RATIONALISING AND SIMPLIFYING THE PRESUMPTION OF SIMILARITY OF LAWS

A party who has not pleaded foreign law may not "rely" on foreign law. On the other hand, a party who has pleaded foreign law may rely on the presumption of similarity of foreign law to the substantive *lex fori*. The result is that if the plaintiff has pleaded foreign law, his claim based on foreign law will be dismissed only if the substantive *lex fori* is in fact unfavourable or the party-opponent proves that the foreign law in fact does not support the claim. These rules are almost trite but the exceptions to the rules are difficult to comprehend by reference to principle. This article examines the rationales of these two rules and argues that a coherent and rational classification is possible when the presumption of similarity is kept out of the pleading rule and its scope modulated in the light of developments in the doctrine of *forum non conveniens*.

TAN Yock Lin
BSc (London), Dip Econ Devt, BA, BCL (Oxford);
Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 In the common law conflict of laws, the broad subject of proof of foreign law yields considerable confusion upon closer scrutiny. Rules which are distinct remain conflated and hard to penetrate despite the long passage of time.[1] One is ostensibly a rule of pleading which is typically stated as follows: foreign law must be pleaded as a fact if it is to be relied on.[2] The second, ostensibly a rule of evidence, is that where the contents of foreign law are not proved or not sufficiently proved, they

1 As noted in *Mercury Bell v Amosin* (1986) 27 DLR (4th) 641 at 645:

> The problem with this jurisprudential rule is that, however old, basic and simple it may be, its real meaning and scope have never been clearly defined.
> …
> This rule is peculiar to English law. It is contrary to that followed in other countries such as France where the judge is not only entitled to take judicial notice of the foreign law but, at least according to the leading doctrine, is even required to do so in view of the public order character of the rules of conflict of laws.

2 See *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at paras 9-002–9-004: "The general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other fact."

are presumed identical or similar to the substantive *lex fori*.[3] The third rule is a tentative choice of law rule that parties to a dispute may agree to have their dispute governed by the *lex fori* whatever other law may be designated by the forum's choice of law rules.[4] The fourth rule is that unless a choice of law rule is mandatory, a court is not obliged *ex officio* to raise the applicability of foreign law and to reject a party's pleaded or proved foreign law which is not the mandatory foreign law. For reasons of space, the third rule will be omitted while for reasons of its rarity, the last-mentioned rule will not be considered explicitly. These omissions do not affect the arguments in this article.

2 In what follows, the arguments first expose at least two conflations in the subject of proof of foreign law; namely that between pleading and the nature of foreign law as fact; and second, between the evidential burden of going forward with proof of foreign law and the legal burden of persuading the court as to the contents of foreign law. The article then argues that rules of pleading indistinguishably require foreign law to be pleaded in order to avoid party-opponent surprise and satisfy the court as to the existence of jurisdiction and justiciability. Consequently, characterisation of foreign law as a fact for the purposes of pleading introduces an unnecessary, unhelpful and confusing layer of rationalisation. Furthermore, conflicts rules are neutral jurisdiction-selecting rules. There is no conflicts rule that the court always applies the *lex fori* until and unless it is demonstrated that the rules of conflict require the court to apply foreign law. So there is no rule arising from the intrinsic nature of conflicts rules that a party relying on foreign law must plead and prove it. Rules of pleading and as to how foreign law is to be proved are qualitatively different in purpose and functionality and ought to remain distinct. Rules of pleading open the way to adduction of evidence of foreign law but the presumption of similarity of laws as a rule of evidence stipulates the quality of evidence which commands judicial fact-finding action. That presumption should be operative only at trial at the behest of the party who has pleaded foreign law and bases his claim or defence on it. It is demonstrated that when conflation between pleading and proving foreign law is eliminated, the so-called exceptions to the presumption of similarity of laws assume greater clarity and coherence. First, the presumption will be irrelevant where the court is exercising the discretion to stay proceedings on *forum non conveniens* grounds or the

3 See *N V De Bataafsche Petroleum Maatschappij v War Damage Commission* [1956] SLR (46–56) 12, where the presumption was applied as the proof that certain minerals *in situ* in Sumatra became *res nullius* on passage of the Netherlands Indies Mining Law 1891 was inadequate.

4 The rule is not yet fully developed; in particular it remains doubtful whether parties can perfectly agree to the governance of a third country law other than the *lex fori* or on a system of conflict of laws other than the *lex fori*'s.

court's O 11 jurisdiction[5] is invoked. The exceptions to the presumption which are supposed to apply in these matters are not in truth exceptions but stand for the irrelevance of the presumption. Second, with cases on matters of jurisdiction out of the way, a more coherent thread running through the remaining exceptions which relate to trial begins to be discernible. These exceptions may now generally be formulated as calling for withdrawal of the presumption from the party with the legal burden to prove the affirmative in his cause who has pleaded foreign law but does not act in good faith.

II. Conceptual problems with the popular formulations

3 The conflations in the subject are very conspicuous in an influential exposition in which the two above-mentioned rules are substantially unified by teasing out four "principles": (a) foreign law is a fact and as such beyond the scope of judicial notice; (b) since foreign law is a fact, it must be formally proved, being unknown and unknowable to the judge; (c) since foreign law is a fact, one who relies on it must expressly plead it; but (d) if foreign law is not pleaded or is pleaded but not adequately proved, the court will apply the substantive *lex fori* "for knowing only [that law] it presumes foreign law to be the same".[6] This clarification is purportedly an important derivation of both the pleading rule and the presumption of similarity from characterisation of foreign law as a fact. It is appropriate that the difficulties in deriving the rules from a factual characterisation of foreign law first be called to attention.

4 The first and second "derivative" principles in the exposition add a motivational consideration and crucial foundational nuance to the rules. It seems, however, to be very ambiguous and conflated. When the principle is expressed in terms that as foreign law is a fact, no judicial notice is possible, this either unhelpfully begs the question or positively overstates the position. The fact that foreign law is a fact means that in the absence of evidence a judge must not profess self-informed or private knowledge of the contents of the foreign law. However, that does not entail that as an abstract proposition he cannot take judicial notice or dispense with proof or evidence of the fact even though the nature of the foreign law, such as its notoriety, or other general considerations, would justify the court in declaring its truth without requiring evidence from the party who is obliged to prove it. On the other hand, when it is posited that foreign law is a fact and must be formally proved because it is actually or presumptively unknown and unknowable by judges, the

5 See O 11 r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

6 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at pp 4–5.

premises of factual judicial ignorance obviously are false. There will be foreign laws that are notorious in fact and those that are not. The principle cannot simply assert that foreign laws can never actually be notorious and consequently foreign law is a fact of which judicial notice cannot be taken.

5 To avoid unreality or circularity, the principle must be re-conceptualised as a completely normative postulate that judges should be deemed to be ignorant and precluded from taking judicial notice of foreign law no matter how notorious. The third principle is then arrived at, that as a result, foreign law must be pleaded as a fact. This postulate tying pleading of foreign law to judicial ignorance or denial of judicial notice, however, is not a strictly correct usage of the evidential concept of judicial notice.[7] There is no entailment that a party must not plead that which the courts know or must plead that which the courts do not know. A party need only plead facts in issue or necessary facts and need not plead facts relevant to or bearing upon facts in issue even though the courts do not know of them until informed of them at trial. Numerous instances may also be found of the courts' taking judicial notice at trial of relevant facts which need not be and have not been pleaded. Perhaps more to the point, it has never been doubted at any time that a party may decide whether he will plead or refrain from pleading foreign law.[8] This liberty is his without regard to whether or not the judge is ignorant or cognisant of foreign law. Judicial ignorance cannot explain why foreign law is not a fact in issue and not in any other way essential to a claimant's pleadings of a cause of action.[9] However, what is true is that where a necessary fact or ground of defence is a matter of common knowledge (so that it is not only known to the judge but also to the party-opponent), it need not be pleaded.[10] The court may in the absence of pleading *ex officio* notice the necessary fact or ground of defence. Other than this special usage of judicial notice, the notion of

7 See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little Brown & Co, 1940) at § 2566.

8 See Rt Hon Lord Justice Mance, "Foreign and Comparative Law in the Courts" (2001) 36 Tex Int'l LJ 415 at 416.

9 There appears to be an indirect explanation in this respect to be gleaned from Fentiman's consideration of mandatory conflicts rules. In Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at pp 74–75, Fentiman suggested an explanation in terms of the now discredited vested rights theory. Influenced by the vested rights theory, common law courts might have considered that they were not to apply foreign law as law but merely to enforce rights arising thereunder as facts. If so, submissions on the foreign law would have had to be pleaded by the parties if they wished them to be considered. However, the problem with the explanation is that the vested rights theory came too late to influence the pleading and proof of foreign law, which were matters settled long before the introduction of the theory.

10 See Joseph Chitty, *A Practical Treatise on Pleading: And on the Parties to Actions, and on the Forms of Actions* vol 1 (W Clarke & Sons, 1809) at p 232 *ff*.

judicial notice or ignorance of foreign law is extraneous to the question of whether a person who wishes to adduce evidence of it should first plead it. The answer in the first place depends on whether foreign law is to be regarded as a necessary fact or ground of defence or a necessary matter of law. The normative postulate that foreign law can never be common knowledge does not prove whether it is necessary to be pleaded or merely optional.

6 There is another difficulty when the third principle is juxtaposed with the fourth. The proposition that he who wishes to rely on foreign law must plead it is ambiguous. "Relying on foreign law" could mean that the relying party is basing a claim on it so that the court should affirm in his favour the legal significance of the pleaded facts in issue which will necessarily and sufficiently constitute legal actionability or non-actionability. The rules of pleading also require the pleading of denial of allegation or controverted allegation. So where the plaintiff omits to plead foreign law, as he may since foreign law actionability is not a fact in issue, the defendant may plead foreign law generally or in particular in order to engage the rules of conflict and by leading evidence of foreign law demand that the plaintiff prove his claim under the foreign law. Such a defendant could also be said to be relying on foreign law.[11] Relying on and thereby pleading foreign law in the sense of demanding that the plaintiff prove his claim under foreign law is very far from a plaintiff basing a claim on foreign law, but the unfortunate result of then juxtaposing the third and fourth principles is a more serious conflation that a party who relies on foreign law must plead and prove it, whether he is a plaintiff basing his claim on foreign law or defendant demanding that the plaintiff prove his claim under foreign law.[12]

7 The conflation between pleading and proving foreign law is especially conspicuous in an alternative formulation which does not refer to "relying on foreign law" but to asserting that foreign law applies. In *Schapiro v Schapiro*,[13] it was said that "the onus lies upon any party

11 The well-established distinction between the legal burden and evidential burden of proof was recently restated in *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855 at [58].

