Foreign Law as a Distinctive Fact—To Whom Should the Burden of Proof Be Assigned?

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Abstract

Some jurisdictions allow a civil claim to be based on foreign law. Those jurisdictions that consider the foreign law to be a question of fact need to decide the legal result of the claimant's failure to prove the contents of the applicable foreign law. Conventional doctrine usually assigns the burden to prove the contents of foreign law (in the sense of persuasion) to the party whose claim is based upon that law, and thus failure to meet that burden ends in the claim being dismissed. The only two exceptions are cases in which the presumption of an identity of laws (presumption of similarity) is evoked or cases in which failure to prove foreign law straightforwardly prompts the court to apply local law as subsidiary law. In these exceptional cases, the application of the law of the forum results in the burden of proof shifting onto the opponent of the claim. Against this backdrop, I propose a new approach for assigning the burden of persuasion regarding the contents of an applicable foreign law. I argue that when foreign law is treated as fact, its unique features as such should be recognized by lawmakers. As a fact, foreign law usually necessitates expert witness testimony, but is relatively easy to ascertain (that is, evidence can always be found). On the other hand, foreign law is also expensive to prove and occasionally more accessible to one litigant than to the other. Moreover, litigants cannot argue that they were surprised by the reassignment of the persuasion burden. Thus, I argue that while the burden to persuade the court as to the content of foreign law ordinarily should rest on the litigant who asserts a claim based in foreign law, the burden should also shift more easily to the other party to promote cost-efficient truth-discovering. The normative part of the paper starts by arguing that the persuasion burden should shift in cases in which the rationales supporting the presumption of identity of laws or the straightforward application of local law as subsidiary law apply, notwithstanding the contents of the law of the forum and whether or not applying it would benefit the party attempting to prove an applicable foreign law. Such an approach is justified at least on grounds of coherence, as the persuasion

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burden already shifts whenever the law of the forum is applied instead of the applicable foreign law. Indeed, the contents of the law of the forum, per se, should not become a factor in the decision on how to allocate the persuasion burden. The paper then moves on to develop a broader argument. As a general rule, it is suggested that the burden of persuasion with regard to the contents of an applicable foreign law shift if the opposing litigant enjoys a clear comparative advantage in providing proof as to the content of that foreign law, while the costs of providing such proof should be assigned on a “loser pays” basis.

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I. INTRODUCTION AND OVERVIEW

One of the difficult tasks that faces a domestic court during the notoriously complex choice of law process is ascertaining the content of an applicable foreign law.\(^1\) After characterizing\(^2\) the specific dispute,\(^3\) choosing the correct connecting factor, localizing that factor to decide the exact territory whose law should apply, and deciding that no reason exists to refrain from applying a particular foreign law to which the choice-of-law process directs,\(^4\) the court still

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1 Throughout the Article it is assumed that the choice of law process in general, and the ascertainment of an applicable foreign law in particular, occur within the confines of a civil adversary process of adjudication. Thus, for example, it is assumed that the rules governing notice of claims—pleadings, in common law terminology—apply. As a result, both the issue of applying foreign law and the dispute between the litigating parties regarding the content of this foreign law arise following a pleading (either before or following the commencement of the case) of a particular foreign law by either the plaintiff or the defendant (as a component of an argument they raise), and a counterargument by the opposing party disputing the content of that foreign law as pleaded by the first party. For example, the plaintiff may argue for breach of a contract, contending that while U.K. law accords him an amount of $200,000 as compensation, the applicable law is actually the law of a jurisdiction called Foreignia, which accords him compensation in the amount of $1 million. The defendant would retaliate by arguing, \textit{inter alia}, that under the specific circumstances of the case, and even if all of the plaintiff’s other arguments are accepted (the defendant can also dispute the applicability of Foreignia law to begin with or other factual arguments raised by the plaintiff), Foreignia law does not accord the plaintiff compensation in the amount of $1 million, but a smaller amount (say, $0 or $300,000). In this example, the parties are in dispute about the content of the foreign law. Only in such a case does the question of the burden of proof become relevant. If neither of the parties pleads foreign law, then the case proceeds as if it were governed by forum law, and the question discussed in this paper does not arise.

2 The Article envisions the “traditional” methodology rather than the “modern” methodology as the relevant choice of law method, but the argument also applies to jurisdictions employing the latter methodology. \textit{For a general discussion of the “traditional” methodology, see DICEY, MORRIS \& COLLINS ON THE CONFLICT OF LAWS (Lawrence Collins et al. eds., 14th ed. 2006); J.J. FAWCETT \& J.M. CARRUTHERS, CHESHIRE, NORTH \& FAWCETT: PRIVATE INTERNATIONAL LAW (14th ed. 2008). For a general discussion and comparison of the two methodologies, see DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER \& KERMIT ROOSEVELT, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 200–311 (8th ed. 2010).}

3 In the world of conflict of laws, a specific dispute is analogous to the atom in the physical world. In other words, it is the basic unit of “matter” to which all judicial action relates—for example, characterization, application of a particular law, and so on. In a single litigation, parties may bring several specific disputes before the court to decide. For example, consider a hypothetical litigation in which three specific disputes arise: (1) the existence of a contract between the parties; (2) breach of the contract by the defendant; (3) the amount of compensation the defendant needs to pay the plaintiff if breach of contract is established.

4 An interesting question concerns a situation in which neither party pleads foreign law to begin with, but the court decides, following its own choice of law analysis, during trial or judgment, that foreign law should have been pleaded and proved. In such a case, three scenarios are possible. First, the court could decide, that since the parties agreed to have their case adjudicated according
must ascertain the content of the applicable foreign law. Indeed, in an adversarial judicial process, parties may agree on the contents of a particular applicable foreign law. If reasonably possible, parties will rarely, however, skip an opportunity to gain an advantage over their opponent by taking a rival position in any dispute that arises, including a dispute over the content of a particular foreign law. In such a case, the court has no option but to attempt to ascertain the content of that law.

Surveying private international law (conflict of laws) in various jurisdictions around the world reveals that two central models dominate the effort to establish an applicable foreign law in specific disputes. In the first model, foreign law is considered by the forum court to be a matter of law and, therefore, the forum court, having been briefed by the parties, decides the content of the foreign law. In the second model, foreign law is treated by the

to the law of the forum, to proceed in accordance with that law notwithstanding the court's own conclusion about the applicability of the foreign law. Second, one or both of the parties could ask for an adjournment. Third, the court could decide to render its judgment based on the assumption that one of the parties failed to meet his burden and should therefore bear the consequences. The question discussed in this article is relevant only for the last two scenarios. The court's choice as to which course of action to undertake is a question that generally concerns the role of judges in civil adjudication and is therefore beyond the scope of the current paper.

Of course, on occasion, the court must ascertain the content of the relevant foreign law before making a decision as to the applicable law (for example, if the parties disagree over the existence of a conflict of laws to begin with, and one of the parties argues that all relevant laws are identical on the point) or before making a decision not to apply a particular foreign law (for example, if the court decides that the foreign law in question cannot be applied for reasons of public policy, even if one party's argument regarding the content of the foreign law is correct).

In such a case, the question discussed in this Article does not arise, of course.

See, for example, Matthew J. Wilson, Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding, 46 Wake Forest L. Rev. 887, 891 (2011) (describing how litigants attempting to avoid the application of a particular foreign law may purposefully "muddy the waters" when pleading its content).


For a detailed description see, for example, Wilson, supra note 7, at 899-908. See, however, Trevor C. Hartley, Pleading and Proof of Foreign Law: The Major European Systems Compared, 45 Int'l & Comp. L.Q. 271, 272 (1996) (noting that few countries truly accept foreign law "on par" with forum law).
forum court as a question of fact rather than law. Therefore, it must be proved in accordance with the forum’s rules of evidence by the party whose claim—whether a cause of action or a defense—is based, whether to his benefit or detriment, upon that foreign law.

