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THE INFERENCE OF SIMILARITY

MARCUS TEO*

ABSTRACT. *English courts have long professed to apply a "presumption of similarity" when faced with inconclusive foreign law evidence. However, its precise nature and implications remain unclear. Here, I argue that no true "presumption" exists. Instead, courts should only draw an inference, that English and foreign courts would render similar rulings on the same facts, when that conclusion can be reliably drawn. Understanding the "presumption" as a reliable inference helps facilitate the accurate prediction of foreign decisions, resolves various controversies surrounding its "use" in civil proceedings and does not render the proof of foreign law unpredictable or inconvenient in practice.*

KEYWORDS: *presumption of similarity*, *inference*, *presumptions*, *proof of foreign law*, *conflict of laws*, *law of evidence*, Brownlie v FS Cairo (Nile Plaza) L.L.C.

I. INTRODUCTION

When a litigant in civil proceedings wants to rely on a particular system of foreign law, she must overcome two hurdles. First, she must show that the relevant choice-of-law rule would select that foreign law as the applicable law. Second, she must then prove that that foreign law would give her the claim or defence she alleges it would. The second task is no mean feat: evidence of foreign law may be patchy, vague or simply non-existent. To overcome these evidential difficulties, litigants have long invoked, and courts have long professed to apply, a "presumption of similarity". The general idea here is that, when a party pleads but does not sufficiently prove foreign law, courts may "presume" that foreign law is similar to English law. As a result, the party relying on foreign law may establish her claim or defence, in whole or in part, by reference to English law.

*Assistant Professor, Faculty of Law, National University of Singapore. Address for Correspondence: 469G Bukit Timah Road, Singapore 259776. Email: marcus.teo@nus.edu.sg. Thanks to Ardavan Arzandeh, Adrian Briggs, Andrew Halpin, Ho Hock Lai, Sophie Ryan, and the anonymous reviewers for their helpful comments, with the usual caveats. Earlier drafts were presented at the NUS Faculty of Law and the Oxford Conflict of Laws Discussion Group in October 2023 and February 2024. This piece is dedicated to the memory of Tan Yock Lin: inspiration, mentor and friend.

This "simplistic" picture, however, is deceptive.[1] In evidence law, presumptions are a controversial subject, owing to difficulties in their conceptualisation and classification.[2] It is often unclear whether a given "presumption" should be understood as a true presumption or something masquerading as one and what follows from that. Similar controversies plague the so-called "presumption of similarity". Despite its frequent invocation in practice – and notwithstanding Lord Leggatt's recent lengthy discussion of it in *Brownlie v FS Cairo (Nile Plaza) L.L.C.*,[3] which received the support of the unanimous Supreme Court[4] – the true nature and implications of the "presumption" remain shrouded in mystery.

Here, I attempt to lift the shroud. I argue that the "presumption of similarity" should not be understood as a true presumption at all. Instead, courts should only ever draw an *inference*, where reliable, that foreign law and English law are similar. English courts applying foreign law must aim to replicate the ruling the foreign court would render on similar facts. And when the English court's own ruling would reflect a shared tradition or universal ethos, that may sometimes be enough for that court to infer reliably that the foreign court would render a similar ruling. By contrast, a true presumption of similarity would be unprincipled, reflecting none of the justifications of "logic, convenience and policy" that support other presumptions.[5] Acknowledging this also has important doctrinal implications: it explains why the "presumption" remains relevant where foreign law is partially proven, under mandatory duties to plead foreign law, between two systems of foreign law, and in interlocutory applications. And there are little practical downsides: rejecting a true presumption of similarity will not, in fact, render the proof of foreign law unpredictable or inefficient.

