(2017) 29 SAcLJ 194
(Published on e-First 22 March 2017)

FOREIGN LAW IN DOMESTIC COURTS

This article reviews the rules governing the ascertainment of foreign law in domestic proceedings. The competing approaches to ascertaining foreign law are reviewed: the traditional approach of proof by expert evidence; the alternative of referral to the foreign court on an *ad hoc* basis or pursuant to bilateral or multilateral conventions; the appointment of a judge from the relevant jurisdiction as a referee; or the ascertainment of foreign law on the basis of submissions. It concludes that the latter option, adopted in international arbitration, and now by the Singapore International Commercial Court, is the preferred approach, and best fits the forensic exercise in which both Bench and Bar are engaged when issues of foreign law arise.

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I. Introduction

1 In common law systems, it has often been noted that foreign law is an issue of fact.[1] Such is the rigour with which this classification has historically been applied, that misrepresentations as to foreign law were treated differently for legal purposes from misrepresentations of English law,[2] and, even where the parties had conducted an arbitration on the basis that foreign law and English law were the same, the resultant "legal" decision was treated as an issue of fact rather than one of law when determining whether an appeal on a point of law could be brought under s 69 of the English Arbitration Act 1996.[3]

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* This article was the subject of a lecture delivered at a joint Singapore Academy of Law – Singapore International Commercial Court seminar in the Singapore Supreme Court on 24 August 2016. The author is grateful to the referee for the comments on this article.

1 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 9-002. Note that this ceased to be true of US Federal Law following the adoption of r 44.1 of the Federal Rules of Civil Procedure in 1966, after which the court's determination of an issue of foreign law "must be treated as a ruling on a question of law": see generally Louise Ellen Teitz, "Determining and Applying Foreign Law: The Increasing Need for Cross-border Co-operation" (2013) 45 *International Law and Politics* 1081.

2 *Andre et Cie SA v Ets Michel Blanc et Fils* [1977] 2 Lloyd's Rep 166.

3 c 23. So held in *Reliance Industries Ltd v Enron Oil and Gas (India) Ltd* [2002] 1 All ER (Comm) 59.

2 However, as has been observed, while foreign law is an issue of fact, it is "a question of fact of a peculiar kind".[4] In criminal and civil jury trials in England, issues of foreign law are determined by the judge rather than the jury.[5] The process of cross-examining a foreign law expert bears a far greater resemblance to the Socratic dialogue between bar and bench when making legal submissions than to the cross-examination of a witness of fact, or even of a technical expert.[6] David Steel J has observed that determining issues of foreign law "is much less dependent on the to and from of cross-examination, let alone impressions formed from demeanour of witnesses. It is much more concentrated upon analysis of the documents and the materials".[7] In *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd*,[8] Chief Justice Menon referred to "a discernible discomfort amongst courts in the common law tradition with the characterisation of foreign law as a pure question of fact, due to the legal quality inherent in this 'fact'". Perhaps for this reason, it has become relatively common for foreign law to be dealt with in international arbitrations by way of direct submission to the tribunal – written and oral – rather than through the service of expert reports and cross-examination of those experts. Judith Gill QC has referred to "the trend towards decreasing use of legal expert witness and more presentation of legal argument by way of submission" in international arbitration.[9] In "Bermuda Form" arbitrations, involving disputes arising under an insurance policy governed by New York law but which take place under the English Arbitration Act 1996, this is invariably the way in which New York law is received.[10]

4 *Parksha v Singh* [1968] P 233 at 250 (the "peculiarity" here being its greater susceptibility to appellate review than other findings of fact).

5 Senior Courts Act 1981 (c 54) (UK) s 69(5); County Courts Act 1984 (c 28) (UK) s 68 and Administration of Justice Act 1920 (c 81) (UK) s 15.

6 As Chief Justice Spigelman AC noted in "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 LQR 208 at 209, "it is apparent, sometimes explicitly stated, that the court engages in a process of legal reasoning, not factual analysis, when it undertakes this exercise".

7 *Cooper Tyre & Rubber Co v Shell Chemicals* [2009] EWHC 833 (Comm) at [14].

8 [2014] 1 SLR 860 at [57].

9 Judith Gill QC, "The Development of Legal Argument in Arbitration" in *Practising Virtue: Inside International Arbitration* (David D Caron, Stephan W Schill, Abby Cohen Smutny & Epaminontas E Triantafilou eds) (Oxford University Press, 2016) at p 405. See also *Fidel v Felicia and Faraz* (23 November 2015) CA002/2015 (DIFC CA) at [72].

10 Richard Jacobs QC, Lorelie S Masters & Paul Stanley QC, *Liability Insurance in International Arbitration: The Bermuda Form* (Hart Publishing, 2nd Ed, 2011) at para 3.11.

3 There is now provision for the Singapore International Commercial Court ("SICC") to order that any question of foreign law be dealt with by way of submission, including by advocates qualified in the relevant law.[11] Further, the Dubai International Financial Centre ("DIFC") Court of Appeal has upheld a direction by which the laws of a foreign state should be established by adducing the relevant legal materials and receiving written submissions as to their effect rather than by way of expert evidence.[12] These changes reflect the increasing globalisation of legal disputes, in which the link between the forum and the substantive law or *lex causae* it will apply in resolving the dispute has become increasingly flexible. Given the greater frequency with which issues of foreign law now fall for resolution in commercial litigation, and the different approaches on offer for their resolution, this article attempts a critical reappraisal of the manner in which issues of foreign law are addressed before domestic common law courts.

II. Conventional position: Foreign law must be pleaded and proved like any other fact

4 In both England and Singapore, the usual position is that foreign law must be pleaded and proved like any other fact.[13] By contrast, under German law, foreign law is an issue of law, which the court independently investigates using whatever sources of information are available.[14] In common law systems, if foreign law is not pleaded for

11 Paragraph 110 of the Singapore International Commercial Court Practice Directions as to which see further below.

12 *Fidel v Felicia and Faraz* (23 November 2015) CA002/2015 (albeit in a case in which the judge was trained in the law of the "foreign" jurisdiction). Deputy Chief Justice Sir Anthony Colman had allowed expert evidence of United Arab Emirates law in the Dubai International Financial Centre (hereinafter "DIFC") where the case would be heard by a judge trained in the common law tradition: *Taaleem PJSC v National Bonds Corp PJSC* (12 May 2013) CFI 014/2010. However, in *Fidel* the DIFC Court of Appeal indicated that even in circumstances in which the DIFC judge was not trained or experienced in the relevant foreign law, there was no universal rule requiring foreign law to be ascertained on the basis of expert evidence: [61].

13 See *Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno di Pietro Ostali SNC* [1971] 1 WLR 173 at 178; *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 at [22] where various Singapore cases following this approach are cited and *Dynasty Line Ltd v Sukamto Sia* [2015] SGHC 286 at [18].

14 Trevor C Hartley, "Pleadings and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 275–276. For a comparative survey of approaches to the determination of foreign law see Shaheeza Lalani, "Establishing the Content of Foreign Law: A Comparative Study" 20 *Maastricht Journal* 1 (2013) 75. In Iceland, the Supreme Court refused a parties' request to establish English law by expert evidence from a Queen's Counsel: see Eirikur Ellis Porlaksson, "Proof of Foreign Law by Icelandic Courts: A Change of Course?" (2016) 21(2) *Journal of International Private Law* 301.

a cause of action governed by foreign law, then the law of the forum is applied,[15] historically on the basis that the content of the foreign law is presumed to be the same as the law of the forum (the so-called presumption of identity or similarity) or because the law of the forum applies under a choice of law rule by default if the content of the relevant foreign law is not established.[16] For foreign law to be pleaded, the pleading requirement is generally held to require not simply a generalised assertion that "the contract claims are governed by the law of X", but rather the specific identification of the principles and provisions of foreign law relied upon. Previous editions of *Bullen & Leake & Jacobs*, a leading text of pleading precedents, provided that:[17]

> … where a party relies on foreign law to support his claim or as a ground or a defence thereto, he must specifically plead the foreign law relied on … and he should plead full particulars of the precise statute, code, rule or regulation, ordinance or case law relied on, with the material sections, clauses, or provisions thereof.

