PLEADING AND PROVING FOREIGN LAW IN THE ENGLISH COURTS

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This note summarises the principles and practice applicable to foreign law in the English courts, including when a foreign law must be pleaded and how it is to be proved, as well as appeals on questions of foreign law. It takes account of the Supreme Court's decision in *FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45* and the new approach to proof of foreign law in the 11th edition of the Commercial Court Guide (2022).

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SCOPE OF THIS NOTE

Issues of foreign law frequently arise before the courts of England and Wales. Such courts (especially the Commercial Court) are therefore familiar with applying foreign law. Parties to a claim to which foreign law is said to apply need to be aware of the principles governing pleading and proving foreign law. This note explains the requirements for pleading foreign law, the aspects of the claim to which foreign law will apply and the requirements for proving foreign law (including those set out in Part H3 of the Commercial Court Guide). It also explains how the English courts determine the content of, and apply, foreign law and the extent to which findings of foreign law can be appealed.

MEANING OF "FOREIGN LAW" AND WHEN IT IS APPLICABLE

In an English court (but not the UK Supreme Court), the law of any jurisdiction which is not the law of England and Wales is regarded as "foreign law". This includes Scots law and Northern Irish law (which is why contractual choice of law clauses should not refer to "British" or "UK law").

Any cause of action which involves foreign elements may involve questions of which law should apply to the dispute (often called the "conflict of laws"). English law has detailed rules, called "choice of law" rules, which determine which law should be applied in such a situation. For more information on these rules in respect of contractual and non-contractual claims, see:

- *Practice note, Governing law: contracts made before 17 December 2009* on the Rome Convention.
- *Practice note, Governing law: contracts made on or after 17 December 2009* on the Rome I Regulation (Rome I) and, in respect of contracts entered into after the end of the UK-EU transition period, the on-shored version of Rome I.
- *Practice note, Governing law: non-contractual obligations* on the Rome II Regulation (Rome II) and, in respect of events giving rise to damage occurring after the end of the UK-EU transition period, the on-shored version of Rome II.

In situations where none of these instruments applies (in particular, in relation to property and family law), the traditional English common law rules on choice of law will apply (*Dicey, Morris and Collins, The Conflict of Laws (Sweet & Maxwell, 15th ed, 2012): Parts 4 and 5*).

There is an important caveat relevant to an English practitioner:

- The UK Supreme Court always acts as a court of all four home nations. Even if it is hearing an English appeal, it will not regard Scots or Northern Irish law as foreign law. Therefore, the rules outlined below do not apply in the Supreme Court (even if they applied at first instance and in the Court of Appeal) (see *MacShannon v Rockware Glass Ltd [1978] AC 795, Lord Diplock at page 815; SOCA v Perry [2013] 1 AC 182, at paragraph 101*).
- It appears that the Judicial Committee of the Privy Council will not regard English (and presumably Scots and Norther Irish) law as foreign law even though it is hearing an appeal from an overseas jurisdiction. In *Investec v Glenalla [2019] AC 271* (an appeal from Guernsey) Lord Hodge referred to "well established principles of English trust law" without reference to expert evidence (*at paragraph 59*). He also accepted matters of Jersey trust law without expert evidence (*at paragraphs 56-57*). However, it is less clear whether the Privy Council would take as wide an approach as the UK Supreme Court, such that upon hearing a case from Jersey or Guernsey it would not regard the law of a non-Channel Island jurisdiction (for example, British Virgin Island law) as foreign law.

Renvoi

The law of another jurisdiction will usually have its own choice of law rules, which may be different to those in English law. This could create a problem if an English court were to apply those rules as part of applying the foreign law, which might then refer back to England (sometimes called renvoi or "return").

The general solution in relation to nearly all in personam (against a person) actions is to prevent renvoi by excluding the foreign law's choice of law rules from consideration.

Foreign law is a matter of fact, not of law

English judges will take judicial notice of the law of their own jurisdiction, and therefore all the parties need to do is to provide copies of relevant cases or statutes where issues of law are in dispute (*Sims v Marryat (1851) 17 QB 281, Lord Campbell CJ at page 292*). The court is then entitled to evaluate and apply such cases or statutes according to its own learning and judgment, as guided by the submissions of the parties.

However, unlike many continental systems, English courts have long regarded foreign law not as a type of law at all (*Castrique v Imrie (1869-70) LR 4 HL 414, at page 430*) but as a matter of fact, albeit a "special" fact (*King v Brandywine Reinsurance Co (UK) Ltd [2005] EWCA Civ 235, at paragraph 67*).

One significant exception is in relation to EU law. Where it is necessary to decide a question about the meaning or effect in EU law of any of the EU treaties (or any other treaty or international agreement relating to the EU), or the validity, meaning or effect in EU law of any EU instrument issued by an EU institution, such matters must be treated as a question of law (*section 15(2) and paragraph 3, Schedule 5, European Union (Withdrawal) Act 2018*). (For more information, see *Practice note, EU law in the UK after Brexit, EU law treated as a question of law.*)

No general judicial notice can be taken of foreign law. A number of very significant procedural consequences flow from this classification, which are discussed in detail below.

NECESSITY OF PLEADING FOREIGN LAW, THE "DEFAULT LAW" AND THE PRESUMPTION OF SIMILARITY

Like other matters of fact (*Bartlett v Smith (1843) 11 M & W*) foreign law is a matter for the parties to plead (*King of Spain v Machado (1827) 4 Russ 225*).

