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Philip D. Stacey

IIT Chicago-Kent College of Law

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RULE 44.1, *BODUM USA V. LA CAFETIERE*, AND THE CHALLENGE OF DETERMINING FOREIGN LAW

PHILIP D. STACEY*

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INTRODUCTION

As the forces of globalization push people, capital, and ideas across national borders, the actions of people and organizations in one country increasingly affect people outside that country.¹ Disputes are inevitable and litigation involving parties from different countries has proliferated since World War II.² More than ever, domestic courts are asked to resolve some of these international disputes, which often

* J.D. candidate, May 2011, Chicago-Kent College of Law, Illinois Institute of Technology; B.B.A., Management and Organizations, 2007, University of Iowa.

¹ See *National Boundaries Become Less Important in a Global Age*, CENTER ON LAW & GLOBALIZATION (Feb. 16, 2011, 12:40 PM), http://clg.portalxm.com/library/keytext.cfm?keytext_id=40 (noting that the massive regional and global flows of people, capital, culture, and information are blurring the distinction between domestic and foreign law).

² See 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, 616 (1967) (discussing the proliferation of international litigation after World War II).

requires them to analyze and apply foreign law.³ For example, domestic courts frequently confront foreign law issues when deciding a case involving the Foreign Corrupt Practices Act of 1977 (FCPA),⁴ interpreting a commercial contract governed by the law of a foreign country,⁵ or judging the validity of a foreign money judgment being enforced in the United States.⁶

Historically, domestic courts took a “fact approach” to determining foreign law issues, meaning that courts treated foreign law issues as raising a question of fact.⁷ As Professor Miller stated in his famous treatise on foreign law, if the fact approach “represented only a perversion of nomenclature, it would be of little consequence.”⁸ However, treating foreign law as a question of fact had a number of questionable practical consequences.⁹ It forced the party relying on foreign law to raise the issue in the pleadings or risk dismissal based on motions presented under local procedural rules.¹⁰ It required proof through evidence, a process that was complicated by the local

³ The issue of domestic courts deciding issues of foreign law is completely different from the much-publicized debate about the use of foreign law to interpret the United States Constitution, a topic not addressed herein.

⁴ For example, a person charged with violating the anti-bribery laws of the FCPA can claim as a defense that the payment was legal under the written laws of the foreign country. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-2(c) (2006) (discussing affirmative defenses).

⁵ *See, e.g.,* *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010) (interpreting stock purchase agreement governed by French law).

⁶ *See, e.g.,* *Society of Llyod’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000) (comparing the English legal system to the American legal system).

⁷ *See* Miller, *supra* note 2 at 617 (“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 by the party whose cause of action or defense depends upon alien law.”).

⁸ *Id.* at 620.

⁹ 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2441 (3d ed. 2010) (summarizing the undesirable practical consequences that resulted from regarding foreign law as raising a question of fact).

¹⁰ *See id.*

evidence rules.¹¹ It implied that juries and not the court should interpret the meaning of the foreign law,¹² forcing laypersons to perform complex legal analysis even though most had no legal background. Also, in theory, it required appellate courts to engage in a limited review of foreign law issues since questions of fact are reviewed under deferential standards such as the preponderance of the evidence standard.¹³ This meant that appellate courts had less discretion to overturn lower court decisions that misinterpreted the foreign law.¹⁴

In reality, many states never fully embraced the common law approach to determining foreign law,¹⁵ particularly the notion that the jury was the appropriate body to determine foreign law. For example, in 1936 the National Conference on Uniform State Laws and the American Bar Association approved the Uniform Judicial Notice of Foreign Law Act, which contained a comment section that stated “foreign law [is] determinable by the judge, not the jury, thus changing the absurd old common law.”¹⁶ Other states passed statutes that modified the traditional common law approach, but there was no uniform or consistent way that courts handled foreign law issues and most adopted some variation of the fact approach.¹⁷ Those who have reviewed the history of foreign law issues in domestic court lament the tremendous inconsistency in approaches and “tenacious retention of archaic dogma . . . that had the sole virtue of being harmonious with the fact characterization of foreign law.”¹⁸ Professor Miller, in particular, has called the fact approach a relic of the English common

¹¹ *See id.*

¹² *Id.*

¹³ *See* WRIGHT & MILLER, *supra* note 9 at § 2446.

¹⁴ *See id.* (listing examples of appellate cases that set aside the trial court’s decision only if it were clearly erroneous).

¹⁵ *See* Miller, *supra* note 2 at 624 (reviewing statutes passed in the 1800s that modified the common law view of foreign law).

¹⁶ *Id.* at 624–26 (discussing the Uniform Judicial Notice of Foreign Law Act and other legislative modification of the common law approach).

¹⁷ *Id.* at 625.

¹⁸ *Id.* at 624.

law system that needlessly divorced the procedures for determining domestic law from the procedures for determining foreign law.¹⁹

Federal Rule of Civil Procedure 44.1 (“Rule 44.1”) was designed to cure the problems associated with the fact approach by giving judges a more flexible framework for determining foreign law issues.²⁰ Adopted in 1966, Rule 44.1 sounded the “death-knell”²¹ for the fact approach by making clear that foreign law determinations “must be treated as a ruling on a question of law.”²² Analytically, defining foreign law as a question of law had the reciprocal consequences of treating foreign law as a question of fact. Foreign law no longer had to be raised in the pleadings²³; after Rule 44.1, issues involving foreign law “should be argued and briefed like domestic law.”²⁴ Many courts had questioned the traditional requirement of pleading foreign law after the adoption of Federal Rule 8(a)(2), which was designed to liberalize pleading standards,²⁵ but characterizing foreign law as an issue of fact ended the disagreement.²⁶ Second, characterizing foreign law as law means that the parties need not “prove” the law by presenting evidence to the judge.²⁷ The judge may perform independent research on what the law is and give the materials unearthed by that research whatever probative value he or she thinks appropriate, regardless of whether the materials would be

¹⁹ *See id.* at 748 (“This classification, which originally was employed by the English courts for purposes that in retrospect appear to have little relevance to existing conditions, permeated the entire process for proving alien law and obfuscated the functional similarity between domestic and foreign-law issues.”).

²⁰ *See* Fed. R. Civ. P. 44.1.

²¹ *See* Miller, *supra* note 2 at 615 (dubbing the adoption of Rule 44.1 the “death knell” for the fact approach to foreign law).

²² *See* Fed. R. Civ. P. 44.1.

²³ *See* WRIGHT & MILLER, *supra* note 9.

²⁴ *Eschelbach v. CCF Charterhouse/Credit Commercial de France*, No. 01 Civ. 1778(FM), 2006 WL 27094, *12 (S.D.N.Y. Jan. 4, 2006) (quoting *Anglo Am. Ins. Group, P.L.C. v. CalFed, Inc.*, 899 F. Supp. 1070, 1076 (S.D.N.Y. 1995)).

²⁵ *See* Fed. R. Civ. P. 8.

²⁶ *See* WRIGHT & MILLER, *supra* note 9.