Jurisdictions that consider foreign law, when applicable in a civil litigation, to be a question of fact need also to decide on the legal result of failure to prove the contents of the applicable foreign law by the litigant whose claim is based on that law. Practically speaking, this question usually arises during trial after evidence-hearing when the trier of fact needs to determine what the relevant facts are. Under the terms of the law-as-fact model, failure by the party asserting foreign law as part of his claim to provide proof, or such that convinces the

10 For a historical review of this rule and its origin, see McComish, supra note 8, at 415–16; Otto C. Sommerich & Benjamin Busch, The Expert Witness and the Proof of Foreign Law, 38 CORNELL L.Q. 125, 127–28 (1953). The foreign law is treated as an “adjudicative” rather than “legislative” fact. In other words, it is considered as a fact the ascertainment of which is necessary for the adjudication of only the particular dispute between the litigating parties. See also A. Christopher Bryant, Foreign Law as Legislative Fact in Constitutional Cases, 2011 BYU L. REV. 1005, 1006 (discussing the distinction between “adjudicative” and “legislative” facts).

11 Often enough, foreign law is invoked as a defense. See, for example, McComish, supra note 8, at 404–06 (noting that the typical assertion of foreign law in Australia is defensive).

12 See FENTIMAN, supra note 8, at 182. Several other ramifications of this model concerning a court’s decision on the content of the specific foreign law derive from the forum’s approach to factual findings; for example, limited appellate review or absence of precedential power. See, for example, McComish, supra note 8, at 416–17 (citing an example in which conflicting interpretations of the same foreign statute were given by a forum court).

13 In civil cases, the parties must typically prove the facts supporting their claim. See 2 MCCORMICK ON EVIDENCE §337 (Kenneth S. Broun ed., 6th ed. 2006). This “burden of proof” consists, however, of two separate burdens that must be differentiated: the burden of producing evidence (“the burden of production” or “the burden of evidence”), which imposes a duty to present evidence before the court, and the burden of persuasion, which imposes a duty to prove that the pertaining fact is more probable than not (for example, the burden to prove a fact according to the “P>0.5 rule,” the “rule requiring proof by a preponderance of the evidence,” “proof on a balance of probabilities,” or proof that a fact is “more probable than not”). See James B. Thayer, The Burden of Proof, 4 HARV. L. REV. 45 (1890); McCormick, supra, §336. From an economic viewpoint, each burden is supported by a different rationale or fulfills a different task. The burden of production identifies the party against whom the court will rule when a relevant factual issue argued at trial is left with no evidence to establish it. The burden of persuasion, on the other hand, usually comes into play at the end of a trial when the trier of fact must reach factual findings, and it determines what the trier of fact should do if left with doubt after all of the evidence is presented as to whether an alleged fact is true. If the trier of fact remains unconvinced, the party upon whom the burden of persuasion lies loses. Indeed, bearing the burden of persuasion means that the party cannot establish that the fact in question is more probable than not. Thus, the burden of persuasion assigns among the parties the risk of non-persuasion or the risk of an erroneous judicial factual finding, which tend to be made in conditions of uncertainty, when neither of the parties can prove the pertaining fact by the requisite standard of proof, which is usually a preponderance of evidence in civil cases. See Alex Stein, Allocating the Burden of Proof in Sales Litigation: The Law, Its Rationale, a New Theory, and Its
court by a preponderance of the evidence, as to the contents of the applicable foreign law would result in dismissal of the claim. The only exceptions to a full dismissal of the claim are: (1) cases in which either the court decides to employ the Presumption of Identity of Laws (also known as the Presumption of Similarity of Laws) on the assumption that the specific foreign law is identical to the law of the forum (which is therefore applied instead of the foreign law) and (2) cases in which the court decides forthrightly to apply forum law instead of the applicable but un-established foreign law. The Presumption of Identity of Laws, like the straightforward application of the law of the forum, is usually employed based on one or more of the following three rationales: (1) to refrain from the injustice associated with dismissing a claim when the specific foreign law upon which it is based is relatively difficult to ascertain and prove under the

\[ \text{Failure, 50 U. MIAMI L. REV. 335, 336 (1996). Moreover, each burden generates } \text{ex ante incentives that encourage or discourage parties from seeking and introducing evidence at trial. See, generally, John Leubsdorf, Evidence Law as a System of Incentives, 95 IOWA L. REV. 1621 (2010). To close the circle, one should understand the reasons why each party carries the burden of persuasion in regard to facts that support their claims. Under an assumption of fixed disutility from judicial errors—that is, each error is considered by the social planner to be equally harmful—when the probability of a fact being true is 0.5 (or less), the party arguing for that fact should lose, as enforcement costs that would otherwise be incurred if that party was allowed to recover are spared, as are litigation costs from frivolous lawsuits. An acceptable justification of the need to save those costs is the diminishing utility of income or, alternatively for those who do not believe in people behaving in a strictly rational manner, the endowment effect. See Alex Stein, Of Two Wrongs That Make a Right: Two Paradoxes of the Evidence Law and Their Combined Economic Justification, 79 TEX. L. REV. 1199, 1205–6 (2001). In a more intuitive way, shifting the burden of persuasion regarding a fact to the party whose claim is based on that fact can be seen as an attempt by that party to change the status quo. Therefore, the party should also bear the risk of failure to prove or persuade the trier of fact. See MCCORMICK, supra, at 474.} \]

\[ 14 \text{ For the paradox created in applying the “P>0.5 rule” when several facts are interrelated, see, for example, Ronald J. Allen & Sarah A. Jehl, Burdens of Persuasion in Civil Cases: Algorithms vs. Explanations, 2003 Mich. St. L. Rev. 893 (describing the “conjunction paradox,” according to which judges rule in favor of a party who proves each of facts E, B, and D with a probability of 0.75, although the overall probability of its case is only 0.42—the result of multiplying the three probabilities with one another; this means that the case is more improbable than probable and that forty-two out of 100 cases with identical probabilities would be decided correctly and fifty-eight cases incorrectly); Stein, Of Two Wrongs, supra note 13, at 1203–5.} \]

\[ 15 \text{ See GEEROMS, supra note 8, at 195–200.} \]

\[ 16 \text{ See id. at 205–11; McComish, supra note 8, at 408–9 (describing the rule in Australia and citing relevant authorities).} \]

\[ 17 \text{ To be sure, one could differentiate between the Presumption of Identity of Laws and the doctrine viewing forum law as subsidiary on the basis of their rationales. See, for example, GEEROMS, supra note 8, at 205–06 (arguing that each doctrine is motivated by different rationales). Those who adhere to such a position should read the arguments presented in this paper as addressing only the Presumption of Identity of Laws. However, one could also argue that both doctrines share a similar ideology, which concerns the need to tackle the hardship involved in proving foreign law.} \]
particular circumstances of the case;\(^8\) (2) to refrain from the injustice associated with dismissing a claim when the court has concrete indication that the foreign law is at least somewhat similar to the law of the forum\(^9\) (in such a case, the court's judicial commission of discovering the truth would be undermined if the claim were dismissed altogether);\(^20\) and (3) because the law of the forum is considered by the forum court to be of subsidiary nature and applicability.\(^21\) The underlying ideology aside, the immediate practical implication of resorting to one of these exceptions is the application of the law of the forum.