Thus, there is (or should be) only an *inference of similarity* between foreign and English law, rather than a true presumption. After a brief overview of presumptions and inferences (Section II), I demonstrate that the cases on the "presumption of similarity" remain unclear about its true nature (Section III). I then argue that courts can sometimes reliably, and thus justifiably, infer that foreign law is similar to English law, in the sense that the foreign court would reach a similar ruling as English courts would on the same facts (Sections IV and V) and that the application of a true presumption of similarity will, by contrast, always be unjustifiable (Section VI). I go on to sketch out four discrete

[1] R. Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Oxford 1998), 3.
[2] Provoking Edmund M. Morgan's famous statement in "Presumptions" (1937) 12 Washington Law Review and State Bar Journal 255 that studying them breeds "hopelessness" and "despair" (at 255).
[3] [2021] UKSC 45, [2022] A.C. 995, at [96]–[166].
[4] See ibid., at [6], [88].
[5] I. Dennis, *The Law of Evidence*, 6th ed. (London 2017), [12-023]; see also A. Keane and P. McKeown, *The Modern Law of Evidence*, 9th ed. (Oxford 2012), 652 ("Presumptions are based on considerations of common sense and public policy").

implications of my argument (Section VII), before finally responding to some practical objections that may be raised against it, concerning certainty, predictability and disproportionate foreign law evidence (Section VIII).

As a preliminary, a brief overview of some other English rules on pleading and proving foreign law – which this article assumes and does not seek to question – is needed to set the stage. We can glean these from the rest of Lord Leggatt's judgment in *Brownlie*. There is generally no duty to plead foreign law,[6] though if a litigant does plead foreign law, she must also plead the specific foreign legal norms she relies on, and then bear the burden of proving them.[7] There is one prominent exception: if the defendant chooses to plead foreign law, the claimant must either deny that foreign law applies, or come under a duty to plead a positive case under the applicable foreign law in retaliation[8] (call this the claimant's "retaliatory duty"). If no one pleads foreign law, English law applies as the applicable law by default, nominally on the basis of a tacit choice-of-law agreement selecting English law.[9] If foreign law is pleaded and shown to be applicable, a party who bears the burden of proving foreign law, but fails to do so to the requisite standard of proof, will have her claim or defence dismissed.[10] Thus, if both parties plead foreign law – which, given the claimant's retaliatory duty, happens whenever the defendant pleads foreign law and the claimant does not deny its application – and the evidence adduced cannot satisfactorily prove foreign law's content, both cases will be dismissed, which ultimately means that the claimant loses. I take all of this as given. The *only* questions I am concerned with here are these: to what extent can a party who bears the burden of proving foreign law avoid having her case dismissed on failure of proof by relying on the "presumption" that foreign and English law are similar? And how, exactly, should we understand this "presumption"?

II. Presumptions and Inferences

Before we discuss the "presumption of similarity", we need to know what a "presumption" is. Legal presumptions are meant to "facilitate and expedite" practical reasoning and action in "circumstances of pressure and uncertainty", such as where a court must render a decision but is faced with inconclusive evidence and/or time and resource constraints.[11] Presumptions may be described as follows:

[6] *Brownlie v FS Cairo* [2021] UKSC 45, at [113]–[114].
[7] Ibid., at [116].
[8] Ibid., at [163]–[165].
[9] Ibid., at [114]; but see text accompanying notes 128–131 below.
[10] *Brownlie v FS Cairo* [2021] UKSC 45, at [117].
[11] E. Ullmann-Margalit, "On Presumption" (1983) 80 Journal of Philosophy 143, 147, 154–56.

> A court presumes p on the basis of q when, given proof of q, it proceeds as if p were true, until given contrary reasons.[12]

This definition captures three traits.[13] First, presumptions involve two separate facts: the fact presumed (p, the "presumed fact") and the fact triggering the presumption (q, the "basic fact"). Second, the basic fact's existence cannot be sufficient evidence to support a conclusion that the presumed fact exists. The whole point of presumptions is to help courts decide when the evidence is uncertain.[14] Presumptions thus give courts reasons to proceed "as if" the presumed fact exists, not reasons to believe that the presumed fact actually exists; the court has no such actual belief precisely because the evidence is uncertain. Courts therefore cannot draw further inferences from a presumed fact,[15] and cannot treat a presumption as a piece of evidence in favour of the presumed fact,[16] because presumptions and presumed facts are not supported by evidence. Third, presumptions are rebuttable. Since they exist to overcome evidential uncertainty, presumptions can only reflect some tentative or reversible point in the factfinding process rather than a conclusion of fact. When sufficiently strong evidence against the presumed fact is adduced, the evidential uncertainty is resolved and the presumption is rebutted.

