FAILURE TO PROVE FOREIGN LAW IN U.S. COURTS

INTRODUCTION

The increase in international trade has frequently required United States (U.S.) and foreign courts to resolve disputes that involve the application of foreign law in domestic litigation.[1] In response to these types of disputes, each nation has its developed procedures that outline how foreign law shall be treated in its forum. The United States has followed this modern trend.

In addition to the task of determining how foreign law will be treated in U.S. courts, our courts have been faced with two even more difficult tasks. The first involves deciding the appropriate means by which foreign law shall be proven in federal courts. The second involves the court's response if the parties fail to give timely notice that they intend to rely on foreign law or to adequately demonstrate that such a foreign law exists.[2]

This Comment analyzes the effects of failure to prove[3] foreign law in U.S. federal courts, specifically the Second and Ninth Circuits. In this particular area, the application of the law is not uniform. For example, the consequences of failing to prove foreign law can range from dismissal to the application of various presumptions which essentially apply the forum law. In view of the growing importance of foreign law in U.S. courts, it is imperative to formulate uniform procedures to provide guidance when foreign law has not been proven.

MANNERS IN WHICH FOREIGN LAW IS PROVEN

Once it has been ascertained that foreign law is an element to be considered in a particular dispute, the court must decide the proper methods for proving the law in question. Rudolf Schlesinger accurately explains why foreign law merits different attention than domestic law:

> Since the ascertainment and interpretation of foreign law require skill which the court simply does not possess, the procedural treatment of a foreign law question cannot be the same as that of a question of domestic law.[4]

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[1]Carpenter, *Presumptions as to Foreign Law: How They are Affected by Federal Rule of Civil Procedure 44.1*, 10 Washburn L.J. 296 (1971).

[2]R. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 Cornell L. Rev. 1 at 1 (1973).

[3]For brevity, when the phrase "failure to prove foreign law" is used, it is intended to encompass the phrase "failure to plead or prove foreign law."

[4]Schlesinger, *supra* note 2.

In U.S. courts the approved methods of proving foreign law are the fact approach, judicial notice of the foreign law, and, most recently, Rule 44.1 of the Federal Rules of Civil Procedure.

The Fact Approach

This approach had its origin in the English common law and was traditionally accepted by U.S. courts.[5] In order to prove foreign law under the fact approach, the foreign laws that a party relies upon are not considered as elements of a separate legal system, but are viewed as facts that the litigant is required to specifically plead and prove.[6] The first step is that the foreign law must be pleaded in a timely and sufficient manner.[7] Secondly, the foreign law must be proven in accordance with the applicable rules of evidence.[8] Where the foreign law is set up as bearing on a litigated issue, such law is required to be substantively proven.[9] The applicable foreign law must be proven to the trier of fact as would any other fact in issue.[10] Under the fact approach, the methods for proving foreign law are time consuming and tedious. Furthermore, failure to meet one's burden under this approach quite often results in the immediate dismissal of the claim.[11]

Judicial Notice Through State Statutes and Uniform Laws

In response to the sometimes absurd consequences of the fact approach, many states (especially those states in which transnational litigation is commonplace) have enacted statutes or rules that provide for "judicial notice" of the foreign law or that authorize the court to consider any relevant material or source, regardless of the particular material's admissibility under the technical rules of evidence and regardless of whether the particular material had been submitted by the party or discovered by the court's research.[12] It should be noted that simply because a particular state has adopted a judicial notice

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[5]*See* H. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18:4 Va. J. of Int'l L. 619 (1978).
[6]G. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 Nw. U.L. Rev. 602 at 605 (1975).
[7]*Id.* at 605.
[8]Wharton, Evidence §300 and cases cited therein (1877); Wharton, Conflicts of Laws §772 (1905).
[9]O. Sommerich & B. Busch, Foreign Law - A Guide to Pleading and Proof 11-12 (1959).
[10]*See generally* R. Schlesinger, Comparative Law (3rd ed. 1970).
[11]*See* Cuba Railroad Company v. Crosby, 222 U.S. 473 (1912).
[12]*See generally* Schlesinger, *supra* note 10.