²⁷ *See id.*

admissible under the applicable rules of evidence.²⁸ Third, the court, not a jury, decides questions of law.²⁹ Though Rule 44.1 does not explicitly state that the judge should decide foreign law questions—the enabling act for the federal rules prevents it from allocating functions between the court and jury—there is no doubt that the judge should decide foreign law questions.³⁰ Fourth, characterizing foreign law as a question of law ended any question as to the scope of appellate review of foreign law decisions. Before Rule 44.1, most courts fully reviewed the lower court’s determination of foreign law, but others set aside the lower court decision “only if it was clearly erroneous.”³¹ Rule 44.1 ended the split by stating that the trial “court’s determination must be treated as a ruling on the question of law.”³² Therefore, lower court determinations of foreign law are now reviewed *de novo*, as are any other questions of law.³³

However, Rule 44.1 did not sound the death knell for the fact approach entirely because judges cannot determine foreign law issues the same way they determine domestic law issues. The drafters of Rule 44.1 recognized that determining foreign law requires procedures not typically authorized in domestic law cases.³⁴ The most prominent example is Rule 44.1’s approval of expert testimony,³⁵ a fact-based procedure that is clearly in tension with the Rule’s declaration that foreign law issues are questions of law, since domestic law issues are

²⁸ See Fed. R. Civ. P. 44.1.

²⁹ See WRIGHT & MILLER, *supra* note 9 at § 2445.

³⁰ See Fed. R. Civ. P. 44.1. advisory committee’s note (citing treatises that argue foreign law issues should be decided by the court and listing cases that have reached that same conclusion even before Rule 44.1).

³¹ *Id.* at § 2446.

³² See Fed. R. Civ. P. 44.1.

³³ See, e.g., *United States v. Schultz*, 333 F.3d 393, 401 (2d Cir. 2003) (“[W]e review the district court’s findings regarding [the foreign law] *de novo*.”).

³⁴ See Fed. R. Civ. P. 44.1 (authorizing both evidentiary type procedures and independent research of the foreign law by the judge).

³⁵ *Id.*

not determined by reference to expert opinions.³⁶ Regardless, the use of expert opinions remains one of the most common³⁷—and controversial³⁸—ways to “prove” foreign law. The end product is an analytically inconsistent, but pragmatic approach to determining foreign law. (After all, judges are not expected to be comparative law scholars). Thus, even after Rule 44.1, foreign law sits in a sort of legal “Neverland”—not purely an issue of law nor purely an issue of fact.

This Note examines a 2010 Seventh Circuit Court of Appeals case that debates the propriety of using foreign law experts after Rule 44.1, perhaps due to the fact that Rule 44.1 approves both expert testimony (a fact-based procedure) and independent research by the judge (a procedure consistent with the way domestic law is determined).³⁹ In *Bodum USA Inc. v. La Cafetiere, Inc.*, the Seventh Circuit held that the final version of a contract governed by French law permitted the defendant to sell a product design anywhere except France.⁴⁰ Although the panel of judges agreed on the outcome of the case, they disagreed over what sources judges should use to determine foreign law.⁴¹ Specifically, Judge Easterbrook and Judge Posner wrote that judges should rely on official translations of foreign law or scholarly treatises about foreign law, if available.⁴² They criticized the use of foreign law experts, primarily because experts are paid for their analysis and strategically selected by the parties to help their case.⁴³ However, in

³⁶ See Fed. R. Evid. 702 (permitting expert testimony when it will assist the trier of fact to determine a *fact* in issue).

³⁷ See WRIGHT & MILLER, *supra* note 9 at § 2446 (listing numerous cases where experts testified as to the scope, meaning, or application of foreign law).

³⁸ See 2 MCCORMICK, EVIDENCE § 335 (Strong, ed., 6th ed. 2006) (“[Expert testimony] seems to maximize the expense and delay and hardly seems best calculated to ensure a correct decisions by our judges on questions of foreign law.”).

³⁹ See Fed. R. Civ. P. 44.1.

⁴⁰ *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 631 (7th Cir. 2010).

⁴¹ See *infra* Part II (discussing the differing views of all three judges in *Bodum* concerning the use of experts to prove foreign law).

⁴² *Bodum USA*, 621 F.3d at 628–32 (Posner, J., concurring).

⁴³ *Id.* at 628 (“Trying to establish foreign law through experts’ declarations . . . adds an adversary’s spin, which the court then must discount”).

her concurring opinion, Judge Wood wrote that exercises in comparative law are notoriously difficult and that simply reviewing an official translation of a law or treatise may not be enough to apply foreign law accurately.⁴⁴

Bodum highlights the theoretical and practical challenges domestic judges face when interpreting foreign law. Among the most important are (1) language barriers, (2) the judge's unfamiliarity with the foreign legal system, and (3) the reality that the law does not always function as it is written due to unofficial and underground elements of legal systems.⁴⁵ Once these challenges are understood, it is easy to see why Rule 44.1 sacrifices analytical consistency to improve the chances the judge determines foreign law accurately.

The intriguing question, and the focus of this Note, is *how* federal courts overcome these challenges when analyzing foreign law issues using the blueprint provided in Rule 44.1. Part I discusses the text and purpose of Rule 44.1. Part II reviews the Seventh Circuit's analysis of the foreign law issue in *Bodum*, focusing on its disapproval of the use of foreign law experts and approval of written sources of foreign law. Part III argues that the *Bodum* methodology, which instructs the trial judge to determine the foreign law by researching written sources of the foreign law and to disregard the testimony of foreign law experts in the great majority of cases, does not properly account for the challenges inherent in determining foreign law and reads out some of the most important parts of Rule 44.1.

II. BACKGROUND AND CONTEXT – RULE 44.1

Though this Note focuses on how domestic courts deal with foreign law issues today, American courts have always confronted foreign law issues. America inherited the English common law and international treaties signed by the United States have often incorporated international or foreign law. In its early years, the

⁴⁴ *Id.* at 639 (Wood, J. concurring).

⁴⁵ *See infra* Part II (analyzing the challenges faced by domestic judges when deciding foreign law issues).

Supreme Court cited English cases and statutes as non-binding but persuasive,⁴⁶ took judicial notice of laws of territories acquired by the United States that were previously subject to the laws of another country,⁴⁷ interpreted land grants under French law,⁴⁸ and acknowledged the role of experts in proving “unwritten” foreign law.⁴⁹ However, as the world has become more globalized, national boundaries are becoming less important,⁵⁰ resulting in a rapid increase in the number of foreign law cases in domestic courts.⁵¹ Just as people are no longer surprised to see German cars on American roads, or Chinese household goods on Wal-Mart shelves, people should no longer be surprised to see cases that turn on interpretations of German or Chinese law being decided by American courts.

Rule 44.1, adopted in 1966, sets out the basic parameters for determining these foreign law cases in federal court. It provides:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal

⁴⁶ See *Smith v. Alabama*, 124 U.S. 465, 478 (1888) (“The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law.”); *United States v. Wong Kim Ark*, 169 U.S. 649 (relying on English common law principles and statutes to determine the meaning of the phrase “citizen of the United States” in the Constitution).