12 So while Fentiman recognises that relying on foreign law covers relying on it in the abstract and relying on its contents, he does not hesitate to draw the elided conclusion; namely that in either case, the presumption of similarity is available. Fentiman apparently does not separate the pleading and the proof of foreign law. The presumption of similarity which aids the proof of foreign law is considered available to the person who relies on foreign law and has pleaded it irrespective, it would appear, of how foreign law is being "relied on". See Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at pp 143–144.

13 (1904) TS 673 at 677.

who asserts that the law of a foreign country applies, to prove what the law of that country is and wherein it differs from our own". By "asserting that foreign law applies" it is apparently not meant that the defendant who pleads foreign law in controverting the plaintiff's affirmative in the cause merely bears the evidential burden of going forward with evidence. It does not seem to be intended to mean that the legal burden of disproving the contents of the foreign law which the defendant asserts is left where it belongs with the plaintiff asserting the affirmative. Thus, whether relying or asserting foreign law is intended, the presumption of similarity immediately avails to place the legal burden of proof on the defendant to disprove the affirmative case of the plaintiff under the foreign law.[14]

8 The conflation between pleading and proof is reasonable if the plaintiff pleads foreign law and bases his claim on it. Clearly such a plaintiff must prove foreign law and the facts in issue according to foreign law; consequently, he must plead and prove foreign law. This may be said fairly to be analogous to the cases where the plaintiff must plead a fact in issue the onus of proof of which is on him. In such instances, the onus of proof is relevant both at the pleading stage and at trial, since if the fact in issue is not pleaded, the claim will disclose no cause of action and be struck out at the pleading stage. That a plaintiff must plead and prove the facts in issue is a true proposition. However, once the liberty to plead or not plead foreign law is premised, so that foreign law is not essential to a cause of action, a conflation immediately occurs if the defendant who pleads foreign law in denial of the plaintiff's claim must prove it. The allocation of the legal burden of proof on the defendant who is not basing any affirmative claim on foreign law is not only oddly unfair to the defendant.[15] As a matter of logic and authority too, pleading is one thing and proving another when the pleaded fact is not a fact in issue. However, the juxtaposition of the third and fourth principles falsifies the distinction between pleading and proof by coalescence.[16]

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14 *Cf* Albert Dicey & John Morris, *The Conflict of Laws* (Sweet & Maxwell, 10th Ed, 1980) at p 1216: "The burden of proving foreign law lies on the party who bases his claim or defence on it."

15 As was stated in *Lee Tso Fong v Kwok Wai Sun* [2008] 4 HKC 36:

> The general rule is *Ei qui affirmat non ei equi negat incumbit probation* [*sic*]. Proof rests on he who affirms, not he who denies. It therefore lies upon the party who substantially asserts the affirmative of the issue: see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd, The Kingswood* [1942] AC 154 at 174.

16 Albeit, this "burden is fixed at the beginning of the trial by the state of the pleadings": *Phipson on Evidence* (Hodge M Malek *et al* eds) (Sweet & Maxwell, 18th Ed, 2015) at para 6.06. So a case is not properly pleaded if the pleadings do not disclose a cause of action. See *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107. This distinction between pleading and proof is clearly maintained in

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9 Perfect coincidence between pleading and proof is not impossible. It could be postulated that the contents of the foreign law are "special facts" or "particular facts" to be proved by the party who pleads foreign law.[17] There is, however, no well-established notion of a legal burden of proof of particular facts.[18] Although the notion found expression in early 19th century evidence codes,[19] there is little doubt that the burden of proof of a particular fact is actually the evidential burden of going forward. It follows that the legal onus of proof of foreign law cannot shift to the defendant who asserts the foreign law as a particular fact in controverting the plaintiff's claim which has been pleaded on the basis of the *lex fori*. Nor does it help to postulate that the defendant who pleads foreign law in controverting the plaintiff's claim bears the onus to prove foreign law because it is a fact within his especial knowledge. Again, the burden of proof of facts within the especial knowledge of a person is only evidential and not legal.[20] There is furthermore simply no entailment that the defendant who asserts that foreign law controverts the plaintiff's claim has any more personal knowledge of the foreign law than the plaintiff, or that his expert on foreign law is more able to deal with the proof of foreign law than the plaintiff or the plaintiff's expert.[21] In addition, as will be elaborated immediately below, an examination of the rationales underlying pleading and proving sufficiently demonstrates that it is wrong to conceive of foreign law as a particular fact to be proved by whoever pleads it, regardless of where the burden of proof of the affirmative in the cause or the defence would otherwise lie.[22]

10 Among other possible conceptualisations, the least satisfying recommendation would be to tie up the pleading of foreign law and the presumption of similarity of laws by making the latter implicit in the former. Since foreign law is presumed similar to the *lex fori*, whoever

Soward v Leggatt (1836) 7 C & P 613 and *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd, The Kingswood* [1942] AC 154.

17 It could more superficially be constructed by conceiving that the defendant who is pleading foreign law must prove the particular fact that the forum's conflicts rule designates that law as governing or applicable. Such an attempt is superficial because it would confuse law with fact. The applicability of foreign law in that sense, if any, is a matter of the forum's conflict of laws. It is a question of law.

18 See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol 9 (Little Brown & Co, 1940) at § 2486.

19 See s 105 of the Evidence Act (Cap 97, 1997 Rev Ed).

20 See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol 9 (Little Brown & Co, 1940) at § 2486. In the case of s 106 of the Evidence Act (Cap 97, 1997 Rev Ed), the same point made in the text is true. The legal burden under s 106 cannot be recognised where its effect would be to lessen the burden of proof of the affirmative in the cause under s 103.

21 *Cf* Yaad Rotem, "Foreign Law as a Distinctive Fact – To Whom Should the Burden of Proof Be Assigned?" (2014) Chi J Int'l Law 625.

22 See paras 12–15 below.

asserts that foreign law is different must plead and prove the difference. This is even less cogent than postulating that foreign law is a particular fact to be proved by the person asserting it. It is arguing backwards. It starts with a conclusion about how foreign law is to be proved and what happens when there is no proof or inadequate proof. It then reasons backwards to what must be pleaded and to the incidence of the burden of proof.

11 Last but not least, the postulate that as a matter of policy a court will apply the *lex fori* unless a party pleads and proves that the foreign law is different may be presented as a more cogent recommendation than the foregoing. Such a postulate is not ontological, and in particular does not rely on judicial ignorance or notice, but on a broad based policy of forum bias. However, an examination of the objects and functions of pleading and proof of foreign law which immediately follows shows that there is no warrant for adopting such a broad-based policy, nor is there a conflicts policy of forum bias to be reflected in such a postulate. The question of whether conflicts rules by their nature intrinsically allocate the burden of proof of foreign law to the party relying on it to displace the *lex fori* will be addressed as part of the discussion of the rule of evidence which follows the rule of pleading below.[23]

III. Separating the rule of pleading foreign law

12 To avoid the conflation of pleading and proving as well as proleptic reasoning, it is necessary to inquire more deeply about the rationales for rules of pleading and of evidence, particularly whether they are distinct and unique to the functionalities of pleading and proof. The rationales are not to be found in the judicial state, as to what judges know or do not know, but reside entirely in what the parties know or should know or do not and need not know. This is because rules of pleading have two primary objects, namely the minimisation of surprise to the party-opponent (in order to give him the opportunity to answer) and informing the court of issues that are justiciable by the court.[24] A rule of pleading in the first place aims to minimise surprise by informing the party-opponent of the minimal nature of the case he has to meet so as to minimise the risks of abusive action and wasteful costs of discovery. This is achieved by insisting, for instance, on the pleading of the facts in issue and barring a party who fails to plead these facts

23 See paras 16–20 below.

24 *R v Mayor and Burgesses of Lyme Regis* (1779) 1 Doug 149 at 159, *per* Buller J. See also *R v Horne* (1777) 2 Cowp 672 at 682–683.

from leading evidence of them.[25] It also explains why the plaintiff need not plead the law on which he bases his facts in issue. Where there are no conflicts issues, a plaintiff has never been required to plead actionability under the law whether generally or in any particular respect not because judges were bound to know the law but because a party-opponent could not generally claim to be surprised and prejudiced by any omission of this nature.[26] It is submitted that there was no difference where foreign law was concerned. The persisting liberty to plead or refrain from pleading foreign law continues to reflect the same premises that legal actionability whether under the *lex fori* or foreign law is not generally essential to pleading a cause of action save where not pleading it would occasion surprise and prejudice to a party-opponent. Importantly, this pleading paradigm is established by barring the adduction of evidence for the sake of avoidance of surprise and prejudice, not by resolving whether such evidence as may be adduced has the requisite quality to establish the contents of foreign law. Without having to characterise foreign law as fact or law, the prevention of surprise to a party-opponent sufficiently explains why foreign law must be pleaded if evidence is to be led of it.[27] A party-opponent being sued in the forum would not expect to have to deal with evidence of foreign law unless the plaintiff so informed him by the pleadings. Conversely, the plaintiff would not expect to have to deal with foreign law unless the party-opponent pleaded it in denial of the plaintiff's claim.[28]

13 Secondly, a rule of pleading aims to produce facially clear, material and contested issues which the court has authority to adjudicate and as to which it can, *inter alia*, validly declare the law arising upon the facts. It is for this reason that a plaintiff must plead *all* the facts in issue of his cause of action; otherwise the court must at the defendant's behest strike out his claim as disclosing no cause of action.[29] This object of pleading with the emphasis on justiciable issues is critically

25 Similarly, from taking a new point on appeal by seeking to introduce for the first time evidence of foreign law when foreign law was not pleaded originally. See *ROP v Maler Foundation* [2014] 1 SLR 1389 at [77].

26 Put another way, legal actionability is not essential to the pleading of a cause of action, which of course also serves to facilitate access to justice by ensuring that pleadings will not be impugned by reason only that they are based on an incorrect view of the law.

27 See *N V De Bataafsche Petroleum Maatschappij v War Damage Commission* [1956] SLR (46–56) 12 where although the pleadings of foreign law were unsatisfactory (for example, the defence of *specificatio* under foreign law had not been pleaded), the court held that evidence of foreign law would be allowed as in the circumstances no substantial injustice had occurred to either party.

28 So that the judge is entitled to exclude evidence of the unpleaded foreign law even if it had been led under reservation. See *Armour v Thyssen Edelstahlwerke AG* 1989 SCLR 26.

