

PROOF OF FOREIGN LAW – PROBLEMS AND INITIATIVES

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Introduction

As Chief Justice Spigelman has pointed out, the economic, cultural and political phenomenon of globalisation has resulted in a marked increase in the appearance in Australian courts of legal disputes involving the application of foreign laws.¹ Uncertainty as to whether, and to what extent, a foreign law will be applied produces doubt for parties to international commercial transactions, posing a potential impediment – or at least an additional risk, and therefore cost - for international trade and commerce.² The common law postulates that the content of foreign law is a question of fact, not law. Thus, foreign law is unable to be known by a judge until it is pleaded and proved by a party.³ In contrast to the position with the laws of other states,⁴ and those of New Zealand,⁵ our courts cannot take judicial notice of foreign law.

Foreign law is nonetheless a ‘question a fact of a peculiar kind’.⁶ This peculiarity is manifested in certain anomalies, which may be grouped roughly into seven categories: (1) in jury trials, questions of foreign law are decided by the judge;⁷ (2) no ‘doctrine

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¹ See for instance: The Hon J. J. Spigelman AC, ‘Conflict of Laws in Australia’, speech delivered in Sydney 16 April 2010, 5, (hereafter *Nygh*); The Hon J. J. Spigelman, ‘Transaction Costs and International Litigation’ (2006) 80 *ALJ* 435 (hereafter *Transaction Costs*); The Hon J. J. Spigelman, ‘Proof of Foreign Law by Reference to the Foreign Court’ (2011) 127 *LQR* (April), 208 (hereafter *Proof of Foreign Law*); see also: 1999 *Seoul Statement on Mutual Judicial Assistance in Asia Pacific Region*, which was signed on behalf of Chief Justices of 25 countries in the Asia-Pacific, recognising, amongst other things, that ‘1. Increasing numbers of individuals, corporations and other forms of business associations are doing business internationally; 3. The increasing number of commercial transactions between individuals, corporations and other forms of business associations resident, incorporated or registered in different countries within the Asia-Pacific region creates the potential for conflict over the most appropriate forum in which to determine commercial disputes.’

² The Hon J. J. Spigelman, ‘Cross Border Issues For Commercial Courts: An Overview’, speech given at Second Judicial Seminar on Commercial Litigation in Hong Kong, 13 January 2010, 6 (hereafter *Cross Border Issues*).

³ See, for example: *Fremoult v Dedire* (1718) 1 P. Wms 429, *Nelson v Bridport* (1845) 8 Beav. 527, R Fentimen, *Foreign Law in English Courts* (1998, Oxford), (hereafter *Foreign Law in English Courts*), and J McComish, ‘Pleading and proving foreign law in Australia’ (2007) 31 *MULR* 400, (hereafter *Pleading and proving foreign law*).

⁴ (NSW) *Evidence Act*, s 143, (CTH) *Evidence Act*, s 143.

⁵ (CTH) *Evidence and Procedure (New Zealand) Act 1994*, s 40.

⁶ *Parkasho v Singh* [1968] P, 233, 250.

⁷ See (NSW) *Evidence Act* s 176 and (CTH) *Evidence Act* s 176.

of precedent' applies, with prior decisions by courts of the forum on the content of foreign law not being binding;⁸ (3) decisions of courts of the foreign country are not conclusive, but merely evidence, of the content of the foreign law;⁹ (4) appellate review of findings of foreign law at first instance are not constrained as in respect of other findings of fact;¹⁰ (5) if a party fails sufficiently to prove the content of foreign law, the law of the forum will generally be applied by default;¹¹ (6) where expert evidence of foreign law is 'patently absurd',¹² untenable, or contradictory, the court may provide its own analysis of the content of foreign law;¹³ and (7) while the content of foreign law is a question of fact, its application to the facts of a case is a question of law in respect of which evidence cannot usually be received.¹⁴

Decisions of appellate courts in recent times have also increased the importance of proving foreign law. The rejection of the 'double actionability rule'¹⁵ in *Renault v Zhang*,¹⁶ with the adoption of the *lex loci delicti* as the governing law with respect to torts where the *locus delicti* is a foreign place, has expanded the number of instances in which foreign law would be applicable. While, notwithstanding some suggestions in our Court of Appeal to the contrary,¹⁷ the issue may not yet have been authoritatively determined by the High Court, the currency of the conventional

⁸ *Re Marseilles Extension Railway and Land Co* (1885) 30 Ch D 598, 602 (Pearson LJ), *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, 290.