⁴⁷ *United States v. Perot*, 98 U.S. 428 (1878) (announcing that the court would take judicial notice of Mexican law in force in Texas before Texas became a U.S. state).

⁴⁸ See *Strother v. Lucas*, 31 U.S. 763 (1832).

⁴⁹ See *Ennis v. Smith*, 55 U.S. 400, 401 (1852) (“Unwritten foreign laws, must be proved by experts.”).

⁵⁰ See *National Boundaries Become Less Important in a Global Age*, *supra* note 1 (discussing how territorial boundaries of states are becoming less important in the globalization era).

⁵¹ See *Miller*, *supra* note 2 at 616 (noting that international litigation has increased after World War II).

Rules of Evidence. The court's determination must be treated as a ruling on a question of law.⁵²

A. *The Notice Requirement*

Prior to Rule 44.1, because foreign law was characterized as a question of fact, the party relying on foreign law had to raise that fact in the pleadings.⁵³ Insufficiently pleading the foreign law issue typically resulted in the court dismissing the complaint with leave to plead.⁵⁴ Rule 44.1 simplified the procedure for raising foreign law by simply requiring the party relying on foreign law to give reasonable written notice that it intends to do so in “a pleading *or other writing*.”⁵⁵ The purpose of such notice is to prevent “unfair surprise” that a case involves foreign law and give the opposing side (and the court) time to research the foreign law, which “often will not be as familiar to the parties” as domestic law.⁵⁶ There can be severe consequences when a party does not provide reasonable notice. For example, in *In re Magnetic Audiotape Antitrust Litigation*, the appellate court refused to grant a defendant’s motion to dismiss based on its foreign law defense because the defendant could not provide a reasonable explanation for its failure to assert the defense in the district court case.⁵⁷ Similarly, in other cases where the party does not give reasonable notice under Rule 44.1, the court has assumed the party waived its right to apply foreign law in the case or presumed that the foreign law is the same as the law of the forum state.⁵⁸

⁵² Fed. R. Civ. P. 44.1.

⁵³ *See* *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 444 (1889) (“The law of Great Britain since the declaration of independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved.”).

⁵⁴ *See* *Miller*, *supra* note 2 at 639.

⁵⁵ *See* Fed. R. Civ. P. 44.1 (emphasis added).

⁵⁶ *See Id.* advisory committee’s note.

⁵⁷ *See* 334 F.3d 204, 209 (2d Cir. 2003) (per curiam).

⁵⁸ *See, e.g.,* *Cary v. Bahama Cruise Lines*, 864 F.2d 201, 205 (1st Cir. 1988).

B. Materials / Sources of Foreign Law

Although Rule 44.1 permits the judge to research the foreign law issue on his or her own,⁵⁹ the use of foreign law experts remains prevalent in foreign law cases.⁶⁰ The weight that courts will afford the foreign law material presented by the parties, including testimony from experts, often turns on the individual facts of the case. Nevertheless, a few general patterns emerge. First, in many cases, judges conduct independent research if the parties inadequately or unfairly present the foreign law,⁶¹ which is not surprising given the advisory comments to Rule 44.1 state that courts should do so under those circumstances.⁶² For example, in *Carlisle Ventures, Inc. v. Banco Espanol de Creditor*, the court discounted the affidavit of a well-known Spanish attorney and former law professor because his interpretation of Spanish law was not supported by case law or other legal authority.⁶³

In particular, the Seventh Circuit has pushed for “both trial courts and appellate courts . . . to research and analyze foreign law independently.”⁶⁴ *Bodum* epitomizes that approach; the judges independently cited a number of treatises and primary source materials on French contract law instead of relying on the incomplete foreign law materials submitted by the parties.⁶⁵

⁵⁹ See Fed. R. Civ. P. 44.1.

⁶⁰ See WRIGHT & MILLER, *supra* note 9 at § 2446 (listing recent cases where experts testified as to the scope, meaning, or application of foreign law).

⁶¹ See *id.*

⁶² See Fed. R. Civ. P. 44.1. advisory committee’s note.

⁶³ 176 F.3d 601, 604 (2d Cir. 1999) (“The Spanish law evidence cited by the district court—the affidavit of Bernardo Cremades, a prominent Spanish attorney and former law professor—provides only very limited support for this measure of damages, as Cremades’ declaration cites no cases or legal authority to support his construction of [Spanish Law].”).

⁶⁴ See *United States v. First Nat’l Bank of Chi.*, 699 F.2d 341, 344 (7th Cir. 1983).

⁶⁵ See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010).

Second, recent Seventh Circuit decisions take a more critical view of expert testimony when compared to cases decided by other circuits. *Sunstar, Inc. v. Alberto-Culver Co.* offered the most scathing criticism of foreign law experts.⁶⁶ *Sunstar* involved an exclusive-use license agreement for “Alberto VO5” trademark registrations for shampoo and skin-care products in Japan.⁶⁷ The Japanese buyer-licensee sought a declaration that it could use a variation of the VO5 trademark, called a *senyoshiyoken* in Japanese, under the license agreement.⁶⁸ The American seller-licensor sued the buyer-licensee for damages and also sought an injunction rescinding the license agreement and a return of the VO5 trademarks, which were being held in trust until the license agreement expired.⁶⁹ Although the license agreement stipulated that Illinois law governed all disputes arising under the agreement, the court analyzed Japanese law to ascertain the meaning of the term *senyoshiyoken*.⁷⁰ Judge Posner, the author of the *Sunstar* opinion, acknowledged that expert testimony plays a role in most cases involving foreign law, but urged judges to consider “superior sources” to research the foreign law such as treatises, cases, and law review articles.⁷¹ He asserted that because “judges are experts on law,” they could use primary source materials to determine the foreign law, which he felt are more objective than testimony from paid experts, which suffer from bias.⁷² Judge Posner also pointed out that federal courts do not allow expert testimony when they apply state law (considered “foreign” law because it is not the law of the forum), even if Louisiana state law is at issue, which developed out of the French

⁶⁶ See 586 F.3d 487, 495–96 (7th Cir. 2009).

⁶⁷ *Id.* at 492–93.

⁶⁸ *Id.* at 494.

⁶⁹ *Id.* at 495.

⁷⁰ *Id.* at 497–98.

⁷¹ *Id.* at 496.

⁷² *Id.* at 495–96 (“But the lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and 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.”).

Civil Code.⁷³ Although cases in other circuits independently research foreign law when the parties do not adequately present the foreign law,⁷⁴ very few express Judge Posner's confidence in domestic judges' ability to determine foreign law⁷⁵ or advocate such a restricted use of expert testimony.⁷⁶

⁷³ *Id.* at 495 (“When a court in one U.S. state applies the law of another state, or when a federal court applies state law, the court does not permit expert testimony on the meaning of the ‘foreign’ law, even if it is the law of Louisiana, which is based to a significant degree on the French Civil Code.”).

⁷⁴ *See, e.g.,* *Jinro Am., Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 1000 (9th Cir. 2001) (holding that district court did not error by not considering declaration of Korean legal expert when drafting jury instruction on Korean law); *Carlisle Ventures, Inc. v. Banco Espanol de Creditor*, 176 F.3d. 601, 604 (2d Cir. 1999) (independently researching Spanish law); *Curley v. AMR Corp.*, 153 F.3d. 5, 13 (2d Cir. 1998) (implying that the trial court should have researched Mexican law when the presentations by the parties were insufficient).

