A. Recognition and Enforcement of a Foreign Judgment

(A) General Questions

1) What laws exist in your country regarding the recognition and enforcement of a foreign judgment?

Article IV, § 1 of the U.S. federal Constitution generally requires that each U.S. state recognize and enforce valid judgments issued by courts of sister U.S. states. The so-called “Full Faith and Credit” clause does not apply to judgments issued by courts of other nations, but foreign judgments will generally be enforced under principles of comity as long as they are valid under the laws of the foreign nation and not inconsistent with the public policy of the enforcing state. See Corpus Juris Secundum, Judgments § 1273.

Recognition and enforcement of foreign judgments are generally a matter of state law, and federal courts will apply the law of the state in which they sit when considering whether to give effect to a foreign judgment. See id. § 1357. Most, but not all, U.S. states have adopted a version of the Uniform Foreign Money-Judgments Recognition Act (the “Uniform Act”) (or, in its revised form, the Uniform Foreign-Country Money Judgments Recognition Act). Id. § 1356. These laws govern the recognition and enforcement of money judgments from other countries. Id. At least one court has opined that for a U.S. state to refuse to enforce a judgment on public policy grounds, “the level of contravention” of the enforcing state’s policy must be high. See Southwest Livestock and Trucking Co., Inc. v. Ramon, 169 F.3d 317, 321 (5th Cir. 1999) (considering Texas’ version of the law).

The Uniform Act and the Uniform Foreign-Country Money Judgments Recognition Act apply to foreign judgments granting or denying recovery of a sum of money, but do not cover judgments “for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.” See, e.g., N.Y. C.P.L.R. § 5301 (New York is one state that adopted the Uniform Foreign-Country Judgments Recognition Act). Judgments that do not fall within these uniform laws will nevertheless generally be given effect under principles of comity.

Parenthetically, the discussion that follows refers to “U.S. courts” to mean American courts in general, at both the state and federal level.
2) **What is the difference in the operative result in your country between the recognition of a foreign judgment and the enforcement of a foreign judgment?**

Although the words are sometimes used interchangeably, “recognition” of a foreign judgment is properly understood to mean when a U.S. court interprets the foreign judgment as proof that the legal issue has been validly decided, thus obviating the need for further merits-based litigation in the U.S. court. This is commonly known as giving the foreign judgment “res judicata” or “collateral estoppel” effect. “Enforcement” of a foreign judgment, on the other hand, is when a U.S. court recognizes a foreign judgment and reduces that judgment to a U.S. judgment that can then be enforced here. *See* Corpus Juris Secundum, Judgments § 1273.

3) **What conditions are required in the court of your country in order to declare a foreign judgment enforceable?**

As mentioned already, U.S. courts will generally enforce foreign judgments under principles of comity so long as they are not strongly counter to public policy. Additionally, an enforcing court may consider whether the foreign judgment was issued in accordance with due process principles or whether the issuing court had valid jurisdiction over the judgment-defendant. For example, a New York asked to enforce a foreign money judgment will analyze the request under New York’s version of the Uniform Foreign-Country Money Judgments Recognition Act, which is codified at New York Civil Practice Law and Rule Section 5301 et seq. This statute bars a New York court from recognizing a judgment that was “rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law” or where the issuing court did not have personal jurisdiction over the defendant. N.Y. C.P.L.R. § 5304.

4) **In order to enforce a foreign judgment, does your country require reciprocity with the country which gave the judgment?**

The Uniform Act generally does not require reciprocity for the enforcement of a judgment issued by a court of another country, but some U.S. states’ variation of the Act permit courts to decline enforcement where there is no reciprocity. *Corpus Juris Secundum, Judgments* § 1357.