In *Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno di Pietro Ostali SNC*,[18] Ungoed-Thomas J ordered the pleading of Italian law:[19]

> … to include full particulars of the statements and propositions of Italian law including rules of construction relied on, with reference in each case to the Italian legal authorities relied on in support of it, and of any agreement and any passage or terms therein to which they are directed.

The direction was upheld in the Court of Appeal.[20] To like effect in Singapore, G P Selvam J in *The H156*[21] described a pleading which alleged "the governing law is Norwegian law" without pleading the

15 For England 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 and 9-011. For Singapore see *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 at [25] and *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042 at [44].

16 There is a quite a body of academic writing which debates whether the court is really applying a presumption that foreign law is the same as the law of the forum, or simply applying the law of the forum in default of proof of foreign law. The latter view now seems dominant: Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 20.87.

17 *Bullen & Leake & Jacob's Precedents of Pleadings* (J I H Jacob & Iain S Goldrein eds) (Sweet & Maxwell, 13th Ed, 1990) at p 1170 (although the 18th edition at para 1-29 is less prescriptive). The terms of para c1.2(f) of the Admiralty and Commercial Court Guide have also become less prescriptive over time.

18 [1971] 1 WLR 173.

19 *Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno di Pietro Ostali SNC* [1971] 1 WLR 173 at 180–181.

20 *Ascherberg, Hopwood & Crew Ltd v Casa Musicale Sonzogno di Pietro Ostali SNC* [1971] 1 WLR 1128.

21 [1999] 2 SLR(R) 419 at [14].

propositions of Norwegian law as suffering from "an egregious flaw". Certainly, in the author's experience, foreign law tends to be pleaded in great detail and at great expense, with responsive pleadings (be they defences, replies or rejoinders) very often adding to the body of foreign law in play whose content is thereby revealed in stages in a costly dance of the seven veils.

5 This is not only expensive, but can have curious consequences. What happens where one party puts in play one aspect of the foreign law of contract – for example its rules on causation and remoteness – but not some other part (for example whether contributory negligence operates as a defence)? If the point is not specifically pleaded by the other party, does the trial proceed on the basis that (say) the French contractual provisions on causation and remoteness are to be applied, but English law is applied on the issue of whether there is a defence of contributory negligence? There could be occasions when this would produce an unsatisfying outcome: very often different legal systems address the same underlying concern through different concepts, and it would be unattractive for a litigant to achieve a result not available under either legal system by allowing him to mix a cocktail of the two. In *Tamil Nadu Electricity Board v St CMS Electricity Co Ltd*,[22] Mr Justice Cooke refused to allow the presumption to be used as a means of introducing a new point of law at a late stage in a case which was proceeding on the basis that the relevant issues were governed by Indian law, suggesting it would be artificial to do so against a background where both parties had been permitted and had produced expert evidence of Indian law.[23] However, that was a case in which the "new point" did not feature in the defined list of Indian law issues. Mr Justice Cooke also held that where a party had pleaded foreign law, but had declined or been unable to prove it, he could not rely on the presumption to fill the gap.[24] By contrast, where the "gap" is some incidental issue of foreign law and the principal issues have been pleaded, the suggestion that a claim or defence should fail merely because the incidental issue was overlooked when the expert evidence was prepared is less attractive, and there is a stronger case here for allowing the law of the forum to fill the gap.[25] There are other occasions

22 [2007] EWHC 1713 (Comm).

23 At [98]–[99].

24 Citing Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at pp 60–64 and 143–154. However, compare *NV De Bataafsche Petroleum Maatschappij v War Damage Commission* [1956] SLR 65 where the presumption was applied in circumstances in which proof of the effect of the Netherlands Indies Mining Law 1891 was inadequate.

25 For a discussion of this issue, and reference to Australian authority allowing a "gap-filling" function for the law of the forum see James McComish, "Pleading and Proving Foreign Law in Australia" [2007] MULR 400 at 437–438.

when allowing some mixture of laws – for example applying local rules of interpretation to a foreign statute in the absence of any evidence they differ – seems entirely proportionate. Professor Adrian Briggs has suggested that rejecting the case of a party who has advanced a case on foreign law, but failed to adduce evidence as to some part of it, would be to make "the best the enemy of the good".[26]

6 The presumption of similarity (or default application rule) has never been absolute, and courts in England and Singapore are becoming increasingly wary of its application. It has been held that a court will not apply English legislation to a foreign transaction to which it would not otherwise have been applicable simply because there had been no proof of a foreign law which was applicable in circumstances for which English law had created some special institution.[27] In *Shaker v Al Bedrawi*,[28] the English Court of Appeal refused to proceed on the basis of a presumption that a Pennsylvania company was subject to legislation in its place of incorporation which was equivalent to the Companies Act 1985.[29] Where the English statute was, on its face, not applicable to a foreign company, and there was no basis for concluding that it reflected or embodied some "generally accepted rule of law", the court did not believe it was appropriate to proceed on the basis of English law. Professor Fentiman has argued that the presumption of similarity has been abolished by *Shaker v Al-Bedrawi*, and that, following that decision, the proper approach now is that the law of the forum applies as a choice of law rule in default of proof of foreign law, and that statutes from the forum will only apply where, by their terms, they have the territorial or subject-matter scope to be capable of applying to foreign law transactions or entities.[30] However, the language of presumption has continued to be used in both England and Singapore when referring to the application of the law of the forum in default of proof of foreign law, and on the basis of it, English statutes have been applied to foreign law transactions to which they are not applicable on their terms.[31]

26 Adrian Briggs, "The Meaning and Proof of Foreign Law" [2006] LCMLQ 1 at 6.
27 *Osterreichische Landerbank v S'Elite Ltd* [1981] QB 565 at 596.
28 [2002] EWCA Civ 1452.
29 c 6.
30 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 20-95.
31 *Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 1900 (Comm) (Unfair Contract Terms Act 1977 (c 50) (UK)) and in Australia *Tisand (Pty) Ltd v The Owners of the Ship MV Cape Moreton* [2005] FCAFC 68 (Federal Court, Australia).

7 There is no doubt, however, that courts have become increasingly hesitant about the default application of the law of the forum to foreign law causes of action. In considering the lawfulness of acts of employees of foreign governments, the English Court of Appeal has declined to proceed on what it described as "the inherently improbable basis" that the laws were the same as English law in each jurisdiction.[32] In Singapore, also, the courts have taken steps to limit the application of the presumption of similarity. In *D'Oz International Pte Ltd v PSB Corp Pte Ltd*,[33] the court described the presumption as a "rule of convenience which the courts may resort to unless it is unjust and inconvenient to do so" and the Singapore Court of Appeal refused to allow a point to be raised on the basis of the presumption in *Republic of the Philippines v Maler Foundation*.[34] Concern at applying the presumption of similarity has been particular acute when one party seeks to establish the court's jurisdiction on the basis of an English or Singapore law analysis in a case in which foreign law is obviously engaged.[35] By contrast, at a trial, Christopher Clarke J was prepared to apply the presumption with the result that contracts not governed by English law were nonetheless subject to the Unfair Contract Terms Act 1977[36] in *Balmoral Group v Borealis*[37] ("*Balmoral*"), reasoning that if he was going to assume the application of the Sale of Goods Act 1979,[38] there seemed to be no principled basis for not assuming the application of the 1977 Act as well.[39] And in Singapore, the general applicability of the presumption was recently reaffirmed by the Court of Appeal in circumstances in which no issue of foreign law had been raised.[40]

32 *Belhaj v Straw* [2015] EWCA Civ 1394 at [154].
33 [2010] 3 SLR 267 at [25].
34 [2014] 1 SLR 1389 at [77].
35 *Sukhoruchkin v Van Bekestein* [2014] EWCA Civ 399 at [42]; *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3107 (Ch) at [37]–[40]; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [43]; *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [44]; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391. See generally Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 191 and 193, paras 26 and 29.
36 c 50.
37 [2006] EWHC 1900 (Comm) at [431]–[435].
38 c 54.
39 Although the former was essentially a statutory codification of English common law mercantile law (to which the presumption was applied for that reason in *The Parchim* [1918] AC 157 at 160–161 (PC)) whereas the latter was a policy-driven parliamentary intervention to change the position at common law.
40 *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [58].