29 See *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107.

dependent on the nature of the jurisdictional framework within which the plaintiff's claim is to be instituted and rebutted. Pleading not only identifies, narrows and confines the contested issues; it must also display them exactly so that the court can see *ex facie* from the pleadings that there are justiciable issues. That said, where jurisdiction is *in personam*, the court is little concerned with the subject matter of the action in general and in particular with legal differentiations between categories of *in personam* causes of action which are comprehended by the jurisdiction. As of right jurisdiction *in personam* was originally conceived in purely territorial and personal terms. When a defendant could only be made to answer the complaint of the plaintiff if he was served with a writ within the jurisdiction, or had voluntarily submitted to the jurisdiction, the court applying territorial rules of jurisdiction would naturally not be concerned with foreign law actionability in relation to the subject matter of the action. It was sufficient that the plaintiff's pleadings in the cause should *ex facie* be cognisable by the court and not necessary that he should plead the foreign law, disclosing a cause of action thereunder. This was an additional reason that rules of pleading *in personam* causes of action did not need to be concerned with actionability under the law, including foreign law.[30] Reinforcing this initial disinterest in the law at the pleading stage, there is still no rule that requires the court to state clearly and unequivocally which legal rule it will apply when giving its judgment. Nor is there any change in the refusal to require that an appeal on a question of fact must specify whether the outcome is based on foreign law. However, though not required to plead any law for the purposes of obtaining *in personam* jurisdiction over the defendant, a plaintiff was required to avoid surprise as already mentioned; therefore, he had to plead the foreign law if he sought to lead evidence of the foreign law. The same considerations of avoidance of surprise sufficiently explained why a defendant who wished to adduce evidence of foreign law was obliged to plead the foreign law when controverting the plaintiff's claim in his pleadings. These considerations have remained unchanged.

IV. Separating the rule of evidence (or the presumption of identity of laws)

14 The presumption as a rule of evidence is undergirded by different considerations from the rule of pleading. There is a popular and sentimental theory which posits that the presumption was little more than an expression of English notions of the superiority of the common law inculcated by English colonial expansion on a massive

30 Which was of course convenient because this would not occasion prejudice to persons ignorant of the law.

scale.[31] It is submitted that the theory owes more to popular imagination than to rationalism. As a matter of history, the influence of trial by jury as a universal mode of fact-finding was singularly important. It was reflected in a rule of venue which distinguished the local from the transitory cause of action.[32] If a dispute was local in nature, jurors were to be selected from the locality in which the cause of action arose. Although that was not required for the trial of transitory causes of action, the problem which became significant as local litigation of foreign transitory causes became more common was that no foreign juror could be summoned as of right from the foreign locality in which the cause of action arose. To complicate matters, a party to the proceedings was at this time an incompetent witness of fact and hence non-compellable as a witness by the opposite side[33] while the expert witness was not accepted as a competent witness until the late 1700s.[34] The not insignificant likelihood of absence of key but unwilling foreign juror-witnesses of foreign procedures, rules, practices, usages, customs and standards of conduct and probity meant that a rule of venue serving to provide for a better administration of justice and bound up with fact-finding by jurors was in danger of derailment if the facts to be proved occurred outside the jurisdiction. Perhaps more importantly, since the plaintiff was bound to sue the defendant where he could be served personally with a writ, he had no real choice of representation by foreign counsel but to sue by local counsel unversed in foreign law. The defendant likewise was bound to defend by local counsel although intending to raise a foreign law defence. Costly proof of foreign law by experts, when expert evidence became admissible, was inevitable so that where events complained of occurred out of the realm, the parsimonious plaintiff faced serious prospects of dismissal at trial for want of evidence or complete evidence of critical facts of the claim or failure of effective legal apprehension. Not spared these difficulties, the Defence too faced

31 Hugessen J in *Mercury Bell v Amosin* (1986) 27 DLR (4th) 641 at 651 lent weight to this theory, saying:

> … expressions of the rule dating from the last century were obviously coloured by the climate of their time. English law and custom were being exported and spread by colonial expansion to every corner of the globe. English lawyers and judges, not unnaturally, viewed their system as being far superior to any other. Kipling expressed a general sentiment when he spoke of 'lesser breeds without the law'; there is no doubt that the law he referred to was the common law of England. In those circumstances, it was perhaps understandable that the rule should frequently have been expressed in terms of a 'presumption' that the foreign law was identical to English law since the latter expressed the standard against which all others must be measured. In the modern context, however, such a presumption makes little or no sense.

32 See *British South Africa Co v Companhia de Mocambique* [1893] AC 602; *Deschamps v Miller* [1908] 1 Ch 583.

33 Parties were incompetent at common law by reason of interest in the case and motive to lie.

34 See *Folkes v Chadd* (1782) 3 Doug 157.

serious prospects of judgment being given for the plaintiff on account of want of evidence or complete evidence or failure of accurate legal apprehension of the defence.

15 Denial of the existence of jurisdiction was not an optional solution to these systemic risks of failure of proof of foreign law since the distinction between local and transitory actions was a rule of venue concerned with the exercise of jurisdiction, not the existence of jurisdiction. Outright dismissal of a foreign transitory cause of action by way of refusing the exercise of jurisdiction which could lead to dismissal at trial was obviously also not a sensible solution. As it turned out, presumptions provided the courts with a solution. There were instances of the courts turning to presumptions as a means of avoiding injustice to a party which would otherwise be prejudiced by the inability to compel key witnesses on his behalf to prove foreign procedures.[35] So far as evidence of other foreign law was concerned, the presumption of similarity of laws was a more general and effective mitigating reaction. It made it more possible for the plaintiff to conduct the trial of his transitory cause of action or the defendant his defence by local counsel without the fear that the claims or defence as the case may be would be dismissed for reasons of inadequate information or comprehension of foreign law. It gave them the presumption of similarity as an expedient measure. The plaintiff or defendant who could not prove foreign law or had not appreciated the need for proof of a particular foreign law had a second chance, as it were, of falling back on the *lex fori* where it was also supportive, albeit in a lesser manner or to a lesser extent, of the cause or defence as the case might be.[36]

16 Such considerations of venue are largely or virtually things of the past, although the insistence on proof of foreign law by experts, if proof is desired, remains.[37] If they were all there was to the presumption,

35 For example, where the pleadings alleged a formally valid marriage, the courts dispensed with proof of foreign marriage ceremony by eyewitnesses by allowing a presumption of formal celebration to be raised by evidence of local habit and repute of marriage. See also *Sheludko v Sheludko* [1972] VR 82 and *Re Williamson v Williamson* (1912) 8 Tas LR 33.

36 The explanation given in the text is more specific than similar but more general injustice prevention rationales such as the unfairness of dismissal of the case when proof of foreign law is difficult (see James McComish, "Pleading and Proving Foreign Law in Australia" (2007) 31 MULR 400 and Otto Sommerich & Benjamin Busch, "The Expert Witness and the Proof of Foreign Law" (1953) 38 Cornell L Rev 125 at 127–128) or when there is some indication that the foreign law is similar to the *lex fori*: see Albert Kales, "Presumption of Foreign Law" (1906) 19 Harv L Rev 401 at 406.

37 In Singapore, s 40 of the Evidence Act (Cap 97, 1997 Rev Ed) qualifies this requirement by providing for admissibility of purported rulings of the foreign court contained in a book reporting such rulings. However, their weight will be slight unless they are explained, clarified and construed by expert witnesses as to

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the presumption should have outlived its usefulness as being a procedure of an older and obsolete system of trial. Moreover, the presumption would be irrelevant as being conditioned by the special rules by which that system was governed, in particular, a principle of as of right jurisdiction which demanded that the jurisdiction if it existed should be exercised except in very restrictive circumstances such as where to do so would be vexatious or oppressive on the defendant.[38] Under modern conditions of litigation, the defendant has been provided an important facility of staying as of right proceedings brought by the plaintiff on wider and more flexible grounds of *forum non conveniens*.[39] Experience with the doctrine of *forum non conveniens* shows that the plaintiff's choice of venue is now significantly circumscribed by allowing the defendant to show where a dispute turns significantly on the contents of the foreign law that the decision is more appropriately made by the foreign courts which are the best equipped, qualified and positioned to apply the foreign law.[40] It would be inconsistent with this development to allow the presumption of similarity of laws to influence the exercise of jurisdiction as a matter of course in the same manner as before. As argued further below,[41] the presumption, however, remains a valid principle of modern litigation if confined strictly to trial of issues of foreign law. The important consideration will be that where the defendant neither pleads foreign law nor seeks a stay on foreign law grounds, he may be taken to have tacitly accepted the appropriateness of trying the case as if it were a domestic case. Indeed, parties will often for the sake of economy of trial selectively plead foreign law, if they choose

their effect as law. See *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [54]–[60] and *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042. See also *Baron de Bode's Case* (1844) 8 QB 208 at 265 and *Sussex Peerage Case* (1844) 11 CL & F 85 at 115. There is, however, no need for expert evidence of English law as foreign law when it is cited to explain and illumine Singapore law as distinct from when a decision about English law is to be made. See also *White v Jones* [1995] 2 AC 207.

38 The stricter approach to stay of proceedings is noted and recounted in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

39 See *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377; and *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391.

40 If the governing law is not the law of the forum (*Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [43]):

> … even where a party has failed to adduce evidence of foreign law, the mere factum of a foreign *lex causae* may be accorded due weight despite a failure to adduce evidence regarding the content of this law.

The impact of a different applicable law of course will be greater if the issues are mainly legal as opposed to being factual. Note that there is a contrary view that the significance of the applicable law is very modest. Its role is merely to identify the issues in the case. It is only exceptionally therefore that a court of the country whose law is the applicable law will find itself to be the court of the natural forum on that basis alone.