The Supreme Court has recently emphasised that two separate rules are therefore engaged at the stage of pleadings in relation to foreign law:

- The default rule, which applies where foreign law has not been pleaded.
- The presumption of similarity, which applies where foreign law has been pleaded but its content has not.

(*Brownlie v FS Cairo (Nile Plaza) LLC [2021] 3 WLR 1011, Lord Leggatt at paragraph 112*.)

Necessity of pleading foreign law and the default law

In an adversarial system it is for the parties to determine the factual issues to be decided. This includes questions of the content and application of foreign law. Even if it is obvious from the evidence before it (for example, a claim to enforce a contract which is explicitly governed by a foreign law), an English court will not (and cannot) ascertain or apply a foreign law of its own motion. (The only exception is where the law is that of a Commonwealth country, where under the British Law Ascertainment Act 1859 the court may, exceptionally, order the ascertainment of the law under its own motion.)

As a result, if the parties fail to plead the applicability of foreign law then the court will apply the law of the forum (English law). This is called the "default rule". There are many cases where it may be tactically or practically sensible for one or both of the parties to have the claim determined according to English law, especially given the costs involved in advancing a case based on foreign law (*Brownlie*, at paragraphs 114 to 115). There is no public policy preventing parties to private law disputes from tacitly agreeing at the outset of the proceedings that they be governed by English law.

Although it is only stated obliquely by the Supreme Court, the default rule is not itself an issue of fact or evidence but of choice of law (*Brownlie, at paragraph 114*). That being so, a party must also show their plea that a foreign law is applicable is well founded by reference to those choice of law rules (*Brownlie, at paragraph 116*). Not being necessary to consider on the facts of the case, Lord Leggatt does not state what would happen if a party pleaded the application of foreign law but both parties failed to advance a case on how such a law was applicable. Such a state of affairs may be considered a tacit consent by the other party to withdraw from the pleaded position or, as Lord Leggatt suggests, an after the event agreement to choose English law to govern the claim.

However, if the applicability of foreign law is pleaded and substantiated, then the court is required to apply that foreign law instead of English law (*Brownlie, at paragraphs 116 - 117*), subject to the points raised below (see *Presumption of similarity*).

Presumption of similarity

Even if the applicability of foreign law has been pleaded, a party must decide whether to plead the content of that law. Insofar as a party wishes to rely on some specific principle or provision of foreign law, they must plead this fact in order for the other party to know the case which it has to meet (*Ascherberg, Hopwood & Crew v Casa Musicale Sonzogno [1971] 1 WLR 1128, Russell LJ at page 1131; section C1.3(f), Commercial Court Guide* (11th Edition, 2022)).

However, there may be cases, as in *Brownlie* itself (*at paragraphs 100 and 102*), where the content of the applicable foreign law is not pleaded.

In those circumstances, a party may in some cases rely on the "presumption of similarity" (*Brownlie, at paragraphs 112 and 119*). This is an evidential rule which allows a judge to assume that the foreign law is the same as the relevant English law. While it is principally a question of proving the fact of the content of foreign law (see *Requirements for proving foreign law*), it appears from the decision in *Brownlie* that this presumption is not simply a matter of proof, but also enables a party to omit to plead the particular content of the foreign law insofar as they intend to rely on the presumption alone to prove these "facts" (*at paragraph 165*). It is then for the other party to plead (and prove) how the content of the foreign law differs from English law.

If a party does not plead any particular rules of the foreign law, they may find that they cannot adduce any evidence of particular rules later without amendment to their statement of case, which itself will be governed by the usual principles relating to late amendment (*Brownlie, at paragraph 166*).

WHICH ASPECTS OF THE CLAIM WILL THE FOREIGN LAW APPLY TO?

Multiple foreign laws

It is possible to have more than one foreign law in a given case (or a case may involve both English law and foreign law). For example, one law may govern the claim in tort, another the claim in contract. In such a case, each foreign law will govern the particular cause of action to which it applies.

More complicated are situations where a claim is made in tort under one law but the defence is based on a contract governed by another. There is no clear answer to this question under English common law rules on applicable law (*Sayers v International Drilling Co [1971] 1 WLR 1176*).

The EU law which replaced it (Rome II) generally favours choosing the same law to govern the tort claim as governs the contract between the parties (see *Practice note, Governing law: non-contractual obligations*). Even if the two applicable laws are different, because the EU choice of law rules on contractual and non-contractual obligations are drafted to be mutually coherent, they almost always provide specific rules to determine which aspects of the case will be governed by which country's law.

Public policy and exclusion of foreign law

English law will sometimes override an otherwise applicable foreign law because the content or application of that law is contrary to public policy. Particular examples are laws which contravene human rights, such as racial discrimination (*Oppenheimer v Cattermole [1976] AC 249*) and possibly laws permitting fraud or corruption (*Les Laboratoires Servier v Apotex [2015] AC 430, at paragraph 25*).

Similarly, but distinctly, English law may refuse to apply a law which is otherwise applicable because the English law on the subject is mandatory. This includes rules of consumer and labour protection, for example *section 74* of the Consumer Rights Act 2015 and *section 289* of the Trade Union and Labour Relations (Consolidation) Act 1992.

Substance and procedure

The applicability of one or more foreign laws does not mean that English law will have no role to play in such a claim. As the *lex fori* (law of the forum), English law will retain an important role in relation to procedural matters.

However, care must be taken to distinguish between domestic law and (retained) EU law in determining the extent of that role.