statute does not imply that the disputants are immunized from pleading the foreign law.[13] For example, under the Uniform Judicial Notice of Foreign Law Act,[14] which was promulgated in 1936, observance of the rules of pleading is required to ensure that the adverse party would have adequate time to prepare his defense.[15]

Most jurisdictions that adopted judicial notice statutes have enacted permissive statutes which make the court's utilization of the statute essentially a discretionary one.[16] Schlesinger[17] comments that the states which depart from the majority view typically provide that, in general, judicial notice is discretionary, but that it becomes mandatory if one party has given both timely notice of his intent to utilize the foreign law and adequate information regarding the content of foreign law. California[18] and New York[19] are the only two major states that have embraced this notion in their judicial notice statutes. Most judicial notice statutes leave it primarily to the court's discretion whether or not to take judicial notice of the foreign law.[20] Essentially, the end result is that the courts are not inclined to conduct any outside research if counsel has not provided the court with any assistance.[21] The generally accepted principle is that in the absence of an express statute of the forum to the contrary, the court will not take judicial notice of the law of a foreign country.[22]

Even under judicial notice statutes, however, the judge has discretionary power to decide that the foreign law must be proven in accordance with the rules of evidence, just as is done under the fact approach.[23] In retrospect, it appears as if strict adherence to the rules

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[13]A. Nussbaum, *The Problem of Proving Foreign Law*, 50 Yale L.J. 1018 at 1021 (1941).

[14]Uniform Judicial Notice of Foreign Law Act, 9A U.L.A. 569 (1969).

[15]Section 4 of the Uniform Act states: "Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."

[16]S. Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 Am. J. Comp. L. 332 at 345 (1968).

[17]*See generally* Schlesinger, *supra* note 10, at 80.

[18]California Evidence Code §§310-311, at 452-453 (West 1966).

[19]N.Y. Civ. Prac. Law R. §4511 (McKinney 1963).

[20]*See* Liverpool & G.W. Steam Co. v. Phoenix Ins. Co., 129 U.S. 397 (1889).

[21]*See* Ruff v. St. Paul Mercury Insurance, 393 F.2d 500 (2d Cir. 1968). Here the court would not take judicial notice of the local law of a foreign nation on the ground that the party had failed to give notice at the trial court level of his intention to rely on foreign law.

[22]J. Splanking & G. Lanki, *Pleadings and Proof of Foreign Law in American Courts*, 19 Stan. J. Int'l L. 3 at 5 (1982).

[23]S. Sass, *Foreign Law in Federal Courts*, 29 Am. J. Comp. L. 97 at 107 (1981).

of evidence is somewhat relaxed; thus, the outcome of the litigation is more apt to be equitable. Under the traditional fact approach, the use of foreign law can be prohibited by the rules of evidence[24] or simply because the litigant cannot afford the expense of proving the law in accordance with the rules of evidence.[25]

It must not be forgotten that despite judicial notice statutes, there are times when certain circumstances arise in which the court does not have the statutory power to take judicial notice of the foreign law in question, or where the court chooses to exercise its discretion and not take notice of the foreign law in question.[26] When these situations arise, the judicial notice statute becomes useless and the court (and thus the disputants) are thrown back into the common law fact approach, discussed above.

Judicial Notice and Federal Law

Federal Rule of Civil Procedure 44.1 was adopted in 1966 in an effort to provide federal courts with a uniform and effective set of procedures for raising and determining an issue that involves foreign law.[27] Rule 44.1 currently provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleading or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.[28]

When Rule 44.1 was enacted, one of its major contributing drafters referred to the rule as the "death knell" for the traditional common law fact approach; this rule essentially created new methods for proving foreign law.[29] Additionally, Rule 44.1 is "founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence, but rather of the rules of procedure."[30]

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[24]A. Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 Colum. L. Rev. 348 at 348 (1981).

[25]O. Sommerich & B. Busch, *supra* note 9, at 64-74.

[26]Sass, *supra* note 23, at 98.

[27]The original version was modified in 1972; the amended version of Rule 44.1 went into effect on July 1, 1975.

[28]28 U.S.C. Rule 44.1.