⁹ *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853, 923, (Lord Reid).

¹⁰ *Parkasho v Singh; King v Brandywine Reinsurance Co (UK) Ltd (formerly Cigna RE Co (UK) Ltd)* [2005] EWCA Civ 235.

¹¹ *Lloyd v Gilbert* (1865) LR 1 QB 115; *Wright Heaton & Co, Ltd v Barrett* (1892) 9 WN (NSW) 13, 15, *United States Surgical Corporation v Hospital Products International Pty Ltd* [1892] 2 NSWLR 766, 799 (McLelland J), *Neilson v Overseas Projects Corporation of Victoria Ltd and Another* 223 CLR 331, 370-371 (Gummow and Hayne JJ), 411 (Callinan J), 417 (Heydon J). Cf *Foreign Law in English Courts*, at 149-156 (above n 3), compare also Heydon JA's approach in *Damberg v Damberg* 52 NSWLR 492.

¹² *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1947) 80 Ll. L. R. 99, 108.

¹³ *A/S Tallinna Laevauhisus v Estonian State Steamship Line* (1947) 80 Ll. L. R. 99, 107.

¹⁴ *Hospital Products; National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 22 FCR 209; *United States Trust Company of New York v Australian and New Zealand Banking Group Ltd* 37 NSWLR 131; *Neilson*, 371 (Gummow and Hayne JJ).

¹⁵ *Phillips v Eyre* (1870) LR 6 QB 1; *Breavington v Godleman* (1988) 169 CLR 41, 110-111 (Brennan J).

¹⁶ *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

¹⁷ In *Dyno v Wesfarmers* [2003] NSWCA 375, Handley JA (at [45]) stated that '*Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ... decides that the plaintiff's rights in an Australian court arising from a tort committed outside Australia will be subject to a limitation provision under the law of the place of the wrong whether that provision is procedural or substantive.' In *Garsec v Sultan of Brunei* (2008) 250 ALR 682, Campbell JA (at [142]), reasoned that 'Since *Voth*, it has been clear that the provisions concerning limitation of action are regarded as substantive for the purpose of Australian choice of law rules'. See also the decision of the Western Australian Court of Appeal in *O'Driscoll v J Ray McDermott, SA* [2006] WASCA 25. In *Renault v Zhang*, the joint majority said, at 520, of the decision in *Pfeiffer*: 'The conclusion was reached that the application of limitation periods should continue to be governed by the *lex loci delicti*, and secondly that: "all questions of damages, or amount of damages that may be recovered, would likewise be treated as substantive issues governed by the *lex loci delicti*." We should reserve for further consideration, as the occasion arises, whether that latter proposition should be applied in cases of foreign tort.'

common law position, that limitation periods are matters of procedure and not substance, is questionable.¹⁸ This apparent jurisprudential shift, to a more ‘cosmopolitan’ approach to the application of foreign laws, concurrent with economic globalisation, entails that proof of foreign law is likely to be increasingly a feature of litigation in Australian courts.¹⁹

Proof of foreign law generally

At common law, the content of foreign law can be proved only by expert evidence,²⁰ and not simply by placing foreign legislation or law reports before the court,²¹ leaving the court reliant on the testimony of experts and their supporting material.²² This has been mitigated by the Uniform Evidence Acts, which permit materials such as books and pamphlets containing statutes or proclamations,²³ and reports of judgments of foreign courts, to be adduced to prove foreign law.²⁴ Hence a party no longer necessarily must call an expert to prove the content of foreign law. Nonetheless, expert evidence will often be required to illustrate, for example, how discretions under statutes may be exercised,²⁵ or to establish the currency of legislative provisions.²⁶ The admissibility of expert opinion is governed by *Evidence Act*, s 79, hence an expert is required to have specialised knowledge of the foreign law based on training, study or experience.²⁷