5) **Under what circumstances does the court in your country not enforce a foreign judgment?**

Generally speaking, U.S. courts will not recognize foreign judgments that are violative of public policy or that were issued by a court that lacked procedural safeguards or jurisdiction over the defendant. New York’s version of the Uniform Foreign-Country Money Judgments Recognition Act, which applies to foreign money judgments sought to be enforced in New York courts, lists grounds on courts must refuse to recognize foreign judgments and grounds on which they may refuse to recognize foreign judgments. Grounds for mandatory non-recognition may include where the judgment was rendered without due process of law or where the issuing court did not have either personal jurisdiction over the defendant. *Corpus Juris Secundum, Judgments* § 1363; *see, e.g.*, N.Y. C.P.L.R. § 5304(a). Grounds for discretionary non-recognition may include where the foreign judgment was obtained by fraud or where the judgment is repugnant to the public policy of the enforcing state. *See* Corpus Juris Secundum, Judgments § 1363; *see, e.g.*, N.Y. C.P.L.R. § 5304(b).

6) **Can your country impose temporary orders issued by a foreign court, such as alimony?**

Whether a court can recognize or enforce temporary orders such as alimony is a question of state law. Such orders are generally not covered by the Uniform Act or the Uniform Foreign-Country Money Judgments Recognition Act, but they nevertheless may be enforced if the law of the state in which the enforcing court sits so provides. For example, New York courts may enforce or

7) What are the conditions necessary for recognition of a foreign judgment in your country? Can your court recognize a foreign judgment incidentally?

Under U.S. law, there does not appear to be a meaningful difference between recognizing a foreign judgment “incidentally” or “directly.” Note that there is a difference between recognition and enforcement of foreign judgments (see the response to question 2, above).

8) Is it possible to enforce a foreign arbitration award in your country?

Yes, U.S. courts may recognize foreign arbitration awards pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention). The Convention and its implementing legislation permit U.S. federal courts to hear actions to enforce foreign arbitral awards. See 9 U.S.C. § 201 et seq. To prevail, however, the party seeking enforcement must demonstrate that the U.S. court has personal jurisdiction (i.e., a basis for imposing its power) over the party against whom enforcement is sought. See Transatlantic Bulk Shipping, Ltd. v. Saudi Chartering, S.A., 622 F. Supp. 25 (S.D.N.Y. 1985).

(B) Cases

1) Humpty and Dumpty are a business partners in Wonderland. Humpty violated the partnership agreement signed between them. The partnership agreement stated that the partnership will be the representative in your country, of an investment company from Wonderland, and will market its services in your country. Humpty argued that Dumpty established a competing investment company in your country. Wonderland Court ruled that the Dumpty violated his duty of good faith and fair dealing and ruled against him to pay Humpty damages of 5.5 million dollars. A sum of one and a half million dollars as punitive damages and the rest as compensatory damages for harm caused. Humpty asks the court in your country to enforce the Wonderland court ruling, Dumpty opposed, his main claim being that part of the damages is punitive and therefore is not enforceable. What is the law in your country?

Dumpty will probably not be able to resist enforcement solely on the grounds that part of the damages award is punitive. As discussed already, there are certain grounds on which U.S. courts may refuse to recognize or enforce a foreign judgment, but the nature of the damages--i.e., compensatory or punitive--is generally not meaningful. See Restatement (Third) of Foreign Relations Law § 483 (1987).

2) A British businessman got into debt in the amount of 100-200 million pounds sterling and a bankruptcy order was issued against him by the High Court of Justice in London, with the appointment of estate trustees. Following this ruling, the trustee submitted to the court in your country a request to enforce the order and to appoint an official receiver for the realization of the debtor's assets located in your country.

a. Will the court in your country enforce the court order obtained in England?

b. The question was asked to address the fact that the English ruling does not include a personal operative remedy; in this case can your court enforce the ruling or rather give recognition?
c. Can it be a direct recognition? If not, can it be an incidental recognition?

d. What are the different effects of the three variations: enforcement, direct recognition and incidental recognition?