41 See paras 32–40 below.

to do so, leaving all other matters to be resolved according to the *lex fori*.[42]

V. Conflicts rules do not affect incidence of burden of proof of foreign law

17 There is another non-pragmatic argument for maintaining a rule of pleading distinct from a rule of evidence stemming from the peculiar nature of the common law rules of conflict. The common law does not define the rules of conflict by reference to a preliminary delineation between the domestic and the international claim. It thus does not involve the courts in a preliminary determination of whether the claim is domestic or international (and thus amenable to application of the applicable law). Focusing on the issues to be resolved, the common law asks instead whether they fall to be determined by reference to foreign law.[43] The plaintiff, and the defendant alike, only needs to decide whether he wishes to lead evidence of foreign law and if so, to identify the foreign law which he will plead. Since issues only fall within the rules of conflict if they are determinable by reference to foreign law, the way also to dispute and ascertain the rules of conflict themselves is to plead foreign law generally. So if the plaintiff does not plead foreign law and the defendant wishes to engage with the rules of conflict he will plead the foreign law. All this is acknowledged in the recent Singapore Court of Appeal decision in *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd*.[44] Clarifying that the rules of pleading and the presumption of similarity of laws are distinct, Sundaresh Menon CJ implicitly accepted that the effect of neither party pleading the foreign law as applicable law is that the case is treated as if it were a purely domestic case though it is in truth not.[45] This domestic case was equated to one marked by the absence of any conflicts issue.[46]

18 The point needs clarification. The absence of any conflicts issue could be intended to mean that the *lex fori* is applied in the absence of any conflicts issue. In the recent English case of *Shaker v Al-Bedrawi*,[47] the Court of Appeal contrastingly considered that if there was no pleading of foreign law and no evidence of it, the *lex fori* would be applied as the *lex causae*.[48] The English case acknowledges by referring

42 See *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267.
43 See also the Foreign Limitation Periods Act 2012 (Act 13 of 2012).
44 [2014] 1 SLR 860 (CA), reversing *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2013] 1 SLR 1254 (HC).
45 *EFT Holdings Inc v Marniteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [60].
46 *EFT Holdings Inc v Marniteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [61].
47 [2003] Ch 350.
48 Michael Hwang JC took this position in *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 1 SLR(R) 579. The Supreme Court of

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to the *lex causae* that there is a conflicts issue albeit one governed by the *lex fori*. The lower court judge had decided as a preliminary issue that the *Prudential* principle of reflective loss[49] barred all three claims of the claimant, apparently invoking the presumption of similarity of laws and thereby finding the defendants in breach of certain accounting responsibilities imposed by Pt VIII of the UK Companies Act 1985.[50] The Court of Appeal, however, applying the *lex fori* held that the English statutory law made no provisions for directors of a Pennsylvanian company and imposed no such accounting duties on them. Consequently, there was no proof that the claimant's loss was caused by the defendants' breach of duties owed to the company and no occasion for invoking the *Prudential* principle.[51]

19 The reasoning in *Shaker v Al-Bedrawi* has been welcomed by those who have long denied that there is any real difference between applying the *lex fori* and applying the foreign law on the basis that the contents of foreign law are similar to the *lex fori*.[52] In the present view, although for reasons of space no detailed substantiation will be attempted, there is a more cogent conception of the notional "domestic" case which does not call for applying the *lex fori*. This is that the effect of treating a case as if it were purely domestic is that both parties are seen as having made mutual admissions of fact to the effect that there are conflicts issues but that the contents of foreign law are indistinguishable

Canada in *Canada National Steamships v Watson* [1939] SCR 11 at 14 simply stated that if foreign law is neither pleaded nor provided, the court applies the *lex fori*.

49 See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.

50 c 6.

51 Not drawn to the attention of the English Court of Appeal in *Shaker v Al-Bedrawi* [2003] Ch 350, a Canadian authority seems to have relied on the presumption of similarity in the absence of a plea of foreign law in *Hellens (falsely called Densmore) v Densmore* [1957] SCR 768 at 780. See also *Tamil Nadu Electricity Board v ST-CMS Electric Co Pte Lid* [2007] All ER (Comm) 701 at [99], where it was said that the presumption might properly be "aimed at the situation where foreign law is [not] pleaded". Recent cases such as *Royal Boskalis Westminster NV v Mountain* [1999] QB 674 and *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 221 ALR 213 are easily distinguishable. Where the foreign conflicts rule is relevant (for example, because the doctrine of *renvoi* is admitted), the party who has pleaded foreign law is entitled to lead evidence of both its conflicts rules and the substantive foreign law. There is no reason not to apply the presumption of similarity also to the contents of the foreign conflicts rule.

52 See Richard Fentiman, "Laws, Foreign Laws, and Facts" (2006) 59 CLP 391. Mills has also pointed out that "in this context … the presumption seems artificial and unnecessary, given that the application of foreign law is not attempted": Alex Mills, "Arbitral Jurisdiction and the Mischievous Presumption of Identity of Foreign Law" (2008) 67 Camb LJ 25 at 27.

from the substantive *lex fori*.[53] Admissions of fact are of no weight and will be rejected if they in fact are not true and it follows that in the English case, the true basis for the decision was that the admissions would be rejected as objectively false having regard to the scope of the Pt VIII of the UK Companies Act 1985.

20 For the sake of being complete, it should be added that the fact that there is no immediate interest in the conflicts rule at the pleading stage implies that the nature of the conflicts rule has or should have little impact on pleading foreign law. With respect, the reasoning in the Singapore case just mentioned, *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd*, purporting to relate the rule of pleading to the nature of the choice of law rule relating to torts (the double actionability rule ("DAR")) overlooked this point and was unnecessary. The Court of Appeal dealt with the submission that the plaintiff bringing a tort action must plead actionability under the *lex loci delicti* by an examination of the nature of the DAR. It was deduced from observations about the historical evolution of the choice of law rule for torts that the DAR as it had evolved existed primarily for the benefit of the defendant.[54] It followed that the defendant was the party who must plead the foreign law and prove the difference between *lex fori* and foreign law actionability. As the defendant on the facts had failed to plead the foreign law, the court held that there was no ground to criticise the plaintiff for omitting to plead the foreign law. The difficulty with this solution to the pleading point is that it ignores that conflicts rules are essentially neutral jurisdiction-selecting rules, favouring neither the plaintiff nor the defendant. So the remarks highlighted should be understood as a practical observation that since in practice the plaintiff selects his forum and will prefer to sue the defendant where the *lex fori* is favourable to his claims, the DAR will typically benefit the defendant in that he can plead the lack of actionability under the foreign law to deny the plaintiff's claim. The critical point, however, is that without recourse to any such argument, the rule of pleading that legal actionability is not a fact in issue already predicates the plaintiff's liberty not to plead foreign law. That being the case, the court could have held that the defendant's submission failed *in limine*.[55]

21 By the same token, a more generalised proposition that the burden of proof is always on the party relying on foreign law because the forum always applies its own law unless that law ought to be displaced is also doubtful. This appears to be the proposition relied on in

53 The effect put another way, at least where foreign elements appear *ex facie* from the pleadings, is not that the *lex fori* is applied but that the court will dispense with proof of the foreign law unless an exception arises.

54 *EFT Holdings Inc v Marniteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [61].

55 The last-mentioned point was never in contemplation.

Partenreederei MS "Heidberg" v Grosvenor Grain & Feed Co Ltd[56] to resolve a dispute about whether a contract of affreightment had incorporated a French or an English arbitration clause. Aside from holding that the French judgment which had decided that the French arbitration clause was incorporated was to be recognised as *res judicata*, the court applied what it cited as the "well-established" rule that the English court:[57]

> … applies English law to decide disputes that come before it unless and to the extent that it is demonstrated, either by statute or rules of English private international law, it is required to apply the law of some other country.

The proposition makes reference to neither pleading foreign law nor the presumption of similarity and reads like a conflicts rule of forum bias. With respect, as the court thought the proposition was well established, it could not have adopted a controversial principle of forum bias which some US courts have done when abandoning the jurisdiction-selecting methodology of the conflict of laws.[58] Alternatively, the proposition should be regarded as an exceptional and circumscribed conflicts rule that applies the *lex fori* only if there is a gap arising from any intrinsic indeterminacy in the applicable law. This more modest understanding seems to reflect the endorsement of the case by the Court of Appeal in *Dornoch Ltd v Mauritius Union Assurance Co Ltd*.[59]

56 [1994] 2 Lloyd's Rep 287.

57 *Partenreederei MS "Heidberg" v Grosvenor Grain & Feed Co Ltd* [1994] 2 Lloyd's Rep 287 at 307–308. The Commercial Court determined that the question of existence of an English arbitration clause was governed by the subjective putative proper law, but as the plaintiff was unable to show which of two subjective proper laws should be applied to prove that the English term rather than the French term was incorporated, English law as the *lex fori* was to be applied. With respect, a simpler solution than the court's simple solution previously doubted was ready at hand. Neither party had in effect pleaded French law since the parties were agreed that by that law there would be no incorporation. Therefore, as a result of mutual admissions that whatever may be the identity of the applicable law, its contents would be identical to the *lex fori*, the plaintiff's claims could only succeed if by English law the English term was incorporated.

58 See *Kasel v Remington Arms Co* 101 Cal Rptr 314 at 327 (1972) that "the forum has a definite interest in applying its own law" which "will be displaced only if there is a compelling reason for doing so".

59 [2006] 2 Lloyd's Rep 475. The court said (at [17]):

> Our case is not concerned with the existence of an agreement but with one of its terms. Where there is more than one possible putative law (as here) it makes no sense to decide which one to choose by any putative law. At this stage the court has no choice but to apply the law of the forum.

VI. Qualifications to the rule of pleading

22 If rules of pleading must also accommodate considerations of jurisdiction, the question which next arises is whether the introduction of discretionary *in personam* jurisdiction predicating distinct causes of action connected in a stipulated manner to the forum entails that plaintiffs should now be required to plead foreign law. Relevant established features of this jurisdiction include the requirement that the plaintiff seeking service out of the jurisdiction state clearly and distinctly the particular cause of action and forum connection which together comprise the nexus or gateway of jurisdiction which he invokes.[60] Once he has specified this in his pleadings, a plaintiff is generally held to the pleaded nexus. He can no longer switch direction at his will untrammelled by his pleaded nexus.[61] So if he pleads a right under the law of tort citing damage suffered in the forum, he cannot add as of right and without leave of the court a hitherto unpleaded breach of contractual right governed by the *lex fori*.

23 Does the requirement that the cause of action and forum connection must be pleaded imply that the plaintiff must now plead the foreign law underlying his pleaded cause of action? Three possible answers could be given to this obscure question. The first is that there is no difference between a plaintiff invoking an as of right *in personam* jurisdiction where the cause of action need not be pleaded, and a discretionary *in personam* jurisdiction. It is equally open to the plaintiff not to plead the cause of action by reference to foreign law in the latter situation. The second is that all substantive subject matter requirements whether they make up the jurisdictional gateways of the discretionary jurisdiction or form the merits of the dispute are to be established according to the *lex fori*. The plaintiff and defendant as the case may be have no choice to plead foreign law. The third is that there is no universal or absolute rule either way. The merits are never required to be shown to be serious under foreign law and some jurisdictional gateway causes of action are to be pleaded by the plaintiff by reference to foreign law (so that there is no choice not to plead foreign law) but others may be pleaded by tacit reference to the *lex fori*.

60 The requirements were recently restated by Lord Collins of Mapesbury in *Altimo Holdings & Investment Ltd v Kyrgiz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 at [71]. First, in relation to the foreign defendant there must be a serious issue on the merits to be tried. Second, there must be a good arguable jurisdictional nexus. Third, "the forum is clearly or distinctly the appropriate forum for the trial and … the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction".

61 *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391; [1989] 3 All ER 14.