English common law

In the (now limited) circumstances in which the English common law choice of law rules apply to a claim, the applicable foreign law will govern matters of substance, but English law will govern matters which it characterises as procedural (*Cox v Ergo Versicherung AG [2014] UKSC 22, at paragraphs 12 and 17*). Therefore, the Civil Procedure Rules will govern how an action is brought, pleaded, progressed and tried. Equally, English law will govern questions of evidence (*Loutchansky v Times Newspapers Ltd (No 2) [2001] EWCA Civ 1805, at paragraph 86*) and available remedies (*Harding v Wealands [2006] UKHL 32, at paragraphs 19 - 22*).

While the divide is generally both sensible and easy to apply, it can on occasion produce anomalous or confusing results. Most notorious was the case law which considered that heads of damage (for example, pain, suffering and loss of amenity) were substantive, whereas the assessment of the quantum of those damages was a matter of evidence, and thus procedural (*Cox, at 14*).

Equally difficult are rules relating to contractual formalities. Under the Statute of Frauds 1677, no action shall be brought on a guarantee not in or evidenced by signed writing (*section 4*). It has been held that as this is a rule of procedure precludes the enforcement of a French guarantee which would be enforced by a French court (*Leroux v Brown (1852) 12 CB 80*). On the other hand, as *section 2* of the Law of Property (Miscellaneous Provisions) Act 1989 is a matter of formal validity of the underlying contract, it would not itself affect an action brought on a foreign law contract which did not have the same exacting formality rules (albeit it might be regarded as an overriding mandatory rule of English law).

There are a number of modifications to the domestic law rule, most importantly in relation to limitation. Like section 4 of the Statute of Frauds, as this is a **procedural** defence which merely bars the bringing of a claim (rather than extinguishing the underlying cause of action), it was governed by English law as the lex fori (law of the forum) (*Black-Clawson v Waldhof-Aschaffenberg [1975] AC 591, at page 630*). Under the *Foreign Limitation Periods Act 1984* however, the limitation period applicable in the foreign law will apply instead (subject to certain exceptions).

EU law

The Rome Convention, Rome I and Rome II (and UK Rome I and UK Rome II) deliberately avoid a monolithic divide between substance and procedure. Instead, while all of these instruments expressly generally exclude "evidence and procedure" (*Article 1.1(h), Rome Convention; Article 1.3, Rome I and UK Rome I; Article 1.3, Rome II and UK Rome II*) and therefore do not require an English court to adopt civil law inquisitorial methods (*Wall v Mutuelle de Poitiers Assurances [2014] EWCA Civ 138*) they do all include particular "carve-ins".

Thus, under Rome I, the applicable law governs heads and quantification of damages (*Article 12.1(c), Rome I*) and the burdens of proof (*Article 18, Rome I*), both of which would be regarded as matters of procedure by English law. Both of these are subject to the caveats:

- An English judge has no obligation to attempt to reach the same quantification of damages as the foreign court would (*Wall at paragraphs 11 to - 12*), although regard should be had to guidelines which would be employed in the foreign court (*at paragraph 28*). However, there is no requirement that such guidelines be followed if this practice has been criticised by a foreign appeal court, even if the evidence shows such a practice is commonly followed (*Syred v Powszecnny Zaklad Ubezpieczen (PZU) SA [2016] EWHC 254 (QB), at paragraph 47*).
- While the foreign law will govern burdens of proof, English law still determines the standard of proof required from the party bearing the burden (*Marshall v MIB [2015] EWHC 3421 (QB), at paragraph 25*). Therefore, an English court is not to have regard to the French standard of proof for permitting an interim payment on a French tort claim (and, by analogy, summary judgment or interim injunctions sought in such claims) (*Folkes v Generali Assurances [2019] EWHC 801 (QB), at paragraph 16*).
- English law, as the lex fori (law of the forum), will still determine questions of privilege and disclosure (*PJSC Tatneft v Bogolyubov [2020] EWHC 2437 (Comm), Suppipat v Siam Commercial Bank Public Company Ltd [2022] EWHC 381 (Comm), at paragraph 26*).

English law will continue to govern the available remedies. However, Article 12(1)(c) of Rome I and Article 15(d) of Rome II instruct a court to attempt to use domestic law to mirror the remedies available under the foreign law if possible, within the limits conferred by its procedural law.

However, controversies about the scope of the "evidence and procedure" exception remain. In particular:

- English courts have traditionally regarded the award of interest on judgments to be a matter of procedure (*Maher v Groupama Grand Est [2009] EWCA Civ 1191*). Section 35A of the Senior Courts Act 1981 and its County Court equivalent do not confer substantive rights on the claimant, but are powers given to the court. On the other hand, there is a split of authority in relation to Rome II. In *AS Latvijas Krajbanka v Antonov [2016] EWHC 1679*, Leggatt J held that the court should exercise its discretion in accordance with the rules on interest applied in the courts of the foreign law. However, in *Troke v AMGEN [2020] EWHC 2976 (QB)*, Griffiths J held that this is a choice a judge may make in the exercise of their discretion.
- Foreign law governs not only the **period** of limitation, but also the **manner** of interrupting that period (*Pandya v Intersalonika General Insurance Co SA [2020] EWHC 273 (QB)*). However, it is unclear how this would work in circumstances where the foreign law required an act (for example, certification of service by a bailiff) which English law does not employ.
- Although Tatneft and Suppipat take a firm view on the question of privilege, neither engage closely with the "evidence and procedure" exception in Rome I or Rome II. On the traditional view, privilege was just that; a special right to refuse inspection of documents in court proceedings (*Parry-Jones v Law Society [1969] 1 Ch 1, Diplock LJ at page 9*). That being so, it clearly had to be a matter for the procedural rules of the forum, as it did not exist independently of such rules. However, English law now regards privilege as a substantive right (*Three Rivers DC v Bank of England (No 6) [2004] UKHL 48, at paragraph 26*). If that is so, then it is at least arguable that the scope of privilege ought to have reference to the law governing the parties' other substantive rights. This is an area where practitioners should tread carefully, as these cases will not be the last word on the matter.

