the shape of the legal conflict. They are presumed to be the masters of their own fate. If the parties do not raise questions of foreign law then courts will not raise them *sua sponte*. Under a court-centered approach, the court bears the responsibility for finding and applying the right law to the case. The parties might make suggestions to the court, but in the end the court will make the determination of which law applies.

Both of these approaches have different strengths and weaknesses. The adversarial model emphasizes party autonomy. It gives the parties the agency to resolve their disputes on terms that they themselves contemplated. The court-centered model stresses that courts should apply the correct law to a given situation, independent of the

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261. See L.E. CIV. art. 281.2; Iglesias et al., *supra* note 258, at 355-68.

262. See L.E. CIV. art. 317 (Spain) (“Clases de documentos públicos”) (governing the use of public records).

263. See *id.* art. 355 (“Reconocimiento de personas”) (governing the use of experts).

264. See *id.* art. 281.2 (“[E]l tribunal de cuantos medios de averiguación estime necesarios para su aplicación.”) (“[T]he court may use all means of inquiry it deems necessary [to ascertain foreign law].”); Iglesias et al., *supra* note 258, at 358-60.

potentially misguided intentions of the party. Predictability and accuracy trump party autonomy under this model.

Foreign systems that used to incorporate court-driven *and* party-driven features have moved away from hybrid models towards pure models—for good reason. Adhering simultaneously to two schemes conceptually and normatively at odds with each other causes, predictably, instability and confusion. Recognizing these problems, courts abroad have eliminated or reduced mixed approaches to questions of foreign law as much as practicable.

Meanwhile, the U.S. model has been drawing, increasingly, on both of these models. Predictably, the effect is a pleading regime that is confusing and inconsistent. The rise of heightened pleading under *Twombly* and *Iqbal* has intensified pre-existing tensions in the regime for pleading and proving foreign law.

This Article thus advocates for a clear choice between the adversarial and court-centered model. The U.S. model should either return to treating foreign law as fact or fully endorse treating it as law. It could return to its adversarial common law roots that are deeply embedded in the Federal Rules of Civil Procedure and the American legal system.<sup>265</sup> Or the U.S. system could complete its slow transformation to a court-centered system initiated with the adoption of Rule 44.1 and completely endorse court-driven proceedings. This would be consistent with the recent rise of the “managerial judge,” concerns about high litigation costs, and notions of judicial efficiency and accuracy.<sup>266</sup> There are numerous international models of how either might be done consistently and efficiently. Meanwhile, being stuck in the middle, between adversarial and court-centered normative commitments, is not pragmatic; it is incoherent and unpredictable. As such, both of the conceptually pure alternatives are preferable (despite their various

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265. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001) (describing the defining adversarial features of the U.S. legal system).

266. See, e.g., E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308-10 (1986); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 4, 63-78 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386-413 (1982).

shortcomings) to a system that combines both and ends up with the worst of both worlds.

A comparative perspective offers three other solutions to the conceptual and practical problems that plague the pleading of foreign law in U.S. courts.

First, the U.S. system could abandon the ideal of trans-substantive procedures. This ideal suggests that the same procedural regime should govern the adjudications of all substantive rights.<sup>267</sup> Instead, it could endorse adversarial norms for some pleadings (e.g., patents), but follow more explicitly court-centered norms in other areas, like foreign law. This position has the virtue of not assuming that “one size fits all.”<sup>268</sup> Perhaps adversarial norms serve well in other contexts but are misplaced in the context of pleading foreign law. Abandoning trans-substantive norms would thus allow courts to develop a coherent model for pleading foreign law without unbalancing the pleading regime for other areas of law. In part, the Federal Rules of Civil Procedure already recognize this difference by placing questions of foreign law in Rule 44.1 instead of Rule 8 or 12.<sup>269</sup>

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267. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) (defining trans-substantivity); see also Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068-69 (1989) (defending the trans-substantive regime); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238 (1989) (suggesting that a revision to the Federal Rules would likely result in limiting the depth of discovery); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 41 (1994) (questioning trans-substantive procedures).

268. See Stephen N. Subrin, *The Limitations of Transsubstantive Procedures: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 377 (2010).

269. However, this approach has an important limitation. Courts are often willing to let adversarial norms govern cases where the underlying law is either difficult to research, in a different language, and where little English-language research is available. See *supra* notes 143-44 and accompanying text. In contrast, they are more confident with court-centered norms where the foreign law is easily available, researched, and similar to U.S. law. Abandoning trans-substantive procedures does not pick up on these distinctions.