⁷⁵ *Compare Sunstar* 586 F.3d at 496 (claiming that judges can accurately decide foreign law issues when published legal materials are available because “judges are experts on law”), *with* *In re “Agent Orange” Product Liability Litigation*, 373 F.Supp.2d 7, 18 (E.D.N.Y. 2005) (“The lack of judicial expertise and the complexity of sources in these two fields—foreign and international law—often make it desirable for the court to seek assistance.”).

⁷⁶ *Compare* *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 632 (7th Cir. 2010) (“[T]he court doesn't *have* to rely on testimony; and in only a few cases, I believe, is it justified in doing so.”), *with* *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venez.*, 575 F.3d 491 (5th Cir. 2009) (relying on English translations of statutes and affidavit from expert explaining the content of the foreign law); *Jinro Am.*, 266 F.3d at 1000 (“[A]lthough pursuant to Rule 44.1, courts may ascertain foreign law through numerous means, expert testimony accompanied by extracts from foreign legal materials has been and will likely continue to be the basic mode of proving foreign law.”) (*quoting* *Universe Sales Co. v. Silver Castle, Ltd.*, 182 F.3d 1036 (9th Cir. 1999)); *Curley v. AMR Corp.*, 153 F.3d. 5, 13 (2d Cir 1998) (“We urge district courts [in the Second Circuit] to invoke the flexible provisions of Rule 44.1 to determine issues relating to the law of foreign nations.”).

C. Ruling as a Question of Law

The last sentence of Rule 44.1 provides that determinations of foreign law are considered questions of law.⁷⁷ Considering foreign law as a question of law unquestionably cured some of the most serious defects of the fact approach. For example, some cases before Rule 44.1 viewed the trial court's determination of foreign law "as a finding of fact that could be set aside only if it were clearly erroneous."⁷⁸ Such cases have no precedential value after Rule 44.1 because the trial court's determination of foreign law is now reviewed *de novo*, like any question of domestic law.⁷⁹ Owing no deference to the trial court's conclusions, appellate courts may conduct their own research, and apply the foreign law to the facts in record.⁸⁰

Treating foreign law as a question of law also implies that the judge, not the jury, decides the meaning of foreign law. Rule 44.1 does not specifically state that judges should determine foreign law issues because the enabling act for the Federal Rules prohibits the rules from allocating functions between the court and jury. However, the Advisory Comments are more explicit, stating, "it has been long thought . . . that the jury is not the appropriate body to determine issues of foreign law."⁸¹ In addition, the advisory comments note that pre-Rule 44.1 cases concluded that judges should determine foreign law.⁸²

⁷⁷ See Fed. R. Civ. P. 44.1 ("The court's determination [of the foreign law issue] must be treated as a ruling on a question of law.").

⁷⁸ WRIGHT & MILLER, *supra* note 9 at § 2446.

⁷⁹ See *United States v. Schultz*, 333 F.3d 393, 401 (2d Cir. 2003) (citing both Federal Rule 44.1 and the parallel rule for foreign issues in criminal law cases for the proposition that the lower court's findings are reviewed *de novo*).

⁸⁰ See, e.g., *Aon Fin. Prod., Inc. v. Société Générale*, 476 F.3d 90, 101 (2d Cir. 2007) ("[A]ppellate courts, as well as trial courts, may find and apply foreign law." (quoting *Curley*, 153 F.3d at 12); *Kalmich v. Bruno*, 732 F.2d 1294, 1300-01 (7th Cir. 1984) (appellate courts may use their own research and analysis to resolve the foreign law issue).

⁸¹ See Fed. R. Civ. P. 44.1. advisory committee's note.

⁸² *Id.*

III. BODUM USA V. LA CAFETIERE: THE SEVENTH CIRCUIT CASE

A. *Background and Procedural History*

The *Bodum* case involved a dispute over the interpretation of a stock purchase agreement (“SPA”) governed by French law.⁸³ Pursuant to the SPA, Bodum USA, Inc. (“Buyer”) acquired all the stock of Societe des Anciens Etablissements Martin S.A. (“Seller”), a European company that distributed a popular style of French-press coffee maker.⁸⁴ Restrictive covenants in the SPA expressly disallowed the Seller (or its related companies and shareholders) from using the “Melior” and “Chambord” trademarks associated with the design of the coffee maker but expressly allowed the Seller to distribute products similar to the coffee maker outside of France.⁸⁵ Specifically, the SPA language that was issue, translated into English from French, stated:

In consideration of the compensation paid to Stockholder for the stocks of [Seller,] Stockholder guarantees, limited to the agreed compensation, see Article 2, that he shall not – for a period of four (4) years –be engaged directly or indirectly in any commercial business related to manufacturing or distributing [Seller’s] products. . . .

Notwithstanding Article 4 [Buyer] agrees that Stockholder through [an entity related to the Seller] . . . can manufacture and distribute any products similar to [Seller’s] products outside of France. It is expressly understood that . . . [the affiliate] is not entitled, directly, or indirectly, to any such activity in France, and that Household . . . furthermore is not entitled, directly or indirectly, globally to manufacture and / or distribute coffeepots under the trade marks and / or brand

⁸³ See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th. Cir. 2010).

⁸⁴ *Id.* at 625.

⁸⁵ *Id.* at 627–28.

names of “Melior” and “Chambord,” held by [Seller]. Stockholder agrees that [Seller] . . . is not entitled to use for a period of four (4) years the importers, distributors, and agents which [Seller] uses and/or has used the last year. Any violation of these obligations will constitute a breach of Stockholder’s obligation according to Article 4.⁸⁶

Fifteen years after the SPA was executed, the Buyer filed a lawsuit in Denmark against the Danish affiliate of the Seller.⁸⁷ The Buyer alleged that the Danish affiliate violated the SPA by selling products embodying the Chambord design in Denmark.⁸⁸ The Danish court ruled against the Buyer on the ground that the SPA expressly authorized the Danish company to distribute products similar to the Chambord in Denmark.⁸⁹ The Buyer appealed, but the Western Danish High Court affirmed the lower court’s decision.⁹⁰

While the Danish lawsuit was pending, the Buyer had also sued La Cafetiere, Inc. (another entity related to the Seller) in federal district court in Chicago.⁹¹ The Buyer again claimed that an affiliate of the Seller was using the Chambord trade dress without authorization.⁹² The Buyer lost in Chicago as well: The district court granted La Cafetiere’s Motion for Summary Judgment, finding that the SPA authorized La Cafetiere to sell products similar to the Chambord design in the U.S.⁹³

⁸⁶ *Id.*

⁸⁷ Brief of Defendant-Appellee at 2 *Bodum USA*, 621 F.3d 624 (No. 09-1892). 2009 WL 4831860.

⁸⁸ *Bodum USA*, 621 F. 3d at 630.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *See Bodum USA, Inc. v. La Cafetiere, Inc.*, No. 07 C 6302, 2009 WL 804050 at *1 (N.D. Ill. Mar. 24, 2009).