REQUIREMENTS FOR PROVING FOREIGN LAW

As a question of fact, a party must prove their case on foreign law (B*umper Development Corp v Metropolitan Police Commission [1991] 1 WLR 1362, at page 1368*). There are (at least) four ways in which the content of foreign law may be proved by a party:

- Judicial notice.
- Admission.
- Evidence.
- Presumption.

In all cases, the tribunal to whom the party relying on foreign law must prove the content of the foreign law is the judge alone (*section 69(5), Senior Courts Act 1981 and section 68, County Courts Act 1984*). This is true even in trials by jury, whether in civil court or in criminal court on indictment (*R v Hammer [1923] 2 KB 786*).

In an ordinary civil case, the standard of proof will be the balance of probabilities.

However, in contempt applications and criminal trials, the standard of proof of any matter of foreign law essential for the crime or contempt to be shown is the criminal standard of beyond all reasonable doubt (*Masri v Consolidated Contractors International Co [2011] EWHC 1024 (Comm), at paragraph 148*).

Judicial notice and foreign application of English common law

English courts will not generally take judicial notice of foreign law.

However, there are certain statutes which provide for it to take such notice, such as *section 22(2)* of the Maintenance Orders Act 1960. Consideration is given to the admissibility of prior decisions under *section 4(2)* of the Civil Evidence Act 1972 (see *Evidence*).

Equally, there is no impediment to the court taking judicial notice of "notorious" foreign laws in the same manner as it would other notorious facts. For example, an English court will recognise that gambling is generally legal in Monte Carlo (*Saxby v Fulton [1909] 2 KB 208, at page 211*). This does not extend to more high-level principles, such as that English courts take a stricter approach to interpretation that civil law courts (*Hartmann v Konig (1933) 50 TLR 114, at page 117*). However, in *Brownlie* Lord Leggatt took the view that English courts could take judicial notice of the general "non-cumul" principle (which precludes combining liability in contract and liability in tort) of civil law systems (*at paragraph 159*).

Similarly, the statute of a former colony may be admitted under the Evidence (Colonial Statutes) Act 1907. Under this Act, an official copy of the foreign statute of a state which is or was a "British possession" at the time of enactment may be noticed by the court as if it were an English statute and construed in the same way (*Jasiewicz v Jasiewicz [1962] 1 WLR 1426*). However, the court may choose not to take notice of the statute if it has reason to believe that it has been superseded (including by the amount of time that has passed since its enactment). In those circumstances expert evidence may be required to prove the statute is still in force (*Jasiewicz, at page 1428*).

Admission

As with all factual matters, a party can admit, formally or informally, the accuracy of foreign laws (*Moulis v Owen [1907] 1 KB 746*). The usual rules on admissions will apply in this context, and so a party must be careful to respond to a pleaded case on foreign law if they wish to contest its accuracy, or else be faced with a deemed admission under *CPR 16.5(5)* (*Prowse v European and American Steam Shipping Co (1860) 13 Moo PC 484*). Similarly, once such an admission is made it can only be withdrawn with the permission of the court in accordance with *CPR 14*.

A similar principle is that the parties may together agree that the court can determine a point of foreign law without evidence, but the court itself must be content to take such a course (*Beatty v Beatty [1924] 1 KB 807*).

Evidence

Unsurprisingly, the most common way by which foreign law is proved is by evidence. It is a longstanding common law rule that such evidence is of opinion, and therefore must be proved by the evidence of a sufficiently qualified expert (*Earl Nelson v Lord Bridport (1845) 8 Beav 527, at page 536*).

English law now gives relatively wide leeway to parties in selecting such experts. There is no requirement that the expert be a qualified practitioner (*section 4(1), Civil Evidence Act 1972*). Expert evidence may be given by any person "who is suitably qualified to do so on account of his knowledge or experience". For an extensive list of persons who have been held qualified (or not qualified), see *Phipson on Evidence (Sweet & Maxwell, 20th ed, 2021): Chapter 33: Section 10: Subjects of expert evidence: Foreign law, at paragraphs 33-97 and 33-98*.

As with other experts, foreign law experts will usually give their evidence in the form of an expert report in accordance with *CPR 35*, followed by oral evidence and cross-examination at trial. The court's permission will be required to adduce such evidence, and it may become increasingly common for such permission to be refused, in the light of changing judicial practice (see *Change in direction: where experts will not be needed*).

A party may adduce evidence from a suitably qualified person which does not fall within CPR 35 (for example, a report made for purposes other than the proceedings (*Rogers v Hoyle [2015] QB 265, Leggatt J at paragraph 120*)). However, the court is unlikely to place any great weight on this evidence where it is contested and forms a significant part of the dispute, and may well exercise a power to exclude it under *CPR 32.1*. Such an approach may be considered where, for example, there is a question about whether a statute admitted under the Evidence (Colonial Statutes) Act 1907 is still in force. Obtaining a CPR 35-compliant report in these circumstances would be disproportionate (*Rogers, Christopher Clark LJ at paragraph 81*).