Note, however, that under either one of the two exceptions—that is, the Presumption of Identity of Laws and the application of forum law as subsidiary—the burden of proof, in the sense of persuasion, de facto shifts from the party whose claim is based on the foreign law to his opponent. Thus, if that opponent is interested in proving that the applicable foreign law provides a different result than the result provided by the law of the forum, he now has to carry the persuasion burden with regard to the contents of the foreign law.\(^22\)

Against this background, the current Article starts by asking the following question: what should be the legal result of a failure to prove the contents of an applicable foreign law\(^23\) in cases where application of forum law is of no value for the party attempting to provide such proof (that is, to base his case on the applicable foreign law)?\(^24\) This question actually reveals the inconsistency associated with application of forum law when the contents of an applicable foreign law are not established by a preponderance of the evidence. Indeed, certain cases that fall under this category reveal that, although there is

\(^{18}\) See Sommerich & Busch, supra note 10, at 140. It should be noted that difficulty in proving the content of the foreign law need not manifest in one of the litigating parties (for example, the plaintiff) failing entirely to introduce evidence, that is, expert witness testimony. Indeed, an objective difficulty in proving the content of the foreign law can manifest in introducing unpersuasive witness testimony as well, as in a case in which the expert witness is hardly an expert on the content of the specific foreign law. In such a case, the question of assigning the persuasion burden becomes highly relevant.

\(^{19}\) See Albert Martin Kales, Presumption of the Foreign Law, 19 HARV. L. REV. 401, 406 (1906).

\(^{20}\) The Presumption of Identity of Laws can also be applied to penalize a party for not supplying evidence on the content of the foreign law. See Geeroms, supra note 8, at 201. This paper does not address such a situation.

\(^{21}\) See Geeroms, supra note 8, at 205–11 (noting that the straightforward applicability of the law of the forum is usually motivated by this third rationale rather than the previous two).

\(^{22}\) See, for example, Kales, supra note 19, at 402, 404; Alex Mills, Comment, Arbitral Jurisdiction and the Mischievous Presumption of Identity of Foreign Law, 67 CAMBRIDGE L.J. 25, 27 (2008).

\(^{23}\) Note, of course, that the question of allocating the persuasion burden becomes practically relevant only when a party whose claim is based on a foreign law is unable to meet his burden, and the court needs to decide the result of such failure.

\(^{24}\) For a working example, see the text accompanying note 36, infra.
occasionally a justification for invoking doctrines such as the Presumption of Identity of Laws to aid a party who failed in proving the contents of an applicable foreign law, application of the law of the forum is hardly an appropriate remedy.

In jurisdictions that employ the law-as-fact model, the current prevailing result of a failure to prove the contents of an applicable foreign law, in cases where application of forum law is of no value for the party attempting to provide such proof, is a full dismissal of the relevant claim. This Article offers a different solution. Basically, courts should consider shifting the burden of proof (with regard to the contents of the applicable foreign law) to the other party, notwithstanding the contents of the law of the forum. In other words, once the court decides that a litigant whose claim is based on an applicable foreign law has failed to prove the contents of that law by a preponderance of the evidence, the court should consider refraining both from dismissing the claim and from applying the law of the forum, and instead consider shifting the persuasion burden (with regard to the contents of the applicable foreign law). The immediate practical consequence of an eventual decision to shift the persuasion burden is to examine whether the opposing party proved, by a preponderance of the evidence, that the applicable foreign law is not as pleaded by the party whose claim is based on that foreign law. Of course, a decision that the burden was not met by the party to whom the burden shifted would bring about a ruling accepting the claim against him.

This Article introduces two versions of the argument—a "narrow" version and a "broader" one. The "narrow" version argues that, in cases in which rationales such as rationales (1) or (2) of those supporting the Presumption of Identity of Laws apply, the court should certainly shift the burden of proof (even if application of forum law itself is unhelpful to the party attempting to prove the contents of the foreign law). The "broader" version adds that in all other cases the court should at least consider doing so when the other party enjoys a comparative advantage in providing proof as to the contents of the applicable foreign law. In such cases, even if application of the law of the forum can help the party whose claim is based on an applicable foreign law that he has failed to prove, the court should prefer shifting the persuasion burden with regard to the contents of the foreign law rather than applying the law of the forum or dismissing the claim.

25 A concept from the field of microeconomics, a comparative advantage exists whenever one of two production factors has lower opportunity costs when producing a certain good. Sensible economic decision-making, which has the potential to improve the welfare of both factors, would direct each of them to produce only the good that is less costly to him and to trade with the other some of the produce. See Hal R. Varian, Intermediate Microeconomics: A Modern Approach 620–22 (8th ed. 2009).
Although the "narrow" argument is based on common sense and coherence alone—as the contents of the law of the forum should not become a decisive factor in the decision concerning the burden of persuasion when a party fails to prove an applicable foreign law and at least one of the rationales for invoking the Presumption of Identity of Laws apply—consider the reasoning for the "broader" argument. Within the context of the law-as-fact model,26 I argue that, to the extent that foreign law is treated as a question of fact rather than the equivalent of local law, it should be recognized as a distinctive fact and treated as such.27 Indeed, the ordinary course of civil litigation normally requires the proof of facts, but foreign law may be described as having at least five unique features when considered a fact. First, proof of foreign law usually necessitates an expert to testify to the contents of the foreign law, as "silent" evidence relating to the foreign law in question—such as statutes, court decisions or books—cannot be expected to capture the intricacies and complexities of that (or any) law.28 Second, foreign law is relatively easy to ascertain; a witness to testify as to the contents of the foreign law can always be found. Third, foreign law is relatively expensive to prove; hiring an expert witness to submit an opinion and testify before the court can be quite costly. Fourth, in many cases, the foreign law is more accessible to one of the litigants. If examined from an economic perspective, proving the contents of a foreign law may be less costly for one of the litigants. Fifth, one cannot assert an expectations defense against being assigned with the task of gathering evidence to prove a foreign law, even as late as the date of the trial. Even if one were to claim to have been surprised by the need to prove the contents of the foreign law in question, his distress can be easily relieved if the court allows a reasonable amount of time to prepare to meet this burden.

26 The thesis of the paper is thus relevant primarily to legal systems that consider foreign law to be a question of fact rather than law. It has been noted, however, that even in systems adhering to the opposite model, according to which foreign law is a matter of law, processes need to be devised to ascertain the content of the foreign law, as judges rarely undertake this task themselves. See McComish, supra note 8, at 422. In this respect, the paper's thesis is relevant to those legal systems as well.

27 It has already been noted that foreign law is a fact of a peculiar or anomalous nature. See, for example, Baron de Bode's Case, 8 QB 208, 260 (1845) (Williams J.) (U.K.); Parkash v. Singh, P. 233, 250 (1968) (Cairns J.) (Australia); McComish, supra note 8, at 415–16; P.L.G. Brereton, Proof of Foreign Law: Problems and Initiatives, The Future of Private International Law in Australia (Symposium, May 16, 2011). The current paper addresses this peculiarity from a different viewpoint—one that asserts it should carry practical implications in regard to the burden of persuasion.

28 See John Henry Merryman, Foreign Law as a Problem, 19 STAN. J. INT'L L. 151, 153–55 (1983). For a different approach, which allows foreign law to be established without expert witness testimony, see McComish, supra note 8, at 422–23. Such an approach, however, raises the immediate concern described above that the complexities of the foreign law are neglected.
The judicial process of civil litigation is preoccupied with discovering the truth about the relevant facts. Of course, because the judicial process here is of a civil nature, emphasis should also be placed on engineering procedure that aims to discover the truth efficiently. I argue that for the purpose of conducting a cost-efficient and fair quest for the truth in regard to the contents of an applicable foreign law, the regulation of the burden to prove the contents of that law, in the sense of persuasion, should be modified in accordance with the unique features that characterize foreign law when it is considered to be an issue of fact. As these special features of foreign law are taken into consideration, both fairness and efficiency should be re-evaluated.