The United States Bankruptcy Code incorporated the Model Law on Cross-Border insolvency, which allows courts in the U.S. to recognize foreign bankruptcy proceedings. 11 U.S.C. § 1501 et seq. (2006). In order to obtain recognition, a foreign representative must file a petition for recognition accompanied by the required evidentiary showing of the foreign bankruptcy proceeding abroad. Id. §§ 1515, 1517. However, even if a petition for recognition fulfills the evidentiary requirement, a court may deny recognition if it “would be manifestly contrary to public policy of the United States.” Id. § 1506.

Once a petition is properly brought, the foreign proceeding must be characterized as either a foreign main proceeding or a foreign nonmain proceeding. Id. § 1517. A foreign main proceeding exists where a bankruptcy proceeding is pending in the foreign country where the debtor has the “center of [his] main interests.” Id. §1517(b)(1). An individual’s center of main interest is presumed to be his habitual residence. Id. § 1516(c). A foreign nonmain proceeding exists where there is “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.” Id. § 1502.

Assuming the businessman’s habitual residence is in Britain, the case brought by the estate trustee to a court in the United States would be characterized as a foreign main proceeding. The trustee would qualify as a foreign representative under the Code because he had been appointed by the High Court of Justice in London. See 11 U.S.C. § 1515 (2006). The trustee’s petition for recognition must be accompanied by all the appropriate documentation as set out by the Bankruptcy Code § 1515. Once the trustee has provided all paperwork to the court, absent any public policy concerns, the court shall grant an order recognizing the High Court of Justice’s bankruptcy order. Upon such recognition, “the foreign representative may apply directly to a court in the United States for appropriate relief in that court.” Id. § 1509(b)(2).

The Bankruptcy Code provides that relief may be granted, at the request of the estate trustee, in the form of a “realization of all or part of the debtor’s assets within” the United States. Id. § 1521. This relief may be granted to the trustee, as the foreign representative, or to another person authorized by the court. Other possible forms of relief include staying an action or commencement regarding any of the debtor’s assets, or staying the right to transfer or dispose of the debtor’s assets. Id. Additionally, the Bankruptcy Code allows a foreign representative to commence a full involuntary bankruptcy action under Chapter 7 or Chapter 11 in the United States. Id. § 303(b)(4). Should the trustee, acting as foreign representative, choose to initiate a full bankruptcy proceeding, realization is limited to those assets which are located in the U.S. Id. § 1528. Further, the Code requires that the court overseeing the recognition “shall cooperate to the maximum extent possible with the foreign court or [the] foreign representative.” Id. § 1525(a).

3) Sarah and Judy have been lifetime partners for 7 years and are citizens of your country. Their permanent residence is the State of Neverland. Sarah bore a son after she had been impregnated with a donor sperm. The son was adopted by Judy with Sarah’s consent. The adoption order was issued in Neverland and Judy was registered in the birth certificate as an additional parent. Sarah and Judy would like to return to your country for the purpose of studying there for two years. They have notified the registration official that Judy has adopted the child, relying on the birth certificate and the ruling of the State of Neverland which issued the decree of adoption. The Registration official refused to accept the registry on the grounds that the existence of two biological parents of the same gender is not possible.
and he is not obliged to accept the registration at its face value. Sara and Judy apply to the court in your country to recognize the adoption.

a. What will be your ruling?

The ruling would depend on the law and public policy of the U.S. state in which Sarah and Judy sought to have their adoption recognized. See U.S. Dep’t of Health and Human Services, “State Recognition of Intercountry Adoptions Finalized Abroad: Summary of State Laws”; 1 see also Peter Hay, Recognition of Same-Sex Legal Relationships in the United States, 54 AM. J. COMP. L. 257, 258-60 (2006). As with any foreign judgment or decree, a state court may decide not to give effect to a foreign adoption decree if it finds the decree is counter to the state’s strong public policy.