Our definition of presumptions covers two things evidence lawyers use that label to describe.

First, it covers what evidence lawyers call "rebuttable presumptions of law".[17] These are legal rules requiring courts to hold tentatively that a presumed fact exists upon proof of the relevant basic fact.[18] Once the party relying on the presumption (the "relying party") proves the basic fact, the presumption places some burden on the party contesting the presumed fact (the "contesting party"). Examples of rebuttable presumptions of law include the presumption that a person unheard of for seven years is dead[19] or the presumption of resulting trust when a transfer is made outside of certain relationships.[20]

[12] Adapted from ibid., at 147.
[13] Ibid., at 147–52.
[14] See *Sheldrake v DPP; Attorney-General's Reference (No. 4 of 2002)* [2004] UKHL 43, [2005] 1 A.C. 264, at [43] for this observation.
[15] See e.g. *Re Phené's Trusts* (1869–70) L.R. 5 Ch. App. 139, 144 (Giffard L.J.) ("the law presumes a person who has not been heard of for seven years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular period at which he died").
[16] See *S v S; W v Official Solicitor* [1972] A.C. 24, 41 (H.L.) (Lord Reid) ("Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for [the presumed fact]"); see also R. Munday (ed.), *Cross and Tapper on Evidence*, 13th ed. (Oxford 2018), 138.
[17] Here, I leave aside "irrebuttable presumptions of law", or rules which make proof of a basic fact conclusive proof of a presumed fact, which most evidence lawyers view as substantive rules of law.
[18] See H.M. Malek (ed.), *Phipson on Evidence*, 20th ed. (London 2022), [6-18].
[19] *Chard v Chard* [1956] P. 259, 272 (P.) (Sachs J.).
[20] *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432, at [60] (Baroness Hale); *Jones v Kernott* [2011] UKSC 53, [2012] 1 A.C. 776, at [29] (Lord Walker and Baroness Hale).

There are two kinds of rebuttable presumptions of law, placing different burdens on the contesting party.[21] The first type, the "persuasive presumption", places the burden of disproving the presumed fact on the contesting party. That party must then adduce enough evidence against the presumed fact to disprove it on the requisite standard of proof. The second type of presumption, the "evidential presumption", places the burden of adducing evidence against the presumed fact's existence on the contesting party. That party must then adduce evidence sufficient to keep the court "in a state of equilibrium" about the presumed fact's existence.[22] In civil proceedings – which we are concerned with here – there is only one practical distinction between persuasive and evidential presumptions. That is: where the contesting party has adduced evidence against the presumed fact and the court still remains equivocal about the presumed fact's existence on a balance of probabilities, the court will proceed as if the presumed fact is established if the presumption is persuasive but will not if the presumption is evidential.

Second, our definition of presumptions also covers initial burden rules, or rules laying down the incidence of the initial burden of proof in certain proceedings or for certain facts. Examples include the presumption of innocence in criminal proceedings, that the prosecution bears the burden of proving the facts necessary to secure conviction,[23] and the presumption of regularity in judicial review proceedings, that the applicant bears the burden of proving the facts establishing administrative unlawfulness.[24]