Expert's role

As with all experts in English proceedings, the role of an expert on foreign law is to assist the court in determining the content of foreign law, but not to opine on its application to the case.

An expert's report should:

- Identify the relevant rules and principles of foreign law, including statutes or other legislation (in a properly translated form).
- Identify any relevant judgments interpreting or explaining those rules and the status of judicial decisions (as well as any local customs, practices or religions which may be relevant, such as Sharia principles in *Harley v Smith [2009] EWHC 56 (QB), at paragraph 51*).
- Where there is no direct authority, offer their opinion as to how a foreign court would determine the question.

(*MCC Proceeds v Bishopsgate Investment (No 4) [1999] CLC 417, pages 424 - 425.*)

The distinction between assisting the court and offering an opinion on the case is important in relation to matters of construction.

Where the foreign law in question is a statute or other general law, the expert should give their opinion on what the statute means and its effect in the foreign system (*Santander v Totta [2016] 4 WLR 49, at paragraph 237(7)*).

However, where the foreign law concerns a contract or other instrument, the expert will generally only give evidence as to the principles of construction to be applied, and will leave their application (for example, interpretation and questions of factual implication) to the court (*Deutsche Bank AG v Comune di Savona [2018] EWCA Civ 1740, at paragraph 15*).Questions of whether foreign law implies terms by law remain a matter for the expert (*Vizcaya Partners Ltd v Picard [2016] UKPC 5, at paragraphs 60-61*).

As part of their report, an expert should identify and provide copies of relevant statutes, textbooks, judicial decisions or other sources of law they rely on or consider relevant. They should also make clear which parts of the source they regard as current and/or correct, as the English court is bound to look at the sources if the evidence is contested; the English court cannot itself do research into the validity of the sources (*Bumper Development, at pages 1369-1371*).

Gaps in the evidence

If one or more of the parties adduce evidence of a foreign statute, the English court may proceed to interpret it itself if:

- There is no expert witness.
- The expert does not explain how the statute has been interpreted or the principles by which it is interpreted.

(*Re Mahadervan [1964] P 233, at page 240.*)

In doing so, the court will construe the statute as an English statute (as it would a colonial statute under the Evidence (Colonial Statutes) Act 1907) (*F&K Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139, at page 148*). In *Brownlie*, Lord Leggatt relied (*at paragraph 151*) (without direct citation) on this case to state that if there are gaps in the foreign law pleaded and evidenced, a party may rely on the presumption to fill those gaps if it is otherwise appropriate (see Presumption). However, a court may refuse to allow such reliance if it amounts to raising new unpleaded issues for which permission to amend would not be permitted (*Tamil Nadu Electricity Board v ST-CMS Electric Co Private Ltd [2007] EWHC 1713 (Comm)*).

This is likely to become more common in light of the approach now being adopted in the Commercial Court (see *Commercial Court Guide: proving foreign law*).

Change in direction: where experts will not be needed

As with all forms of expert evidence, the courts are increasingly concerned with the costs involved in producing reports on foreign law. Although the rules on expert qualifications were softened under the *Civil Evidence Act 1972*, foreign law experts are frequently practitioners or academics who can command large fees (particularly if they need to attend court to give evidence orally). As such, in line with the overriding objective and the duty under *CPR 35.1* to limit expert evidence, courts are increasingly looking at ways in which to reduce reliance on expert evidence.

In *Brownlie*, seemingly drawing together numerous previous judicial statements (including those of Vos C in KV (*Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, at paragraph 34*), Lord Leggatt commented that:

- The view that the requirement that foreign legal materials be brought before the court by an expert in all cases was "outdated".
- On some occasions, the text of foreign legal materials may require an explanation by a foreign law expert, and in appropriate cases this should be ordered.
- In many cases, a copy of a foreign code or statute from an official source (or an official translation) may be sufficient.
- Even if there is a dispute about whether the foreign law is still current, it is better to have an actual text and rely on a presumption of continuity than to disregard the foreign text altogether and rely on the presumption of similarity (see *Presumption*). Direct evidence of foreign law is better than such indirect evidence.

(*At paragraphs 148-149*.)

Commercial Court Guide: proving foreign law

Nowhere is this new approach more important than in the Commercial Court, where the majority of cases are international and therefore foreign law questions frequently arise. As a result, Part H.3 of the 2022 (11th) edition of the Commercial Court Guide makes clear the ways in which the court will attempt to limit expert evidence on foreign law.

While accepting that foreign law remains a matter of evidence, paragraphs H3.3(b)-(d) give effect to Lord Leggatt's suggestions by providing that a judge at the case management conference may (among other things):

- Limit oral expert evidence to only certain parts of written reports or dispense with oral evidence altogether and allow the parties to make submissions on the basis of the reports and any oral evidence permitted (*paragraph H3.3(b)*).
- Limit the expert evidence to "identification of the relevant sources of foreign law, and of any legal principles as to the interpretation and status of those sources", and then allow the parties to make submissions as to the content of foreign law on the basis of those sources (*paragraph H3.3(c)*).
- Order that there is to be no expert evidence and that the court take judicial notice, or accept the agreement of the parties, as to the nature and importance of sources of foreign law, allowing submissions on the content of that law based on materials identified by the parties (*paragraph H3.3(d)*). This appears to replicate the approach taken in *Beatty v Beatty* (see *Admission* above).