Second, U.S. courts could follow the example of Germany and Italy, and allow for certification of questions of foreign law to a national institute. For example, Germany has a network of Max Planck Institutes that specialize in different areas of comparative law.<sup>270</sup> These institutes can provide information to courts that are timely, context specific, well-researched, and often beyond the linguistic capacity of the judge.<sup>271</sup> They are non-adversarial in nature.<sup>272</sup> As such, they are well-suited for a court-driven approach to questions of foreign law.

Third, the U.S. system could certify questions to a foreign court for an advisory opinion.<sup>273</sup> This approach has the benefit of being recognizable to U.S. courts. Many courts already allow questions of state law arising in cases pending in another jurisdiction (often federal courts sitting in diversity) to be certified to the state's highest court for resolution.<sup>274</sup> In principle, this system could be made

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270. For example, the Institute in Hamburg specializes in foreign private and private international law. MAX PLANCK INST. FOR COMPARATIVE AND INT'L PRIVATE LAW, <http://www.mpipriv.de/ww/en/pub/news.cfm> (last visited Nov. 12, 2011). Others include: Munich in foreign and international patent, copyright, and competition law; Heidelberg in public law; Freiburg in criminal law; Frankfurt in legal history. *Max Planck Institutes*, MAX-PLANCK-GESELLSCHAFT, <http://www.mpg.de/institutes> (last visited Nov. 12, 2011) (providing a list of all institutes).

271. See Bach & Gruber, *supra* note 222, at 106-07 ("Most [German and Austrian] courts prefer an expert who is not only familiar with the foreign law, but also the Austrian or German law or who at least speaks German. In this case, the danger of misunderstandings—especially that of a misinterpretation of the questions asked by the court—is limited. Usually both countries' courts commission specialized law professors of Austrian or German law schools with the preparation of the expert opinion, with German courts often preferring the Max Planck Institute for Comparative and International Private Law in Hamburg." (footnotes omitted)).

272. The Max Planck Institutes are primarily focused on research. *Short Portrait*, MAX-PLANCK-GESELLSCHAFT, <http://www.mpg.de/183251/portrait> (last visited Nov. 12, 2011).

273. This would not resolve the question of what law to apply, but once that question is settled, it could contribute to a coherent court-centered approach to resolving the content of the foreign law.

274. See, e.g., N.Y. CONST. art. 6 § 3(b)(9) ("The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the

compatible with an adversarial system or a court-centered system (depending on who may move for certification and how such a certification is subsequently handled). However, in practice certification will likely give greater control to courts, at home and abroad.

All of these solutions generate reliable information for courts and make litigation more predictable. These solutions also avoid some or all of the conceptual and practical contradictions that the current hybrid model in the U.S. suffers. While none is perfect, each offers tools to overcome the tensions built deep into the current model for pleading and proving foreign law. A comparative perspective illustrates these tensions, arising from an adherence to conflicting underlying norms. Only by choosing between court-centered and adversarial norms and procedures can the U.S. regime shed the difficulties that currently beset invocations of foreign law, a task made all the more urgent by the recent rise of plausibility pleading.

#### CONCLUSION

The U.S. regime for pleading and proving foreign law relies on adversarial and court-centered norms. It borrows methods and tools from both and it places burdens on parties and courts based on both norms.

In practice, this gives tremendous discretion to judges. It also means that results are unpredictable, often inconsistent, and that the process of litigation is expensive and cumbersome. More fundamentally, the attempt to borrow tools from both adversarial and court-centered systems is conceptually incoherent. The current regime is a patchwork of rules and guidelines without overarching and organizing principles.

The rise of the plausibility pleading regime in recent years has highlighted these practical difficulties and conceptual tensions. It has given us occasion to re-examine

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certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.”); Local Rules of the Second Circuit, R. 27.2 (“If state law permits, the court may certify a question of state law to that state’s highest court. When the court certifies a question, the court retains jurisdiction pending the state court’s response to the certified question.”), *available at* [http://www.ca2.uscourts.gov/clerk/Rules/Rules\\_home.htm](http://www.ca2.uscourts.gov/clerk/Rules/Rules_home.htm).

the means of pleading and proving foreign law in U.S. courts. As Rule 44.1 illustrates, procedures that do not meaningfully constrain litigants and judges can be dangerous. The immense flexibility such rules provide is a liability, not an asset.