⁹² *Id.*

⁹³ *See id.* at *8 (holding that the SPA reflected an intent to permit La Cafetiere to sell products similar to the Chambord in the United States).

B. The Decision

The Buyer appealed the case to the Seventh Circuit. It asserted that the district court improperly interpreted the SPA under French law because Article 1156 of the French Civil Code requires a court to “seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms [in the contract].”⁹⁴ The owner of the Buyer submitted an affidavit stating that he thought the SPA restricted the Seller to selling products similar to the Chambord in other markets,⁹⁵ despite the seemingly unambiguous language in the SPA that restricted the Seller from doing so in France only. That meant, according to the Buyer, a trial was necessary to determine the parties’ intent and the district court erred by granting the motion to dismiss.⁹⁶ The Buyer buttressed its assertion with the opinion of a renowned law professor at Universite Pantheon-Assas Paris II. Likewise, La Cafetiere hired experts to support its contrary view that the SPA unambiguously allowed the U.S. sale of French-press products that looked similar to the Chambord design, provided that it did not use the “Chambord” trademark.

The three-judge panel—Judge Easterbrook, Judge Posner, and Judge Wood—agreed with La Cafetiere and affirmed the judgment of the district court.⁹⁷ But the holding of *Bodum* is not what makes the case important. The case is noteworthy because all three judges disagreed on how courts should evaluate expert opinions submitted by the parties to prove foreign law.

Judge Easterbrook, who wrote the majority opinion, declared that “[b]ecause objective, English-language descriptions of French law are readily available, we prefer them to the [experts’] declarations.”⁹⁸ He opined “it is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its

⁹⁴ *Bodum USA*, 621 F.3d at 628 (citing CODE CIVIL [C. CIV.] art. 1156 (Fr.)).

⁹⁵ *Bodum USA*, 621 F.3d at 628.

⁹⁶ *Id.*

⁹⁷ *Id.* at 631.

⁹⁸ *Id.* at 629.

origins in the French Civil Code.”⁹⁹ The text of Rule 44.1, wrote Judge Easterbrook, “does not compel” judges to consider expert testimony.¹⁰⁰ Rather, judges can base their decision on any material or source they find probative and even disregard the material presented by the parties if it is presented in a partisan fashion or in insufficient detail.¹⁰¹

Judge Easterbrook opined that English translations of foreign law and scholarly treatises about foreign law were more reliable than expert opinions, which must be discounted because experts tend to slant their opinion to favor the party that pays them.¹⁰² However, Judge Easterbrook did acknowledge that expert opinions serve a useful purpose if no accepted translations of the foreign law are available.¹⁰³

Judge Posner wrote separately to further criticize

the common and authorized but unsound judicial practice . . . of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses, usually lawyers or law professors, often from the country in question. . . . [T]he court doesn’t have to rely on testimony; and in only a few cases, I believe, is it justified in doing so.¹⁰⁴

He criticized the parties for not providing the court with adequate translations of the relevant French laws¹⁰⁵ and also faulted judges for

⁹⁹ *Id.* at 628.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 629 (“Trying to establish foreign law through experts’ declarations not only is expensive . . . but also adds an adversary’s spin, which the court then must discount.”).

¹⁰³ *Id.* at 628 (agreeing that expert testimony may be helpful when the judge must interpret a statute or decision that is not available in English or covered by English-language secondary sources).

¹⁰⁴ *Id.* at 632.

¹⁰⁵ *See id.* (“The only evidence of the meaning of French law that was presented to the district court or is found in the appellate record is an English

relying “on paid witnesses to spoon feed them foreign law that can be found well explained in English-language treatises and articles.”¹⁰⁶ In Judge Posner’s opinion, relying on experts “is excusable only 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.”¹⁰⁷

Although Judge Wood agreed with the majority’s interpretation of the SPA, she disagreed with her colleagues’ discussion of Rule 44.1. She pointed out that Rule 44.1 does not create a “hierarchy for sources of foreign law, and [was] unpersuaded by [her] colleagues’ assertion that expert testimony is categorically inferior to published, English-language materials.”¹⁰⁸ Judge Wood noted that English translations of the foreign law may not be available or may even be misleading, and that relying on such materials could cause the judge to assume the foreign law is the same as U.S. law when it is not.¹⁰⁹ She reasoned that testimony from respected foreign law experts would help the U.S. judge understand the full context of the foreign law at issue or avoid being misled by “*faux amis*”—foreign words or phrases that look deceptively similar to English words but have completely different meanings.¹¹⁰ The following passage best represents her view of using expert testimony in foreign law cases:

Rule 44.1 permits the court to consider ‘any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.’ The written sources cited by both of my colleagues throw useful light on the problem before us in this case, and both were well within their rights to conduct independent research and

translation of brief excerpts from the French Civil Code and affidavits by three French law professors.”).

¹⁰⁶ See *id.* (Posner, J. concurring).

¹⁰⁷ *Id.* at 633-34.

¹⁰⁸ *Id.* at 638.

¹⁰⁹ *Id.* at 639.

¹¹⁰ *Id.* at 638-39.

to rely on those sources. There is no need, however, to disparage oral testimony from experts in the foreign law. That kind of testimony has been used by responsible lawyers for years, and there will be many instances in which it is adequate by itself or it provides a helpful gloss on the literature. The tried and true methods set forth in FED. R. EVID. 702 for testing the depth of the witness's expertise, the facts and other relevant information on which the witness has relied, and the quality of the witness's application of those principles to the problem at hand, suffice to protect the court against self-serving experts in foreign law, just as they suffice to protect the process for any other kind of expert.¹¹¹

The court's disagreement over the use of experts to prove foreign law should not be dismissed summarily because it is *dicta*. The divergent views of three influential appellate court judges on how domestic courts should determine foreign law will influence the way lower courts in the circuit determine foreign law issues. Unfortunately, the methodology advanced by Judges Easterbrook and Posner in *Bodum* is flawed. Those judges failed to consider the unique challenges domestic judges face when interpreting foreign law, but the next Part of this Article does just that.

IV. CRITIQUE OF THE BODUM METHODOLOGY FOR ANALYZING FOREIGN LAW ISSUES

Though Judge Easterbrook and Judge Posner did nothing wrong by performing independent research and discounting the expert testimony in *Bodum*, they were wrong to suggest that judges should do so in most cases and that written materials such as English language translations of the foreign law are categorically superior to other sources of foreign law, including expert testimony.¹¹² Moreover, if

¹¹¹ *Id.* at 639.

¹¹² *Id.* at 628-29 (asserting that translations and secondary sources are better than expert testimony).

procedures for determining foreign law were supposed to mirror the procedure for determining domestic law (i.e. briefing by the parties and independent research by the judge), Rule 44.1 would be superfluous. As explained below, the practical challenges of determining foreign law generally mean that the judge should not summarily dismiss those who have a working knowledge of the foreign legal system and rely solely on published foreign law materials.