Executing such a re-evaluation against the backdrop of current regimes, which incorporate doctrines such as the Presumption of Identity of Law, prompts the conclusion that, while the burden to persuade the court as to the content of foreign law should ordinarily rest with the litigant who asserts a foreign-law-based claim, it should also shift more easily to the other party. To be sure, some of the rationales that justify the application of forum law within the doctrinal confines of the Presumption of Identity of Laws also support a shift of the persuasion burden even in those cases in which forum law is of no value to the party asserting a foreign-law-based claim. Consider, for example, the rationale of avoiding the injustice associated with dismissing a claim when proof of foreign law is less accessible to the plaintiff. This is one of the rationales for evoking the Presumption of Identity of Laws. Yet if this is indeed the rationale justifying application of forum law in cases in which a plaintiff who asserts a foreign-law-based claim fails to prove the applicable foreign law, then even if the law of the forum does not help that plaintiff, the court, at least for reasons of institutional coherence, should nonetheless be willing to shift to the defendant the burden of persuasion with regard to the contents of the foreign law, as the court would do if forum law were in fact of any value to the plaintiff. After all, whether or not the law of the forum is helpful to the plaintiff who failed to prove the applicable foreign law should not by itself control the question of assigning the persuasion burden. Indeed, the Presumption of Identity of Laws—with its resulting shift of the persuasion burden—should have been employed in this example not because of any motivation to apply the law of the forum but in order to avoid the injustice associated with dismissing a claim when proof of foreign law is less accessible to the plaintiff. Why should the litigant who has failed to prove the applicable foreign law on account of such a difficulty be

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deprived of any remedy merely because of the coincidence of having an unhelpful forum law?

In all other cases in which a litigant—to continue the previous example, the plaintiff—fails to provide proof as to the contents of the applicable foreign law upon which his claim is based, lawmakers should be willing to impose the persuasion burden on the party who enjoys a comparative advantage in providing evidence on the specific foreign law, if such an advantage can be identified by the court. As a general rule in evidence law, when one of the parties to a litigation enjoys a better capability of supplying a piece of evidence, he may be subject to a shift of the production burden only, while the persuasion burden may remain in place. I argue, however, that when the relevant piece of evidence is the content of a foreign law, the court’s reaction should be to shift the persuasion burden from the party failing to provide proof to his opponent—if and when the latter enjoys a clear comparative advantage of the type mentioned in providing proof about the contents of the applicable foreign law. Allocating the persuasion burden on the basis of comparative advantage is justified, again, because the persuasion burden already shifts in some cases, such as when the law of the forum is applied instead of an applicable foreign law in accordance with the Presumption of Identity of Laws. Surely the mere happenstance of having certain practical results in applying the law of the forum (as in the context of the Presumption of Identity of Laws) is less convincing a reason to shift the persuasion burden than is the respective capability of the parties to cope with it.

Of course, even if the burden of persuasion should shift when a litigant enjoys a clear comparative advantage in providing proof as to the contents of the foreign law, the costs of providing such proof should nonetheless be

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30 See Stein, Allocating the Burden, supra note 13, at 336.
31 Thus, at the end of a trial, after all of the evidence was presented by the parties—and the trier of fact must reach factual findings and contemplate what to do if left with doubt as to whether pleaded content of the foreign law is true—if the trier of fact remains unconvinced, the party upon whom the burden of persuasion lies loses the argument on what the content of the foreign law is. For example, if the plaintiff argued that the applicable foreign law, under the circumstances of the case, accords him compensation in the amount of $1 million, and the defendant argued that that foreign law in fact allows no compensation, a shift in the persuasion burden from the plaintiff to the defendant means that the defendant loses if the trier of fact is left unconvinced by both parties’ evidence, and the court would accept the plaintiff’s argument of entitlement to $1 million in compensation. Of course, nothing changes with regard to any other element of the plaintiff’s claim (for instance, other factual or legal contentions made by the plaintiff, such as a contention that the defendant breached her contract in a manner entitling the plaintiff to compensation). Needless to say, a shift of the persuasion burden does not excuse any of the parties, including the party upon whom the burden rests initially, from providing evidence. Indeed, if the plaintiff chooses not to provide evidence on the content of the applicable foreign law, and the defendant is able to present convincing evidence, then even a shift of the persuasion burden from the plaintiff to the defendant cannot help the plaintiff, and he will lose.
assigned to the party whose arguments concerning the contents are eventually rejected. Thus, prior to assigning the burden of persuasion in regard to the content of the applicable foreign law—a move usually undertaken at the end of the trial, although it can also be announced at the beginning—the forum court must consider the following: the relative objective difficulty facing each of the litigants and their respective capabilities in providing proof as to the contents of the particular foreign law; the relative monetary cost for each of them to do so; the extent to which a shift of the burden would surprise the other party and the extent to which such a surprise can be mitigated by procedural means; and, finally, the extent to which the party requesting that the burden of persuasion be shifted can pay the expenses involved in proving the foreign law if its argument concerning the contents of that law is rejected. The result is a model according to which the task of providing evidence as to the contents of the applicable foreign law can liberally, albeit selectively, shift from the party asserting a claim to his adversary.

I do want to emphasize that my approach is not as radical as it may sound; I still adhere to the default assignment of the persuasion burden to the party whose claim is based on the foreign law. I suggest, however, an exception that in its “narrow” version shifts the persuasion burden in cases in which either a rationale for invoking the Presumption of Identity of Laws or straightforwardly applying forum law exists anyway but the law of the forum is of no value to the litigant asserting, but failing to prove, the applicable foreign law. In the “broader” version of the reform I suggest, the persuasion burden with regard to the contents of the applicable foreign law would shift to a party who enjoys a clear comparative advantage in proving that law only when such advantage can be clearly identified, perhaps without having the need to conduct an evidentiary hearing on this issue. Regardless (and this is an important novelty), the burden of persuasion with regard to the contents of the foreign law could shift without first considering the result provided by the law of the forum with regard the specific dispute in question. Moreover, shifting the burden with regard to the contents of the foreign law should be preferred over application of the law of the forum.

The rest of this Article proceeds as follows. Section II includes a positive analysis of the manner in which courts treat foreign law when it is considered as a question of fact. This section starts with conventional conflict of laws doctrine, which incorporated either the Presumption of Identity of Laws or an approach according to which a failure to establish the contents of the applicable foreign law would lead to a straightforward application of forum law as subsidiary law.

In this sense, the “loser pays” rule with regard to the costs of proving the content of the foreign law should be applied separately from the assignment of the litigation’s overall costs.
Both doctrines result in a shift of the burden to persuade the court as to the contents of a foreign law from the party whose claim is based on that foreign law to his adversary. Then, the unique traits characterizing foreign law as a matter of fact before the forum court are explained. Section III considers the normative implications of the situation described in Section II. It develops the “narrow” and “broader” versions of the argument, asserting that the burden of persuasion with regard to the contents of the applicable foreign law should be selectively shifted.

II. FOREIGN LAW AS A FACT—A POSITIVE ANALYSIS

A. Failure to Prove Foreign Law

When suggesting a legal reform, one risks being labeled as too extreme or hasty. Such accusations cannot be made in the case at hand. Indeed, shifting the burden of persuasion in regard to the contents of foreign law when such law is treated as a fact is hardly a novel concept.

Jurisdictions that treat the content of an applicable foreign law as a question of fact rather than law often adopt one or two complementary tools: the Presumption of Identity of Laws and/or the application of forum law as subsidiary law. Either one of these two doctrines comes into action in cases in which the party that carries the burden of proof regarding a particular issue of foreign law does not meet that burden. The burden is not met either because that party did not provide any proof as to the contents of the foreign law or because the proof provided was exposed as insufficient in convincing the court by a preponderance of evidence. For example, the court might be unable to determine the precise content of the foreign law for lack of clarity. On occasion, however, instead of dismissing the claim altogether because the party did not prove its case and convince the court in accordance with the requisite standard of proof, the court may assume, in favor of that party, that the foreign law on the specific issue is identical to the law of the forum, unless proof to the contrary (which is also required to convince in accordance with the preponderance of evidence) is presented (naturally, by the opposing party). Alternatively, the law of the forum might be applied straightforwardly as part of the use of forum law as subsidiary law. The application of forum law, rather than the foreign law in question, to the specific dispute, results. Consequently, the party arguing for the application of foreign law would then enjoy the entitlements accorded to him by the law of the forum. Note, however, that

33 See, for example, Geeroms, supra note 8, at 200–11.
34 See, for example, William Ewald, The Complexity of Sources of Trans-National Law: United States Report, 58 AM. J. COMP. L. (SUPPLEMENT) 59, 67 (2010); Wilson, supra note 7, at 908.
applying forum law actually benefits that party—being extended something under forum law is better than receiving nothing if the claim is denied altogether.35 Of course, the opposing party is negatively affected as a result of the application of forum law because, instead of winning and having the claim against him denied altogether, he must face a certain loss, as dictated by the law of the forum.