[29]A. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die Hard Doctrine*, 65 Mich. L. Rev. 613 (1967).

[30]Federal Rules of Evidence 201; Advisory Committee's Note, 56 F.R.D. 183, 207 (1973).

Rule 44.1 attempts to make application of foreign law easier by eliminating the pleading requirement and by giving the court discretionary authority to ascertain foreign law without regard to the restrictive formalities and technicalities of the rules of evidence.[31] Another liberalizing effect of Rule 44.1 is that the scope of appellate review is no longer confined to the "clearly erroneous" standard of Rule 52(a) that applies to matters of fact.

Rule 44.1 essentially makes foreign law a *tertium genus*, a third category that is a mixture of law and fact. Nevertheless, foreign law is not treated under Rule 44.1 in the same manner as domestic law. There is no notice requirement for raising an issue of domestic law and the court may not deny judicial notice to a domestic law that applies to the particular dispute,[32] although such provisions are applicable to foreign law issues.

CONSEQUENCES OF FAILING TO PROVE FOREIGN LAW

Even when it is obvious that foreign law would be applicable, the disputants commonly do not invoke the foreign law. Whether or not the litigants have chosen to raise foreign law when it is clearly applicable, the court must decide what effect the failure to invoke the pertinent foreign law will have on that particular case. Several approaches have been developed for dealing with disputants' failures to prove the applicable substantive foreign law, principally either a finding that the cause of action or the defense failed,[33] or the application of various presumptions. The various presumptions are that the foreign law is the same as the forum's common law, the foreign law is identical to the forum law, the foreign law is based on generally recognized principles of civilized nations, and finally, that the party by not proving the foreign law has essentially acquiesced to the forum law.

The Fact Approach

The harshest result that a party may face when it fails to prove the applicable foreign law is the immediate dismissal of the claim.[34] The classic illustration of the severe consequences that follow from this approach is *Cuba Railroad Company v. Crosby*.[35] Here, the plaintiff

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[31]Sass, *supra* note 23, at 98.
[32]*Id.* at 98.
[33]Schlesinger, *supra* note 2, at 6.
[34]Often dismissal is ordered with leave to replead. *See* Harrison v. United Fruit Co., 143 F. Supp. 598 (S.D.N.Y. 1956).
[35]222 U.S. 473 (1912).

became aware of a potentially dangerous defect in his employer's machinery. The plaintiff reported his observation and was promised that this potentially dangerous situation would be remedied quickly; in the interim, the plaintiff was told to continue with his job.[36] Inevitably, an accident ensued in which the plaintiff lost his hand. The accident took place in Cuba, but no evidence was introduced as to any applicable Cuban law. The jury returned a verdict for the plaintiff which the trial judge allowed to stand.[37] On appeal, the Third Circuit Court of Appeals held that the defendant carried the burden of demonstrating that the foreign law was different from the forum law that had allowed the plaintiff to recover.[38] In reversing, the United States Supreme Court, in an opinion by Mr. Justice Holmes, held that it was the plaintiff who carried the burden of pleading and proving the substantive Cuban law which defined the plaintiff's right to recovery. Mr. Justice Holmes reasoned:

> . . . when an action is brought upon a cause arising outside of the jurisdiction . . . [t]he duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. . . . The law of the forum is material only as setting a limit of policy beyond which such obligation will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. . . . That and that alone is the foundation of their rights.
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> . . . the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case and if there is reason for doubt he must allege and prove it.[39]

Walton v. Arabian American Oil[40] is another case involving the failure to invoke foreign law. The testimony and the pleadings of the plaintiff, Leo Walton, tended to show that Walton, a citizen of Arkansas, was en route to work when an accident occurred between Walton's car and a truck owned by the defendant, a Delaware corporation. The defendant's truck was being driven on the wrong side of the road; furthermore, the truck had only one operative headlight.

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[36] *Id* at 477.
[37] *Id.* at 477.
[38] Cuba Railroad Company v. Crosby, 170 F. 369 (3d Cir. 1909).
[39] 222 U.S. 473 at 478-479 (1912).
[40] 233 F.2d 541 (2d Cir. 1956) *cert. denied*, 352 U.S. 872 (1956). The statement of facts in the text is based in part on the record as contained in the appendix to appellant's brief in the court of appeals.