Interestingly, a federal appeals court struck down an Oklahoma law that prohibited state courts from recognizing same-sex adoptions. Finstuen v. Crutcher, 496 F.3d 1139, 1156 (10th Cir. 2007). The court held that the Full Faith and Credit Clause required Oklahoma courts to recognize valid same-sex adoptions from states such as California. As mentioned already, the Full Faith and Credit Clause does not apply to foreign judgments, so the rationale of this case would not apply to Sarah and Judy’s adoption.

b. Does it depend on the question of the law in your country allowing an adoption by a couple of the same sex?

--and--

c. If so, what will be the ruling if it is not allowed?

Whether same-sex adoption is outlawed in a particular state (it is prohibited in two U.S. states--Utah and Mississippi) will inform whether a foreign same-sex adoption decree is violative of that state’s public policy, but the law is not necessarily dispositive.

B. Cross Border Issues in the Conduct of Trials

Factual Scenario # 1

Company “Head Co.” is the parent company of an international group of companies. It carries on business in its country of incorporation, country A. It also carries on business in country B through a subsidiary (“Subsidiary”) which is incorporated in country B. “Director” is a director of Head Co. and Subsidiary. He is also a resident of country B.

Head Co. and Subsidiary claim that Director has breached statutory, fiduciary and contractual duties that he owed to each of them, arising out of his position as director of both Head Co. and Subsidiary. The companies allege that he misappropriated funds of Head Co. and Subsidiary. They rely on substantially the same acts and events to support their respective claims.

Head Co. and Subsidiary have commenced two sets of proceedings against Director: one in country A and the other in country B, both actions seeking relief against Director arising out of substantially the same facts.

Assume you are a Court in country A. Director has applied to your Court for an order to stay the proceedings against him in your country.

Questions:

1) What test would your Court apply or what factors would your Court take into account when determining Director’s application?

U.S. district courts’ power to stay proceedings “is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). In determining whether to grant a stay request, courts in the Second Circuit in New York generally consider:

(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to plaintiffs if delayed;
(2) the private interests of and burden on the defendants;
(3) the interests of the courts;
(4) the interests of persons not parties to the civil litigation; and
(5) the public interest.

See, e.g., Am. Steamship Owners Mut. Prot. & Indem. Ass’n v. LaFarge N. Am., Inc., 474 F. Supp. 2d 474, 482 (S.D.N.Y. 2007). The party requesting the stay must make out a clear case showing inequity or hardship if required to proceed with dual litigations, because courts are hesitant to force a litigant to wait for the resolution of another action to assert his claim.

2) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention on jurisdiction?

Currently, the United States is not a signatory to any convention with a provision governing the stay of proceedings. Thus, U.S. courts are guided by United States law alone.

3) If your country is a signatory to such a convention how would this influence the decision making process?

As discussed above, the United States is not a signatory to any such convention. Accordingly, no convention will influence the decision of the United States courts.

However, if there was a convention or treaty on point, U.S. courts are bound to give effect to such international agreements, except that a “non-self-executing” agreement will not be given effect as law in the absence of necessary implementation. Restatement (Third) of Foreign Relations Law §§ 111, 115 (1987). An international agreement of the United States is “non-self-executing” if (a) the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required. See id. If the treaty represents only an agreement or international commitment, it is not self-executing and becomes binding only if implemented through the legislative process.

4) Would it make any difference if there was a choice of jurisdiction provision in the contractual arrangements between the companies and Director providing that the parties
submitted to the exclusive jurisdiction of country B?

Yes, a choice of jurisdiction provision would change the analysis. A court must dismiss the claim if there is a valid forum selection clause. A forum selection is presumptively valid and enforceable if (1) it was reasonably communicated to the party resisting its enforcement; (2) it has mandatory force (i.e. the parties were required to bring any dispute in the designated forum as opposed to permitted to do so); and (3) the claims and parties involved in the suit are subject to the forum selection clause. *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007). The resisting party can rebut the presumption of enforceability by making a sufficiently strong showing that “enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972) (establishing federal standard relating to enforcement of forum clauses applicable in admiralty and international transactions).