8 The present scope of the presumption of similarity (or default application rule) is unclear, and (consequently) unsatisfactory. Tan Yock Lin rightly describes formulations of the exceptions to the presumption as "generalised, impressionistic and ultimately pragmatic".[41] Hedyon JA in the New South Wales Court of Appeal decision in *Damberg v Damberg*[42] identified a whole series of circumstances in which the presumption was not to be applied, ranging from (a) where it was not in the interests of justice; (b) where the foreign law was not based on common law;[43] (c) where the domestic law in question altered the common law; (d) where it was inherently improbable that the foreign law was the same as the law of the forum; and (e) where fairness required it. The presumption of similarity was rejected in that case on ground (d): the provisions of capital gains tax and tax avoidance or evasion could not be assumed to rest "on great and broad principles likely to be part of any legal system". Christopher Clarke J in *Balmoral* suggested the distinction is between "substantive provisions of a general character" (to which the presumption would apply) and rules of "a localized or regulatory character" (to which it would not).[44] In an important recent survey of the law on this topic,[45] Tan Yock Lin has argued that the exceptions to the operation of the presumption are essentially founded on a requirement of good faith, although how far such a protean concept can provide an adequate guide for a lawyer to identify those circumstances in which the presumption will not operate must be open to doubt.

III. Modes of proof of foreign law

9 In court proceedings in England, foreign law is overwhelmingly proved by expert evidence,[46] with the experts identifying and exhibiting the relevant legal sources. In Singapore, foreign law can be proved either by expert evidence or by directly introducing the sources of foreign law in evidence.[47] This is the effect of s 40 (together with ss 86 and 88) of the

41 Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 203, para 43.

42 (2001) 52 NSWLR 492.

43 To similar effect see Cartwright J in *Gray v Kerslake* [1958] SCR 3 (Canada).

44 *Balmoral Group v Borealis* [2006] EWHC 1900 (Comm) at [432] adopting a distinction drawn by Marceau J in the Federal Court of Appeal in Canada in *The Ship "Mercury Bell" v Amosin* [1986] 27 DLR (4th) 641 and in *Pickering v Stephenson* (1872) LR 14 Eq 322 at 340.

45 Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 206, para 46.

46 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 9-013.

47 *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [54]. See also *Ong Jane Rebecca v Lim Lie Hoa* [2003] SGHC 126 at [36].

Evidence Act[48] rendering statements of foreign law in books produced by the relevant government and law reports relevant and admissible.[49] In practice, however, foreign law has almost invariably been proved by expert evidence in Singapore courts as well, the Singapore Supreme Court having stated that "it is preferable that solicitors provide expert opinions on foreign law whenever possible".[50]

10 There are a number of older cases confining the court to the particular extracts or provisions put in evidence by the foreign law expert, and which suggest that the court should very rarely go behind uncontradicted evidence as to what the effect of a source is.[51] While this remains the formal position,[52] the relative persuasive balance of the expert and the sources when deciding issues of foreign law has moved significantly in favour of the latter. In *MCC Proceeds v Bishopsgate Trust Place (No 4)*,[53] the Court of Appeal defined the role of the expert on foreign law as being:

> (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;
>
> (2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.

11 The role of the expert is said to be "to predict the likely decision of the foreign court, not to press upon the English judge the witness's personal view of what the foreign law might be". The law in Singapore is to the same effect,[54] and has recently been restated by Stephen Chong J in an important judgment in *The Chem Orchid*.[55] Where the issue which arises is one of construction of a contract, the role of the expert is to

48 Cap 97, 1997 Rev Ed.

49 Textbooks on foreign law whose authors are dead and the sources on which they rely have also been held to be admissible under s 62(2) of the Evidence Act (Cap 97, 1997 Rev Ed) in *Wong Kai Woon v Wong Kong Hom* [2000] SGHC 176.

50 Teo Guan Siew & Wong Huiwen Denise, "Referring Questions of Foreign law to the Court of the Governing Law: No Longer 'Lost In Translation'" (2011) 23 SAcLJ 227 at 230, para 8 and *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [60].

51 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at paras 9-15 to 9-016.

52 See, *eg*, *Bumper Development Corporation v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362.

53 [1999] CLC 418 at [23].

54 *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [76].

55 [2015] 2 SLR 1020 at [160]–[167].

identify the relevant principles, but not to offer his or her own view on the proper meaning of the words.[56] Unfortunately the restriction that the role of the expert on foreign law is to identify the relevant principles and sources, and not to provide his or her own answers on the issues which arise in the case, is one which is more honoured in the breach than in the observance in both jurisdictions. The usual formulation adopted is for the expert to say something along the lines of "if the courts of X had to determine whether there was a breach of contract on the pleaded facts, they would conclude there was/was not".

12 It would be open to the court under both systems to appoint a single joint expert – in England under r 35.7 of the Civil Procedure Rules 1998 ("CPR") and in Singapore under O 40 r 1 of the Rules of Court[57] ("RC"). If this power was exercised, it might be possible to appoint an academic qualified in the relevant law from a local university. This would produce an outcome similar to that adopted by the German courts, where a judge may consult an academic institute for a report on the relevant issue of foreign law, such as the Max Planck Institute for Foreign Law and Private International Law.[58] However, in England at least, proceeding by way of a joint expert on foreign law has acquired little traction in civil litigation, perhaps because of the expectation that the parties would appoint their own "shadow experts" in any event and because of a judicial desire to retain greater control over issues of foreign law.

13 At common law, previous English decisions are not admissible in other proceedings as to the content of foreign law in subsequent cases.[59] There is a statutory exception to this rule in the form of s 4 of the Civil Evidence Act 1972[60] (which has no Singapore equivalent) making a judgment of another English court on a provision of foreign law admissible in subsequent English proceedings and giving it presumptive effect. The section applies to prior determinations of foreign law in proceedings in courts of England and Wales, the Supreme Court or the Privy Council, makes the findings admissible in evidence for the purpose of proving the foreign law in the subsequent proceedings, and places the burden of proof on any party seeking to

56 *King v Brandywine* [2005] EWCA Civ 235 at [68]; *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [81].

57 Cap 322, R 5, 2014 Rev Ed.

58 Trevor C Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 276. A collection of the opinions provided to the German courts is published annually under the title *Gutachten turn Internationalen und auslandischen Privatrecht*.

59 *Eg, Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 289 at 297–298 and the Privy Council in *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260.

60 c 30.

contend for a different result.[61] This allocation of the burden of proof does not apply where two inconsistent prior decisions are adduced as evidence of foreign law.

14 Finally, the court can decide issues of foreign law without proof where the parties agree to this approach, and the court is content with it, or the court may (with the parties' agreement) decide the foreign law issues based on expert reports without cross-examination. In *Deutsche Bank v Sebastian Holdings Inc*,[62] the court adopted all three approaches – arguments as to the preclusive effect of judgments in foreign proceedings were the subject of letters of submission from the lawyers who acted in those proceedings,[63] the New York law of contract was addressed by way of submission on reports alone without cross-examination,[64] and the New York law of tort was dealt with conventionally by cross-examination of expert witnesses.[65] There are a number of (generally older) cases in which courts have expressed reluctance to take this course, other than for issues of interpretation of foreign statutes.[66] However, it has much to commend it, in circumstances in which the judicial determination of issues of foreign law is more likely to be conditioned by the judge's analysis of the source material and the inherent logic of the arguments than by the impression given by a particular expert under cross-examination.

IV. Disadvantages of proving foreign law by expert evidence

15 Much of the commentary on this topic focuses on the perceived lack of independence on the part of foreign law experts,[67] and a case which is frequently cited in this context is the decision of the US Court of Appeals for the Seventh Circuit in *Bodum USA Inc v*

61 The weight to be attached to the previous decision is a matter for the court: *Phoenix Maritime v China Ocean* [1999] 1 Lloyd's Rep 682 at 685. For recent use of the provision in an application for summary judgment, in reliance on findings made in a prior trial, see *JSC BTA Bank v Ablyazov* [2013] EWHC 7691 (Ch).