At the close of the plaintiff's case, the trial court directed a verdict for the defendant because the plaintiff had failed to state a cause of action. This judgment was later affirmed on appellate review.[41]

The simple explanation as to the outcome of this case is that the accident took place not in the United States, but in Saudi Arabia. Neither the plaintiff nor the defendant introduced any evidence as to Saudi Arabian law. The applicable conflict of law rules provided that the substantive law of the country where the alleged tort took place was the controlling law;[42] therefore, the plaintiff carried the burden of proving the applicable Saudi Arabian law. As the plaintiff chose not to prove an "essential element" of his case (i.e., proving the applicable foreign law) the court concluded that the complaint had been properly dismissed in the lower court.[43]

The Ninth Circuit also followed the fact approach's harsh consequences of dismissal for failing to prove the foreign law in *Philp v. Macri*.[44] Philp sought equitable relief in the district court in a complaint which alluded to, but did not plead or prove, the inadequacy of Peruvian law which allegedly did not allow the appellant to be sued in the state of Washington.[45] The court held that the appellant's case should be governed by Peruvian law. Because the plaintiff did not prove the controlling Peruvian law, the court was obliged to decide the fate of the appellant's cause of action:

> Where one country's judicial system is based on the Common Law and the other's on the civil law, both systems having been modified by statutory changes, there is little to recommend the employment of a presumption that the law of one is the same as the law of the other.
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> We do not presume that the law of defamation in Peru is the same as the law of defamation in the state of Washington.
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> Appellant's complaint, having failed to allege his right to recover was properly dismissed by the District Court . . . .[46]

The court was plainly aware of the presumption available to it, but instead opted for the strict application of the fact approach resulting in the dismissal of the plaintiff's case.

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[41] *Id.* at 544.
[42] *Id.* at 542, citing Conklin v. Canadian Colonial Airways Inc., 266 N.Y. 244 at 248, 194 N.E. 692 at 694 (1935).
[43] *Walton, supra* note 40, at 546.
[44] 261 F.2d 945 (9th Cir. 1958).
[45] *Id.* at 947.
[46] *Id.* at 948, citing Cuba Railroad v. Crosby, 222 U.S. 473 (1912); Gordon v. Commissioner of Internal Revenue, 75 F.2d 469, (2d Cir. 1935); Walton v. Arabian American Oil Co., 233 F.2d 541 (2d Cir. 1956).

Presumptions

In response to the strict and sometimes inequitable results of failing to prove foreign law under the fact approach, some U.S. courts have formulated presumptions about the content of the foreign law that has not been properly proven.[47] The rationale for these presumptions is that they enable the courts to reach the same results that would have been reached had the case been brought in the foreign jurisdiction. The more commonly used presumptions essentially allow the court to apply domestic law.

Wharton, in his treatise on Conflicts of Laws, set out four theories as to a court's recourse when foreign law is not proven or conceded:

1. That the court should follow the presumption that the common law on the subject prevails in the foreign jurisdiction;
2. That the court should indulge the presumption that the law of the foreign jurisdiction is the same as that of the forum;
3. That the law of the forum is to be applied as the only law upon the subject before the court, irrespective of any presumption as to the foreign law;
4. That a party who asserts a right or defense which is properly governed by the law of a foreign jurisdiction will be denied all relief in that respect unless he proves the foreign law.[48]

However, these four theories are not an exclusive list of the consequences of failing to prove the foreign law. For example, the Restatement (Second) of Conflicts of Laws[49] provides that when no information, or insufficient information, has been provided regarding the foreign law, the forum court will usually decide the case in accordance with the local law of the forum. The Restatement further provides that the rationale for the application of local law to a foreign law case is to enable the court to best administer justice. Under the Restatement view, where the litigants have failed to prove the pertinent foreign law, the forum law may hold that the parties have essentially acquiesced in the application of the forum law.[50] The Restatement also justifies the application of local law on the grounds that the application of foreign law in these circumstances is a fundamental principle of law that prevails in all civilized countries.[51] Finally, the Restatement