24 Such cases as might shed light on the question are inconclusive. In the English case of *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*[62] ("*Metall*") the Court of Appeal held that the plaintiff needed, where the substance of the alleged tort arose outside the jurisdiction, to show actionability under both the *lex fori* and the *lex loci delicti*, but that if it arose within the jurisdiction, it was a local tort and it sufficed that there was actionability under the *lex fori*. On the facts, the nexus was established for the tort of inducement of breach of contract but not for the tort of conspiracy since it arose substantially in New York where no such tort was recognised and hence no actionability existed. It cannot, however, be said that *Metall* is authority, at least where the basis of discretionary jurisdiction is the tort gateway, that the plaintiff would be required to plead actionability under the foreign *lex loci delicti* in respect of an overseas tort. It appears that foreign law was pleaded in fact in that case and the decision was not clearly and necessarily one that required foreign law to be pleaded in any event.[63]

25 The contract cases are similarly inconclusive. In *Entores v Miles Far East Corp*,[64] where it was not disputed that a contract was concluded, the *lex fori* was applied to decide that it was made in England, and not in Holland or the US. There was, however, no discussion on the point of which law ought to be applied. The decision would also be perfectly consistent with automatic recourse to the *lex fori* in the absence of any pleadings of foreign law. In two other cases, the plaintiff relied on the connection provided by express or implied choice of the *lex fori* as governing law and the defendant questioned the existence of the

62 [1990] 1 QB 391; [1989] 3 All ER 14.

63 *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156, a Singapore case, was similarly inconclusive. In that case, the plaintiff complained of trademark infringement by the defendant, a Singapore company, in Singapore and sought to serve writs out of the jurisdiction on two co-defendants as joint tortfeasors under O 11 r 1(*f*) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed). *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391; [1989] 3 All ER 14 was not cited to the Court of Appeal. Only *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, a contract case, was. Relying on an analogy with the contract cases, the Court of Appeal held that the plaintiff was required to prove the existence of a tort for the purposes of service out just as would a plaintiff seeking service out with a view to rescind or otherwise affect a contract. This the plaintiff could not do because it failed to show a good arguable case that by the *lex fori* the co-defendants were joint tortfeasors in the tort of copyright infringement. Intellectual property torts are local torts in the sense that the applicable law can only be the local law: in that case, the law of Singapore. Against that backdrop, while the court could appear to have required proof of actionability under the *lex fori* as an element of proof of nexus, it would be too much of a leap to suggest that the court would have required the plaintiff to plead and prove the foreign law if the tort had been a foreign tort.

64 [1955] 2 QB 327.

connection by raising doubts as to the non-existence of the contract. Foreign law was *ex hypothesi* irrelevant in these circumstances where if the contract existed the applicable law was unarguably the *lex fori*.[65]

26 In relation to the requirement that an applicant for service out must have serious merits for adjudication, an Australian case was much influenced by the potential unfairness to absent defendants if they could be dragged into the jurisdiction without the plaintiff being required to plead and prove foreign law on the merits.[66] However, as the defendant is free to plead foreign law in controverting the plaintiff's allegations that he has serious merits, he can thereby eliminate the unfair threat of liability referred to in the Australian case. Thus, despite the introduction of subject-based discretionary jurisdiction over absent defendants, there is still nothing to indicate that this was intended to make or has made any alteration to a party's liberty to plead or not to plead the foreign law.

27 This is not to say that there are or should be no qualifications to the rule of pleading which makes a plea of foreign law optional. Such qualifications, however, will be jurisdiction-centric and based on supporting pleading rationales. An exceptional example would be *Royal Boskalis Westminster NV v Mountain*,[67] where the English Court of Appeal allowed the plaintiff to plead French law for the first time at trial. A less exceptional example is where the plaintiff brings a passing off action in respect of the defendant's activities in a foreign state. English authorities have held that the presumption of similarity of laws does not apply in passing off cases and have thereby required foreign law to be

65 In *Cia Naviera Micro SA v Shipley International Inc* [1982] 2 Lloyd's Rep 351 ("*The Parouth*") the Court of Appeal held that the putative choice of English law should be applied to determine if a contract came into existence. If such a contract existed under English law, the plaintiffs would satisfy the requirement of proof of a contract being governed by the *lex fori*. *Chevron International Oil Co Ltd v A/S Sea Team* [1983] 2 Lloyd's Rep 356 may seem to have contradicted the reasoning of the court in *The Parouth*. There was no difference in the material facts save that the contract whose existence was in dispute did not contain a choice of law term. The High Court held that the *lex fori* should be applied to determine the existence of the contract. Parliament in enacting the gateway could not have contemplated that a matter of jurisdiction would be governed by foreign law.

66 In *Elders IXL Ltd v Lindgren Pty Ltd* (1987) 79 ALR 411 at 415, sellers who were sued for breach of contract of sale of meat sought to join their Japanese suppliers of the bags used to carry the meat in the proceedings by seeking leave of the court to serve a cross-claim out of the jurisdiction. They relied on O 8 r 1(g) of the Federal Court Rules 1976 (which corresponds to the necessary and proper party nexus in Singapore). A further requirement had to be satisfied if the nexus was apt to include cross-claims against a third party, namely that there was a *prima facie* case for the relief sought (within the meaning of O 8 r 2(2)(c) of the Federal Court Rules 1976).

67 [1999] QB 674.

pleaded.[68] To the same effect, but upon more defensible reasoning, these authorities can be explained as requiring the plaintiff to plead foreign law when the fact of special damage is defined by reference to and can only be articulated in terms of the foreign territorial law. To be distinguished from infringement of a trade mark, which is a territorial tort, a passing off action requires the plaintiff to prove the existence of his reputation and that the defendant's activities involve a false representation damaging to his goodwill. While reputation is factual, goodwill is property or a saleable asset which exists only if so recognised and protected as such under the territorial foreign law. These cases thus implicate the foreign law as an integral part of the existence of goodwill which is a mixed notion of fact and territorial law and must be pleaded. The situation is no different from several other cases instanced by the New South Wales Court of Appeal in *Damberg v Damberg*[69] such as where the plaintiff who sues his lawyer alleging negligence in failing to correctly ascertain the foreign law is obliged to plead the foreign law "to provide a basis of a claim under the *lex fori*".[70]

28 Another case, not instanced there, is where the plaintiff seeks enforcement of a foreign judgment under the *lex fori*; he is obliged to prove that there is a judgment by the foreign law.[71] Similarly, if advantage is to be taken of a status such as where the forum court is asked to recognise a status and its incidents, foreign law must be pleaded if *ex facie* the status has been acquired by reference to the foreign law. In *Male v Roberts*,[72] the defendant pleaded infancy but not the foreign law as to the effect of infancy on his implied contract made in Scotland with the plaintiff. Not having pleaded the law of Scotland, the defendant made no attempt to lead evidence of the foreign law but argued that the presumption of similarity of laws should be applied. Lord Eldon, however, would not assume for the defendant's sake that the law of Scotland was similar to English law, the *lex fori*, in making the contract void.[73] Likewise, in *Guepratte v Young*,[74] the plaintiff could not invoke

68 *Alfred Dunhill v Sunoptic* [1979] FSR 337; *Waterford v David Nagli* [1998] FSR 92. For a Singapore case, see *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 201.

69 [2001] NSWCA 87.

70 The New South Wales Court of Appeal referred to such instances as cases where the plaintiff must establish the contents of the foreign law as part of his case. This presupposes that the plaintiff must in the first instance plead the foreign law which is a factual basis for his claim. Likewise, to take advantage of a provision in a forum statute that a will shall be held valid as to form if there was compliance with the requirements of the State where the will was executed or of the State where the testator was domiciled at the time the will was executed, it will be necessary to provide satisfactory information as to the content of the local law of those states.

71 See *Berliner Industriebank AG v Jost* [1971] 2 QB 463.

72 (1800) 3 Esp 163.

73 In *R v Naguib* [1917] 1 KB 359 the Court of Criminal Appeal collected the authorities establishing that if in a bigamy case the Prosecution wished to prove as

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the presumption to invalidate a contract entered into by a domiciled French married woman in France respecting her reversionary interests in an English trust. As the contract was evidently executed in France by the woman, it is submitted that the plaintiff was bound to plead the woman's incapacity to enter into a valid contract under French law. Admittedly, in both cases, reference was made to the presumption of similarity being unavailable and not the rule of pleading. However, that was superfluous since the outcome would sufficiently turn on the rule of pleading, namely that in the absence of a plea of foreign law no evidence could be led of the foreign law.

VII. Exercise of jurisdiction

29 The requirement that a plaintiff must establish a proper case for service out by showing that the forum is the appropriate forum for trial of his claim also makes no difference to the case for disregarding the presumption of similarity in all questions of exercise of jurisdiction. It would be inconsistent with the adoption of *forum non conveniens* principles to apply the presumption of similarity, a rule of evidence, proleptically in the exercise of jurisdiction. To be sure, the exercise of jurisdiction on *forum non conveniens* grounds calls for discussion and deliberation of how the course of trial is likely to proceed; the parties may consider the key evidence to be led on the main issues contested between them and invite the courts to anticipate critical or serious issues, of fact and law, which are likely to surface. On the supposition that the determination of the convenience of trial involves a preview of what evidence will be forthcoming at the intended trial, a superficial argument could be mounted that a presumption which is a rule of evidence should proleptically be operative in the preview of the trial implicit in a question of *forum non conveniens*. However, now that the plaintiff may and should be turned away from the less appropriate forum, it would contradict the fundamental change or shift in the nature of exercise of jurisdiction to allow the plaintiff proleptic recourse to the presumption against the defendant who seeks to show on foreign law grounds that the appropriate forum is elsewhere. If the plaintiff could in opposition invoke the presumption of similarity of laws in the determination of the natural forum, he would be entitled to put the defendant in effect to proof of the contents and differences between the foreign law and the *lex fori*. This would oddly introduce the evaluative standard of balance of probabilities into a question of exercise of discretion. It would also fundamentally contradict the defendant's

the first marriage a marriage depending on a rule of foreign law, it had to establish validity under that law, and held that the same applied if the defendant wished to prove such a marriage.

74 (1851) 4 De G & Sm 217 at 224; 64 ER 804 at 808.

burden when seeking a stay merely to lead some evidence of differences between the foreign law and the *lex fori*.

30 Forwarding or illuminating the above submission, there are recent Singapore cases which have correctly, in the present view, refused to allow reliance on the presumption of similarity for the purposes of ascertaining the natural forum. In *JIO Minerals FZC v Mineral Enterprises Ltd*[75] ("*JIO Minerals*"), the appellants and respondents were parties to an investment agreement which involved the respondents purchasing shares in the appellants and obligating themselves by contract with the appellants to exploit the appellants' mining concessions. Subsequently, the respondents sought rescission of the contract on the ground, among other things, of fraudulent misrepresentation by the appellants. The question on appeal was whether the High Court had exercised correctly its discretion not to stay the proceedings in Singapore. It had formed the view that the investment agreement was governed by United Arab Emirates law in disagreement with the appellants and respondents who contended that the governing law was the law of Indonesia and Singapore respectively. It had also given little weight to possible differences between the laws of Indonesia and Singapore, apparently applying the presumption of similarity in favour of the plaintiff who had sued the respondents as of right. The Court of Appeal held that the lower court had erred in not appreciating that the presumption was irrelevant. So far from presuming similarity, the lower court should have taken judicial notice that there were differences between the two laws and given an appropriate weight to the governing law factor to reflect those differences.[76]

31 There ought also to be no room for the presumption where the defendant seeks to strike out the plaintiff's action on the ground that it discloses no cause of action under foreign law. The defendant must plead foreign law in order to lead evidence of it for the purposes of his strike-out application. He of course bears the burden to show that under the applicable (foreign) law the plaintiff has no arguable case[77]

75 [2011] 1 SLR 391.