5) **Would your Court take into account considerations of international comity?** In other words, grant a stay to give recognition to the jurisdiction of country B to determine the dispute?

U.S. courts may factor international comity into its analysis of whether to dismiss or grant a stay pending resolution in a foreign forum with concurrent jurisdiction. But it is wholly within the court’s discretion how much weight to give comity concerns. *See Royal & Sun Alliance Ins. Co. of Can. v. Century Int’l Arms, Inc.*, 466 F.3d 88, 95-96 (2d Cir. 2006). Courts tend to give greater weight to considerations of international comity when the court’s interest is low but the foreign interest is strong. Courts are more likely to ignore comity concerns when strong public policies of the court conflict with foreign law or when the case involves important questions of federal law.

6) **Would it make any difference if country B was not a signatory to the convention?**

Here, there would be no difference as the United States is not a signatory to any relevant convention.

7) **If your country is a signatory to such a convention, what is your Court’s experience of the convention in resolving issues of jurisdiction and does the convention assist to reduce disputes on jurisdiction?**

The United States is not a signatory to such a convention.

Additional facts:

*Assume that Head Co. argues that your Court should not stay the proceedings in country A because the laws of country B do not recognise all of the claims that have been made under the laws of country A.*

8) **Would this be a relevant consideration to take into account in determining whether to stay the proceedings?**

Yes, the failure of country B to recognize all the claims made in country A could affect the court’s analysis. One of the factors that the court may consider is the private interest of the plaintiff. But whether to grant a stay is discretionary, so U.S. courts may, but are not required to, consider country B’s lack of a comparable cause of action in making that decision. Here, Head Co. would need to make out a clear case that country B’s failure to recognize all of its claims would impose hardship or inequity.
9) How would your Court determine whether the relevant claim formed any part of the laws of country B?

The party raising the issue of foreign law has the burden of proving that it is different from local law. If the party fails meet its burden, or merely alludes to the existence of contrary foreign law, the court may presume that foreign law is identical to local law. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 (2d Cir.), cert. denied, 393 U.S. 826, (1968); see also *Fairmont Shipping Corp. v. Chevron Int'l Oil Co.*, 511 F.2d 1252, 1263 n.16 (2d Cir. 1975). However, the court may, but is not required to, supplement the party’s research with its own; Federal Rule of Civil Procedure 44.1 states that “[i]n 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.

**Additional facts:**

Assume that Director’s employment contract with Head Co. and Subsidiary contained a choice of law clause, nominating the law of country B as the applicable law in the event of a dispute.

10) How would the choice of law clause influence your decision in the above scenario?

As long as the choice of law clause is enforceable, the law of country B would govern the dispute. *Roby v. Corporation of Lloyd’s*, 996 F.2d 1353, 1362 (2d Cir. 1993). Choice of law clauses are presumptively enforceable when the underlying transaction is fundamentally international in character. *See Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Only in rare cases will this presumption be overcome. For example, if there is evidence of fraud or overreaching, grave inconvenience or unfairness of the chosen law such that the plaintiff is deprived of a remedy, or if the provision is contrary to public policy. *Roby*, 99 F.2d at 1363. This is because “international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals. *See Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

A choice of law clause nominating the law of country B as the applicable law would weigh in favor of permitting a stay because such a clause would require the U.S. court to apply the law of a foreign country. *See, e.g.*, *Parry v. Haendiges*, 458 F. Supp. 2d 90, 99 (W.D.N.Y. 2006); *Bybee v. Oper der Standt Bonn*, 899 F. Supp. 1217, 1223 (S.D.N.Y. 1995). However, courts consider various factors when deciding whether to grant a stay, and no one factor is determinative. *Id.* If the other factors considered by the court counsel against permitting a stay, the choice of law clause will not be enforced. *See, e.g.*, *Manu Intern., S.A. v. Avon Products, Inc.*, 641 F.2d 62, 67-68 (2d Cir. 1981); *Sapient Corp. v. Singh*, 149 F. Supp. 2d 55, 59 (S.D.N.Y. 2001).