It is sometimes said that initial burden rules are not technically presumptions because they do not operate upon proof of a basic fact.[25] But this distinction is one of form not substance. Initial burden rules do have basic facts (they are triggered when particular proceedings have been instituted or particular facts have been put in issue) and they do allocate the burden of proof. Moreover, their purpose is likewise to facilitate and expedite practical reasoning, which is why they rest on the same kinds of policies that justify rebuttable presumptions of law.[26] The only differences between initial burden rules and rebuttable presumptions of law are that initial burden rules apply at the start of the factfinding process rather than during the course of argumentation and that, because

[21] See Keane and McKeown, *Evidence*, 653.
[22] Munday, *Cross and Tapper*, 157.
[23] See *Woolmington v DPP* [1935] A.C. 462, 481–82 (H.L.) (Viscount Sankey L.C.).
[24] See *R. v Inland Revenue Commissioners and another, ex parte T.C. Coombs & Co.* [1991] 2 A.C. 283, 300 (H.L.) (Lord Jauncey); cf. situations in which the unlawfulness of an administrative decision is an element in a crime (*Roy Dillon v The Queen* [1982] A.C. 484, 487 (P.C.)) or tort (*Hay v Cresswell* [2023] EWHC 882 (K.B.), [2023] E.M.L.R. 17, at [53]), where there is no presumption that the act was performed regularly.
[25] See e.g. Keane and McKeown, *Evidence*, 656 (calling these "presumptions without basic facts").
[26] See also Munday, *Cross and Tapper*, 138 (rebuttable presumptions of law exist to give effect to the same "policies" that also justify the "allocation of burden").

they must allocate the initial burden of proof, they are invariably persuasive rather than evidential presumptions.

However, there is one more thing which evidence lawyers sometimes call a "presumption", but which does not fit our definition of presumptions. This is the "presumption of fact", which is really an *inference*.[27] Inferences may be described as follows:

> A court infers p from q when it considers proof of q sufficient reason to conclude that p is true.[28]

This definition again captures three traits. First, inferences, like presumptions, involve two different facts: the basic fact (q) and the fact inferred therefrom (p, the "inferred fact"). Second, inferences, *unlike* presumptions, are drawn when the court feels that proof of the basic fact(s) provides sufficient evidence for it to conclude that the inferred fact exists. An inference, in other words, is an actual belief that the inferred fact exists, to the requisite standard of proof. The court is not merely proceeding "as if" that fact exists; it is finding that the fact actually exists, on the strength of the evidence supporting it. A court can therefore also draw further inferences from an inferred fact, just as they might for any finding of fact. Third, then, inferences are conclusions of fact, *unlike* presumptions which are tentative or reversible points in the factfinding process; the basic facts constitute sufficient indirect evidence of (i.e. sufficient relevant facts to establish) the inferred fact. An inference is also therefore irrebuttable in the quotidian sense that factual conclusions reached at the end of the factfinding process cannot be further challenged save on appeal.

Thus, inferences, when stated by courts in propositional form, are really just short-hand expressions for factual conclusions that courts believe they can reliably reach once certain other facts are established. No burden of proof or burden of adducing evidence is imposed or shifted and no further factfinding will occur: the inference is drawn only after the court has seen all the evidence parties adduced and has heard all the arguments parties made. An example of an inference is the "presumption of inducement" in misrepresentation, which is really an "inference of fact"[29] that representees are usually induced by representations "of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction".[30] Another example of an inference is the "doctrine" of *res ipsa loquitur*, which operates when a claimant in negligence is "able to point to a combination of facts which are

[27] Malek, *Phipson*, [6-18].
[28] Adapted from P. Boghossian, "What Is Inference?" (2014) 169 Philosophical Studies 1, 4–5.
[29] *Zurich Insurance Co. plc v Hayward* [2016] UKSC 48, [2017] A.C. 142, at [34] (Lord Clarke).
[30] *Goyal and another v BGF Investment Management Ltd. and others* [2023] EWHC 1180 (Comm), [2023] 4 W.L.R. 65, at [51] (Butcher J.).

sufficient, without more, to give rise to a proper inference that the defendant was negligent".[31]