62 [2013] EWHC 3463 (Comm).

63 *Deutsche Bank v Sebastian Holdings Inc* [2013] EWHC 3463 (Comm) at [56]–[63].

64 *Deutsche Bank v Sebastian Holdings Inc* [2013] EWHC 3463 (Comm) at [88]–[106].

65 *Deutsche Bank v Sebastian Holdings Inc* [2013] EWHC 3463 (Comm) at [295]–[342].

66 The cases are summarised in *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 9-008.

67 James McComish, "Pleading and Proving Foreign Law in Australia" [2007] MULR 400 at 430–431 identifies a series of criticisms of foreign law experts: lack of reasoning, the giving of evidence outside their areas of primary expertise, the lack of comprehensive research and partiality.

La Cafetiere Inc.[68] In that case, the majority stressed the disadvantages of determining foreign law (in that case French law) on the basis of expert evidence, and the benefits of a court determining issues of foreign law based on its own researches into the underlying sources.[69] Chief Justice Easterbrook suggested that "it is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code, or the law of Puerto Rico, whose origins are in the Spanish civil code" and suggested that "trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount". Judge Posner made comments in a similar vein, concluding:

> I do not criticise the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. It is excusable only when the foreign law is the law of a country with such obscure or poorly developed legal system that there are no secondary materials to which the judge could turn.

16 The suggestion that US judges conducting their own research (either personally or vicariously via their law clerks) were better placed correctly to identify French law than French law experts called by the parties drew an impassioned response from Professor Pierre Legrand of the *Sorbonne*, suggesting among other things that the decision subjected French law to "a form of cultural hegemony one might term anglobalization (the dominance of a certain Anglo-American configuration of court and technology)".[70] However, dissatisfaction with expert evidence as a means of proving foreign law is not confined to English and US courts. Andrew Phang Boon Leong J in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd*[71] faced foreign law experts whose evidence was "diametrically opposed … [and] singularly unhelpful … Each expert asserted his position and stuck to his guns". He described "the great potential disadvantage … of having such a rule as to the proof of foreign law".

17 There have been unsatisfactory expert witnesses on foreign law, just as there have on other issues. However, the implicit suggestion that they are more prone than other expert witnesses to fall into the trap of advocating their clients' cases because this is their default mode is not borne out by the author's own experience. While it has been observed

68 (2010) 62 F 3d 624 at 628–629, 631–632 and 638.

69 Judge Wood did not adopt the majority's criticisms of the process of ascertaining foreign law from expert evidence.

70 Pierre Legrand, "Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris" (2013) 8(2) *Journal of Comparative Law* 343 at 377.

71 [2006] 4 SLR(R) 451 at [14].

that "the lawyers who testify to the meaning of foreign law … are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client or their willingness to fall in with the views urged upon them by their client",[72] one might make the same assertion about expert valuers, brokers or accountants with as much (or as little) justification. After all, there are few professions whose participants switch more frequently between telling their clients in frank terms what the law is, and advocating what their clients would like the position to be. We have all left court having spent a day trying to persuade a judge the law is self-evidently to a particular effect, and then told the client the minute we are out of the building that the point is hopeless and should be dropped. Further, the partisan expert is probably less of a danger on an issue of foreign law than on bioengineering because the court is able to test the opinions itself. In rejecting an application that an expert's report be declared inadmissible because the expert was acting on a party's behalf in underlying related proceeding, David Steel J observed:[73]

> … there is [no] rule of principle that a lawyer engaged by a party in litigation cannot furnish expert evidence … in that litigation. Of course, a lawyer has a duty to his client as does an employee, but a lawyer is perhaps better placed to fend off the interests of his client and adopt a more objective approach to matters.

18 The author's own objections to invariably requiring foreign law to be proved by experts are more practical. The involvement of foreign lawyers will generally have begun when the pleadings are being prepared, often through several rounds of amendments. The parties will frequently have retained their own foreign lawyers for this process, who will then be tasked with finding an expert with the same or a similar view of the foreign law as that which has been pleaded. The expert reports will frequently be the product of a lengthy, expensive and heavily-lawyered process, running not simply through two rounds of reports and the joint meeting, but with further foreign law sources continuing right up to the giving of evidence. Save in those cases where an *ad hominem* attack is advanced, the cross-examination will usually involve the expert being taken to helpful passages in the underlying sources, or the same testing of propositions by consequence or consistency as would be deployed when developing a legal argument on domestic law. The judge is usually looking to read the sources him or herself, rather than being restricted to those passages of particular interest to the cross-examiner or the expert, and will often test the arguments of both sides by questions during cross-examination. However, the inhibitions to this process presented by the presence of the

72 *Sunstar Inc v Alberto-Culver Co* 586 F 3d 487 at 495–496 (7th Cir, 2009).
73 *Cooper Tyre & Rubber Co v Shell Chemicals* [2009] EWHC 833 (Comm).

expert in the witness box make the bench-bar dialogue less efficient than the usual exchanges during submissions.[74]

19 "Hot tubbing", with both experts facing interactive questioning from the judge and asking questions of each other, would remove some of the artificiality inherent in the conventional cross-examination process.[75] In *Rendall v Combined Insurance Co of America*,[76] Cresswell J adopted the following course:

> Prior to the start of the trial the experts had prepared a joint report. At the start of the trial I gave directions for a further meeting between the experts which resulted in a supplemental joint report containing further points of law on which the experts agreed, points of law offered by Judge Gillis with which Mr Bates disagreed and points of law offered by Mr Bates with which Judge Gillis disagreed. After cross-examination of both experts in the usual way I called both experts forward and asked a number of questions with a view to narrowing the issues. This procedure worked well.

20 In the UK, para 11 of Practice Direction 35 – Experts and Assessors now makes express provision for "hut tubbing" of experts. Andrew Ang J has also "hot tubbed" foreign experts in Singapore proceedings,[77] exercising the power under O 40A r 6 of the RC. To the extent that foreign law continues to be established by expert evidence, this approach may facilitate judicial interaction directly with the foreign lawyers.

V. Getting the foreign court to decide foreign law

A. Early attempts

21 An obvious alternative to the domestic court makings its own findings as to the content of foreign law is to ask the foreign court to do so. Inter-curial co-operation of this kind has a long, albeit interrupted, history. Chief Justice Spigelman of New South Wales gave an example from 1533, the Court of Common Pleas providing an expert ruling on

74 The inefficiency in cross-examination as a means of testing propositions of foreign law was mentioned by Chief Justice Michael Hwang SC of the DIFC Court of Appeal in *Fidel v Felicia and Faraz* (23 November 2015) CA002/2015 at [72(c)].

75 Pierre Legrand argues for greater use of "hot tubbing" in "Proof of Foreign Law in US Courts: A Critique of Epistemic Hubris" (2013) 8(2) *Journal of Comparative Law* 343 at 387. For a contrary view see Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 20.62.

76 [2005] EWHC 678 (Comm) at [67].

77 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [29].

an English law will to a court of the Duchy of Brabant.[78] The issue was picked up by the tide of Victorian law reform, resulting in the British Law Ascertainment Act 1859 which allowed a court in any part of "Her Majesty's Dominions" to state a case for the opinion of a court in any other part of Her Majesty's Dominions. The resultant opinion is binding on all courts save for the Supreme Court. The provision remains in force, and in relation to more countries than the archaic imperial language might suggest, because it applies to countries in the Commonwealth including those which have since become republics, provided the statute remains in force in that jurisdiction. However, searches of Westlaw reveal only a handful of cases where the statute has been invoked.[79] The editors of *Dicey, Morris & Collins*[80] note that there are "few reported cases … because the procedure is expensive and involves delay" and Professor Fentiman suggests that it has "fallen into disuse".[81] The attempt was made to extend the procedure to other courts in the Foreign Law Ascertainment Act 1861 on the premise that mutual conventions would be agreed with other countries. The Act was repealed in 1973, never having been brought into operation because no such conventions were ever concluded.