Costs to parties and *forum non conveniens*

The necessity to call evidence to prove foreign law may itself be ‘a source of prejudice’ to a party who seeks to rely on foreign law.²⁸ Expert evidence will usually be required, and experts are usually expensive. Furthermore, the need to prove foreign law prolongs trials, takes time, and increases costs. As Howie J has recently observed:

¹⁸ *John Pfeiffer v Rogerson* (2000) 203 CLR 503; *Garsec v Sultan of Brunei* (2008) 250 ALR 682; *O’Driscoll v J Ray McDermott SA* [2006] WASCA 25.

¹⁹ *Zhang* (above n 16), 517 (Gleeson CJ, McHugh, Gummow and Hayne JJ), *Pleading and Proving Foreign Law* (above n 3), 403.

²⁰ *Baron de Bode’s Case* (1845) 8 QB 208, 246-247; *Nelson v Bridport* (1845) 8 Beav. 527, 536; *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362, *Optus Networks Pty Ltd v Gilsan (International) Pty Ltd* [2006] NSWCA 171, [89].

²¹ *Nelson v Bridport* (1845) 8 Beav. 527, 542.

²² See: *Lazard Brothers and Co. v Midland Bank* [1933] AC 289, 298 (Wright LJ), *Buerger v New York Life Assurance* (1927) 96 LKJB 930, 940 (Aitken LJ), and *Wuang v Subbotovsky* [1968] 3 NSW 261.

²³ (NSW) *Evidence Act* 1995, s 174.

²⁴ (NSW) *Evidence Act* 1995, s 175.

²⁵ See, for example, *Renault v Zhang*, (above, n 16).

²⁶ *Optus Networks Pty Ltd v Gilsan (International) Pty Ltd* [2006] NSWCA 171, [89] (Hodgson JA, Beazley and McColl JJA agreeing).

²⁷ (NSW) *Evidence Act* 1995, s 79.

²⁸ *Murakami v Wiryadi and Others* 268 ALR 377, 406, (Spigelman CJ, McColl and Young JJA agreeing), (hereafter *Murakami*).

... the simple fact that the relevant law is not the law of this State adds a complication, expense and inconvenience to the proceedings....²⁹

Thus the need to prove foreign law is a factor to be considered in interlocutory applications for a stay of proceedings based on *forum non conveniens* grounds,³⁰ although the mere fact that an Australian court has to apply the law of a foreign country is not a sufficient reason, in and of itself, for a court to conclude that it is a 'clearly inappropriate forum' to hear the dispute.³¹ As the High Court stated in *Puttnick*³²:

The very existence of choice of law rules denies that the identification of foreign law as the *lex causae* is reason enough for an Australian court to decline to exercise jurisdiction.

Problems of proof

Distilling the content of foreign law is problematic, as it requires an Australian court to pronounce the law of a jurisdiction with which it is unfamiliar. It is trite to observe that the best court to adjudge the law of a particular forum is a court of that forum.³³ There is a risk, as Spigelman CJ noted in *Murakami v Wiryadi*, that 'important aspects of the foreign law will be lost in translation'.³⁴ As T.M. De Boer has observed³⁵:

Most judges dealing with foreign law in a conflicts case are unaccustomed to its vernacular, unaware of its various layers of meaning, insensitive to its subtleties, ignorant of its usage, oblivious to its context. Small wonder that they are apt to make mistakes that their colleagues abroad would avoid instinctively.

However, the extent to which this is so is a matter of degree, influenced by the degree of connection between the relevant systems of law. Although the law of England and Wales is, for relevant purposes, foreign law, its content and methodology is so familiar to us that resort to expert evidence is rarely necessary, and we would usually embark with little concern on deciding its content. Similarly, to a lesser extent, with other common law countries – decreasingly so the more they are influenced by other systems of law (such as Malaysia, Singapore, and Hong Kong). Still less so, for example, the European Union, Azerbaijan, and Kazakhstan.