11) In what circumstances would your Court decline to stay proceedings, despite the clause?

U.S. courts consider various factors when deciding whether to grant a stay, and no one factor is determinative. If, after evaluating these factors, the court finds sufficient grounds for jurisdiction, then the court would decline to stay the proceedings notwithstanding the choice of law clause. *See JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 429 (2d Cir. 2005).
12) Is your country a signatory to a convention for the recognition of exclusive choice of court agreements? If so, how does this influence the decision-making process? Is it your Court’s experience that such a convention reduces disputes about the law to be applied?

The United States has signed, but not acceded to or ratified, the Hague Convention on Choice of Court Agreements, *Convention of 30 June 2005 on Choice of Court Agreements*, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last updated Feb. 19, 2010). Under the convention, the forum designated in a choice of forum clause is presumptively exclusive. 1 Ved P. Nanda & David K. Pansius, *Litigation of International Disputes in U.S. Courts* § 7:33 (2d ed. 2011). Thus, unless the clause in the international contract expressly provides that the choice of jurisdiction is permissive or non-exclusive, a forum selection clause will be enforced. *Id.* § 7:34.

Although the convention is not binding law in the United States, it could influence a court’s decision whether to exercise jurisdiction. A forum clause is presumptively valid and enforceable if it was reasonably communicated to the party opposing its enforcement, if it is mandatory, and if it involves the same claims and parties involved. *Phillips v. Audio Active Ltd.* , 494 F.3d 378, 383 (2d Cir. 2007). Given the convention, U.S. courts are more likely to construe a forum selection clause as mandatory, thus making it more likely that it is enforceable. 1 Ved P. Nanda & David K. Pansius, *Litigation of International Disputes in U.S. Courts* § 7:33 (2d ed. 2011). The court will decline to exercise jurisdiction or grant a stay in the proceedings if the U.S. court is not the designated forum in a valid forum selection clause.

13) Does your Court recognise any limit of jurisdiction based on principles of international comity – that is, that a court should decline jurisdiction in recognition of the foreign court’s jurisdiction?

This Court does recognize principles of international comity, in which United States courts will defer to proceedings taking place in foreign countries. *See, e.g., Jota v. Texaco, Inc.*, 157 F.3d 153, 159 (2d Cir. 1998). However, international comity is not a mandatory rule, rather, it is within the discretion of the court to determine whether it will decline to exercise its jurisdiction. *See Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). Specifically, the court will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States. *Id.* Generally, courts will recognize comity when foreign proceedings are parallel, the alternative forum is adequate, the action in the foreign court was filed first, there would not be any prejudice to either party in the foreign proceeding, and the connection to the case in the foreign jurisdiction is closer than to the United States. *See Freund v. Republic of France*, 592 F. Supp. 2d 540, 565-66 (S.D.N.Y. 2008).

Additional facts:

Assume that both courts are the appropriate forum for the dispute. Assume also that Director makes an urgent application for a stay of both proceedings in both country A and country B. You are the Court in country A and would find it helpful to speak with the judge in country B to ascertain what stage the proceeding has reached in country B and its likely hearing date. You consider that this may be helpful in deciding whether to stay the proceedings.

14) Is there any structured way in your system that enables judges of different courts to communicate? If so, what is the structure and how effective is it?

There is no structure in place in the United States for judges to communicate with judges of other nations with respect to civil causes of action; however, under 11 U.S.C. § 1525, there is a
structure that allows such communication in bankruptcy actions.

Additional facts:

Assume your Court does not grant a stay and the matter proceeds in country A, applying the laws of country B.

15) How would your Court receive evidence in relation to foreign law? For example in most common law countries, the content of foreign law is a question of fact which is proven by expert evidence.