76 There is no inconsistency between the above and the later decision in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 which held that for the purposes of the doctrine of *forum non conveniens* the court should notice judicially the similarities between Malaysian law and Singapore law. The court was far from applying the presumption of similarity of laws but was determining what weight should be attached to the governing law factor when the *lex fori* and applicable law have similar contents in view of a unique and peculiar shared legal heritage. In similar vein, in *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042 the High Court refused to take judicial notice of the English position on non-exclusive jurisdiction clauses.

77 For the requisite standard pertinent to a strike-out application, see *The Bunga Melati 5* [2012] 4 SLR 546.

whatsoever. The plaintiff clearly should not be allowed to raise the presumption of similarity in order to burden the defendant with affirmative proof on balance of probabilities that the plaintiff has no claim whatsoever under the foreign law. To impose the presumption of similarity would not only be inconsistent with the standard of no arguable basis already prescribed for appraising a strike-out application. Further, as will be shown below, the presumption is unavailable to a plaintiff who has not pleaded foreign law; while the defendant who has pleaded foreign law for a defence not known to the *lex fori* would seldom need to invoke the presumption although available in his behalf. Still further, there is authority against summary judgment being granted on the presumption that foreign law is the same as the *lex fori*.[78] Application of the presumption would contradict the interlocutory nature of the strike-out application. By the same token, where the defendant pleads the foreign law in order to strike out the plaintiff's claim, it would not be possible for the plaintiff to require him to rebut the presumption of similarity, and hence prove on a balance of probabilities the non-existence of any cause of action under the foreign law.[79]

32 Regard should also be had to the passing off cases where injunctive relief is sought to protect the plaintiff's goodwill. In *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd*,[80] the High Court observed that the presumption of similarity of laws might not apply where an injunction was sought to restrain the defendant's activities overseas which were alleged to amount to passing off. Earlier it was explained that such passing off cases are not properly pleaded without a plea of foreign law referencing the requisite damage to goodwill. In the Singapore case can be detected an alternative and more general basis for requiring a plea of foreign law whenever the court is asked to exercise its coercive powers to issue orders or injunctions which will be enforced through contempt of court orders. There is little doubt that such potentially extraterritorial

78 *National Shipping Corp v Arab* [1971] 2 Lloyd's Rep 363 at 366, *per* Buckley LJ.

79 *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811; [1997] 2 SLR(R) 641. The presumption of similarity was turned on its head when the defendant submitted that the plaintiff's failure to plead foreign law meant that his claims in tort disclosed no cause of action and was frivolous and vexatious. Dismissing the application to strike out, the court relied on the presumption of similarity of laws. The rejection of the strike-out application followed since the defendant did not dispute that the plaintiff's claim had serious merits under the *lex fori*. The court's reasoning, however, was superfluous in so far as it was purportedly an answer to a pleading point. As has been shown, the defendant's reference to the plaintiff's failure to plead was irrelevant since the plaintiff establishing the *in personam* as of right jurisdiction is free not to plead foreign law. To sustain a strike out in terms of non-actionability under foreign law, the defendant was the party who had to plead foreign law.

80 [2012] 4 SLR 201.

coercive orders ought not to be issued, whether as an interlocutory or a final order, except upon serious consideration of the merits of the case. Moreover, as a matter of comity of nations it would be improper for the court not to have regard to risks of prejudice which issuing the order could pose for third parties with subsequent notice of the order. This additional consideration alone would be sufficient argument that the applicant for injunctive relief should not be free not to plead foreign law. He could not possibly persuade the court to grant the order sought without showing that the act to be restrained is, according to the requisite standard of appraisal, a legal wrong under the foreign law.[81]

VIII. True scope of presumption and why it should be retained

33 While the presumption of similarity does not and should not have a place in matters of jurisdiction, it is submitted going forward that it remains a useful rule of evidence at the trial of the plaintiff's cause of action or the defendant's defence. There have been calls for its complete abrogation.[82] Gray cited a number of reasons in support of abrogation, including the presumption's fictional nature and dubious provenance, namely its untimely birth at a time when evidence of foreign law was scant and English courts "had a particular fondness for applying their own law".[83] The preceding discussion has shown that such arguments may not entirely be well founded if the presumption arose as a reaction to territorial conceptions of jurisdiction which made dismissal of the plaintiff's case for want of evidence or failure of effective legal representation a likely and harsh prospect. A number of other criticisms of the presumption essentially relate to problems of defendant unfairness arising when a plaintiff invokes the presumption against a defendant who has not previously agreed to the foreign law for the sake of transactional planning and lacks resources to prove the difference between foreign law and the *lex fori* in a forum where foreign law is not the native law of the land. These criticisms must be more nuanced or muted now that the presumption under modern conditions of jurisdiction has come to rest on a consensual basis. Three other responses to criticisms of the presumption can be made.

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81 To this end, as was said in an unreported decision, *Mother Bertha Music Ltd v Bourne Music Ltd* [1997] EMLR 459 at 492–493:

> It cannot be assumed, for example, that the law of copyright of a foreign country is the same as that of England because the relevant English legislation applies only to infringements in England.

82 It is noteworthy that when establishing the Singapore International Commercial Court, the Legislature preferred to abrogate the rule of presumption of similarity.

83 Anthony Gray, "Choice of Law: The Presumption in the Proof of Foreign Law" (2008) 31 UNSW LJ 136. See also James McComish, "Pleading and Proving Foreign Law in Australia" (2007) 31 MULR 400.

34 First, properly understood, the presumption will not be available to a party who has not pleaded foreign law. Even when it is available, it is pertinent only where the party who has pleaded foreign law carries the burden of proof of the affirmative in the cause and wishes to avail himself of the presumption for his own benefit.[84] As the presumption will also arise where no evidence of foreign law whatsoever is adduced by the party who has pleaded foreign law, the basic fact giving rise to the presumption is not that the party pleading foreign law has adduced some evidence of foreign law to raise the presumption but simply that he has pleaded foreign law. This means that where the defendant pleads a foreign law defence not known to the *lex fori* in exoneration or avoidance of the plaintiff's claim, the presumption of similarity is in theory available to him. However, where the foreign law gives him better rights than the *lex fori*, he need not and of course will not seek the so-called aid of the presumption where he wishes.[85] That is the nature of a presumption; notwithstanding that it is available for the benefit of a party, the party can choose to forgo its aid where none exists to his advantage.[86] The plaintiff on his part not having pleaded foreign law cannot or ought not to be allowed to claim the benefit of the presumption and compel the defendant also to disprove the plaintiff's affirmative case under foreign law where the defendant has not admitted the plaintiff's affirmative case in pleading his exoneration or avoidance defence. Similarly, where the defendant is the party who pleads foreign law so as to controvert the affirmative in the plaintiff's claim, it will and should not be open to the plaintiff to rely on the presumption of similarity against the defendant and to reverse the burden of proof of the affirmative, thereby requiring the defendant to prove that the plaintiff has no claim under the foreign law. It would be contrary to the logic of proof and adversarial policy that an adversarial party must make his own bed and lie on it.

35 A second limitation which will minimise incidences of defendant unfairness is that the presumption is unavailable at trial with respect to

84 Indeed, even where the plaintiff succeeds in proving the foreign law on which his claim is based, the judge is making a decision about the foreign law and not on the foreign law. See *Islamic Republic of Iran v Berend* [2007] EWHC 132 at [47].

85 See *N V De Bataafsche Petroleum Maatschappij v War Damage Commission* [1956] SLR (46–56) 12.

86 Similarly, where the plaintiff pleads foreign law, he may choose to forgo relying on the presumption when the presumed similarity is of no benefit to him. Such a plaintiff will have his claim dismissed if he cannot prove the foreign law and there are arguments that in circumstances where foreign law proof is more accessible to the defendant the burden of proof of foreign law should be reversed in the sense that the defendant possesses a clear comparative advantage in proving the foreign law. See Yaad Rotem, "Foreign Law as a Distinctive Fact – To Whom Should the Burden of Proof be Assigned?" (2014) Chi J Int'l L 625. The arguments ignore the impact of the doctrine of *forum non conveniens*.

the issue of the identity of the pertinent conflicts rule. The court takes judicial notice of its own rules of conflict which are part of its law and although the parties may make submissions on what the rule is, neither bears any burden of proof with respect to its identity.[87] The presumption should also be irrelevant where the question is as to the identity of the applicable law designated by the rule of conflict. It is submitted that this is because there can be no scope for applying the presumption which *ex hypothesi* is only relevant in relation to the contents and not identity of foreign law.[88] Where the plaintiff pleads foreign law, it is open to the defendant to agree that the pleaded law is the applicable law but disagree that its contents favour the plaintiff's claim. In that case, there is no need to determine the identity of the rule of conflict or the identity of the applicable law. Only a question of proof of the contents of the foreign law arises and the presumption of similarity will be available. However, it is also possible that the defendant may deny that the identity of the foreign law is that which the plaintiff asserts. In accordance with principles of evidence, the party who asserts that the identity of the foreign law is as he has pleaded must prove it since the identity of foreign law is an evidentiary condition to proving the contents of the foreign law. If the conflict rule is the *lex domicilii*, for example, the plaintiff must prove that the domicile is in country X whose law he has pleaded and not country Y as suggested by the defendant. So the plaintiff will bear the burden of proof that the law designated by the pertinent rule of conflict is that which he has pleaded if this is denied by the defendant; likewise where the defendant has pleaded foreign law to contradict the plaintiff's case and the plaintiff asserts that it is not the applicable law which the defendant has pleaded.

36 The decisions of the Singapore Court of Appeal in *Pacific Recreation Pte Ltd v S Y Technology Inc*[89] ("*Pacific Recreation*") and *JIO Minerals* have a significant bearing on this submission. In *Pacific Recreation*, a number of contracts were entered into between the appellants and respondents. The primary contract was governed by Chinese law but a question arose as to the applicable law of the indemnity deed providing additional security which obliged the appellants to indemnify the respondents for providing a standby letter of

87 In *Raiffeisen Zentralbank v Five Star Trading LLC, The Mount I* [2001] QB 825 at 839–840 the English Court of Appeal made it clear that the court was not bound to choose between the proper law of the insurance contract and the *lex situs* of the debt: "A proper legal analysis [could not] depend exclusively upon the legal systems for which two parties happen to contend in their own partisan interests."