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[47]G. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts: Variations on a Theme of Alexander Nekam*, 70 Nw. U.L. Rev. 602 at 608 (1975).
[48]Wharton, Conflicts of Laws §772 (1905).
[49]Restatement (Second) of Conflicts of Laws §136 comment h at 378-379 (1971).
[50]*Id.* at 379 and cases cited therein.
[51]*Id.*

provides that there is a presumption that the foreign law is the same as the forum's common law and statutes.[52]

An illustration of the presumption that certain laws prevail in all civilized countries can be seen in *Compagnie Generale Transatlantique v. Rivers*.[53] Here, Mrs. Rivers was a passenger on a French vessel on the "high seas" when her stateroom was burglarized and she was consequently assaulted by a watchman.[54] The Second Circuit held that the plaintiff did not need to plead and prove the applicable French law that authorized recovery:

> It would seem to be almost an insult to any self-respecting civilized country to assume that under its laws a common carrier of sleeping passengers would not be responsible for assaults of this sort by its own employes [sic], even though the assault were a wanton one, when such assault was made easy through negligence of the carrier in taking proper precautions to assure the safety of its passengers.[55]

The Massachusetts case of *Parrot v. Mexican Cent. Ry. Co.*[56] was one in which the evidence tended to demonstrate that the plaintiff and the general traffic manager of the defendant entered into a contract in which the latter promised on behalf of the defendant that the defendant would pay a certain sum towards the plaintiff's expenditures while publishing a guide to the Mexican Central Railway. The plaintiff received a verdict at the trial level. The defendant appealed, claiming that because the law of Mexico had not been proven, it was error not to give judgment in his favor. The court, however, was not persuaded by the defendant's argument and affirmed the earlier verdict, holding in part:

> In the present case the law upon which the plaintiffs rely is that creating a liability upon a simple contract to pay money for a valuable consideration. We are of the opinion that in a suit upon a simple contract of this kind, there is a broad general presumption of fact that such a contract creates a liability in all civilized countries, which presumption is sufficient to entitle the plaintiff to recover, if no evidence is introduced of the law of the place where the contract is made. In so deciding we do not go so far as the cases which hold in the absence of evidence of the foreign law, the court will in all cases apply the law of the forum. We treat this, not as a presumption that the law of the foreign country is the same as that of the forum, but as a presumption that all countries, in their courts of justice, will give effect to universally recognized

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[52] *Id.*
[53] 211 F. 294 (2d Cir. 1914).
[54] *Id.*
[55] *Id.* at 298, citing Cuba Railroad Company v. Crosby, 222 U.S. 473 (1912); Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898).
[56] 207 Mass. 184, 93 N.E. 590 (1911).

> fundamental principles of right and wrong in deciding between contending parties.[57]

The New York court in *Arams v. Arams*[58] also made use of the "civilized country" presumption. In this case the plaintiff, Richard Arams, alleged that the defendant, Alice Arams, converted his securities to her own use in Switzerland. The defendant asked the court for a dismissal because Swiss law was not alleged.[59] The court held:

> Where the complaint alleges facts which fairly may be assumed to create an obligation under the law of any civilized country, the plaintiff need not specifically allege the law of the state or country in which the things relied upon as giving rise to the asserted obligation took place, considerations of justice and convenience making it proper in such cases to cast upon the defendant the burden of showing, if that be the fact, that the law of such state or country is contrary to that assumption; but where the complaint alleges facts which do not make it reasonably certain that any civilized country would regard them as creating the asserted obligation, the plaintiff must allege the law of the state or country in which the things relied upon as giving rise to such obligation took place, considerations of justice and convenience making it proper in such cases to cast that burden on the plaintiff.[60]

It appears that the court applied the law of the forum because the laws of Switzerland and those of the forum rested on underlying fundamental principles that are inherently embodied in the laws of all civilized countries.