²⁹ *Kim Michael Productions Pty Ltd v Tropical Islands Management Ltd* [2010] NSWSC 269, [84] (Howie J).

³⁰ See for instance: *Voth v Manildra Flour Mills* 171 CLR 538, (hereafter *Voth*); *Marshall v Fleming* [2010] NSWSC 86, (hereafter, *Marshall*); *Puttick v Tenon Ltd* 238 CLR 265, 277-278 (French CJ, Gummow, Hayne and Kiefel JJ), (hereafter *Puttnick*), *McGregor v Potts & ors* [2005] NSWSC 1098, [54] (Brereton J), (hereafter, *McGregor*).

³¹ *Marshall*, 52 (Rothman J) (above n 30), *Puttick*, 277-278 (French CJ, Gummow, Hayne and Kiefel JJ) (above n 30), *Voth*, 566 (Mason CJ, Deane, Dawson and Gaudron JJ), (above n 30).

³² Above n 30, 277-278 (French CJ, Gummow, Hayne and Kiefel JJ).

³³ *McGregor*, [54] (Brereton J), (above n 30).

³⁴ *Murakami*, 406 (Spigelman CJ), (above n 28).

³⁵ 'Facultative Choice of Law: the Procedural Status of Choice-of-Law, Rules and Foreign Law' (1996) 257 Rec. d. Cours 222, 305.

The conventional process of proving foreign law does not necessarily facilitate its accurate ascertainment by our courts. A court is, at least theoretically, constrained by the evidence adduced by the parties and the quality of opinions of experts. Given that it is a question of fact, courts are precluded from conducting their own research.³⁶ However, in the event of ‘obviously false’ expert evidence, expert opinion incompatible with the text of a foreign statute, or conflicting expert views, a court may look at the sources of foreign law adduced to ascertain its contents.³⁷ This means that, in reality, where there is doubt or conflict, judges prefer to look at the foreign sources and draw conclusions based on them – informed by the expert evidence where appropriate – than merely to prefer one expert to the other. As resolution of disputes between experts is usually better achieved by examination of their respective rationales than by their demeanour, this means that in practice the question of fact of a peculiar kind is often approached very much as a question of law.

Two recent decisions illustrate this. In *Ace Insurance Ltd v Moose Enterprise Pty Ltd*,³⁸ a question arose as to whether a Californian court would give effect to a contractual choice of law clause and apply Australian law, or would apply Californian law. Each of the parties called a Californian lawyer, who gave contradictory opinions on the question. Their competing opinions provided a framework within which the Court analysed the Californian statutes and judicial decisions, to conclude what a Californian court would do. In *Michael Wilson & Partners Ltd v Robert Colin Nicholls & ors*,³⁹ there was a question as to whether the law of Kazakhstan prohibited the defendants from producing documents of which the plaintiffs sought discovery. The court was faced with competing evidence of two experts, neither of whom was cross-examined, nor descended to much detail in setting out the statutory or other authoritative basis for the opinions that they tendered, and was left in many respects with competing *ipse dixits*. The issue was resolved in large part by examination of the relevant Kazakhstan *Codes*, to form an opinion as to which of the opinions was more soundly founded in them.

In the absence of acceptable expert evidence, courts resort to the presumption of similarity, namely, that the *lex causae* is the same as the *lex fori*. Such an issue arose in *Neilson*,⁴⁰ where, faced with inadequate expert evidence as to how a Chinese court would exercise the discretion afforded by the second sentence of Article 146 of the *General Principles of Civil Law*,⁴¹ the majority assumed that the Chinese approach to

³⁶ See: *Di Sora v Phillipps* (1863) 10 HLC 624, 640, *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 WLR 1362, 1369.