88 As Richard Fentiman, *Foreign Law in the English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) explains, the presumption of identity of foreign law applies in relation to disputes about the contents, not about which of two different applicable laws is the designated applicable law.

89 [2008] 2 SLR(R) 491.

credit which had been drawn down. The respondents contended it was Singapore law whereas the appellants maintained that it was Chinese law which would have had the effect of nullifying the deed. The trial judge disagreed with both submissions and held that it was the US law. The parties having submitted that it was either Singapore or Chinese law had of course not led evidence of the contents of the US law. This was not an issue for the trial judge who supplied what was missing with the presumption of similarity of laws. On appeal, the Court of Appeal held that the trial judge breached the principles of natural justice in doing so. It was unnecessary for the appellate court to make any observations on the recourse to the presumption since it was able to find for the respondents by rejecting the inference that the indemnity deed was governed by the same Chinese law expressed as governing the closely related primary contract. In the second case, as previously mentioned, the Court of Appeal held that the lower court erred in substituting its own opinion as to the identity of the law designated by the rule relating to choice of law to govern a contract. The Court of Appeal clarified that the lower court should have decided whether it was one or the other in accordance with the parties' submissions.

37 The reasoning in both cases would perfectly reflect the nature of the identity of foreign law as a fact. If the clarification in the above cases was in terms of judicial notice, there would be unexplained gaps. One is whether the appellate court would be making a point purely of natural justice by taking judicial notice of the identity of the foreign law, but insisting that for the sake of natural justice the adversarial parties should be given an opportunity to make submissions on the point to be noticed. The second is whether the court would be saying that it would only exert an independent role by taking judicial notice when neither contested designation is plausible in any threshold sense. In the present view, the most cogent explanation for the court's ruling is that although the rule of conflict is a matter of law, the identity of the designated law is one of fact. Where the trial judges in both cases went wrong was therefore to assume the task of counsel in the provision of proof of the identity and contents. As the identity of the applicable law is a fact to be proved, the only necessary role of the court was to decide which of two opposing views as to the identity of foreign law was proved on the balance of probabilities, although it would be open to the court to invite the parties to make submissions on plausible identities.[90] The presumption of similarity would be out of place as a means of undertaking this task. Suppose the plaintiff has refrained from pleading

90 A person faithful to the orthodox view would say that the judge should have afforded the parties an opportunity to furnish evidence of the US law by ordering an adjournment or dismissed the plaintiff's claim for failure to satisfy the burden of proof. Neither option, it can be surmised, is attractive.

foreign law but the defendant has controverted the plaintiff's claim by pleading foreign law. The plaintiff who does not agree that the applicable law is the pleaded foreign law must prove that it is the *lex fori*. If the presumption of similarity was available to the plaintiff, the burden would shift to the defendant to prove that the applicable law is not the *lex fori* but the law he has pleaded. This would reward the plaintiff for failing to satisfy a condition to applying the *lex fori* as applicable law and would be wrong; likewise where the plaintiff pleads a certain foreign law but the defendant controverts this by pleading another foreign law. Applying the presumption of similarity so as to cast the burden of proof on the defendant to show that the applicable law is not the plaintiff's pleaded foreign law would reward the plaintiff for failing to satisfy a condition to applying his pleaded foreign law.

38 A third limitation is more controversial. It is that the presumption will not be available if the pleaded foreign law in fact gives the party pleading foreign law no rights or defence as the case may be. The presumption will not and cannot be used to improve his position. As Hunt J said in *BP Exploration (Libya) Ltd v Hunt*,[91] the presumption is intended to operate against the person who is obliged to prove foreign law as part of his affirmative in the cause or avoidance defence. It works in giving him on failure of proof the rights if any which the *lex fori* accords but not the further or exceptional rights under foreign law. In the case mentioned above, the court held:[92]

> It would, in my opinion, be an absurd interpretation of the requirements of Pt 10, r 5 (that non-personal service is to be effected) which enabled a judgment creditor, by mere non-disclosure on the *ex parte* application for registration, to obtain the benefit of a more advantageous New South Wales provision as to service, which is in fact not available in the foreign jurisdiction in which service is to be effected.

The principle that the presumption mitigates rather than improves the party's position on foreign law must be right as has been seen.[93] However, what precludes an extended application of the principle at trial is not the principle itself but that its application would encounter serious practical difficulties. The court must know for a certainty that the foreign law is inferior to the *lex fori* but it does not or cannot know this from the pleadings of a party of foreign law. It can only suppose in the absence of evidence of ulterior purpose that a party will only plead

91 [1980] 1 NSWLR 496.

92 *BP Exploration (Libya) Ltd v Hunt* [1980] 1 NSWLR 496 at 503. Although the limitation contained in these remarks is attractive, a simpler explanation for the result in that case is that the presumption is simply unavailable in matters of jurisdiction.

93 See paras 33–34 above.

foreign law if there is advantage to him. Whether the party pleading foreign law is mistaken or ill advised in his supposition of advantage is a conclusion that can be reached only after all the evidence of foreign law is in and a careful analysis of the facts carried out. This evaluation cannot be carried out satisfactorily otherwise than at the trial. There is no expedient preliminary procedure to withdraw the presumption on the basis that it should not be available where the foreign law is more likely less favourable than the *lex fori*. Such a preliminary exercise could also in reality defeat the whole purpose of the presumption to give the plaintiff a concession where he may reasonably form an initial view that the foreign law gives him more rights leading him to plead the foreign law. If that initial assessment should turn out to be erroneous, it would be wrong to withhold the presumption from him and in effect compel the plaintiff to prove that the foreign law gives the plaintiff no rights. There is no defendant unfairness by reason only that the plaintiff's initial view has turned out to be erroneous unless there never was any *bona fide* attempt to make a proper and reasonable initial assessment.

39 Fentiman has argued for a wider view of defendant unfairness:[94]

> [B]y relying on the presumption of similarity between English and foreign law, a plaintiff may transfer the burden of proving foreign law to the defendant, with the attendant inconvenience and expense.

The charge is that the presumption can be employed as a ploy to give the plaintiff an unfair tactical advantage by stretching the defendant's ability to disprove the similarity between the *lex fori* and foreign law. Citing the facts in *University of Glasgow v The Economist*,[95] though not the ratio, Fentiman instanced what seemed to be an egregious example of a plaintiff claiming actionability under various foreign laws in numerous jurisdictions for a defamatory publication without even a perfunctory attempt to prove actionability in the foreign jurisdictions, intending thereby to cast the costs of disproof on the defendant.[96]

40 The point that the presumption can be abused in circumstances when the foreign law in fact gives lesser rights than the *lex fori* is undoubtedly true. However, it does not follow that there is abuse whenever the party pleading foreign law offers no proof. The fact that no proof is attempted may simply be a matter of economy of proof and

94 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at p 144. This sentiment has been echoed in Australia: see *Optus Networks Pty Ltd v Gilsan (International) Pty Ltd* [2006] NSWCA 171 at [89].

95 [1997] EMLR 495.

96 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at p 144. This problem is partly resolvable through doctrines of abuse of process and natural forum.

to the mutual benefit of both parties. On the assumption that proof of foreign law is expensive, there is obviously good sense in proving foreign law parsimoniously. It is furthermore clearly not an abuse of process when the plaintiff is unaware that foreign law affords him no rights beyond those of the *lex fori* or even no rights at all and does not seek to use the presumption as a tactical ploy. This is acknowledged in part in *Tamil Nadu Electricity Board v ST-CMS Electric Co Pte Ltd*,[97] where Cooke J held that "it would be wrong to allow the presumption to be used by a party where he pleads or wishes to rely on foreign law but declines to prove it"[98] and that "if the failure to prove foreign law by a party is the result of a tactical decision, after seeking to rely on it, reliance by that party may amount to an abuse of process".[99] In this inquiry into abuse of process, the court obviously cannot require the defendant to establish that the foreign law in fact gives lesser rights than the *lex fori*. That would be tantamount to applying the presumption so as to require disproof of the plaintiff's affirmative in the cause before proceeding to withdraw the presumption. It would be a futile way to begin to establish abuse of process.

41 Reliance on the presumption that amounts to an abuse of process ought of course to be checked by withdrawing it. It is, however, submitted that in the light of the presumed consensual basis of the presumption, it can and should be withdrawn more readily and generously whenever there is lack of good faith in relying on the presumption irrespective of abuse of process. It is further submitted that there is such lack of good faith where the plaintiff pleading foreign law deliberately omits to lead evidence of it and on an objective judicial assessment where that is possible the foreign law is inherently unlikely to give him better rights than the *lex fori*. In a not *insubstantial* line of authorities, the courts have considered it relevant to assess the likelihood of differences between the *lex fori* and the foreign law. Some attempts are very wide, suggesting that if the probability is that the law in foreign countries is the same as the *lex fori*, the presumption may arise.[100] Explaining this, the courts have said that the presumption as a rule of convenience "can be rationally acceptable only when limited to provisions of the law potentially having some degree of universality".[101]

97 [2008] 1 Lloyd's Rep 93.

98 *Tamil Nadu Electricity Board v ST-CMS Electric Co Pte Ltd* [2008] 1 Lloyd's Rep 93 at [99].

99 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at pp 60–64 and 143–153.

100 In *Schnaider v Jaffe* (1916) 7 CPD 696, the question before the Cape of Good Hope Provincial Division was whether the goods of a married couple were held in community by reason of their having married in Russia.

101 *Mercury Bell v Amosin* (1986) 27 DLR (4th) 641 at 650, *per* Marceau J.