The presumption that foreign law will be the same as that of the forum also includes the notion that because foreign law is based on common law, the foreign law is also the same as the forum's common law. *1700 Ocean Avenue Corporation v. GBR Associates*[61] demonstrates how the Ninth Circuit has gone about implementing this presumption. In this case, the plaintiff, GBR Associates, sued the defendant, a California corporation, on an express written contract; the defendant alleged that a Canadian province made the contract illegal, but there was no proof that such a law existed. The court, finding for the plaintiff, held that "[i]n the absence of a showing at trial that some law other than that of the forum was applicable and proof of it, the presumption would be that the foreign law, if applicable, would be the same as California's."[62]

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[57]93 N.E. at 594.
[58]182 Misc. 238, 45 N.Y.S. 2d 251 (Sup. Ct. 1943).
[59]45 N.Y.S. at 328.
[60]*Id.* at 335, citing 3 Beale, Conflicts of Laws §622A.2 (1935).
[61]354 F.2d 993 (9th Cir. 1965).
[62]*Id.* at 994.

Medina Fernandez v. Hartman[63] is yet another Ninth Circuit case in which the court used the second presumption to justify its application of the forum law. In *Medina Fernandez*, five sailors of the Spanish Navy, who were assigned to ships in the San Diego Harbor, walked to the Mexican border with the specific intent of deserting once they got to Mexico.[64] A treaty between the United States and Spain dealt with desertion that took place in either of the treaty members' ports. The court held that because the desertion took place in Mexico, the treaty between Spain and the United States was inapplicable.[65] In dicta, the court stated that where there was no showing regarding the Spanish definition of desertion, the court would employ the frequently used notion that the foreign law is to be presumed to be the same as that of the domestic law.[66] Therefore, the issue of desertion was resolved by applying the forum's definition of desertion.

The availability of these presumptions is not limited to federal courts. The Arizona Court of Appeals made use of the second presumption in *Noble v. Noble*.[67] In this divorce action, the court held that it had the jurisdiction to ascertain what interest the parties had in property that was located in a foreign country. Furthermore, since neither party stated or proved the laws of the foreign sovereign, the court presumed the foreign country's law to be the same as that of Arizona.[68]

Louknitsky v. Louknitsky[69] is another example of the application of the "civilized country" presumption by a state court. In this divorce action, all property acquired during the marriage was divided in accordance with California's community property laws. There was evidence that most of the funds used to invest in the marital assets were acquired while the parties lived in China.[70] The plaintiff, Mrs. Louknitsky, was appealing from the earlier judgment. The court held that because no evidence was presented regarding the laws of China, those laws would be presumed to be the same as those of California;[71] therefore, the lower court's division of the marital assets was affirmed.

Yet another presumption provides that by failing to prove the applicable foreign law, the party has effectively acquiesced to the

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[63]260 F.2d 569 (9th Cir. 1958).
[64]*Id.* at 570.
[65]*Id.* at 572.
[66]*Id.* at 570 n.1.
[67]26 Ariz. App. 89, 546 P.2d 358 (1976).
[68]*Id.* at 361.
[69]123 Cal. App. 406, 266 P.2d 910 (1954).
[70]*Id.* at 911.
[71]*Id.*

application of the forum law. *Loebig v. Larucci*[72] is an example of the Second Circuit's utilization of this principle of private international law. The plaintiff brought a diversity action in New York to recover for injuries that he received in Germany while he was a passenger on a motorcycle owned and operated by the defendant. Both litigants were U.S. citizens.[73] Both parties specifically requested that New York law be used to resolve the dispute. The trial court refused to accept the parties' stipulation, reasoning that German law must be applied because the accident occurred in Germany. The plaintiff failed to prove the applicable German law regarding negligence. The judge then gave the jury a general charge, reflecting New York law, regarding the standard of care for operating a motor vehicle, and the jury found for the defendant. In affirming the trial court, the Second Circuit held that (1) German law was the substantive law which should have been applied, and (2) it was correct to apply New York law instead, not because German law can be presumed to be the same as New York law, but because both of the parties specifically requested it and because the plaintiff had not met his burden of proof regarding German law. Therefore, the parties had, at a minimum, acquiesced to the application of the forum's laws regarding the standard of care to be exercised when operating a motor vehicle.[74]