22 The next attempt, from a UK perspective, came in the European Convention on Information on Foreign Law, signed in London in 1968 and sometimes referred to as the London Convention.[82] It applies to 42 of the 47 Council of Europe States, as well as Costa Rica, Belarus and Mexico, and provides for requests to be made through designated national organs. The reply is intended to give "information in an objective and impartial manner on the law of the requested State to the judicial authority from which the request emanated" and is to contain "as appropriate, relevant legal texts and relevant judicial decisions" together with "any additional documents, such as extracts from doctrinal works and travaux préparatoires".[83] The information in the

78 J J Spigelman, "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 LQR 208 at 212.

79 In *In re A Debtor* [1981] Ch 384 at 404, Golding J considered making a request to the Royal Court of Jersey under the British Law Ascertainment Act 1859 (c 63) (UK), but decided not to do so in circumstances in which neither party had sought a reference.

80 *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury *et al* eds) (Sweet & Maxwell, 15th Ed, 2012) at para 9-024.

81 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 20.59.

82 Treaty Series No 117 (1969) (Cmnd 4229). See generally Juliette van Doorn & Barry Rodger, "Proof of Foreign Law: The Impact of the London Convention" (1997) 46 ICLQ 151.

83 European Convention on Information on Foreign Law (Treaty Series No 117 (1969) (Cmnd 4229)) Art 7.

reply does not bind the requesting court.[84] There are no civil procedure rules addressing applications under the Convention, although the court would be able to make such an order under its inherent jurisdiction.[85] Professor Fentiman has suggested that there have been no cases where the Convention has been used by an English court.[86] The author's own attempt to obtain figures from the UK Foreign Office went unanswered, although it is recognised that they have had rather a lot on their plate since June 2016. Available evidence suggests minimal use in other countries, because of the time it takes to obtain a response.[87] It is tempting to speculate what effect the Convention might have had if deployed in cases in which the English court reached decisions as to foreign law on the basis of expert evidence, only for the same issue to be decided differently by the foreign court subsequently. Perhaps the most famous such occasion is *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*,[88] in which the English court, applying its findings as to French law reached on the basis of expert evidence, held that an arbitration award against the Pakistan government was not enforceable under French law, only for the French court subsequently to allow the award to be enforced.[89] This led one commentator to observe:[90]

> The *Dallah* case shows that, even though the English courts honestly tried to follow the French approach to the problem, such approaches are so alien to the English way of reasoning that they simply could not overcome the fact that, obviously, it had never been the intention of the government of Pakistan to be bound by the contract. And they did not refer to the objectivist trend of the French case law, the existence of which made it obvious, for a specialist of French arbitration law, that the award would not be set aside.

It is tempting to wonder whether a reference to the French courts under the 1968 Convention would have avoided this true conflict of laws.

84 European Convention on Information on Foreign Law (Treaty Series No 117 (1969) (Cmnd 4229)) Art 8.

85 *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 143 at 149–150.

86 Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 20.60.

87 See Jinske Verhellen, "Access to Foreign Law in Practice: Easier Said Than Done" (2016) 12(2) *Journal of International Private Law* 281 at 293–294.

88 [2011] 1 AC 763.

89 Paris Cour d'Appel 17 February 2011 154 Con LR 222.

90 Pierre Mayer, "The Extension of the Arbitration Clause to Non-signatories – The Irreconcilable Positions of French and English Courts" (2011–2012) 27 *American University International Law Review* 831 at 836.

B. Ad hoc *efforts*

23 While these institutional attempts at inter-curial co-operation on issues of foreign law have not proved particularly fruitful, there have been successful *ad hoc* efforts. This article considers two. The first is the decision in *Verene Von Mitchke-Collande v Thomas Kramer*[91] in which the English court faced diametrically opposing expert views as to the enforceability of a Swiss provisional judgment, in the context of a freezing order obtained from the English court in support of that judgment. Given the conflict between the experts, the judge (Mr Justice Burton) suggested that the issue would be better determined by the Swiss court. The claimant sought to resist this by adducing evidence that the Swiss court would not issue an advisory opinion. In turn, the respondent offered to move a pot of assets to a Swiss lawyer's account, to notify the claimant of their location, and then invite the claimant to seek to enforce the provisional judgment against those assets. The sum of money was duly moved, but the claimants failed to take up the opportunity to try and enforce against it in Switzerland, and as a result the English proceedings were stayed.

24 The other example arises from proceedings in Singapore to enforce an English judgment under the Reciprocal Enforcement of Commonwealth Judgments Act,[92] in which an issue arose as to whether that judgment, was enforceable in England without the leave of the court.[93] In *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR*[94] ("*Westacre*"), the Singapore Court of Appeal adjourned the hearing of the appeal on the point, and ordered the parties to refer that issue to the English court for determination.[95] The issue came before Tomlinson J in the Commercial Court in an application brought by the claimant for declaratory relief on what, so far as the English court was concerned, was a hypothetical question. The judge described this as "an unusual although not altogether unprecedented application", referring to two other cases in which parties had sought declarations from the English court to assist the enforcement of an English judgment abroad.[96] The judge held that it was "clearly appropriate that the English court should assist the parties and the Singapore court by indicating, so far as it is able, how the discretion of

91 [2005] EWHC 977 (QB).
92 Cap 264, 1985 Rev Ed.
93 To determine the enforceability of that judgment in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed).
94 [2009] 2 SLR(R) 166.
95 *Westacre Investments Inc v Yugoimport-SDPR* [2008] EWHC 801 (Comm).
96 *Duer v Frazer* [2001] 1 WLR 919 and *The Society of Lloyd's v Jean Pierre Longtin* [2005] EWHC 2491 (Comm).

the English court would have been likely to have been exercised in the circumstances posited".

25 These were both cases concerned with an easily defined and isolated procedural issue, in which the attempt to secure an answer to the issue of the foreign law from the foreign court had the support of, and came at the initiative of, the domestic court. This is not always the case. In *Faraday Reinsurance Co Ltd v Howden North America Inc*,[97] proceedings were commenced by an insurer in England with a view to obtaining a judgment on English law which could be deployed between the same parties in Pennsylvania litigation. The Court of Appeal rejected the argument that the proceedings had no utility, in part because "it might assist a Pennsylvania court to know what English law is". However, on virtually identical facts, a differently constituted Court of Appeal held that English proceedings brought in order to establish English law for the purposes of the same Pennsylvania proceedings served no useful purpose in *Howden North America Inc v ACE European Group Ltd*.[98] The previous decision was distinguished on the basis that the Pennsylvania proceedings had moved on, the judge there (Judge Conti) having indicated a provisional view that English law was not the proper law of the insurance policy and that if English law did apply, the Pennsylvania court was capable of ascertaining its content by expert evidence. Aikens LJ observed:[99]

> Judge Conti is an experienced and well respected Federal Judge sitting in the Federal Court in Pennsylvania. She has expressed no request or need to be instructed by the English court on what is, in its view and according to the applicable English conflict of laws rules, the applicable law of the policies. Nor is there any suggestion by Judge Conti that she would welcome being told of the English court's view on the elementary principles of English insurance law on the 'coverage issues' that would be raised in the proposed English proceedings. There is no other evidence that Judge Conti wishes to be assisted by the English court's views … In these circumstances, for my part, I would regard the idea that the English court should give its unsolicited judgment as 'advice' to a Federal Judge in the US District Court for the Western District of Pennsylvania on elementary principles of English law, in the expectation or even hope that such a judgment would be 'at the very least … of considerable assistance' as both presumptuous and condescending.