A. Language Barriers

The purpose of this section is not to analyze every problem associated with translating foreign laws—respected authors have done so already.¹¹³ The more modest goal of this section is to discuss a few examples that demonstrate why relying solely on translated legal materials is risky. Neither Judge Easterbrook nor Judge Posner acknowledged this risk in *Bodum* even though both relied extensively on translated texts.

The fidelity of translated documents is always a problem because languages “never exactly ‘map’ onto one another.”¹¹⁴ In fact, the translations of statements of American defendants not fluent in English were so commonly inaccurate that Congress passed a statute requiring judges to use “certified interpreters” when the defendant cannot speak English proficiently.¹¹⁵ In addition, the judge (or translator) could be easily misled by reading words that sound alike in two languages, but have different meanings.¹¹⁶ For example, the French word *contrat*

¹¹³ See, e.g., Fritz Moses, *International Legal Practice*, 4 FORDHAM L. REV. 244 (1935) (discussing the difficulty of translating documents from one legal system to another); Andrew N. Alder, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT’L L. 37 (discussing translation and interpretation issues).

¹¹⁴ See Alder, *supra* note 113 at 46 (using the phrase “I hired a worker” to illustrate why phrases do not directly translate from English to Russian due to differences in syntax and grammar).

¹¹⁵ See Court Interpreters Act of 1978, 28 U.S.C. §§ 1827(d)(1)(A)–(B) (2006).

¹¹⁶ See Moses, *supra* note 113 at 250 (“The German word *eventuell*, for instance, does not mean *eventually*, but *perhaps*.”).

covers what Americans call “conveyances” or “trusts,” but excludes other agreements that we label “contracts.”¹¹⁷ Likewise, the word “actual” means “existing in fact” in English but the French word “*actuel*” means “present.”¹¹⁸

The fidelity of translations of foreign law materials is even more suspect. The judge must trust that he has a “good” translation of the foreign law at issue, which requires that “the merit of the original work is so completely transfused into another language, as to be as distinctly apprehended, and as strongly felt, by a native of the country to which that language belongs, as it is by those who speak the language of the original work.”¹¹⁹ But even the most experienced legal scholar and translator admits that creating a “good” translation is often not possible. In *International Legal Practice*, Fritz Moses describes how one expert translator for the International Congress of Comparative Law attached an addendum to his translation that warned “[i]t has been virtually impossible to translate literally the above report sent out by the Academy, because not only the words, but the forms of expression . . . often have no corresponding words or ideas among English-speaking peoples.”¹²⁰

Though Moses discussed these translation problems in 1939, they are still prevalent today. In *Otokoyama Co. v. Wine of Japan Import, Inc.*, a Japanese brewer sought an injunction against an American liquor distributor in federal district court in New York for allegedly infringing its “otokoyama” trademark.¹²¹ The distributor argued that the district court erred by not considering evidence that the term *otokoyama* was a generic name for sake in Japan and therefore ineligible for trademark protection based on the doctrine of “foreign

¹¹⁷ See Alder, *supra* note 113 at 46–47.

¹¹⁸ *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 639 (7th Cir. 2010).

¹¹⁹ See Zhao Yuhong, *Drafting Policy on Bilingual Legislation—Comments on the Hong Kong Securities and Futures Bill*, <http://www.legco.gov.hk/yr00-01/english/panels/ajls/papers/b1136e01.pdf> (last visited May 1, 2011) (quoting ALEXANDER TYTLER, *ESSAY ON THE PRINCIPLES OF TRANSLATION* 15–16 (John Benjamins, ed. 1978 reprint)).

¹²⁰ See Moses, *supra* note 113 at 248.

¹²¹ See 175 F.3d 266, 268–269 (2d Cir. 1999).

equivalents.”¹²² To make that determination, the court reviewed a Japanese Patent Office decision that “apparently” denied trademark protection for *otokoyama* in Japan.¹²³ The brewer submitted three different translations of the JPO decision; the importer claimed that all three of those translations were incorrect.¹²⁴ In addition, the court considered possibly fraudulent affidavits that stated that *otokoyama* “has no meaning and cannot be translated.”¹²⁵ If nothing else, *Wine of Japan Import Inc.* emphasizes the point that there is no such thing as a perfect translation of foreign law materials.

Perhaps Judge Easterbook and Judge Posner did not address translation errors in *Bodum* because the parties submitted agreed-upon translations of French law.¹²⁶ That rationale would be consistent with a fact approach to foreign law, putting the onus on the parties to present the foreign law because the judge is completely unfamiliar with the foreign law in the case. But that would not explain the judges’ faith in the fidelity of the materials they discovered through independent research. Of course, the fact translations may be disputed does not mean that the judges should require the parties to submit agreed-on translations for every document. Nor should the judge ignore foreign law translations and rely slavishly on expert testimony;¹²⁷ Rule 44.1 permits the judge to consider any source he or she believes relevant.¹²⁸ However, the judge should at least buttress his or her understanding of the translation by considering other materials. As Judge Wood stated in *Bodum*, there are many cases where expert testimony “provides a helpful gloss” on the literature.¹²⁹

¹²² *Id.* at 268.

¹²³ *Id.* at 269.

¹²⁴ *Id.* at 273.

¹²⁵ *Id.* at 269.

¹²⁶ See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628 (7th Cir. 2010).

¹²⁷ See Alder, *supra* note 113 at 38–39 (criticizing judges and lawyers who “retain the centuries-old habit of relying to slavishly on tendentious expert testimony”).

¹²⁸ WRIGHT & MILLER, *supra* note 9.

¹²⁹ See *Bodum USA*, 621 F.3d at 628.

B. *Unfamiliarity with the Foreign Legal System*

The second problem with relying exclusively on published materials is that domestic judges do not have any firsthand knowledge of the foreign legal system.¹³⁰ Even the most respected judges, such as Judge Easterbook, Judge Posner, and Judge Wood, are not experts in all areas of law. They are experts in American law, particularly as applied in Seventh Circuit.¹³¹ To reason that a judge can determine the law of a foreign country because judges are “experts on law”—as Judge Posner did in *Sunstar*¹³²—is tantamount to reasoning that a cardiologist can fix an ACL tear in the knee because doctors are experts in medicine, a rather suspect proposition.

The reality is that American judges view foreign law through an American lens (just as French or Canadian judges view American laws through the lens of a person from their home jurisdiction).¹³³ The vast majority of American judges are accustomed to American law and American culture, which often prevents the judge from taking a more detached and objective perspective on the foreign law at issue.¹³⁴ That is not a criticism of judges; no person who lacks the life experience in the forum can fully understand the foreign law in full context. As

¹³⁰ See *Moses*, *supra* note 113 at 246-247 (giving various examples of how differences in culture impact international legal practice).

¹³¹ See *id.* at 246 (positing that knowledge of the legal system is only one part of practicing law and that lawyers cannot “perform our function without a knowledge of life itself, of the human relations and of the ideas and ideals which move our clients and those with whom we deal.”).

¹³² See *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 496 (7th Cir. 2009) (claiming that judges can accurately decide foreign law issues when published legal materials are available because “judges are experts on law”).

¹³³ See *Moses*, *supra* note 113 at 246-47.