³⁷ *Dalrymple v Dalrymple* (1811) 2 Hagg.Con. 54, *Trimbey v Vignier* (1834) 1 Bing N.C. 151, *Concha v Murietta* (1889) 40 Ch. D. 543, *Shiblaq v Sadikolu* [2004] 2 All E.R. (Comm.), *Arros Invest Ltd v Nishanov* [2004] EWHC 576.

³⁸ [2009] NSWSC 724, esp at [54]-[72].

³⁹ [2008] NSWSC 1230; 74 NSWLR 218, esp at [12]-[25].

⁴⁰ (2005) 223 CLR 331.

⁴¹ See: Gleeson CJ, at 343-344, who said that the evidence was ‘barely sufficient’, McHugh J at 348, Gummow and Hayne JJ at 372, Kirby J at 395-396, Callinan J at 410 stated that the evidence was not ‘of much assistance’, and Heydon J at 416.

statutory interpretation did not differ from the Australian approach, and construed the provision accordingly.⁴²

This approach has been much criticised. In dissent, Kirby J suggested that it ‘strained credulity’ to assume that the approach to statutory interpretation in China would be akin to Australia.⁴³

The presumption relied on by the majority in this Court to repair the defects in the appellant's case should be rejected as unavailable. This leaves the appellant's case silent on the way in which Art 146 would be applied in China. This court does not have the knowledge to fill that gap. Any attempt on its part to do so would be sheer guesswork. We do not advance the orderly development of private international law by encouraging the defective presentation of cases and by adopting incredible fictions to cure such defects.

McHugh J averred that such an approach ‘divorces discretion from context’.⁴⁴ The presumption has been referred to by an academic as a ‘truly grotesque proposition.’⁴⁵ It involves the application of a legal fiction, which may render ‘practical justice’ in the instant case, but will invariably be radically removed from the actual content of the foreign law, calling into question the accuracy and legitimacy of judicial decision making.

Heydon JA, as his Honour was then, in *Damberg v Damberg* – a case in which the relevant question concerned the application of a German revenue law, of which no evidence was adduced – said that it was ‘ethically questionable’ for a court to apply the presumption of similarity in circumstances where to do so would entail accepting facts that could not conceivably be true.⁴⁶ As German law with respect to Capital Gains Tax could not be said to be part of ‘a field resting on great and broad principles likely to be part of any given legal system’,⁴⁷ His Honour refused to apply the presumption.⁴⁸

A similar approach was taken by Siopis J in the recent Federal Court case of *PCH v Dunn (No 2)*.⁴⁹ The *lex causae* was that of Azerbaijan. An Azerbaijani court had previously dismissed an application by the plaintiff for relief in respect of the defendant breaching duties arising from his employment contract.⁵⁰ The plaintiff

⁴² See: Gummow and Hayne JJ at 372, Callinan J at 411 and Heydon J at 416-417, cf Heydon J’s position in this case with that he adopted in *Damberg v Damberg*.

⁴³ At 396-397.

⁴⁴ At 348.

⁴⁵ A Briggs, ‘The Meaning and Proof of Foreign Law’ [2006] *Lloyd’s Maritime and Commercial Law Quarterly* 1, 4.

⁴⁶ At 522, (above n 11).

⁴⁷ *Ibid.*, cf *Renault v Zhang*, 518.

⁴⁸ *Ibid.*, 522-523.

⁴⁹ *PCH Offshore Pty Ltd (CAN 086 216 44) v Dunn (No 2)* 273 ALR 167 (hereafter *PCH v Dunn*).

⁵⁰ *Ibid.*, 174.

sought to bring a similar claim in the Federal Court.⁵¹ In determining an application for a stay for *forum non conveniens*, his Honour observed that the defendant would seek to rely at trial on the affirmative defences of *res judicata*, issue estoppel and Anshun estoppel.⁵² The plaintiff did not lead evidence of the content of those defences under Azerbaijani law.