When deciding whether to make such orders, the court will have regard to the facts listed at paragraph H.3.4, which include:

- How much of the **content** of the foreign law is in issue (as distinct from its application).
- The importance of these issues to the underlying dispute.
- The time and cost efficiency of taking the approaches.
- Whether the foreign law is based on the common law or is otherwise familiar to the court from previous disputes.
- Whether there are admissible previous English decisions on the point of foreign law (see *Evidence of previous English decisions on foreign law*).

(The last two factors will make orders under paragraphs H3.3(c) and (d) more likely.)

It appears that no such orders have been considered or made in reported decisions at this time. However, outside of the Commercial Court, in *Soriano v Forensic News [2021] EWCA Civ 1952* Warby LJ relied on Lord Leggatt's statement in Brownlie to hold that a court could go beyond texts of foreign statutes and rely on the knowledge of English lawyers as to on US libel law, particularly the "actual malice" rule established in *Sullivan v New York Times 376 US 254 (1964)* (this appears to be an application of judicial notice, as envisioned by paragraph H3.3(d)) (*Warby LJ, at paragraph 64*).

Evidence of previous English decisions on foreign law

As they are a factual matter, English decisions on foreign law do not set any precedent (*Re Marseilles Extension Railway (1885) 30 Ch D 598, at page 602*).

At common law, the rule that a finding of fact cannot be relied on either by or against a stranger to that case (*Hollington v F E Hewthorn [1943] KB 587*) meant that the foreign law had to be proved again each and every time (*Lazard Bros v Midland Bank [1933] AC 289, at pages 297-298*) (unless the dispute was between the same parties on the same issue (see *Estoppel*).

This has now been attenuated by *section 4(2)* of the Civil Evidence Act 1972, which permits such decisions to be admitted in evidence (*section 4(2)(a)*). Once a previous decision has been admitted as evidence it is presumed to be correct unless the contrary can be proved, unless there are conflicting decisions of the English courts on the matter (*section 4(2)(b)*).

A party wishing to adduce previous English decisions on the foreign law in question must ensure that the decision is in a form which is citable before an English court (*section 4(5), Civil Evidence Act 1972*). (For the rules on citable authorities, see *Practice Direction: Citation of Authorities [2012] 1 WLR 780*.) Furthermore, section 4(3) of the Civil Evidence Act 1972 requires a party comply with the notice requirements laid down in rules of the court, which are now found in *CPR 33.7*.

Presumption

Where a foreign law is pleaded and shown to be applicable under the relevant choice of law rules, the English court is bound to apply that law (*Brownlie, at paragraph 118*).

However, there may be no (or limited) evidence as to the content of that law. For example, the parties may accept that a foreign law applies to a claim in tort for personal injury. However, neither party advances any evidence as to its content other than as to the limitation period for claims in tort. Is the court to find that there is no cause of action under the foreign law because none has been proven?

Traditionally, this problem has been resolved by an evidential presumption of "similarity"; that the foreign law is the same as English law. As with the presumption, this is a rule of evidence and procedure, and so not governed by Rome I or Rome II (*Brownlie, at paragraph 119*).

However, the decision in Brownlie has made clear that the presumption is not absolute. Instead, it operates in certain circumstances because of three factors:

- Most systems of law reach similar conclusions on the private law issues. This is particularly so in respect of common law systems, but also in civil law systems (*Brownlie, at paragraph 123*).
- Proving all aspects of a foreign law is often disproportionate and unreasonably expensive (*Brownlie, at paragraph 124*).
- The presumption does not reverse the ultimate burden of proof, and will be displaced by a party adducing some evidence of the content of foreign law (*Brownlie, at paragraph 125*).

As a result, Lord Leggatt made clear that the presumption will only apply where:

> "it is a fair and reasonable assumption to make in the particular case ... in the circumstances, is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law ... meaning that any differences between the two systems are unlikely to lead to a different substantive outcome?" (*Brownlie at paragraph 126*).

Lord Leggatt then provided examples of areas of law where common law courts have applied the presumption:

- Rules on the rights of mortgagees (*Bentinck v Willink (1842) 2 Hare 1*).
- Rules against directors using company funds for personal lawsuits (*Pickering v Stephenson (1872) LR 14 Eq 322*).

Lord Leggatt also provided examples where the common law courts have not applied the presumption:

- Rules on contracts contrary to public policy (*Guepratte v Young (1851) 4 De G & Sm 217*).
- Recent legislative enactments altering the common or customary law of the forum (*Schnaider v Jaffe (1916) 7 CPD 696; Purdom v Payey & Co (1896) 26 SCR 412*).
- Rules which are "localised or regulatory" (*The Ship "Mercury Bell" v Amosin (1986) 27 DLR (4th) 641*).
- Rules on bills of exchange (*Österreichische Länderbank v S'Elite Ltd [1981] QB 565*).
- Rules of taxation of capital gains (*Damberg v Damberg [2001] NSWCA 87*).
- Statutory rules of company law derived from EU law and expressed to apply only to English companies (in the context of non-EU member state countries) (*Shaker v Al-Bedrawi [2003] Ch 350*).

From these cases, Lord Leggatt provided further generalised guidance on his general principle outlined above (while noting that the court will have to pay attention to the precise circumstances of each case):

- The presumption is more likely to be appropriate where the foreign law is a common law, although some principles may be so "great and broad" that they will appear in all developed systems.