In sum, there are three relevant concepts, two of which fit our definition of presumptions (hereafter, *true presumptions*) and one which does not. There is:

- The initial burden rule – hereafter, an *initial presumption* – which operates at the start of the factfinding process and allocates the (persuasive) burden of disproving the presumed fact to the contesting party.
- The rebuttable presumption of law – hereafter, an *argumentative presumption* – which operates during the course of the factfinding process and allocates, upon proof of the basic fact, either the (persuasive) burden of disproving the presumed fact or the (evidential) burden of adducing evidence against the presumed fact to the contesting party.
- The "presumption" of fact – hereafter, an *inference* – which is a conclusion, drawn at the end of the factfinding process, that the inferred fact exists, based on proof of basic facts constituting sufficient indirect evidence of the inferred fact.

III. The "Presumption" of Similarity?

So, there are initial (persuasive) presumptions, argumentative (persuasive or evidential) presumptions and inferences. Which is the "presumption of similarity"?

On one view, it is an *initial (persuasive) presumption*. In *Dynamit A.G. v Rio Tinto Co. Ltd.*,[32] Lord Dunedin reasoned that "it is for those who say that the [foreign] law is different from the English to aver it as fact and to prove it",[33] while Lord Atkinson held that "[i]n the absence of ... proof [foreign law] must be assumed to be similar to the law of England".[34] If understood as an initial presumption, the presumption of similarity would resemble the general rule, applicable at the start of the factfinding process, that the party who pleads a fact must prove it, save that what is presumed is not that foreign law has no content but that its content is similar to English law's. And by its nature, an initial presumption of similarity would always apply whenever foreign law applies: "the basic fact giving rise to

[31] *Smith v Fordyce and another* [2013] EWCA Civ 320, at [61] (Toulson L.J.).
[32] [1918] A.C. 260 (H.L.).
[33] Ibid., at 295; see also *Marconi Communications International Ltd. v PT Pan Indonesian Bank Ltd. TBK* [2005] EWCA Civ 422, [2005] 2 All E.R. (Comm) 325, at [70] (Potter L.J.).
[34] *Dynamit v Rio Tinto* [1918] A.C. 260, 300 (H.L.); see also *The Parchim* [1918] A.C. 157, 161 (P.C.) (Lord Parker); *Bumper Development Corp. Ltd. v Commissioner of Police of the Metropolis and others* [1991] 4 All E.R. 638, 644 (C.A.) (Purchas L.J.).

[it] is … simply that [the relying party] has pleaded foreign law."[35] An initial presumption of similarity was thus also probably what Peter Gibson L.J. had in mind in *Shaker v Al-Bedrawi*, when he said that courts should "apply English law as the *lex causae* in default of proof of foreign law",[36] even if it was not "realistic" to think that English and foreign law were truly similar.[37]

On another view, however, the "presumption of similarity" is an *argumentative (evidential) presumption*. In *Neilson v Overseas Projects Corporation of Victoria Ltd.*,[38] for instance, McHugh J. called it an "evidential presumption",[39] which the contesting party can rebut by "'adduc[ing] evidence sufficient to justify consideration of [the] particular issue' as to the law that the [foreign] courts would apply".[40] Similarly, in *Rickshaw Investments Ltd. and Another v Nicolai Baron von Uexkull*,[41] Andrew Phang J.A. called it an "evidentiary presumption", under which "foreign law … is (assumed to be) identical to the *lex fori*".[42] Evidential presumptions, we recall, must be argumentative rather than initial presumptions, because they allocate only the burden of adducing evidence rather than the burden of proof. And unlike an initial presumption of similarity, an argumentative presumption of similarity may not invariably apply whenever foreign law applies, since it may be triggered only upon proof of a narrow basic fact. Thus, in *Damberg v Damberg*,[43] Heydon J.A. reasoned that an argumentative presumption of similarity should only apply in circumstances when English law is "unlikely to differ greatly from foreign law",[44] namely where the foreign legal system is "a common law-based system" or where the relevant foreign norms would reflect "great and broad principles likely to be part of any given legal system."[45]