Siopis J refused to apply the presumption of similarity, quoting Lord Wilberforce in *Carl Zeiss*,⁵³ who stated that the presumption was ‘never more than a fragile support’.⁵⁴ He noted that there would be ‘an element of unreality if I was to apply the presumption’ given that ‘the translation of the judgments are not easy to understand, and the system of law is so different to... Australia.’⁵⁵ This was a significant factor in his Honour’s ultimate conclusion that continuation of the proceedings would be vexatious and oppressive, in the *Voth*⁵⁶ sense.

But these criticisms notwithstanding, the presumption of similarity has an essential rationale. Foreign law being a question of fact, someone must bear the burden of proving its content if it is to be invoked. There must be a default position if there is inadequate proof. It is logical and reasonable that the party seeking to rely on a law other than that of the forum bear the onus of proving the content of that law, and that in default the law of the forum prevail. Nonetheless, decisions such as *Damberg* and *PCH* show that this is not a universal solution, further increasing the likelihood that proof of foreign law issues will arise.

Issues of forum courts pronouncing on the law of foreign jurisdictions are particularly vexed when the foreign law is unsettled, ambiguous or complex, and expert evidence proffers conflicting conclusions as to its content. Mr Justice Eady in the High Court of Justice Queen’s Bench Division was recently confronted with such a problem in *Iran v Berend*.⁵⁷ The Islamic Republic of Iran sought to recover a fragment of Achaemenid limestone, believed to have originated in the period during which the ancient city of Persepolis was built in the 5th century BC.⁵⁸ The applicable law was that of France, being the *lex situs* where the object was purchased by the defendant in 1974.⁵⁹

At issue was whether a French court would, as a matter of policy, apply the law of Iran to an object of profound historical and cultural importance.⁶⁰ Such a question had not been decided by a French court.⁶¹ Two diametrically opposite views were

⁵¹ *Ibid.*, 169.

⁵² *Ibid.*, 182.

⁵³ Above n 9.

⁵⁴ *Ibid.*

⁵⁵ *PCH v Dunn*, 182 (above n 49).

⁵⁶ *Ibid.* 187.

⁵⁷ *The Islamic Republic of Iran v Denyse Berend* [2007] EWHC 132 (QB), [2007] All ER (Comm) 132 (hereafter *Iran v Berend*).

⁵⁸ *Ibid.* [1].

⁵⁹ *Ibid.*, [32].

⁶⁰ *Ibid.*, [34].

⁶¹ *Ibid.*, [51-52].

submitted by the expert witnesses as to whether a French court would so act.⁶² Eady J noted the comments of Wynn-Parry J in the seminal case of *Re Duke of Wellington*:⁶³

... it would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time in this country or in Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject...

In that case, Wynn-Parry J utilised English translations of the Spanish Civil Code and Spanish authorities to decide what the Spanish law would be.⁶⁴ Eady J sought to resolve the issue by refraining from ‘developing’ French law in relation to the alleged policy exception.⁶⁵

It is preferable for a question of law to be resolved in a manner which can be accepted by all parties to be authoritative, which can usually best be done by a court of the country whose law it is.⁶⁶

Proof of foreign law by reference to the foreign court

In this context, recent reforms and initiatives of Chief Justice Spigelman have sought to facilitate the proof of foreign law. In 2008, a question arose in the Supreme Court of Singapore as to the content of English law.⁶⁷ The Supreme Court of Singapore received conflicting expert evidence as to the relevant law of England.⁶⁸ It directed the judgment creditor to apply to an English court for declaratory relief for an authoritative statement of the relevant English law.⁶⁹ Subsequent to this decision, Chief Justice Spigelman proposed that mechanisms be implemented for courts to refer questions of foreign law to foreign courts for an authoritative statement of its content, to ensure that the foreign law would not be incorrectly understood, adopted and applied.⁷⁰ Consequently, the Uniform Rules Committee has adopted new rules in relation to foreign law issues,⁷¹ for which specific authority is now provided by the (NSW) *Supreme Court Act*.⁷²

⁶² Ibid.

⁶³ [1947] Ch 506, 515.

⁶⁴ *Proof of foreign law*, 212 (above n 1).