- It is less likely to apply where the rule is found in a domestic statute, although this depends on the nature of the statute; if the statute codifies general principles it may well apply.
- The test is inherently uncertain, but it is always open to a party to adduce evidence instead of seeking to rely on the presumption.
- The presumption is not binary: a judge may consider the presumption does not suffice at trial on the balance of probabilities, but it may suffice at early stages, where the court may only need to be satisfied of a good arguable case (see *Practice note, Jurisdiction: common law rules: Jurisdiction where defendant served outside the jurisdiction*).

Estoppel

Although there appear to be no reported cases on the question, there is no reason why a fact of foreign law could not be proved by way of a legal estoppel:

- If a necessary finding on foreign law has been made in previous proceedings, then it may form an issue estoppel between the same parties in subsequent English proceedings involving the same issue. This may include a point determined in the courts of the foreign law being applied (see *Practice note, Preventing subsequent litigation: res judicata and abuse of the court process*).
- The parties may agree a point of foreign law in a contract between them, or otherwise act on a convention as to the state of a foreign law.
- A party may make a representation as to foreign law (that is, a representation of fact) which was intended to be and is relied upon by the other party, to the other party's detriment.

EXPERT EVIDENCE OF FOREIGN LAW: POINTS TO CONSIDER

Ultimately, the weight given to expert evidence is not a matter of law or principle but of evaluative judgment by the judge. Therefore, when choosing an expert, a practitioner should bear in mind a number of factors:

- Although *section 4(1)* of the Civil Evidence Act 1972 allows any "suitably qualified person" to give evidence, the court is likely to place greatest weight on the views of practitioners, academics and judges (or other particular officials like notaries).
- Cultural differences must be borne in mind. In many civil law systems, it is common for practitioners also to be academics, while judges are often career civil servants who have not spent time in private practice.
- Like all witnesses, general factors which affect credibility need to be ascertained upfront and remembered throughout. *CPR 35.3* makes clear that an expert has an overriding duty to the court, and interests which may detract from that will weigh against them. It can be expected that an opponent will usually identify and raise such issues in cross-examination (*Rowley v Dunlop [2014] EWHC 1995 (Ch), at paragraph 26*). For example, while a witness with a prior connection to the party for whom they give evidence will not find themselves automatically excluded (*Field v Leeds City Council [2001] CPLR 129*) a judge is entitled to take account of this fact and in some cases it may give rise to such apparent conflict of interest that their evidence is excluded (*Kennedy v Cordia [2016] 1 WLR 597, Lord Reed and Lord Hodge at paragraph 51*)). In contrast to witnesses of fact, it is acceptable and indeed usual to pay an expert witness for their work, but the level of compensation given may also become an issue should it exceed objectively justifiable levels. Equally, a contingency fee agreement is likely to lead to expert evidence being excluded (*R (Factortame) v Transport Secretary (No 8) [2003] QB 381, at paragraph 73*).
- Where an expert has a conflict of interest or an interest in the outcome of the proceedings (such as entitlement to a success fee), they should disclose this in their report (and indeed the party proposing to call them may raise the issue at an earlier stage). A failure to do so will inevitably draw judicial criticism and likely lead to the evidence having less weight, if it does not lead to its exclusion (even where this would not have occurred had the conflict been disclosed) (*EXP v Barker [2015] EWHC 1289 (QB), at paragraphs 62, 65*).
- Foreign law experts are often repeat players and inquiry should always be made as to any previous appointments. Previous decisions may show that an expert has been praised or, potentially, criticised for their evidence. However, while a positive track record will weigh in favour of a particular expert, it may be considered a negative where an expert can be painted as having become a professional witness, both because of the questions it may raise about the currency of their knowledge and also as it may give rise to the suggestion that they are not sufficiently independent of their given client.

Many legal systems will have relatively few experts willing to carry out the task, and potentially even fewer who speak English. For example, in *R v Lama [2017] QB 1171*, the Court of Appeal found that there was only one suitable

expert in Nepali law available even after an adjournment, albeit fortunately the parties agreed he could act as a single joint expert. If a case is likely to involve foreign law from a small jurisdiction, practitioners should attempt to identify and retain an expert willing and able to act as such at an early stage.

HOW THE COURT DETERMINES AND APPLIES FOREIGN LAW

After hearing any expert evidence, the court is tasked with ruling on the point of foreign law (applying the burden of proof and, if appropriate, the presumption of similarity). The task the English courts set themselves in undertaking this exercise varies depending on whether it is deciding the content of some rule of foreign law or applying that rule or rules (particularly by interpreting a foreign instrument).

Determining the content of foreign law

When determining the content of the foreign law, an English judge will normally attempt to determine how the apex court of that jurisdiction would determine the question if the matter were before it (*Dexia Crediop SpA v Comune di Prato [2017] 1 CLCL 969, at paragraph 34*). Usually, this will simply be a matter of asking which expert's evidence is to be preferred.

Often, and particularly where their evidence is unclear or obscure, the court will look to the sources supplied to determine this question (*Concha v Murrieta (1889) 40 Ch D 543, Cotton LJ at page 550*).

After this, the question is one of judgment for the court on the particular facts of the case. However, the following three key points may be noted.

Point not addressed (or addressed authoritatively) by foreign court

An English judge may be confronted with a dispute over a novel or highly controversial point of foreign law. In such cases, the judge must still make a factual determination and resolve the dispute. It is not open to them to simply throw their hands up in the air (*Re B (Standard of Proof) [2009] 1 AC, Lady Hale at paragraphs 30-31*).