A simple working example may help to clarify.36 Suppose the plaintiff, a U.K. domiciliary, is suing for compensation in the amount of $1 million, and the defendant is a corporation incorporated in Delaware whose principal place of business is in Foreignia, an exotic third-world country. Suppose further that the plaintiff is basing his claim on Foreignian law, arguing that he is entitled to such compensation according to that law. The defendant vigorously argues that Foreignian law does not entitle the plaintiff to that amount of compensation. Finally, suppose the plaintiff does not prove that Foreignian law accords him $1 million. Perhaps the plaintiff did not bring any testimony by an expert on Foreignian law, or perhaps the expert whose learned opinion was submitted to the court was unconvincing. Perhaps some inaccuracies were exposed in court on cross-examination of the expert; perhaps the expert was found to have little expertise on Foreignian law. The court's decision to apply the Presumption of Identity of Laws means that the court will award the plaintiff $500,000, the sum of compensation that the forum law accords the plaintiff, which is of course less than $1 million.37 Application of the Presumption of Identity of Laws implies that the defendant has the option to argue and prove that Foreignian law actually accords the plaintiff only $0 (or any other sum less than $500,000). In reality, however, defendants rarely have the chance to bring proof to refute the Presumption of Identity of Laws. Notwithstanding, note that the burden of proof shifted as a result of applying the Presumption of Identity of Laws. The plaintiff initially carried the burden to prove the elements of his claim (in this case, a cause of action), including the contents of Foreignian law; as a result of applying the Presumption of Identity of Laws, the burden shifted to the

35 One can also reasonably assume that, at least in certain cases, if application of forum law is better for the party attempting to substantiate a claim, he would prefer to argue for the application of that law and not for the application of a relevant foreign law, even if such foreign law should have been applied in the first place.

36 The abovementioned example uses the Presumption of Identity of Laws to demonstrate the effect created, but it can also be employed to describe the effect generated by application of the forum law as subsidiary.

37 It is reasonable to assume that the sum accorded to the plaintiff by the law of the forum is smaller than the sum accorded by Foreignian law, since otherwise the plaintiff would have argued for the application of forum law.

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defendant, albeit to prove only that Foreignian law accords the plaintiff a sum smaller than the amount accorded by the law of the forum.

Note that this working example can be easily modified to include a non-binary scenario. Under such a scenario, the plaintiff would argue for a compensation of $1 million to be dictated by Foreignian law, forum law would accord the plaintiff only $500,000, the defendant would attempt to establish that Foreignian law accords the plaintiff a compensation in the amount of $0, but the court, after being presented with all the relevant evidence, would rule that Foreignian law accords the plaintiff a sum of $300,000 or $800,000. Such non-binary scenarios do not undermine the analysis and discussion in the paper. On the contrary, inasmuch as the purpose of the adversarial civil procedure is acknowledged to discover the truth (about the contents of the applicable foreign law), these scenarios prove that the suggested approach is better than the current regime, as it offers a more accurate judicial decision-making process.

The reasons cited in the literature for employing either the Presumption of Identity of Laws or the principle of forum law-as-subsidiary vary. One reason concerns the injustice associated with dismissing a claim when the particular foreign law upon which it is based is relatively difficult to ascertain under the particular circumstances of the case. Another reason concerns the need to refrain from the injustice associated with dismissing a claim when the court has a concrete indication that the foreign law is at least somewhat similar to the law of the forum. In such a case, the court's mission of discovering the truth would be undermined if the claim were dismissed altogether. A third reason highlights the role of forum law in controlling the regulation of entitlements, except when foreign law applies.³⁸

One should note, however, that using either the Presumption of Identity of Laws or the doctrine envisioning forum law as subsidiary law³⁹ can help only when forum law is favorable to the party arguing for the application of foreign law (that is, in cases where the law of the forum accords the plaintiff more than $0). If the law of the forum entitles that party to nothing, then the Presumption of Identity of Laws does not help him, and the claim he filed, which relies on unproven foreign law, is usually dismissed. Of course, the fact that the Presumption of Identity of Laws can assist only those parties who assert foreign law that somewhat resembles forum law is quite startling. It is even more troubling if one recalls that the entire choice of law process under the traditional

³⁸ For the view associating this rationale with the application of forum law as subsidiary, see note 21, supra.

³⁹ For reasons of convenience, the rest of the Article shall ignore the doctrine envisioning forum law as subsidiary and focus on the Presumption of Identity of Laws only. With the necessary changes, however, the arguments developed in the Article extend to this doctrine as well.
approach—an approach that is often followed in jurisdictions that treat foreign law as a question of fact rather than law—is supposed to be neutral. Neutrality means that the forum court should not prefer either the forum law or the foreign law. Nevertheless, when the forum court is willing to shift the burden to prove foreign law only after the application of its own forum law produces practical implications, concerns should be raised. To be sure, one could question whether the process of shifting the burden of proof in regard to the contents of foreign law, which usually results in the application of forum law instead (as the shifted burden of proof is not met by the party to which the burden shifted), is accomplished in such circumstances in a neutral manner.

Courts and scholars have criticized the Presumption of Identity of Laws. In addition to general disapproval of courts overusing the Presumption (such as when no actual difficulty exists in providing proof of the foreign law, when the similarity between the foreign law and the forum law is a mere fiction, or for various policy reasons, such as procedural efficacy), critics have pointed to the possibility of using the Presumption strategically as an “escape hatch” to induce the application of forum law when the application of foreign law is due. It has also been argued that the Presumption undermines the goals that lawmakers attempt to accomplish with evidentiary doctrines, especially the burden of proof. To illustrate, parties whose claims are regulated to their detriment by foreign law could strategically refrain from producing evidence on the law’s content in order to evoke the Presumption of Identity of Laws and thus the application of a more favorable forum law.

Having established that the conflict of laws doctrine is quite familiar with shifting the burden to prove the contents of foreign law, and notwithstanding the fact that shifting the burden is an exception rather than the rule, I now examine the nature of foreign law as a fact to which the law of evidence applies.

B. Foreign Law As a Unique Fact

When introduced to the concept of foreign law as a question of fact for the forum court to decide—in contexts in which the local legal system typically treats local law as a matter of law that is subject to judicial notice—one cannot but wonder about the nature of this “fact.” To illustrate the predicament,

40 See, for example, FENTIMAN, supra note 8, at 182-88 (citing U.K. authorities); Mills, supra note 22, at 26-27 (citing U.K. and Australian case law).
41 See DICEY, MORRIS AND COLLINS, supra note 2, at 112 (arguing that in the U.K., forum law is applied whenever proof of foreign law fails); Franklin F. Russell, Presumption of Similarity of Foreign Law, 5 N.Y.U. L. REV. 29, 36 (1928).
42 See Mills, supra note 22, at 27.
43 Id.
consider a simple domestic lawsuit in which the plaintiff sues for compensation, arguing and attempting to prove one simple fact: that the defendant stole his wallet. Whether the defendant actually stole the plaintiff’s wallet is, of course, a question of fact. It is also obvious that the plaintiff will not be able to recover compensation unless he can prove his claim, which centers on the factual question of whether the defendant stole the plaintiff’s wallet. Yet is this factual question identical to the factual question presented in the hypothetical case introduced earlier—whether Foreignian law accords the plaintiff compensation in the amount of $1 million? If these two “facts” are not identical, what is the difference?