⁶⁵ *Iran v Berend*, 50 (above n 57)

⁶⁶ Spigelman, *Proof of foreign law*, at 212 (above n 1).

⁶⁷ *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166, and *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801 (Comm), The Hon J. J. Spigelman, ‘Law and International Commerce: Between the Parochial and the Cosmopolitan’, address to the New South Wales Bar Association, Sydney 22 June 2010, 21-22, (hereafter *Between the Parochial and Cosmopolitan*).

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ *Cross Border Issues*, 13, (above n 2).

⁷¹ (NSW) *Uniform Civil Procedure Rules 2005*, Part 6, Division 9, (hereafter, UCPR).

⁷² (NSW) *Supreme Court Act 1970*, s 125, inserted by (NSW) *The Courts and Crimes Legislation Further Amendment Act 2010*, effective 7 December 2010.

The Supreme Court may now order, on the application of a party and with the consent of all parties, that proceedings be commenced in a foreign court to answer questions as to the principles of foreign law or as to their application.⁷³ Such an order must state the question of foreign law to be answered, the facts or assumptions upon which the answer to is to be determined, that the foreign court may vary the facts or assumptions and the question, and whether and to what extent the parties may depart from such facts or assumptions in the determination of the question by the foreign court.⁷⁴

It is pertinent to observe that a court cannot make such an order of its own motion, and that the consent of all parties is a condition precedent. Such deference to the parties reflects the circumstance that in many cases it may be more expensive to initiate and litigate such proceedings overseas than to engage experts,⁷⁵ and the tenet of adversarial litigation, that it is generally for the parties to decide the conduct of their case.⁷⁶ Thus, in cases involving novel or ambiguous questions of foreign law, where all parties do not consent to such an order, the court may still be compelled to rely on expert evidence and form its own view on the content of foreign law, potentially raising the problem of the law being ‘lost in translation’.

A reciprocal provision allows parties in foreign proceedings, where questions of Australian law arise, to seek authoritative pronouncements on Australian law from the Supreme Court. Proceedings may be initiated by summons for determination of an issue of Australian law relevant to an issue in proceedings in a foreign court, to answer a question in a form determined by the foreign court.⁷⁷

Additionally, the Supreme Court may now also, on the application of one or more parties, or of its own motion, order that a question of foreign law be answered by a referee.⁷⁸ This rule embraces the usual mechanisms for the reference of a question for inquiry and report and adoption of a referee’s report by the Court.⁷⁹ The use of referees has been a feature of Supreme Court practice for over thirty years.⁸⁰ Such references have, however, to this point, not been utilised to answer questions of foreign law.⁸¹ While the consent or application of the parties is not a condition precedent to such a reference, in a recent decision, the Chief Justice stressed that it has nevertheless been the longstanding practice of the Court to make references only with the parties’ consent.⁸²

⁷³UCPR, r 6.44(1), (above n 71).

⁷⁴ Ibid., r 6.44(3)

⁷⁵ *Between the Parochial and Cosmopolitan*, 23 (above n 67).

⁷⁶ *Neilson*, 370 (Gummow and Hayne JJ), (above n 11).

⁷⁷ UCPR r 6.45, (above n 71).

⁷⁸ Ibid., r 6.44(2).

⁷⁹ Ibid.

⁸⁰ *Between the Parochial and Cosmopolitan*, at 23 (above n 67).

⁸¹ Ibid.

⁸² *Fleming v Marshall* [2011] NSWCA 86, [9] per Spigelman CJ.