The Ninth Circuit also made use of this presumption in *Commercial Insurance Co. of Newark, New Jersey v. Pacific Peru Construction.*[75] None of the parties to the action gave written notice of an intent to raise the potentially relevant Peruvian law.[76] The court, in explaining its holding, cited section 136 of the Restatement (Second) of Conflicts:

> Where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law. . . . The forum will usually apply its own local law for the reason that in this way it can best do justice to the parties. . . . When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum . . . .[77]

Following the Ninth Circuit's holding in *Commercial Insurance Co. of Newark, New Jersey v. Pacific Peru Construction,*[78] the New York District Court in *Wachs v. Winter*[79] also invoked the presumption that

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[72]572 F.2d 81 (2d Cir. 1978).
[73]*Id.* at 83.
[74]*Id.* at 85-86.
[75]558 F.2d 948 (9th Cir. 1977).
[76]*Id.* at 952.
[77]Restatement (Second) of Conflicts of Laws §136 comment h at 378-379 (1971).
[78]588 F.2d 948 (9th Cir. 1977).
[79]569 F. Supp. 1438 (E.D.N.Y. 1983).

parties have acquiesced to the application of forum law when they have failed to prove foreign law. In *Wachs*, an attorney from Israel initiated a libel action against a New York client, based on certain statements made by the client in correspondence to officials; the client's statements alleged improper representations by the Israeli attorney in matters regarding the client's inheritance, located in Israel.[80] Both parties failed to plead the applicable Israeli law; therefore, the court held that because both parties had been silent as to what law would be applicable, they had effectively acquiesced to the application of the forum law.[81]

ANALYSIS

The cases dealing with the consequences of failure to prove foreign law illustrate that this area of the law is in a state of disarray in both the Second and Ninth Circuits. Cases can be found which justify any result that a litigant (or a court) wishes to reach resulting from a failure to plead the applicable foreign law. For example, if a party chooses not to plead the law of Spain, the options available to a court range from dismissing the party's claim (or defense), to deciding the case under the domestic law, to applying general principles of law common to all "civilized countries." In light of the increased frequency of transnational disputes in U.S. courts, it seems logical, if not necessary, that some sort of uniform treatment be required whenever foreign law is not properly pleaded or proven in any U.S. court. The crucial question then becomes, which method provides the most sensible and equitable results?

The fact approach is clearly not the most equitable approach. This approach gives the option of dismissing a dispute simply because the party has not met his burden of proving the relevant foreign law. This approach fails to take into account that the party may not have the financial resources to demonstrate that such a law does exist.

If one is to effectively establish that a particular law is in effect in a foreign country, the party must produce documents, translations of those documents, and witnesses who can testify as to the substance of the particular law. The gathering of this evidence can be extremely time-consuming and, quite often, expensive. When the dispute in question does not concern a great amount of money, it seems ridiculous to expend great amounts of money in order to meet one's burden, only to receive a mere pittance in return. It is difficult to view this method

[80] *Id.* at 1441.
[81] *Id.* at 1443.

as the most equitable approach when the party is either denied the court's attention or, in the alternative, is obliged to become impecunious in order to meet his burden of properly proving the relevant foreign law.

Under the fact approach, potentially serious problems can arise that essentially guarantee a verdict against the plaintiff. For example, as a litigant is required under this approach to prove the law as if it were a fact, the party must then gather much of the evidence in that particular foreign country. Problems can arise when the foreign country in which the pertinent evidence is located has its own policies and laws dealing with the disclosure of such information.[82] If this situation were to arise, the plaintiff would surely be unable to meet his burden under the fact approach. Dismissal due to the unforeseen laws of the situs of the evidence cannot, in any way, be seen as producing an equitable result.