In U.S. federal courts, the content of foreign law is a question of law. Fed R. Civ. P. 44.1. The court may consider any relevant material or source, including testimony, whether or not the evidence was submitted by a litigant or is admissible under the rules of evidence. Id.

Under Rule 44.1, the sources of proof of foreign law are expansive. The court may hear expert testimony, and may also engage in its own independent examination of foreign law. 3 Ved P. Nanda & David K. Pansius, Litigation of International Disputes in U.S. Courts § 7:33 (2d ed. 2011). Foreign statutes, cases and administrative materials may be submitted by the parties by introducing copies of the applicable provisions or court reports. Litigants may also present any other information concerning foreign law that is believed to be relevant, including secondary sources such as texts and journals. The judge may consider these materials and give them whatever weight he or she thinks they deserve. 9A Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure § 2444 (3d ed. 2011).

16) Is your country a signatory to any convention for determining foreign law? For instance, the New South Wales Supreme Court in Australia and the Singapore Supreme Court have entered into a Memorandum of Understanding (MOU) to work closely on issues of foreign law. Under the MOU, when an issue of foreign law arises in a case before either of the courts, they will be able to direct parties to take steps to have any contested issue of foreign law determined by the court of the governing law.

The only current agreement for determining foreign law in the United States is between the New York Court of Appeals and the Supreme Court of New South Wales in Australia.2 The New York State Court System and the Supreme Court of New South Wales (NSW) entered into a Memorandum of Understanding (MOU) that is identical to the MOU between the New South Wales Supreme Court and the Supreme Court of Singapore. Id. Under the MOU, if the parties consent, a substantial legal issue arising in a matter pending before the NSW Supreme Court which involves New York law can now be determined with the assistance of New York judges, and vice versa. Id. This agreement was the first of its kind between a United States Court and the court system of a foreign country. Id.

17) If your country has similar arrangements with foreign courts, what is your Court’s experience? Has it reduced the complexities and difficulties in ascertaining the content of the foreign law?

The U.S. federal courts are not a party to the agreement, so this Court does not have an opinion as to its effectiveness.

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18) What factors would your Court take into account when determining the Director’s application?

It depends on whether the court is applying the Federal Rules of Civil Procedure or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. However, under either set of rules, the importance of protecting foreign litigants from the danger of unnecessary or unduly burdensome discovery requests is of particular importance in overseeing the discovery process. See Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522, 546 (1987). Judicial supervision should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. Id. U.S. courts should demonstrate due respect for any problem a foreign litigant faces as a result of the litigant’s nationality or location of operations. Id.

19) Would you be guided by the laws of your country alone, or some kind of international agreement? For instance, is your country a signatory to a convention for the collection of evidence? If so, how successful is the co-operation in taking evidence in a foreign state and how efficiently and expeditiously can evidence be taken?

The United States is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=82 (last updated: May 5, 2011). However, the use of the Convention’s procedures are optional, “to be employed at the election of the trial court when they will facilitate the gathering of evidence by the means authorized in the Convention.” Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522, 540-41 (1987). In deciding whether to provide the Convention’s procedures, each case should be evaluated on its own particular facts, sovereign interests and the likelihood that resort to those procedures would prove effective. Id.

If a court determines that the Hague Convention applies, then the procedures outlined therein for judicial authorities of one signatory country to use in requesting evidence located in another signatory country govern discovery. 8 Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure § 2005.1 (3d ed. 2011). When discovery is sought pursuant to the convention, parties typically send a letter of request to a receiving authority in the foreign country. 3 Ved P. Nanda & David K. Pansius, Litigation of International Disputes in U.S. Courts, §17:18 (3d ed. 2011). Such an application can request depositions, interrogatories or documents. Id. Once received, the authority designated to receive the letter is obligated to follow this request unless satisfaction of the request it is incompatible with the state’s internal law. Id.