¹³⁴ See *id.* at 246 (“Growing up in a certain environment we become acquainted with its social currents and crosscurrents and the sentiments and business methods of those with whom we are usually concerned in our legal practice.”).

Franz Moses aptly noted, “no brilliancy of mind, no learnedness in the law could balance lack of such experience.”¹³⁵

Because of this inexperience, the judge may assume that the institutions of the foreign legal system operate the same way as in the United States when that premise is false.¹³⁶ For example, the premise that judicial opinions serve the same function in the French legal system as they do the American legal system is false.¹³⁷ To Americans, “the judicial opinion is a valuable legal institution in its own right.”¹³⁸ Judicial opinions written by American judges further systematic goals that are unique to the American legal system: guiding lawyers and other courts, minimizing the risk of arbitrary action by unelected judges, promoting transparency, and legitimizing judicial decisions.¹³⁹ However, French opinions “are neither reasoned nor candid and make no serious effort to realize the goals Americans consider important.”¹⁴⁰ The result is that American and French opinions significantly differ in style, structure, and significance.¹⁴¹ American judges strive to write well-reasoned and candid opinions, mindful of the need to justify the decision and that others will scrutinize the opinion.¹⁴² In contrast, opinions of the even the highest courts in France are usually a short and opaque application of the law to the facts.¹⁴³ These differences are important because the tools the judge uses to analyze domestic law—

¹³⁵ *Id.* at 246.

¹³⁶ *See* *Bodum USA., Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 638 (7th Cir. 2010) (“[A judge may] assume erroneously that the foreign law mirrors U.S. law when it does not.”).

¹³⁷ Michael L. Wells, *French and American Judicial Opinions*, 19 *YALE J. INT’L L.* 81 (1994) (comparing the functions of judicial opinions in France and the United States).

¹³⁸ *Id.* at 81.

¹³⁹ *Id.* at 82.

¹⁴⁰ *Id.* at 84.

¹⁴¹ *Id.* at 85–91.

¹⁴² *Id.* at 87 (stating that one of the purposes of the American legal opinion is to persuade others the court has reached the right result).

¹⁴³ *Id.* at 92.

precedent, deductive reasoning, guidance from higher courts, etc.—do not necessarily help him or her resolve French law.

Judge Posner has twice justified his methodology by pointing out that federal judges do not allow expert testimony in cases involving the law of Louisiana or Puerto Rico, which have their origins in French and Spanish law respectively.¹⁴⁴ However, as Judge Wood made clear, there is a meaningful difference between determining the law of another American state or territory, which is part of the judges' home legal system, and the law of a foreign country's system that likely has not adopted any part of American law.¹⁴⁵ The laws of Louisiana and Puerto Rico share a common core with other states far more than any foreign country. For instance, Louisiana has adopted parts of the Uniform Commercial Code and its procedural rules are converging with other (American) states.¹⁴⁶ Similarly, Puerto Rico has adopted parts of Delaware Corporate law and judges on the First Circuit hear cases that involve Puerto Rican law.¹⁴⁷ There should be no debate that judges are very familiar with the law of these states and would not suffer the same lack of experience as they do when deciding the law of any other foreign country.¹⁴⁸

C. The Law Does Not Always Function As It Is Written

By relying exclusively on written sources of foreign law, the unstated assumption Judges Posner and Easterbrook made in *Bodum* is that the law functions the way it is written. That assumption is often

¹⁴⁴ See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628–29 (7th Cir. 2010) (“It is no more necessary to resort to expert declarations about the law of France than the law of Louisiana, which had its origins in the French Civil Code.”); *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009).

¹⁴⁵ *Bodum USA*, 621 F.3d at 639–40.

¹⁴⁶ *Id.* at 640.

¹⁴⁷ *Id.*

¹⁴⁸ That assumption may have been valid when judges were interpreting the their law as modified by French and Spanish statutes respectively, but as discussed in the text, Louisiana and Puerto Rico are now primarily influenced by United States' law.

erroneous. The actual workings of a legal system often depart from what the law says, especially in developing countries, where governments routinely make decisions based on unpublished laws rather than publically accessible regulations.¹⁴⁹

Though the American judges' role is to interpret the foreign law as written, many cases involving foreign law require the court to evaluate the actual workings of the foreign legal and political system in order to contrast it with the way things work at home. This is true when the court considers the validity of a foreign judgment,¹⁵⁰ forum selection clause in a contract,¹⁵¹ and other cases that contrast procedures of the foreign legal system with American notions of due process.

Currently, China is the preeminent example of how the "law on the books" often differs from the "law in action."¹⁵² As part of its accession to the World Trade Organization, China has made attempts to reform its legal system to respect the rule of law.¹⁵³ The protection of intellectual property has been one of the most crucial areas of reform and, in 2000, Chinese authorities promulgated new patent, trademark, and copyright laws.¹⁵⁴ In addition to the new domestic laws, China also signed a number of international treaties covering

¹⁴⁹ See Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability*, 34 VA. J. INT'L L. 615, 622 (1994) ("A particularly common and recurring frustration is the obscurity of how the law works in China . . . due in part to the government's frequent reliance on a non-public 'operational code,' rather than on publicly accessible written regulations.").

¹⁵⁰ See *Hilton v. Guyot*, 159 U.S. 113, 202–03 (1895) (formulating the rule that foreign judgments will be upheld only if the foreign legal system is "likely to secure an impartial administration of justice").

¹⁵¹ See *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 346–47 (8th Cir. 1985) (refusing to give effect to forum selection clause purporting to give Iranian courts jurisdiction because the American plaintiff could not receive a fair trial in Iran).

¹⁵² See Chew, *supra* note 148 at 621–23 (describing the lack of transparency of Chinese foreign investment law in the 1990s).

¹⁵³ See Eu J. Chuan, *The Laws of the People's Republic of China: An Introduction to International Investors*, 7 CHI. J. INT'L L. 133, 134 (2006) ("China is in transition from a state-controlled system of administrative fiat to one that respects the rule of law.").

¹⁵⁴ *Id.* at 149–50.

intellectual property law, including the Paris Convention for the Protection of Intellectual Property.¹⁵⁵ Despite these attempts at reform, many observe that Chinese courts lack the desire and impetus to enforce intellectual property laws as written and widespread piracy, counterfeiting, and infringement still occurs.¹⁵⁶

Chinese anti-monopoly laws provide another example of how an American judge could not fully understand the relevant law without assistance from a local expert. In 2008, China adopted new anti-monopoly laws (“AML”) based loosely on American and European models.¹⁵⁷ Many practitioners expressed concern that facially neutral provisions of the AML could be enforced in unfair ways against foreign companies.¹⁵⁸ Less than one year after the AML went into effect, Coca-Cola announced a \$2.4 billion acquisition of Huiyuan Juice Group, the largest producer of orange juice in China.¹⁵⁹ The Ministry of Commerce rejected the bid on antitrust grounds, releasing a statement that the acquisition would have hurt local orange juice producers and resulted in higher prices for Chinese consumers.¹⁶⁰ The announced rationale seemed disingenuous to western investors and

¹⁵⁵ *Id.* at 150.