In *The Parchim*,[102] an additional reason for the presumption to arise in respect of the English law of sale of goods was that the presumed *lex fori* was itself quite reasonable in the court's view. The court assessed that foreign law would probably differ from English commercial law only in detail or in the inference to be drawn from particular facts but not in substance or principle. A more cautious attitude appeared in the reasoning in other cases that foreign law which is notoriously different will not be presumed similar to the *lex fori*.[103] As a general exception to the presumption, a recommendation to consider probabilities of the foreign law giving no or lesser rights than the *lex fori* has little to commend it. Such counsel of prediction merely raises the level of uncertainty in international litigation, and the criticism persists even when an evaluation of probabilities of difference is made only if there is some threshold evidence which shows that the foreign law looks to be different.[104] What is submitted is not that there should be an assessment of probabilities of difference as a general rule. If, however, there is altogether no adduction of evidence of foreign law, and evidence exists that this has occurred by contrivance or deliberation on the part of the plaintiff who has pleaded foreign law, an evaluation of inherent probabilities wherever possible that the foreign law gives no or lesser rights than the *lex fori* is justifiable as part of the determination of whether reliance on the presumption is lacking in good faith.[105]

IX. Whether exceptions to the presumption of similarity based on good faith

42 It is submitted that the foregoing requirement of good faith reliance is not confined to the situation where no proof is offered after pleading foreign law but underlines the exceptions to reliance on the presumption when the proof offered is inadequate to meet the requisite balance of probabilities. In *Damberg v Damberg*,[106] Heydon JA admitted that it was difficult to classify the exceptions by reference to principle and that "to state exhaustively when a court will not assume that the unproved provisions of foreign law are identical with those of the *lex fori* would be a difficult task".[107]

43 Popular rationalisations of the exceptions have tended to be generalised, impressionistic and ultimately pragmatic. In several instances,

102 [1918] AC 157.
103 In *Saxby v Fulton* [1909] 2 KB 208 at 211, Bray J declined to make this assumption on the ground that roulette at Monte Carlo was notoriously not an unlawful game.
104 *Neilson v Overseas Projects Corp of Victoria Ltd* (2005) 221 ALR 213, *per* Kirby J.
105 See also *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 at [428].
106 [2001] NSWCA 87.
107 *Damberg v Damberg* [2001] NSWCA 87 at [162].

the courts conceived that as the presumption is one of convenience, it cannot be applied where the rule of the *lex fori* is not a universal rule but particular or peculiar. Consequently, the presumption will be withdrawn from statutory rules which unlike common law rules of the *lex fori* do not have the necessary attribute of universality. In *Gray v Kerslake*,[108] Cartwright J (Kerwin CJ concurring) of the Canadian Supreme Court said that "the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law".[109] However, the ontological nature of the inquiry which a court adopting this prescription will need to pursue raises significant doubts about its cogency. When is a rule particular or peculiar and when universal? In *Mercury Bell v Amosin*,[110] the Federal Court of Appeal in the absence of proof of Liberian law dissected the Canada Labour Code[111] into provisions of a general nature or potential degree of universality (such as those recognising the role of labour unions, giving effect to collective agreements and recognising the right of each individual employee to sue for his wages under the agreement) and provisions of a peculiar nature linked to Canadian circumstances and purposes (such as those dealing with the role of the Canada Labour Relations Board and the requirement of arbitration for the settlement of disputes). There is considerable scepticism whether the jurisprudential and jurisdictional nature of common law legal rules is adequate to this task. In a slightly less radical manner, in *The Parchim*, the Privy Council, in the absence of any proven foreign law, contemplated that the presumption was apt to reach a statute such as the Sale of Goods Act 1893,[112] as it was "merely a codification … of this branch of English mercantile law".[113] This way of disarming statutory law relies on a broader distinction between common law and codifying statutes on the one hand and amending statutes on the other. In modern circumstances, where the sharp traditional roles of courts and Parliament in law-making have become blurred, such lines can be drawn only with much difficulty.

44 A variation on the same theme limits the presumption to general principles of law. In *Pickering v Stephenson*,[114] the court held in the absence of evidence as to Turkish company law, that the directors of a company were bound by the special purposes of the original bond of association. The presumption was valid because the rule of the *lex fori* was "a great and broad principle which must be taken, in absence of

108 [1958] SCR 3.
109 See the much earlier case, *Purdom v Pavey & Co* (1896) 26 SCR 412 at 417.
110 (1986) 27 DLR (4th) 641.
111 RSC, 1985, c L-2.
112 c 71 (UK).
113 *The Parchim* [1918] AC 157 at 160–161.
114 (1872) LR 14 Eq 322.

proof to the contrary, as part of any given system of jurisprudence".[115] Ultimately, however, an assessment which divides between general and particular statutory provisions or between general principles of law and merely distinctive principles runs into the problem of uncertainties of subjective experience. Such uncertainties will undermine counsel's ability to make reasonably accurate predictions of availability of the presumption for the sake of case management.

45 Besides, attempts to distinguish between general *versus* particular will not easily reconcile with the wider rationalisation which Roskill LJ adopted when he held that the presumption is out of place "where fairness requires a claimant to establish its case positively, as where an allegation of fraud has been made".[116] So what seems general may be particular where fraud is alleged. What is there remaining to stop a more encompassing rationalisation based on avoidance of unfairness? Such a view was recorded in *Restatement of the Law (2nd) Conflict of Laws*[117] ("Restatement"). It was there stated that:

> … the forum will usually decide the case in accordance with its own local law except when to do so would not meet the needs of the case or would not be in the interests of justice.

The Restatement also pointed out that:

> One factor that may induce the forum to refuse to apply its local law is the likelihood that the foreign law differs from the local law of the forum and that the parties relied on the foreign law in planning their transaction.

In *D'Oz International Pte Ltd v PSB Corp Pte Ltd*,[118] the Singapore High Court too would appear to have endorsed a rationalisation of the exceptions to the presumption in terms of avoidance of inconvenience

115 *Pickering v Stephenson* (1872) LR 14 Eq 322 at 340.

116 In *Österreichische Länderbank v S'Elite Ltd* [1981] 1 QB 565 at 569, Roskill LJ said in an *ex tempore* judgment (with which Brightman LJ and Sir David Cairns agreed):

> … the negotiation of the bill to the bank took place in circumstances disclosing a fraudulent (or voidable) preference. The expression 'fraud' in sections 29 and 30 of the Bills of Exchange Act 1882 is wide enough to include the making of a fraudulent preference within section 44(1) of the Bankruptcy Act 1914 … It follows that, if the fraudulent preference is established, the bank's title as holder in due course of the bill is defective by reason of section 29 of the Act of 1882 since the negotiation of the bill was obtained by 'fraud'. That is the position in English law and reliance is placed on the presumption that foreign law is the same as English law unless the contrary is proved …

117 *Restatement of the Law (2nd) of Conflict of Laws* (American Law Institute, 1971) at para 136(h).

118 [2010] 3 SLR 267.

or injustice. Chan Sek Keong CJ, sitting as appellate judge on a District Court appeal, stated *obiter* that the presumption is a rule of convenience which will not be applied against a party whose liability depends on the foreign law where it is pleaded by the claimant who fails to prove it and it is "unjust" or "inconvenient" to do so.[119] The test embraced without further elaboration was whether:[120]

> … it would be unjust to apply the presumption against a party so as to make him liable on a claim subject to foreign law when the claimant had failed to prove what the foreign law was.

46 The New South Wales Court of Appeal in *Damberg v Damberg*, however, regarded the Restatement proposition as "an amorphous position".[121] In the present view, the idea of a balance of fairness or convenience between the plaintiff and the defendant, even if workable, is underscored by a false assumption that the presumption is a rule of convenience. It has been argued that the presumption originated as a measure to avoid serious prejudice to a party seeking rights under foreign law on account of non-compellability of key witnesses and absence of choice of foreign counsel. When the court's *in personam* and *in rem* jurisdiction expanded, notably in matters of admiralty and by the introduction of O 11 jurisdiction, a different kind of injustice arose, that of forum shopping by plaintiffs for procedural advantages of the forum. Until the development of the doctrine of *forum non conveniens*, the exceptions above served in substance to put a check on serious prejudice to defendants arising from forum shopping by the plaintiff. The development of the doctrine, however, ushered in a new paradigm, with the presumption coming to rest on a consensual basis. It follows that the true "exception" to the presumption ought not to be found in a balance of fairness but in a doctrine of good faith. The presumption should only be withdrawn if the party pleading foreign law seeks the aid of the presumption for improper, ulterior or collateral purposes. The test of lack of good faith is objective and the authorities on the distinction between general and particular provisions of the *lex fori* should be re-interpreted in the light of the change in basis of the presumption. Good faith reliance is not determinable by reference to a rigid distinction between general and particular. There is a scale which runs from the more particular to the more general which ought not to be artificially compressed into one of two categories of general and particular. To translate this scale into the absence of good faith, courts should consider the transactional planning perspective, the likelihood of

119 *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 at [25].

120 *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 at [25]. There is ambiguity whether the court meant by "fail to prove" both an omission to prove and furnishing inadequate proof of pleaded foreign law.

121 *Damberg v Damberg* [2001] NSWCA 87 at [143].

difference and the quality of such evidence as has been forthcoming. The inquiry will be very fact-specific and the nature of the particular provisions relied on will be considered for such inferences of lack of good faith as may arise in the circumstances of the case.

47 A so-called exception is sometimes cited which it is submitted has nothing to do with the presumption. It comprises cases where personal status is in issue. These cases exemplify the rule of pleading. Where jurisdiction is not *in personam*, but depends on the existence of a specific status (such as the matrimonial jurisdiction), a party who asserts that he is of a particular status acquired under foreign law is obliged to plead foreign law as a matter of satisfying the jurisdictional prerequisite. So where the petitioner sought a dissolution of her marriage celebrated abroad, she was required to prove affirmatively that her marriage was validly celebrated in accordance with the law there.[122]

X. Conclusion

48 This article has argued that if the separation between pleading and evidence is kept firmly in view, many so-called exceptions to the presumption of similarity can be reconciled by reference to principles of jurisdiction. Cases involving jurisdiction are different from cases involving trial. In such cases, foreign law is relevant or not relevant as a matter of pleading and where neither party pleads foreign law, foreign law is mutually admitted as identical to the *lex fori*. At trial, where the presumption is operative, the key to its scope is not a distinction between omission of proof or inadequate proof, nor is it a balancing of fairness. It is a principle of good faith that where the plaintiff is not using the presumption for the purposes for which it is provided, it should be withdrawn from him so that he is obliged to prove the foreign law in the usual way and has no fallback recourse to the *lex fori*. In the circumstances posited, the retention of the presumption is based on the defendant's presumed consent arising out of his forbearance to stay the proceedings or oppose O 11 proceedings on grounds of *forum non conveniens*. What is therefore important is hardship to the defendant where the plaintiff has conducted himself in a manner which has

122 In *Zoubek v Zoubek* [1951] VLR 386 the court referred to this as a uniform practice of the courts. In similar vein, a person who had been granted administration of the deceased's estate with her will annexed by a foreign court and applied for probate of the will or alternatively administration with the will annexed was required to prove that the foreign court had recognised the will as validly made. There is, however, no general rule that a question of title to moveable property in a foreign *situs* must be decided by reference to foreign law as proved. See *N V De Bataafsche Petroleum Maatschappij v War Damage Commission* [1956] SLR (46–56) 12 where the presumption of similarity was applied on a question of whether oil *in situ* (in Sumatra) was *res nullius*.

impaired the defendant's recourse to the doctrine of *forum non conveniens*. Where the defendant has pleaded a defence under foreign law, and seeks to rely on the presumption of similarity, there would in theory be no difference as to when the presumption should be withheld. This in practice will not be a common occurrence since the defendant will more likely plead a foreign law defence which does not exist under the *lex fori*.