Lord Leggatt's judgment in *Brownlie*, on one reading, provides further support for the view that the "presumption of similarity" is an argumentative evidential presumption. There, Lord Leggatt held that the "presumption" does not "alter the legal burden of proof" but "merely places the burden of adducing evidence on a party who wishes to

[35] Y.L. Tan, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 Singapore Academy of Law Journal 172, 197.
[36] *Shaker v Al-Bedrawi and others; Shaker v Masry and another; Shaker v Steggles Palmer (a firm) and others* [2002] EWCA Civ 1452, [2003] Ch. 350, at [68].
[37] Ibid.
[38] [2005] HCA 54, (2005) 223 C.L.R. 331.
[39] Ibid., at [37].
[40] Ibid.; see also ibid., at [248] (Callinan J.) (presumption rebutted with "sufficient evidence"); cf. ibid., at [125] (Gummow and Hayne JJ.), [267] (Heydon J.), which seem to describe a persuasive presumption.
[41] [2006] SGCA 39, [2007] 1 S.L.R.(R.) 377.
[42] Ibid., at [43].
[43] [2001] NSWCA 87, (2001) 52 N.S.W.L.R. 492.
[44] Ibid., at [144].
[45] Ibid., at [162].

displace it".[46] He also suggested that the "presumption of similarity" had a narrow basic fact, similar to that which Heydon J.A. identified in *Damberg*. The presumption would "more likely" apply "where the applicable foreign law is another common law system" or where the rule of English law reflected "'great and broad' principles of law which are likely to impose an obligation in all developed legal systems".[47] By contrast, it would "less likely" apply when the rule of English law "is contained in a statute … which introduces a local scheme of regulation".[48]

On a third view, however, the presumption of similarity is not a presumption at all but an *inference*. This view finds support in another reading of Lord Leggatt's judgment in *Brownlie*. Whether the "presumption" would apply, he said, is a "question … of fact", namely whether "in the circumstances is it reasonable to expect that the applicable foreign law is likely to be materially similar to English law on the matter in issue".[49] Thus, it was "in the nature" of the "presumption" that "its application may often be uncertain" and "difficult to predict".[50] There were only "broad generalisation[s]" rather than "hard and fast rules": the so-called presumption was only "more likely" to apply where the relevant foreign legal system is a common law system or where the relevant English rule reflects a universal norm – suggesting that even these facts may not by themselves necessarily place any evidential burden on the contesting party to adduce foreign law evidence. In other words, these "broad generalisations" merely describe examples of indirect evidence about the content of foreign law, from which courts may sometimes, but will not always, draw certain conclusions about foreign law's content.

Admittedly, this third view is largely implicit rather than explicit in Lord Leggatt's judgment in *Brownlie*. It also seems to contradict his use throughout of the word "presumption" rather than "inference". But it seems clearly expressed in at least this one passage: "the presumption of similarity is only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence … English courts are prepared in some cases to draw conclusions about the content of foreign law on such an indirect basis."[51] This view has also gained some traction since *Brownlie*. In *Soriano v Forensic News L.L.C.*, for example, Warby L.J. described the "presumption" as a "common sense … sensible inference" about foreign law,[52] while in *Granville*

[46] *Brownlie v FS Cairo* [2021] UKSC 45, at [125].
[47] Ibid., at [144].
[48] Ibid., at [145].
[49] Ibid., at [126].
[50] Ibid., at [146].
[51] Ibid., at [149].
[52] *Soriano v Forensic News L.L.C. and others* [2021] EWCA Civ 1952, [2022] Q.B. 533, at [64].