Further, the issues pertaining to foreign law are determined by the trier of fact; consequently, since appellate courts are limited to reviewing questions of law, review of the findings of the trier of fact is, quite simply, not within the appellate court's scope of review.[83] The fact approach has been termed "a . . . burdensome, inconvenient . . . [and] absurd method of ascertaining law."[84]

As discussed above, a variety of presumptions have been developed to bypass the harsh application of the fact approach. The most common presumptions are: that the foreign law is based on generally recognized principles of civilized countries and that because the United States is a civilized country, the foreign laws, if the foreign country is civilized, must be the same as that of the forum law; that the foreign law is equal to the forum law; and finally, that by failing to prove the foreign law, the party has consented to the application of the forum law. While these presumptions do have inherent problems, they at least allow a party access to the court, albeit with the presumption that the domestic law will govern the final outcome of the litigation. This is clearly a more efficient method of dealing with failure to prove foreign law. Under the various presumptions, the dispute is at least heard even if it is decided in accordance with domestic law. However, under the fact approach, the court can justify a dismissal giving no consideration to the underlying merits.

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[82]*See* United States of America v. National City Bank, 396 F.2d 897 (2d Cir. 1968).

[83]B. Currie, *On Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964 at 973 (1958).

[84]R. Crampton, B. Currie & H. Kay, Conflicts of Laws—Cases, Comments, Questions 56 (3d ed. 1981).

The presumption that the court is dealing with a mutually civilized country seems to mandate that the court rest its decision on its own subjective views as to the foreign country's political system. The opportunity for abuse under this presumption is great, as is the potential for affront to foreign states. This presumption is not the most effective method of dealing with the recurring problem of parties failing to prove foreign law. The court's function is to dispense justice, not to comment on particular country's civilized system of justice or lack thereof.

The second presumption essentially assumes that the foreign country's laws, no matter what country, are equal to that of the forum. This notion is ludicrous in that it artificially assumes that legal systems around the world, regardless of cultural differences, are more or less identical. The artificiality of this presumption can be seen by looking at how different countries view what behavior is right and conversely what is wrong. Furthermore, if this presumption were accurate, one would expect laws around the world to be identical; therefore, there would be no need for such a presumption. It appears as if this presumption is the clearest example of the use of presumptions merely for the sake of convenience; to assume that the laws of France are identical to those of the forum's is, to say the least, utterly absurd.

In analyzing the most commonly employed presumptions, it appears as if the presumption that deems a disputant, by his failure to plead or prove the applicable foreign law, to have agreed to have his case governed by the forum's laws, achieves the most equitable results and rests on the soundest rationale. This particular presumption does not force the court to comment on delicate foreign affairs issues nor does it assume that the laws everywhere in the world are in complete uniformity with that of the forum's. Finally, this presumption does not penalize a party for not meeting its burden, it simply does not allow the party the luxury of having its dispute decided in accordance with the applicable foreign law.

There are, of course, other alternatives available to a court in order to achieve some type of uniformity when confronted with a failure to plead or prove foreign law. The most viable of these options is that the court could conduct its own investigation of all of the applicable laws in that particular area and devise a type of "best law" analysis. The court would be forced to extensively research a given area of the law and consider the many countries which deal with this one area, and effectively formulate a "collective" law. While this approach would eliminate the possibility of prejudicial consequences of choosing which law shall govern, the increased time and money that the court

would expend would outweigh the benefits of this theory. This approach has the potential of achieving the most equitable results, but in practical terms, this approach would be too inefficient. Additionally, it is doubtful that a court would be in a position to accurately determine, on its own initiative, what the particular foreign law in question is without the guidance of foreign law experts.

CONCLUSION

The available methods for proving foreign law in U.S. courts are the fact approach, judicial notice of the foreign law, and Rule 44.1 of the Federal Rules of Civil Procedure. Failure to prove foreign law under any one of these approaches can result in either the immediate dismissal of the dispute or the application of the forum law through the various presumptions that have emerged. While the rationales for these presumptions differ from each other, the final outcome of the application of these presumptions is always the same in that forum law is applied. In both the Second and Ninth Circuits, it is never clear whether failure to prove foreign law will result in a dismissal or if the dispute will be resolved under domestic law.

In conclusion, as transnational litigation is fast becoming commonplace, U.S. courts must develop procedures that uniformly and effectively establish the consequences of failing to prove foreign law. While there are many alternatives available to a court in this situation, it seems that some sort of predictability should prevail rather than a haphazard application of the various alternatives that are presently available to the court.

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