¹⁵⁶ *Id.* at 155 (“Often, the difficulty has not been the lack of laws, but rather, both the ability to enforce these laws consistently and public noncompliance in a country where such rights were traditionally nonexistent. As China’s economy develops and many of its business enterprises create their own intellectual property that require protection, there will be an increasing desire and impetus to ensure that all intellectual property rights—regardless of their origin—are protected.”). *See also* Peter K. Yu., *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 875-994 (2006) (analyzing prominent cases in China where the failure to enforce written intellectual property laws has prevented effective protection of intellectual property).

¹⁵⁷ Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law*, 49 VA. J. INT’L L. 379, 397–99 (2009) (discussing the influence on United States and European Union antitrust law on the AML).

¹⁵⁸ *See e.g.*, Peter J. Wang and Yizhe Zhang, *New Chinese Anti-Monopoly Law*, JONES DAY PUBLICATIONS (last visited April 10, 2011), <http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=4662>.

¹⁵⁹ Bill Powell, *China Says ‘Keep Out’ to Coca-Cola*, TIME (Mar. 18, 2009), <http://www.time.com/time/business/article/0,8599,1886024,00.html>.

¹⁶⁰ *Id.*

Beijing antitrust lawyers since the combined market share of orange juice would have been around 20% after the merger.¹⁶¹

Correcting the growing pains of the Chinese legal system is probably best left to the Chinese legal system or international trade organizations, and is surely not the problem of the domestic judge. Nevertheless, judges cannot ignore the realities of the legal system and read only the texts if he or she wants to apply Chinese law as a court in China would. In addition, when the court is required to evaluate the actual workings of the legal system in order to contrast it with the way things work in the United States,¹⁶² the court should not ignore the discrepancy. For example, if a Chinese company won damages in a Chinese antitrust claim against an American company and attempted to have the judgment enforced by a American court, the American company may have an argument that the judgment should not be enforced because the discrepancy between written laws and the way things work is inconsistent with American notions of due process.¹⁶³

D. Using Rule 44.1's Guidelines to Overcome the Challenges of Determining Foreign Law

Fortunately, federal judges already have a methodology that gives them the confidence and competence to overcome the challenges discussed in the previous Section. Rule 44.1 gives federal judges the blueprint they need to make legitimate, informed determinations of foreign law.¹⁶⁴ In many cases, the judge will chose to independently

¹⁶¹ *Id.* (“From a purely competitive point of view, [the Coca-Cola acquisition] would not have affected the [non-alcoholic beverage] market.”).

¹⁶² *See supra*, footnotes 151-153 and accompanying text.

¹⁶³ *Id.* Similarly, state-controlled trade associations in China blur the line between private and public entities for purposes of affirmative defenses based on the sovereignty of foreign states. *See* Laura Zimmerman, *Sovereignty-Based Defenses in Antitrust Cases Against Chinese Manufacturers: Making Room For Diplomacy*. 36 BROOK. J. INT’L L. 337 (2010) (reviewing the AML and arguing that American courts should construe sovereignty defenses asserted by Chinese companies for public policy reasons).

¹⁶⁴ *See* Fed. R. Civ. P. 44.1; *see also* Miller, *supra* note 2, at 749 (“[Rule 44.1] offers parties and trial judges a highly malleable scheme for raising, proving, and

research the law and disregard the testimony of foreign law experts, as Judge Easterbrook and Posner advocate.¹⁶⁵ But in many other cases the experts selected by the parties may provide insights about the foreign law that the judge might otherwise miss.¹⁶⁶ The problem with the methodology advanced in *Bodum* is that it reads out the flexibility of Rule 44.1 by instructing judges to rely exclusively on published materials if they are available.¹⁶⁷

In addition, a more holistic view of Rule 44.1 is most consistent with the purpose of the federal rules: “the just, speedy, and inexpensive determination” of disputes.¹⁶⁸ While experts can certainly add expense and delay in certain cases, lower courts do not have the resources to ignore expert opinions on foreign law. Simply put, the Seventh Circuit is better positioned to wade through scholarly articles on foreign legal systems, or other sources that the panel of judges thinks relevant.¹⁶⁹ The comparative lack of resources of federal district courts does not excuse them from failing to seek out sources that allow them to determine foreign law accurately. Nor does it excuse them from having experts “spoon feed” them the foreign law,¹⁷⁰ but it does

determining foreign law that is compatible with the clarion for the ‘just, speedy, and inexpensive’ administration of justice sounded in Federal Rule 1.”).

¹⁶⁵ See *supra* Part II (explaining Judge Easterbrook and Judge Posner’s methodology for determining foreign law).

¹⁶⁶ See *supra* Part II.D. (discussing how American judges’ lack of direct experience in the foreign country often prevents them from understanding the meaning and applicability of the foreign law).

¹⁶⁷ See *supra* notes 106-110 and accompanying text.

¹⁶⁸ See Fed. R. Civ. P. 1 (“[The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

¹⁶⁹ Judge Wood argues makes a general efficiency argument against having judges search through volumes on foreign law materials. See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 639 (7th Cir. 2010). Certainly, appellate courts have more resources to conduct independent research on the foreign law than do federal district courts.

¹⁷⁰ See, e.g., *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 634(7th Cir. 2010) (warning judges not to rely on foreign law experts to “spoon feed them foreign law”).

mean that lower courts need to streamline the process. Moreover, listening to experts from the foreign jurisdiction and then critically comparing the expert's opinion with other sources of law (including official translations and articles) is more efficient than wading through thousands of pages of documents. At the very least, the expert's opinion will allow the trial court judge to hone in on the outcome determinative foreign law issues that must be researched elsewhere.

No matter what methodology the court uses to determine foreign law in a particular case, the purpose of Rule 44.1 is to achieve "a sound result . . . with fairness to the parties."¹⁷¹ Lower court judges should be free to determine what will achieve that result on a case-by-case basis, provided the chosen methodology fits within the guidelines of Rule 44.1. The most egregious flaw of the methodology advanced in *Bodum* is that it does not allow the judge to decide what sources of foreign law will fulfill the purpose of Rule 44.1 under the circumstances. Just as courts were mistaken to insist on formal pleading standards because doing so was consistent with treating foreign law as a question of fact,¹⁷² two of the three judges in *Bodum* were mistaken to insist that the judge independently research unfamiliar foreign law when published materials are available.

CONCLUSION

Judges confront challenges in foreign law cases that they do not face when determining domestic law. The purpose of Rule 44.1 is to provide flexible procedures for addressing those challenges and achieve a sound result in the case in a way that is fair to the parties. One of those procedures permits the judge to consider expert testimony. The arguments offered here hardly compel the conclusion that the judge should consider expert testimony in every case. But they should leave some doubt that relying nearly exclusively on written sources of foreign law will lead to accurate and consistent decisions in foreign law cases. The court should not dismiss the challenges of

¹⁷¹ See Fed. R. Civ. P. 44.1. advisory committee's note.

¹⁷² See Miller, *supra* note 2 at 748.

interpreting foreign law so casually if it hopes to resolve future cases that involve the law of a foreign country competently.