Foreign law before the forum court, I argue, is a unique fact and should be distinguished from ordinary, commonplace facts. First, when treated as fact, foreign law is typically proved with a particular form of evidence: expert testimony. A party interested in establishing the disputable content of a particular foreign law will submit to the court the opinion of a witness with self-proclaimed expertise concerning that foreign law. Although there exists no formal rule to ban or require other forms of evidence—such as copies of statutes, court decisions or legal books articulating the relevant foreign law—such “silent” evidence is usually less acceptable and convincing. Indeed, sources of legal doctrine, even if current and updated, cannot be expected to capture the intricacies and complexities associated with ascertaining the law in regard to a specific set of facts presented by the relevant case. Explaining the law requires, inter alia, a process of interpretation, which under modern jurisprudence is anything but technical and straightforward.

Relying on expert witnesses to establish the contents of foreign law has several shortcomings. These include the inherent problems associated with the use of expert witnesses in general.44 To begin with, an expert witness is often feared to be a “hired gun” that is willing to compromise the truth in his or her testimony.45 Moreover, the credibility of expert witnesses is more difficult to verify because of their expertise. Furthermore, expert witnesses whose testimony is submitted by opposing parties tend to cancel each other out, leaving the trier of fact baffled. Of course, it is equally plausible to adhere to an alternate set of assumptions regarding expert witnesses; for example, experts’ academic records can serve as a proxy for their credibility, or experts can be viewed as repeat players whose reputation for honesty and precision is important enough to


45 See, for example, Wilson, supra note 7, at 891.
overcome even direct financial temptations to circumvent the truth offered to them by the parties.46

Second, when treated as fact, foreign law is relatively easy to ascertain. In particular, a witness can always be found to testify on the contents of the foreign law. It may sometimes be difficult or expensive to find such a witness, but it is nonetheless possible. Certain ordinary facts cannot be characterized in a similar manner. Consider the stolen wallet example. It is certainly possible that no witnesses can be found to testify simply because the theft occurred where no one was present but the thief. Similarly, it is also possible that no physical evidence tying the defendant to the wallet can be found simply because such evidence does not exist. Evidence on the contents of foreign law always exists, and the only evidentiary questions concern the difficulty of tracing evidence and the quality of evidence.

Third, when treated as a fact, foreign law is relatively expensive to prove before the court. In particular, the proof of foreign law typically necessitates an entire operation that revolves around expert witnesses. Such an operation involves various expenses associated with hiring an expert witness to submit a written opinion and to later be questioned and cross-examined before the court. Expenses include physically bringing the expert witness to testify and even flight and accommodation expenses. When compared to other typical pieces of evidence in a civil litigation, expert witness testimony is certainly not the cheapest way to prove facts. Consider, for example, possible evidence in a stolen wallet trial—such as testimony of an eyewitness, photos taken from a nearby security camera, and even forensic evidence. All things being equal, none of these pieces of evidence is likely to match the cost of using an expert witness.

Fourth, when treated as fact, foreign law can often be proved with evidence that is relatively more accessible to one of the litigants than to the other. If translated in monetary terms, proving the contents of a foreign law may be cheaper for one of the litigants. Note, however, that the emphasis here is placed on the assumption that the foreign party’s advantage in obtaining evidence to prove the content of the foreign law is clear, unequivocal, and can be easily predicted by both parties ahead of any litigation, as opposed to an implicit advantage, which is difficult to detect in advance. This trait of foreign law results from the fact that in a typical litigation involving choice of law questions, the laws to be applied relate to the parties and, from the forum court’s perspective, one of the parties is usually a foreigner. If a party argues for the application of a foreign law that is a local law for the other party, then the latter’s prima facie advantage in proving the foreign law becomes clear.

Fifth, when foreign law is treated as fact, no litigant can argue that the court surprised him with a decision to impose on him the burden to prove the contents of the foreign law and that this surprise resulted in a lack of evidence to meet such a burden. As a piece of evidence, testimony on foreign law can be obtained at any time by the litigants and does not merit any preservation effort or measures to be undertaken in advance, as opposed to evidence of past events or past correspondence between the parties.

Consider the following example. Suppose that in the stolen wallet trial, the court decided at the beginning of the trial to shift the burden of proof from the plaintiff to the defendant. In such a case, the defendant would certainly be able to argue that he was unfairly surprised. The defendant could also argue that he had certain pieces of evidence that he did not save pending an upcoming trial because he did not know that he would have to prove that he did not steal the wallet from the plaintiff. For example, the defendant might at one time have had bus tickets or e-mail messages dating to the actual moment of the theft, establishing that he could not have committed the theft because he was riding the bus out of town or writing e-mails to friends. When the burden of proof is unexpectedly imposed upon him, the defendant cannot undo what has already been performed; in other words, he cannot retrieve the bus tickets if he had thrown them away or the e-mail messages if they were erased from his computer. On the other hand, if the defendant finds that the burden of proof is imposed upon him in regard to the contents of a foreign law, even as late as the beginning of the trial, he cannot assert that this is an unexpected surprise that affects his ability to collect pieces of evidence and prepare for trial. If the defendant argues to that effect, the court can easily relieve the defendant’s distress by extending a reasonable amount of time to prepare to meet this burden.

Having established that foreign law is a fact with unique traits, I now argue that lawmakers should take these traits into consideration when deciding how to regulate their courts’ efforts to ascertain foreign law.

III. NORMATIVE IMPLICATIONS

Once it is acknowledged that foreign law is a fact with unique features, the question arises whether these features ought to affect the assignment of the burden of proof. To be sure, because both the production burden and the persuasion burden are currently borne by the party whose claim is based on the foreign law, one could ask whether the production burden or even the
persuasion burden should shift to the party’s opponent.47 Accepting the intrinsic value of maintaining the general rule of evidence law, according to which the party whose claim is based on a foreign law bears the burden to persuade the court as to the contents of that foreign law, I narrow the discussion to cases in which the court can easily determine that the party’s opponent enjoys a clear comparative advantage in supplying evidence on the foreign law. In other words, the question is whether an exception to the general rule imposing the burden of proof upon the party whose claim is based on the foreign law should be adopted for cases in which the other party has a clear comparative advantage in supplying evidence on that foreign law.

A. Shifting the Burden of Production

It seems almost trivial to argue in favor of shifting the burden of production in cases in which one of the parties has a clear comparative advantage in supplying proof on the contents of the foreign law. Courts often accept that parties who incur lower costs in gathering or producing evidence should be assigned with the production burden.48 The features characterizing the foreign law as a fact only amplify the reasons for shifting the burden of production to the party who possesses a comparative advantage in supplying such evidence. Expert witness opinion on foreign law is always accessible and often distinctively more accessible to the party associated with the foreign law; the costs of finding and hiring such an expert can be significantly lower for that party, and one need not worry about that party’s expectations, as even a late assignment of the production burden cannot surprise him to a degree that prevents him from locating and hiring an expert witness.

Nonetheless, the debate regarding the burden of production is perhaps less important from the perspective of ascertaining the truth regarding the contents of the foreign law because the court is sure to view all relevant evidence. Unlike some other typical facts, foreign law is established with an expert witness opinion and testimony, and at least one such expert’s opinion will probably be submitted to the court by one of the parties. In short, in most cases there exists no question of missing evidence. Moreover, there should rarely be problems for the party initially assigned the burden of production, as he would seemingly

47 Shifting either of these burdens when neither party to the litigation enjoys any advantage with respect to providing proof on the content of the foreign law seems to be a moot question, and I therefore disregard it.