If the court determines that the Hague Convention does not apply, then the same rules that govern discovery in all other civil cases in federal courts applies. See 3 Ved P. Nanda & David K. Pansius, Litigation of International Disputes in U.S. Courts, §17:2 (3d ed. 2011).
**Additional question:**

If your country is a signatory to conventions in civil proceedings, is it your Court’s experience that civil procedure for commercial cases as between signatory countries have become more harmonized?

Although the United States is a signatory to such a convention, its application is optional. Therefore, the effects of the convention are unknown.

**Factual Scenario # 2**

The plaintiff company commenced civil proceedings in country “X” against the defendant, who was resident and living in England. The plaintiff alleged the defendant had been involved in the misappropriation of $US21m by one of its employees, and applied to the Court for a worldwide injunction “freezing” the defendant’s assets, in aid of the proceedings in country “X”, together with an ancillary disclosure order relating to the defendant’s assets worldwide.

**Questions:**

1) Would the court in your country have jurisdiction to hear this matter? If so, on what basis? For instance, in some common law countries exceptional circumstances would permit the making of an order on a particular issue, even where the court otherwise did not have jurisdiction to hear the matter. One such exceptional circumstance might be where the court hearing the substantive dispute could not make the freezing order of a person’s assets, so the making of the freezing order by another court would assist the main proceedings.

Setting aside whether the U.S. court would have jurisdiction over the defendant or the subject matter of the case, courts in the United States (at least under federal law) do not have the authority to order pre-judgment asset freezes in cases such as this, where the plaintiff does not assert a basis for equitable relief. *Grupo Mexico de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999). U.S. courts may, in certain circumstances, enforce worldwide freezing orders issued abroad. See Laurence Lieberman & Howard Fischer, *International Asset Freezing: The U.S. and U.K. Perspectives*, BUTTERWORTH’S J. INT’L BANK’G FIN. L., Feb 2010.

2) What provisions (statutory, procedural or otherwise) exist to enable a court to make a worldwide order freezing an individual’s assets? What about disclosure orders?

As mentioned above, U.S. courts generally do not issue pre-judgment worldwide freeze orders. As for discovery orders, U.S. federal courts may in certain circumstances compel persons over which they have jurisdiction to provide material in support of foreign litigations. Section 1782(a) of Title 28 of the United States Code provides that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. . . .” The three requirements for discovery under this provision are that the person to provide discovery be found within the jurisdiction of the ordering court; that the discovery be for use in a foreign proceeding, and that the applicant be an interested person. If these requirements are satisfied, the U.S. court has discretion to order discovery. See, e.g., *In re Godfrey*, 526 F. Supp. 2d 417, 418-19 (S.D.N.Y. 2007).

3) How would an order for disclosure and/or an order for the freezing of assets be enforced? Would enforceability of the order influence the decision as to whether or not to make the order in the first place? (If it was likely that the order could not be enforced, do you think
the court would still make the order?

A discovery order like the one described “may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person. . . .” 28 U.S.C. § 1782.

4) Are there any provisions the defendant can rely on, to resist the disclosure order? (for instance, the privilege against self-incrimination)

Assuming he could be found within the jurisdiction of a U.S. federal district court and was compelled to provide discovery pursuant to 28 U.S.C. § 1782, the Defendant would probably not be able to assert his Fifth Amendment privilege against self-incrimination to resist the order, at least insofar as it compelled him to turn over documents that were prepared to comply with financial regulations. Defendants in civil actions may invoke the Fifth Amendment to avoid civil discovery where it is plainly apparent that the evidence sought would “necessarily tend to incriminate,” United States v. Hubbell, 530 U.S. 27, 35, 120 S. Ct. 2037, 127 L. Ed. 2d 24 (2000), but the privilege extends only material that is considered “testimonial.” “[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege [against self-incrimination],” id., and the Defendant would therefore likely be required to turn over financial records to the extent that they were created pursuant to civil regulations.