Where that point concerns general principles of private law then a judge may start with the presumption of similarity, particularly where the law is of a common law jurisdiction. But a judge is entitled (or may have no choice) to go beyond this and, by reference to the evidence, offer its answer as to how the foreign court would resolve the controversy (*Blue Sky One v Mahan Air [2010] EWHC 631 (Comm), at paragraph 88*).

Point already determined by foreign court

Conversely, if the evidence identifies that a superior court has already determined the point in dispute, the English court may treat that decision as weighty, if not conclusive. Indeed, in line with its duty to restrict expert evidence, the court may prevent the parties adducing any other evidence of foreign law (*National Bank of Egypt International Ltd v Oman Housing Bank SOAC [2002] EWHC 1760 (Comm)*).

However, this must not be pushed too far. An English court is entitled to regard a foreign decision (even at the highest level) as incorrect (*Santander v Totta, at paragraph 237(9); Deutsche Bank v Comune di Busto [2021] EWHC 2706 (Comm), at paragraph 108*). However, if the decision is of a court of appeal or apex court, the court is very unlikely to reach such a conclusion (*Guaranty Trust Company of New York v Hannay [1918] 2 KB 623, at pages 638-639*).

Ultimately, the court is not applying the prior decision, but asking the factual question of whether a future court would follow that decision. The weight to be given to the past decision may therefore depend on the strictness of precedent within the foreign system (*Santander v Totta, at paragraph 237(13)*). This is a matter which an expert should also address in their report.

Uncontroverted evidence

As the decision on foreign law is for the judge and not the expert, the judge is not bound to accept evidence even if it is not controverted or it is agreed. A court could in an appropriate case simply hold that the presumption of similarity had not been displaced. However, as with other types of expert evidence (see, for example *Griffiths v TUI [2021] EWCA Civ 1442, at paragraph 50*), an English court will be slow to exercise its right to reject uncontroverted foreign law evidence (*Sharif v Azad [1967] 1 QB 605, at page 616*).

A court is only likely to reject such evidence if it is obviously biased, irrational or logically flawed or entirely unsupported by its sources (*Debt Collect London Ltd v SK Slavia Praha-Fotbal AS [2010] EWCA Civ 1250, at paragraphs 33, 36; Catalyst Recycling v Nickelhutte Aue [2008] EWCA Civ 541, at paragraph 49*).

Caution is particularly important in relation to foreign law as it may involve technical or cultural context that may appear unusual to an English common lawyer.

Interpretation of instruments and other application of foreign law

Once the relevant principles are established, the English court must then apply them to the dispute before it.

At this stage, the English court is no longer engaged in an exercise of prediction. Instead, the English court is exercising its own evaluative discretion in applying the law, as recognised by the Commercial Court Guide at paragraph H3.4(a).

This is particularly relevant when an English court is interpreting a foreign instrument; it has been made clear that an English court is not asking itself how a foreign court (even the "highest court") would interpret the contract in question if it were to do so. Instead, the English court is merely applying the rule of interpretation as identified to that instrument (*Savona, at paragraph 15*).

APPEALS ON FINDINGS OF FOREIGN LAW

When a judge makes a determination as to the content or principles of English law, an appellate court is entitled to interfere with that determination simply on the basis that it considers the judge was wrong (*Henderson v Foxworth Investments Ltd [2014] UKSC 41, at paragraph 67*). By the same token, a first instance judge should give permission to appeal on a question of law simply if there is a "real prospect" that the appellate court would disagree with their determination (*CPR 52.6(1)(a)*).

It was emphasised in *Deutsche Bank v Busto (permission to appeal) [2022] EWHC 219 (Comm)* that as the content of foreign law is a matter of fact and is determined by reference to expert witnesses, the first instance judge is entitled to a degree of deference as to their evaluation of the witness evidence. This deference applies with even more force where the judge has applied a rule of the applicable foreign law to the facts of the dispute (Busto, at paragraph 79).

However, being a "special" or "peculiar" kind of fact, an appellate court is not required to follow the usual practice in relation to factual determinations in all cases (*Parkash v Singh [1968] P 233*). Instead, as the Court of Appeal in *Dexia Crediop SpA v Comune di Prato [2017] EWCA Civ 428* recognised, the deference accorded to the trial judge's findings will vary according to whether:

- The foreign law in question is closely related to English law (for example, US law as in *MCC Proceeds v Bishopsgate* or *King v Brandywine*), in which case an appeal court is well placed to address the matter using its own knowledge and experience and deference will be lessened.
- It is entirely different, such as civil law or Islamic law, in which case the court will give much greater deference to the trial judge given their better vantage point as to the expert evidence in respect of a law with which it has less familiarity.

(*Dexia, at paragraphs 34 - 42.*)

At one end of this spectrum is a decision on an unfamiliar system of civil law which involved significant disputes between the expert witnesses who gave evidence at trial. In such cases the court can only interfere in the judge's decision if it is not supported by any evidence or is otherwise an unreasonable conclusion on the available evidence (*Busto, at paragraphs 39 - 42*).

At the other end of the spectrum is a case where the English court has applied English principles of interpretation to a statute of a common law system and there then there is no evidence of any special meaning of principles; in such cases the trial judge's decision on the law is entitled to no particular deference (*MCC Proceeds, paragraphs 423 and 424*).