In addition to these formal developments, the Chief Justice has negotiated and concluded arrangements with foreign jurisdictions that allow for references of questions of foreign law to be determined by those jurisdictions. Memoranda of Understanding ‘to consult and cooperate on questions of law’ have been entered into between the Supreme Court of Singapore and the Supreme Court of New South Wales,⁸³ and between the Chief Justice of New South Wales and the Chief Judge of the State of New York,⁸⁴ in September and December 2010 respectively. These memoranda make provision for each Court to give consideration, in accordance with its rules and procedures, to the reference of contested issues of law to the courts of the party of the governing law.⁸⁵

The Memorandum of Understanding with Singapore provides that if proceedings are instituted for an answer to questions of foreign law, then the court will undertake to provide such an answer as expeditiously as its procedures allow.⁸⁶

Due to constitutional limitations, the Court of Appeals of New York cannot give what are effectively ‘advisory opinions’ on the law of New York. Hence, the Memorandum of Understanding with New York provides for the respective Chief Justices to provide ‘answers to questions of referred law’ in accordance with the procedures it has established, as expeditiously as those procedures allow.⁸⁷ For this purpose, the Chief Judge of New York has appointed a panel of five judges – acting in an extra-judicial capacity – to sit in panels of three and answer questions referred by the Supreme Court of New South Wales.⁸⁸ Such judges could be appointed as referees by the Supreme Court of New South Wales.⁸⁹

In February this year, the Court of Appeal was called upon to decide an application for a stay of proceedings on *forum non conveniens* grounds, in a case concerning alleged negligence by New York attorneys.⁹⁰ The applicable law was potentially that of New York. The Court of Appeal emphasised that the mere fact that a foreign law applied did not constitute a reason, in and of itself, for granting a stay.⁹¹ Spigelman CJ noted that the weight to be accorded to such a factor had been ‘significantly attenuated’ by the adoption of the new rules.⁹² His Honour stressed that a reference of a question of the law of professional negligence in relation attorneys could be made to the New York Supreme Court, to be determined by a panel of three appellate judges

⁸³ Memorandum of Understanding between the Supreme Court of Singapore and the Supreme Court of New South Wales on References of Questions of Law, (hereafter *MOU with Singapore*).

⁸⁴ Memorandum of Understanding between the Chief Justice of New South Wales and the Chief Judge of the State of New York on Questions of Law, (hereafter, *MOU with New York*).

⁸⁵ *MOU with Singapore*, art 1, (above n 83), *MOU with New York*, art 1 (above n 84).

⁸⁶ *MOU with Singapore*, art 3 (above n 83).

⁸⁷ *MOU with New York*, art 3 (above n 84).

⁸⁸ *Proof of Foreign Law*, 215 (above n 1).

⁸⁹ *Ibid.*

⁹⁰ *Fleming v Marshall*, [20-39] (Macfarlan JA), (above n 82).

⁹¹ *Ibid.*, [91] (Macfarlan JA; Spigelman CJ and Handley AJA agreeing).

⁹² *Ibid.*, [6] (Spigelman CJ).

sitting as volunteer referees.⁹³ His Honour pointed out that it was by no means clear that such a course would be less expensive for the parties than the conventional process of engaging experts.⁹⁴ He did, however, observe that issues of professional practice were liable to be the subject of disparate views, so that “advice from three serving appellate judges of the foreign jurisdiction is much more likely to be accurate than an Australian judge choosing between contesting expert reports.”⁹⁵

Conclusion

The bilateral treaties entered into by the Chief Justice, and the amendments to rules of court, represent innovative and important steps in ameliorating issues that surface when questions of foreign law arise for determination. The European Union has created a similar arrangement in the *European Convention on Information of Foreign Law*, which allows for requests for answers to questions of law between judiciaries in the European Union.⁹⁶ Such initiatives obviate the need for courts to resort to fictions such as the presumption of similarity, or to choose on unsatisfactory grounds between conflicting expert opinions. The Chief Justice’s initiatives provide a framework for further bilateral and multilateral arrangements that facilitate answers to legal questions between courts of different countries, reducing the risk that foreign law may be ‘lost in translation’, and enhancing the legitimacy of judicial decision making. They amount to a significant advance in the orderly development of private international law.

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⁹³ Ibid., [9].

⁹⁴ Ibid., [10].

⁹⁵ Ibid.

⁹⁶ The Hon J. J. Spigelman, ‘Memorandum of Understanding between New York and New South Wales’, address to the New York Bar Association International Section Meeting, Sydney 28 October 2010, 13.