48 See, for example, 2 McCormick on Evidence, supra note 13, § 475 (discussing the doctrine that assigns the burden of production to the party for whom the issue lies peculiarly in his knowledge); Bruce L. Hay & Kathryn E. Spier, Burdens of Proof in Civil Litigation: An Economic Perspective, 26 J. Legal Stud. 413, 426–27 (1997).
welcome the opportunity to present the court with an expert opinion in his favor.49

The only consequence of assigning the production burden concerns the minimization of the overall costs of adjudication. Indeed, it has already been argued that assigning the production burden to one party relieves his opponent, therefore minimizing the costs of gathering and presenting information to the court.50 Thus, a rather convincing argument can be made for shifting the burden of production to the party who enjoys a clear comparative advantage in supplying relevant evidence while assigning the costs of supplying such evidence to the party whose argument is rejected at the end of the trial.

B. Shifting the Burden of Persuasion

The case for shifting the burden of persuasion from a party whose civil claim relies on the foreign law to his opponent can be tested from various viewpoints—for example, based on equality and fairness considerations or from an efficiency perspective.51 I would like to emphasize one viewpoint, however, which concerns institutional coherence—defined as the manner in which lawmakers employ, across a continuum of possible cases, a rationale they created and adhere to.

1. The “narrow” argument.

Adopting a wide perspective, which compares litigants across a set of litigation units, including those in which the Presumption of Identity of Laws is invoked, reveals the current incoherence of courts. Let us consider why.

If the practical result of applying the Presumption of Identity of Laws is indeed to shift the burden of persuasion from the party asserting foreign law to his opponent, then the Presumption’s rationales—when applicable—should also dictate a similar result even when the law of the forum does not award anything to the party asserting the foreign law (on whom the burden of persuasion rests initially). Any other result would be contrary to both common sense and the principle of neutrality, which—as already mentioned—is a key tenet in the area of private international law.

49 See Hay & Spier, supra note 48, at 424. Indeed, the realistic assumption according to which social planners should regulate is that a party may usually be able to introduce into evidence a partisan and biased expert opinion. While such an expert’s opinion may be of low quality, controversial, or unconvincing, it nevertheless may be secured by a sufficiently determined party.

50 See id. at 426–27.

51 See, for example, Stein, supra note 29, at 215 (asserting that “allocation of the risk of error accompanying fact-finding decisions in civil litigation can be fair, efficient, both, or neither”).
With recourse to common sense, one might wonder why the rationales supporting the Presumption of Identity of Laws (for example, difficulty in obtaining evidence on the contents of the foreign law) merit protection only when the application of forum law carries a practical result (which benefits the party carrying the persuasion burden). For example, if the goal is to assist plaintiffs who face difficulties in obtaining evidence regarding the contents of a foreign law, which applies to their relationship with the defendant, should not these plaintiffs be assisted even if they are entitled to nothing under the law of the forum (in contrast to their claimed entitlement under the foreign law)? Moreover, the principle of neutrality in executing the choice-of-law decision dictates that the forum court refrain from applying forum law simply for reasons of self-preference. But if the forum court assists the litigants only inasmuch as the law of the forum accords them something, one may suspect that a hidden preference for the law of the forum is the driving force. In short, if lawmakers are sincere in supporting the Presumption of Identity of Laws, then this ideology should be protected notwithstanding the contents of the forum law. From a practical viewpoint (since simply applying the law of the forum is not helpful), such a protection necessitates a shift of the persuasion burden, at least in cases in which the law of the forum entitles the party arguing for a particular foreign law to nothing.

Thus, while typical circumstances would still indicate that the party whose claim is based on a foreign law should be assigned the burden of persuasion as to the contents of that law, this burden should shift at least when any of the rationales supporting the Presumption of Identity of Laws (such as difficulty in obtaining proof in regard to the foreign law) are applicable, notwithstanding the contents of the law of the forum. Of course, according to this approach, if the rationales supporting the application of the Presumption of Identity of Laws do not

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52 The same argument can be made concerning the second possible rationale offered to support cases in which the Presumption of Identity of Laws is invoked. Recall that this second rationale attempts to refrain from the injustice associated with dismissing a claim when the court has a concrete indication that the foreign law is at least somewhat similar to the law of the forum. In such a case, the court’s judicial commission of discovering the truth would be undermined if the claim were dismissed altogether. Consider then the argument put forward here: if indeed the court suspects that the foreign law is similar to the law of the forum, then the court should be even more compelled to ascertain the exact content of the foreign law rather than to apply forum law as an approximation. Indeed, in the modern world, foreign law should always be considered as an ascertainable fact.

53 Note that the current framework assumes a given legal regime, as described earlier in the paper, which, when failure to prove foreign law is identified, evokes the Presumption of Identity of Laws, or a doctrine that applies forum law as subsidiary law. See supra Section II.A. Thus, the individualized justification for shifting the burden of persuasion is not tested in a vacuum but rather against the backdrop of an existing legal reality.
not apply to the case, there exists no reason, at least from a fairness or coherence perspective, to shift the burden of persuasion.

If this coherence argument is persuasive—that courts are already committed to shifting the burden to prove foreign law and just need to separate their commitment from any predisposition for the application of the law of the forum—note that the burden of persuasion, and not simply the burden of production, should shift as well, because the Presumption of Identity of Laws would shift the persuasion burden. Moreover, shifting only the production burden is rather meaningless because the problem is not a complete lack of evidence on the contents of the foreign law, as such evidence can always be found, but rather the manner in which the best possible evidence on the contents of the foreign law should be cost-efficiently obtained and presented to the court.

I thus argue that whenever faced with a decision as to the legal result of a foreign law not established in accordance with the preponderance of evidence by the party whose claim relies on that foreign law, the forum court should shift the burden of persuasion from the party upon whom the burden initially rests to his opponent, even if shifting the burden would occur outside the doctrinal confines of the Presumption of Identity of Laws (even if application of forum law does not help the claimant who failed to prove the foreign law), so long as any of the rationales for evoking the Presumption of Identity of Laws apply.

2. The “broader” argument.

An even broader argument can now be developed. Again, the starting point for this argument focuses on shifting the persuasion burden as a result of employing the Presumption of Identity of Laws. Recall that when employed, this doctrine results in a shift of the persuasion burden from the party attempting to prove the contents of the applicable foreign law to his opponent. When employed, this doctrine requires that the opponent, if seeking to establish the contents of the foreign law as different from the contents of the law of the forum, meet the persuasion burden with regard the contents of the relevant applicable foreign law.

On the other hand, consider what the result should be of adhering, in a sincere or zealous manner, to the rationales supporting the Presumption of Identity of Laws—particularly those that concern the difficulties associated with proving foreign law or those that focus on revealing the truth of the contents of the foreign law. Consider the need to accommodate the difficulties associated with proving foreign law. If lawmakers are truly interested in helping litigants who need to prove the contents of an applicable foreign law to cope with the difficulties of attempting to provide such proof, and since occasionally—to be sure, (only) when application of the law of the forum can actually assist those litigants in hardship—the persuasion burden with regard to the contents of the
applicable foreign law shifts anyway, why not allocate the persuasion burden to
the party who enjoys a comparative advantage in providing proof concerning
such contents of the foreign law to begin with? In a similar vein, consider the
need to ascertain the truth with regard to contents of the applicable foreign law:
if lawmakers are truly interested in courts discovering the aforementioned truth
in relevant cases, and since occasionally the persuasion burden with regard the
contents of the applicable foreign law shifts anyway (when the Presumption of
Identity of Laws is employed), why not allocate the persuasion burden to begin
with to the party who enjoys a comparative advantage in providing proof
concerning such contents of the foreign law? In fact, other than the question of
how to establish the existence of such a comparative advantage, the proposed
approach seems inexorable.