26 Indeed the English court has itself looked with disfavour on an attempt by a party to procure a decision from a foreign court on an issue

97 [2012] EWCA Civ 980.
98 [2012] EWCA Civ 1624.
99 *Howden North America Inc v ACE European Group Ltd* [2012] EWCA Civ 1624 at [37].

of foreign law arising for determination in an arbitration held under English curial law. The case involved an arbitration between a non-Russian entity and a Russian company to enforce claims under a contract containing an arbitration clause. A shareholder in the Russian company commenced proceedings in Russia against both the Russian company and its non-Russian counterpart, seeking a declaration that the transaction between them was void, in the hope of creating an issue estoppel to be deployed in the arbitration, or at least generating favourable findings of Russian law on matters which were in issue in the arbitration. In *BNP Paribas SA v Open Joint Stock Company Russian Machines*,[100] the English court granted an anti-suit injunction to restrain pursuit by the shareholder of the Russian proceedings on the grounds that the Russian proceedings were, on the facts, vexatious and oppressive.[101] The decision was upheld on appeal.[102]

C. Bilateral conventions

27 Inspired by the innovative approach adopted by the Singapore Supreme Court in *Westacre*, the then-Chief Justice of New South Wales, James Spigelman, proposed mechanisms to allow a court to refer an issue of foreign law to the determination of the foreign court.[103] This has resulted in a number of bilateral agreements intended to facilitate this process. The first, concluded on 21 August 2010 between the Supreme Courts of Singapore and New South Wales, was the "Memorandum of Understanding on References on Questions of Law".[104] To provide for its use, the Singapore RC were amended by O 101 r 2 introduced on 15 September 2010,[105] and amendments were made to the Uniform Civil Procedure Rules (New South Wales) by Amendment No 34. The Singapore-New South Wales Memorandum of Understanding ("MOU") was followed on 20 December 2010 by a similar MOU between the Chief Justice of New South Wales and the Chief Justice of New York.[106] Due to constitutional restraints applicable to the New York courts, assistance on New York law was to be provided by judges from a

100 [2011] EWHC 308 (Comm), affirmed in *Joint Stock Asset Management Co v BNP Paribas SA* [2012] EWCA Civ 644.

101 *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm) at [77]–[78].

102 *Joint Stock Asset Management Co v BNP Paribas SA* [2012] EWCA Civ 644.

103 J J Spigelman, "Cross Border Issues For Commercial Courts: An Overview", speech given at the Second Judicial Seminar on Commercial Litigation in Hong Kong, 13 January 2010.

104 Teo Guan Siew & Wong Huiwen Denise, "Referring Questions of Foreign law to the Court of the Governing Law: No Longer 'Lost In Translation'" (2011) 23 SAcLJ 227.

105 Rules of Court (Amendment No 3) Rules 2010 (S 504/2010).

106 Louise Ellen Teitz, "Determining and Applying Foreign Law: The Increasing Need for Cross-border Co-operation" (2013) 45 *International Law and Politics* 1081.

specialist panel of New York judges rather than by the New York court itself.[107] Finally there is a second MOU between the Singapore courts and the DIFC courts concluded on 20 January 2015. It is fitting, given Singapore's leading role in this area, that Singaporeans signed both sides of the DIFC MOU: Chief Justice Sundaresh Menon for Singapore, and Dr Michael Hwang SC, Chief Justice of the DIFC, for the DIFC courts.

28 So far as proceedings in Singapore are concerned, O 110 r 2 of the RC provides that where a question of foreign law arises in proceedings in Singapore, the court may order that proceedings be commenced in a specified country to determine that issue, the only specified countries being New South Wales and the DIFC. Order 110 r 3 allows the Singapore court to direct that proceedings be commenced in any foreign country for the purpose of determining any issue of law arising in foreign proceedings (effectively allowing for the *ad hoc* referral used in *Westacre*). As the foreign court's view is to be determined by way of proceedings commenced there rather than by obtaining an advisory opinion, it seems to be open to the "losing" party in the foreign proceedings to exercise whatever rights of appeal the local jurisdiction offers.[108] The status of the ruling of the foreign court has been the subject of some debate. The decision of Tomlinson J in *Westacre* was adduced before the Singapore Court of Appeal as an exhibit to an affidavit, which might suggest it had the status of evidence rather than preclusive effect. However, where the ruling results from contested proceedings before the foreign court, there seems to be no reason why some form of estoppel should not apply. The very fact that the foreign court has issued the declaration of foreign law, rather than refused to do so on the basis that the issue was hypothetical, should be sufficient to establish the "judgment on the merits" requirement for issue estoppel.[109] Even where the issue of foreign law which arises is procedural, as was the position in *Westacre*, the foreign court is not ruling for the purposes of applying its own procedure, but for the purposes of determining an issue which arises on the merits (rather than as a matter of procedure) in the referring court. If this ruling is determinative for the purposes of proceedings in the referring court, it should as much be capable of giving rise to an issue estoppel on that question as it would if the referring court had determined the issue

107 J J Spigelman, "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 LQR 208 at 215.

108 Teo Guan Siew & Wong Huiwen Denise, "Referring Questions of Foreign law to the Court of the Governing Law: No Longer 'Lost In Translation'" (2011) 23 SAcLJ 227 at 231, para 13 (who suggest that the Singapore court could issue an anti-suit injunction if it wished to confine the parties to the determination at first instance).

109 See the discussion of the issue in Teo Guan Siew & Wong Huiwen Denise, "Referring Questions of Foreign law to the Court of the Governing Law: No Longer 'Lost In Translation'" (2011) 23 SAcLJ 227 at 238–240, paras 27–28.

itself, either on the basis of expert evidence, or by treating the foreign court's judgment as advisory rather than determinative.

29 To date, the importance of these MOUs appears to be more symbolic than practical. There is one reported attempt to use the New South Wales-New York MOU, on a basis which was subsequently found to be procedurally defective,[110] but none for the two Singapore MOUs. The conclusion of inter-curial MOUs of this kind is likely to be easiest in those circumstances in which the domestic court's need for assistance from the foreign court in determining its own law is the least: between systems which share a similar legal heritage (as all four signatories do) and whose legal sources are in the same language. It is precisely for these reasons that issues of New York, Australian or other common law systems of law might well be determined in a Singapore arbitration by way of submission rather than on the basis of expert evidence.[111] It is also for these reasons that the application of a foreign law which is very similar to Singapore law is treated as only a neutral factor when conducting a *forum conveniens* inquiry.[112]

30 Bilateral agreements might provide more assistance in ascertaining the content of foreign laws from legal systems with which the domestic court does not share a legal and linguistic heritage, for example civilian law systems, but here the history of the European Convention on Information on Foreign Law is not wholly encouraging. And there are real difficulties in extending the process of asking foreign courts to ascertain issues of foreign law arising in domestic proceedings to those courts about whose reliability or integrity justifiable doubts are entertained by the local court or the parties, either because of systemic difficulties[113] or because of particular characteristics of one of the litigants.[114] Indeed the very reason why a dispute governed by the law of State A finds itself being determined in the courts of State B may be because the parties share a confidence in the neutrality of the courts of the latter which they did not have for the courts of the former. Teo and Wong suggest that the benefit of asking the foreign court to determine the issue of foreign law is that "the impartiality and competence of a foreign court for the purpose of making a determination based on its own law can quite safely be assumed and no one will seriously dispute

110 *Marshall v Fleming* [2014] NSWCA 64.

111 Although evidence of English law has been received by Singapore courts by way of expert evidence rather than submission based on the underlying sources, for example in *Boustead Singapore Ltd v Arab Banking Corp (BSC)* [2015] 3 SLR 38.

112 *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [43]; *The Hooghly Mills Co Ltd v Seltron Pte Ltd* [1994] 3 SLR(R) 757 at [16].

113 *889457 Alberta Inc v Katanga Mining Ltd* [2008] EWHC 2679 (Comm).

114 As in *Cherney v Deripaska* [2012] EWCA Civ 1235.

that the foreign court is certainly in a better position than an expert to do so".[115] While this is certainly true of many foreign courts, it is, unfortunately, not true of all of them.

VI. Foreign law as submission

31 The reception of foreign law by submission, with advocates arguing its content in the same way as they would argue the law of the forum by reference to the underlying source materials, is the most cost-efficient means of ascertaining foreign law, which may explain its popularity in arbitration. It has been described by Michael Hwang SC, Chief Justice of the DIFC, as the "international approach", presumably because of its popularity in international arbitration.[116] While it would only be appropriate for legal systems where there is a substantial published body of source material, that is increasingly true of most legal systems.

32 It is also an approach which avoids one of the principal problems with approaches based on the referral of the issue of foreign law either directly to the foreign court or to a retired judge of that court sitting as a special referee or master – *viz*, the artificial separation of legal and factual determinations. Professor Fentiman has suggested that this is one of the principal reasons why the 1968 Convention has been so little used:[117]

> The giving of the opinion is inevitably detached from the circumstances of the dispute. This might introduce an element of objectivity into the process but it also imports a degree of unreality, in so far as questions of law are always answered to a greater or lesser degree against the background of actual litigation.

33 The principal criticism made of the approach is that it is apt to obscure what may be real differences between the two laws, with the advocates defaulting to domestic law concepts to explain their submissions on foreign law and the tribunal being intrinsically attracted to the interpretation of foreign law which most closely resembles the domestic legal system with which he or she is most familiar. When English language treaties on foreign law became popular in the 19th century, a common complaint about them was that "many of the nineteenth century treaties may have interpreted the foreign civil law

115 Teo Guan Siew & Wong Huiwen Denise, "Referring Questions of Foreign law to the Court of the Governing Law: No Longer 'Lost In Translation'" (2011) 23 SAcLJ 227 at 231, para 12.

116 *Fidel v Felicia and Faraz* (23 November 2015) CA002/2015 at [67].

117 Richard Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford University Press, 1998) at p 243.

through the lens of common-law viewers, detached from the foreign legal traditions and culture that properly put the law into context".[118]

34 The "halo effect" of local law when foreign law comes to be determined was memorably described by Justice Oliver Wendell Holmes Jr in *Diaz v Gonzalez*[119] in a passage worth quoting for its prose as much as for its content:[120]

> When we contemplate such a system from outside it seems a wall of stone, every part, even with all others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practise, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books.

35 A particular criticism is that common lawyers invariably want to ascertain the content of foreign law from decided cases, even though they do not have the juridical significance in the foreign legal system that they have at common law. Chief Justice Spigelman referred to the fact that "common law judges in resolving competing submissions as to the meaning of foreign law instinctively apply their own jurisprudential heritage rather than that of the foreign jurisdiction", citing *Bremer v Freeman*[121] where, having acknowledged that cases did not have the same force of authority as in common law systems, the Privy Council proceeded to analyse French law in a manner indistinguishable from the common law approach.[122]

36 As a proponent of the reception of foreign law by submission, the author acknowledges these risks. The first response to them is that the scope of the submissions can and should embrace the relevant differences between the two systems which a tribunal viewing the issues from a purely domestic law perspective might otherwise miss: whether that be the status of case law, different approaches to the interpretation of statutory materials or the permissible limits of reasoning by analogy. The second response is that the "halo effect" is as much a risk when foreign law is ascertained by expert evidence as by submission. In evaluating the experts, and their formulation of the relevant foreign law, evidence which chimes most readily with the domestic law on the issue

118 Louise Ellen Teitz, "Determining and Applying Foreign Law: The Increasing Need for Cross-Border Co-operation" (2013) 45 *International Law and Politics* 1081 at 1086.

119 261 US 102 (1923).

120 *Diaz v Gonzalez* 261 US 102 at 105 (1923).

121 (1857) 10 Moo PC 306 at 366–367.

122 J J Spigelman, "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 LQR 208 at 209.

has a greater prospect of acceptance. Expert reports on foreign law are heavily lawyered by lawyers qualified in the relevant forum, precisely with a view to ensuring that they offer those familiar echoes to the law with which the judge is most familiar. The third response is that all too often, the cross-examination of foreign law experts effectively functions as a proxy to legal submissions between bar and bench, but of an indirect and inhibited kind, with the result that any unwritten foreign colour is "lost in translation". The final response, and here it has to be recognised that the author is venturing into the parochial and offering essentially assertion rather than evidence-based analysis, is that it is in seeing the applications of rules to particular fact patterns in decided cases that a court is best placed to understand a rule, its rationale and limitations. It is only in this way that one can move beyond the fiction of law as it is stated on a page to the law as it is actually applied to resolve disputes. That is, after all, the genius of the common law methodology. It is, no doubt, precisely for this reason, that even when the content of the common law is established by expert evidence, its application to the facts of a case remains a matter of submission rather than evidence.[123]

VII. Appointment of foreign lawyer as special master or referee

37 Another approach to the determination of foreign law is the appointment of a foreign lawyer as a special master or referee to report to the domestic court. This has proved particularly popular in the US,[124] and was adopted in *In re Union Carbide Gas Plant Chemical Disaster at Bhopal*.[125] For those jurisdictions able to adopt this course, it allows for considerable flexibility. The court could appoint, for example, a retired judge from the foreign jurisdiction as special master, and the parties' experts would in effect advocate the case before him. In New South Wales, this result can be achieved through the appointment of a referee under r 6.44(2) of the Uniform Code of Civil Procedure (New South Wales), Chief Justice Spigelman noting: "The court has in mind, in appropriate cases the selection of a retired judge from the relevant jurisdiction as a referee."[126]

38 In proceedings before the United States District Court for the Western District of Tennessee, the court has appointed Sir Bernard Rix

123 A principle going back to *Duchess di Sora v A L Phillipps* (1863) X HLC (Clark's) 624; 11 ER 1168.

124 Louise Ellen Teitz, "Determining and Applying Foreign Law: The Increasing Need for Cross-border Co-operation" (2013) 45 *International Law and Politics* 1081 at 1093.

125 643 F Supp 842 at 847.

126 J J Spigelman, "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 LQR 208 at 215.

as a Special Master, and he has heard what is described as "oral argument" by the two English Queen's Counsel retained as the parties' experts.[127]

39 The approach is, to some extent, a variant of the "ask the foreign court approach", albeit the domestic court will retain greater control both over the procedure, and over the identity of the foreign lawyer who provides the interpretation of foreign law to the domestic court. For the experts asked to present their evidence to the interrogation of a retired judge of their home jurisdiction, the line between evidence and submission must be very thin indeed.

VIII. Singapore International Commercial Court

40 When the creation of the SICC was under consideration, the Singapore International Commercial Court Committee recommended:[128]

> In line with the international character of the SICC, foreign law need not be pleaded and proved as fact in proceedings before the SICC, as the Judges can take judicial notice of foreign law with the assistance of oral and written legal submissions, supported by relevant authorities. This would facilitate buy-in from foreign counsel to bring their disputes to the SICC and, at the same time, aligns the SICC procedure with the practice in international arbitration.

This recommendation, which was adopted, proved to be one of three features of the SICC which have left it uniquely placed to resolve disputed issues of foreign law. Order 110 rr 25 to 29 of the RC implement the Committee's recommendation. Rule 25 provides that on the application of a party, the court may order that a question of foreign law be determined on the basis of written or oral submissions instead of proof. The order is conditional on the court being satisfied that the parties are represented by counsel who are competent to make submissions on the issue and who are authorised to appear before the SICC, albeit there is nothing which requires that counsel to be qualified in the relevant jurisdiction.[129] The SICC is permitted to have regard to legal materials from the relevant jurisdiction as well as the matters referred to it in submission.

127 *Smith & Nephew, Inc v New Hampshire Insurance Company* Case 2:04-cv-03027.

128 Report of the Singapore International Commercial Court Committee (November 2013) at para 34.

129 This is also implicit in Singapore International Commercial Court User Guides Note 3 at para 19.

41 The second feature is provision for the submissions on foreign law to be made by a foreign lawyer, provided he or she satisfies the registration requirements in the Legal Profession Act[130] and has been named in the order made under O 110 r 25 of the RC as authorised to make the submissions. In assessing the foreign lawyer's competence, regard is had to his or her experience in practising the law or subject matter in question, their qualifications in those matters and their proficiency in the language in which the foreign law is expressed. It seems implicit in the scheme that a foreign lawyer meeting the relevant requirements would appear simply to make submissions on the issue of foreign law, without otherwise being counsel in the case.[131]

42 The third feature comes from the judges on the SICC panel. In addition to judges drawn from common law countries, they include judges from civil jurisdictions such as Austria, France and Japan.[132] No doubt if a particular foreign law features regularly before the SICC, there is the option to add judges from other legal backgrounds to the judicial roster. The legal background and linguistic competencies of the judges allocated to decide a case are relevant considerations when assessing whether a particular counsel has the requisite experience to make submissions on foreign law.[133] Presumably it is hoped that the potential involvement of advocates and/or a judge from the relevant jurisdiction will increase the prospects of an accurate resolution of the foreign law issues, and reduce the risk of a subconscious default to the law of the forum in their resolution.