Moreover, note that in the context of this “broader” argument, the
immediate implication of acknowledging that foreign law as a question of fact
involves special features is to support vigorously the argument presented here. Recall that these features include, first, a typical method of proof—expert
testimony. Second, supplying proof is relatively easy, as an expert witness can
always be found. Third, an expert witness is a costly form of proof. Fourth, a
difference in accessibility exists, as an expert on certain foreign laws can be more
accessible to one of the parties than to his opponent. Fifth, litigants are
sometimes unable to argue surprise by a reassignment of the persuasion burden,
as evidence on the contents of the foreign law is a piece of evidence that can be
gathered as late as the date of the trial.

Consider the significance of these features for the argument presented
here. If foreign law is always accessible, albeit in varying degrees and costs, then
the questions become: for which of the two litigating parties is this piece of
evidence more easily accessible and less costly to obtain and whether the
difference between them justifies a shift of either proof burden. Moreover, it
should be noted that in many instances, the foreign law asserted during trial is
associated with one of the parties. Because the judicial process is a civil one, to
regulate their relationship, parties who value cost-efficiency will gravitate, even
before considering any litigation, towards choosing a foreign law that is
associated with one of them. Thus, one can expect that a comparative advantage
in supplying proof on the content of a particular foreign law will abound.

It should also be emphasized that the reason that the burden of proof
should shift rather than simply applying the forum law stems from the fact that
the content of the foreign law is an accessible piece of evidence. This is an
essential feature of foreign law when treated as fact. If parties agree to avoid the
costs of ascertaining the contents of the foreign law and voluntarily subject
themselves to the law of the forum, their agreement should of course be
respected. If the trier of fact, however, is tasked with discovering the truth
regarding the contents of a foreign law, then applying local law does less to
promote this goal than does shifting the burden of proof to a party who enjoys a comparative advantage in producing evidence on the contents of that law.

In the working example introduced earlier, in which the plaintiff, a U.K. domiciliary, filed suit for compensation in the amount of $1 million against the defendant, a corporation whose principal place of business is Foreignia, one could argue that even if the forum law, when applied to the specific issue before the court (the amount of compensation due), awarded the plaintiff some compensation (such as when forum law accords the plaintiff compensation in an amount which is more than zero but less than the amount due under the foreign applicable law), one should not avoid the result of shifting the burden of persuasion to the defendant in regard to the contents of Foreignia law, but prefer it over the mere application of the law of the forum. Indeed, it does not matter what the forum law dictates concerning the amount of compensation due to the plaintiff. To be sure, the example was introduced following the assumption that the forum court had decided at the end of the choice-of-law process that Foreignia law applies to the specific dispute at hand. Instead of looking to what the law of the forum dictates about the specific issue of compensation for the plaintiff, the social planner should clearly observe that the defendant has a comparative advantage in proving the contents of Foreignian law. For example, suppose experts on Foreignian law are difficult to find and attempts by the plaintiff to locate an expert have failed and the defendant, on the other hand, is well familiar with several lawyers working in Foreignia, who are experts on that law. They would agree either to testify before the forum (as they are already working with the defendant on a retainer fee) or to assist the defendant with locating another inexpensive expert;\(^\text{54}\) thus, the defendant would only have to pay a modest fee for the services of an expert witness. The social planner should further take notice of the fact that the defendant may not expect to have to prove the contents of Foreignian law before the forum court; however, a rather short postponement of the hearing—say, for three months—would be more than enough time for him to approach his lawyers and coordinate their testimony before the forum court. Finally, the social planner should note that there exists no reason to doubt the plaintiff’s ability to pay costs to the defendant should it turn out at trial that Foreignian law, in contrast

\(^{54}\) Note that in some common law jurisdictions, a party’s legal advisers are prohibited from giving expert evidence at a trial in relation to the foreign law, as they do not meet the independence requirements for an expert witness. See, for example, FENTIMAN, supra note 8, at 176–77 (discussing these requirements and the manner in which courts sometimes relax them). Yet this is a problem that can easily be solved if lawmakers take it into account and consider formulating an exception with regard to witness experts testifying on the content of a foreign law. Regardless, the existing legal advisors can still provide helpful networking advice, following which an impartial and effective expert can be hired.
to the plaintiff's claim and in accordance with the defendant's persistent position, does not award the plaintiff any compensation under the circumstances of the specific case. If such a doubt does exist in a specific case, the court should perhaps refrain from shifting the persuasion burden.

In sum, the following considerations should lead the court to make a fair decision concerning the burden to persuade as to the contents of Foreignian law: the defendant enjoys a comparative advantage over the plaintiff in producing evidence on this particular foreign law; the plaintiff experiences considerable objective difficulty in producing such evidence himself; assigning the defendant with the task of producing evidence on the contents of this foreign law would result in overall lower expert fees and costs (especially for the party to which such costs would be assigned); there is presumptively no problem in having the plaintiff pay the expert fees and costs if he loses the case; and a postponement of three months can be granted to the defendant to gather evidence on this foreign law, if he so wishes. Therefore, in the Foreignia example, the court should shift the burden of proof (production and persuasion) to the defendant.

One should emphasize in this context that the party to whom the persuasion burden is to shift cannot assert a fairness defense, at least not when the party possesses a comparative advantage in providing evidence as to the contents of the foreign law. For example, he cannot argue that imposing the persuasion burden upon him would expose him to undue costs because his costs in obtaining relevant evidence are the lowest, and the court can always assign the costs to the loser. Indeed, as part of the proposed reform I suggest, the costs associated with proving an applicable foreign law should not only be assigned under the usual "loser pays" rule but treated separately from the costs associated with other parts of the litigation.

Moreover, if the party to whom the persuasion burden is to shift enjoys a comparative advantage in producing proof as to the contents of the foreign law, the party cannot argue that he did not expect to bear the burden of persuasion in regard to the foreign law. Indeed, when foreign law is treated by the forum court as fact, a party who wishes to gather relevant evidence on the contents of the foreign law can always ask the court for a continuance, and even a moderate one would suffice to gather evidence (which, after all, is mostly the opinion of an expert witness). Finding such a witness is always possible, and the cost of doing so would no doubt be reduced if imposed on the party who enjoys the aforementioned comparative advantage.

The "broader" argument calls for shifting the persuasion burden with regard to the contents of an applicable—but unsubstantiated—foreign law instead of merely applying the law of the forum. For the sake of moderation, however, I would like to note that this argument should be understood to be nothing more than a suggested exception to the rule imposing the burden of persuasion with regard to the contents of an applicable foreign law on the party
whose claim is based on that foreign law. In other words, shifting the burden of persuasion from the party whose claim is based on an applicable foreign law to his opponent should occur only when a clear, almost undisputable, comparative advantage exists so as to make any evidentiary hearing over the question of such an advantage unnecessary. A classic example for such a comparative advantage would be the case of a Western plaintiff who sues a defendant from an exotic, third-world jurisdiction based on the foreign law of that jurisdiction.

IV. CONCLUSION

If social planners are interested in coherently regulating the assignment of the persuasion burden, they should consider the distinctive features of foreign law when its contents become an issue of fact during a trial that mandates the application of foreign law. These features neutralize any possible objection to shifting the persuasion burden when a party enjoys a comparative advantage in proving the foreign law. Consequently, the burden of persuasion should not necessarily be allocated to the party whose claim is based on that foreign law.

Coherence concerns, which derive their force from a similar burden shift that occurs once the law of the forum is applied, suggest shifting the burden either when any of the rationales behind the Presumption of Identity or the straightforward application of forum law apply (in the “narrow” version of the argument formulated in the paper) or, more generally under the “broader” version of the argument, when the non-burdened party enjoys a clear comparative advantage in producing evidence on the foreign law—all notwithstanding the content of the forum law. Thus, even if the application of forum law does not carry any practical implication (for example, application of forum law is of no value to the party asserting a foreign-law-based claim), the forum court should nevertheless consider shifting the burden of persuasion in regard to the contents of the foreign law and avoiding the application of forum law.