43 It is too early in the SICC's story to know which of these features will prove the most useful in resolving issues of foreign law in an appropriate and cost-efficient way. The first reported decision of the court determined foreign law on the basis of expert evidence rather than submission.[134] However, there are two particular issues concerning the operation and effect of the rules which can usefully be discussed.

44 The first issue is whether, if an order is made for foreign law to be dealt with by way of submission rather than proof, there is any room for the presumption of similarity with Singapore law to apply to the extent that the party is unable to persuade the court of the foreign law content which it urges. The concept of a presumption is readily

130 Cap 161, 2009 Rev Ed.

131 Singapore International Commercial Court User Guides Note 3 at para 20.

132 <http://www.sicc.gov.sg/Judges.aspx?id=30> (accessed 1 February 2017).

133 Paragraph 110(5) of the Singapore International Commercial Court Practice Directions which notes that in assessing the counsel's experience, the court can "take into account its own competence in the foreign law … and proficiency in the language which the foreign law in question is in".

134 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1.

understood when addressing the factual inquiry inherent in establishing the fact of foreign law as a matter of proof, but seems entirely inappropriate to an exercise of submission (in which the *process* of securing findings of the content of foreign and domestic law are intended to be essentially the same). There is the further argument that as an "international tribunal", there is no "law of the forum" to default to (just as international arbitrators are unable to default to a law of the forum).[135] However, while international arbitration tribunals can default to concepts such as international commercial practice or the *lex mercatoria* to fill gaps on the legal submissions before them, this is likely to prove a less attractive approach to a commercial court, even an international one. Further, O 110 r 25 of the RC contemplates the identification of the specific issues of foreign law which the SICC will permit to be established by submission. To the extent that there are other foreign law issues, falling outside the scope of the permission, which are thrown up by the case, for which no order under O 110 r 25 is made, there may be argument as to whether the presumption of similarity with Singapore law can be prayed in aid.

45 The second issue, which is likely to be encountered in the early years of the court, is whether the significance traditionally attached to the existence of disputed issues of foreign law in rendering the domestic court *forum non conveniens* has been weakened by the flexible procedures now available to the SICC to decide foreign law questions. Disputed issues of foreign law have been treated as a strong factor militating against the retention of jurisdiction in Singapore, in cases such as *CIMB Bank Bhd v Dresdner Kleinwort Ltd*[136] and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull*.[137] It has already been suggested that the significance of foreign law in jurisdictional disputes may be weakened in cases in which an MOU allowed a request to be made for an answer on the issue of foreign law from the foreign court.[138] The New South Wales Court of Appeal in *Fleming v Marshall*[139] was of the view that the MOU between New South Wales and New York had "significantly attenuated" the jurisdictional significance of the fact that the *lex causae* was New York law. The argument that SICC procedures make Singapore more *conveniens* has already been accepted

135 As noted in Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2003) at pp 440–443, in international arbitration there is no "foreign law".

136 [2008] 4 SLR(R) 543.

137 [2007] 1 SLR(R) 377.

138 Teo Guan Siew & Wong Huiwen Denise, "Referring Questions of Foreign law to the Court of the Governing Law: No Longer 'Lost In Translation'" (2011) 23 SAcLJ 227 at 247–248, paras 44–45.

139 [2011] NSWCA 86 at [20]–[39].

by Lai Siu Chiu SJ in *Accent Delight International Ltd v Bouvier*.[140] The judge was of the view that "the perceived advantages (to the defendants) or disadvantages (to the plaintiffs) of Switzerland being the forum will be levelled out if this Suit remains in Singapore but is transferred to the SICC".[141] The judge observed:[142]

> Such a transfer offers all the advantages and none of the disadvantages to the plaintiffs or the defendants that were raised in their submissions. The international judges who sit on the SICC are not only eminent and very able but some hail from countries that have civil law systems. In addition, one of them (Justice Dominique T Hascher of the Supreme Judicial Court in France) is equally fluent in French and English.

46 It remains to be seen whether the argument that the SICC has moved the *forum conveniens* dial firmly in Singapore's favour gains traction. In an age of increasing rivalry between the major trial centres, it seems safe to predict that it is likely to find more favour as a reason why Singapore courts will retain cases than a reason why foreign courts will disclaim jurisdiction in Singapore's favour.

IX. Too much foreign law?

47 If issues of foreign law arise in a case, there is, of course, everything to be said for resolving those issues accurately and in a cost-efficient manner. However, there are many occasions when issues of foreign law are raised, argued and resolved, in circumstances in which their application made no conceivable difference to the outcome of the case. Arguments by reference to foreign law principles for the construction of contracts seem particularly prone to this outcome, and the suggestion that the meaning of a carefully drafted commercial contract will vary depending on its proper law is particularly surprising. The Court of Appeal in *King v Brandywine*[143] noted:

> Our starting point is that we find it difficult to accept that a New York court and English court would reach a different conclusion on the construction of a policy negotiated as this one was between organisations well versed in what they were seeking to cover and well versed in the risks that were likely to materialise from the business being carried on by the various assureds, the systems of law are seeking to identify what the parties agreed, and both systems of law use similar pointers to ascertaining that intention.

140 [2016] 2 SLR 841.
141 *Accent Delight International Ltd v Bouvier* [2016] 2 SLR 841 at [111].
142 *Accent Delight International Ltd v Bouvier* [2016] 2 SLR 841 at [116].
143 [2005] EWCA Civ 235 at [116].

48 In Singapore, in *The Chem Orchid*,[144] Stephen Chong J noted "where an application of foreign law will lead to the same result as an application of the law of the forum, it is also unnecessary".[145]

49 This raises the issue of whether there should be any certification requirement before foreign law is pleaded, in an effort to ensure so far as possible that it only appears where necessary, and whether there should be costs sanctions when its appearance proves to be unnecessary. At a COMBAR seminar in 2014, the author raised the suggestion that counsel who plead foreign law should be required to certify that they believe, on reasonable grounds, that the principles of foreign law pleaded are materially different from the equivalent principles of English law in a manner reasonably capable of affecting the outcome of the case, and that the court should have the power to order a party who has unnecessarily raised issues of foreign law to pay the costs resulting from its having done so. The suggestion did not meet with a positive response then, but it is suggested that it merits further consideration.

X. Concluding reflections

50 As will be apparent from the foregoing, like Karl Llewellyn,[146] the author believes the common law methodology of hammering out the content and limitations of principles of law through their application in cases, with the law being found through its application in decided cases interpreted together and appropriately reconciled, to be the most satisfying and informative form of legal reasoning. The great success of common-law based commercial law in giving effect to the world's commerce is testament to the fundamental strength of that methodology, and the way it equips lawyers to draft, structure and advise upon business transactions.

51 The footprint of the common law was largely established by the explorations and imperial adventures of the Elizabethan and Victorian ages, spreading in the wake of men of war, or as part of the baggage brought by hardy settlers. It has long been assumed that its days of territorial growth were over. However, the SICC offers the intriguing prospect of civilian and other non-common law judges being involved in determining issues of law arising under their own systems on the basis of the submissions of advocates qualified under those systems, but with the results of their analyses being arrived at and recorded in

144 [2015] 2 SLR 1020 at [157].

145 Citing Pippa Rogerson, *Collier's Conflict of Laws* (Cambridge University Press, 4th Ed, 2013) at p 50.

146 Most famously in *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown & Co, 1960).

common-law form judgments by reference to detailed findings of fact. Is it too much to hope that those judgments might in turn find themselves being cited to support legal arguments in the home jurisdiction of those judges and advocates, and that, through them, the common law methodology might embark on a new age of expansion?