Technology Group Ltd. v LG Display Co. Ltd., Foxton J. described it as a "presumption[] of fact" and "a reasonable inference".[53] Yet it is fair to say that courts remain equivocal: in both these decisions, the "presumption" was still described at points as an "evidential presumption"[54] or a presumption as distinct from an "inference".[55]

Today, then, there seems to be no consensus on whether the "presumption of similarity" is:

- An *initial (persuasive) presumption*, triggered whenever foreign law is applicable under a choice-of-law rule, placing the burden of proving that foreign law is different from English law on the contesting party;
- An *argumentative (evidential) presumption*, triggered once the relying party proves that the relevant foreign legal system is a common law system or that the relevant English rule reflects a universal norm, placing the burden of adducing evidence of foreign law on the contesting party; or
- An *inference*, where the court concludes at the end of the factfinding process that foreign law and English law are materially similar, based on the other indirect evidence of foreign law, including but not limited to the fact that the relevant foreign legal system is a common law system or that the relevant English rule reflects a universal norm.

IV. Foreign Law as Foreign Legal Rulings

Should we understand the "presumption of similarity" as an initial (persuasive) presumption, an argumentative (evidential) presumption, or an inference? I will argue that only the last option is justifiable. Before that, however, I must address a prior definitional question: what do courts mean when they talk about "foreign law"? This question is important because, in order for us to figure out whether it is ever justifiable for courts to presume or infer that "foreign law is similar to English law", we first need to know what "foreign law" is.

When English courts talk about "foreign law", they are referring to the *legal ruling* that the foreign court would render on the same facts, were proceedings brought before it, rather than the *legal rules* the foreign court would apply to get there.[56] A legal rule is a general legal norm, applicable to classes of people or conduct, while a legal ruling is a

[53] *Granville Technology Group Ltd. (in liquidation) and others v LG Display Co. Ltd. and another* [2023] EWHC 2418 (Comm), [2024] 1 W.L.R. 100, at [12], [23].
[54] Ibid., at [21]–[22] (Foxton J.).
[55] *Soriano v Forensic News* [2021] EWCA Civ 1952, at [65] (Warby L.J.).
[56] See M. Teo, "Foreign Law as Fact" [2024] L.M.C.L.Q. 635, 647–50.

specific legal norm that determines what legal rights and obligations specific parties who engaged in specific conduct have, which results from the application of, but is conceptually independent from, legal rules.[57] Put another way, the foreign legal ruling is the *fact-in-issue* in any claim or defence governed by foreign law: for a litigant to prove that "foreign law" grants her the claim or defence she alleges it would, she must show that the foreign court would render the ruling she alleges it would on the same facts. Evidence of foreign legal rules does still remain admissible, but only because those rules are relevant facts from which English courts may infer whether the fact-in-issue (the legal ruling the litigant alleges the foreign court would render) does or does not exist.[58]

Why should we understand "foreign law" in this sense, as referring to foreign rulings rather than foreign rules? For one, not only is this view widely endorsed by courts[59] and commentators[60] today, but the cases also support it. In particular, it explains why English courts faced with foreign statutes must ascertain their "exposition, interpretation and adjudication" by foreign courts,[61] ideally in relation to the "very facts" before them,[62] while English courts faced with foreign rules conferring judicial discretion must ascertain both "the relevant rules" and "their fact sensitive application to the circumstances" by the foreign court.[63] Admittedly, courts often say that, when interpreting foreign law contracts, they must ascertain the foreign rules of interpretation from the evidence but then apply those rules for themselves.[64] But this statement is inaccurate, because it elides two distinct questions arising under the process of interpretation.[65] The first is a linguistic question: "what did parties intend to communicate?" This is a question of fact for the law of evidence and civil procedure, which is governed by the *lex fori*. The second question is a legal question: "what legal norms should be derived from those communications?" This is the true question of substance, governed by the foreign *lex contractus*. This explains, for example, why

[57] J. Gardner, "The Legality of Law" (2004) 17 Ratio Juris 168, 169; T. Endicott, "The Generality of Law" in L.D. d'Almeida, J. Edwards and A. Dolcetti (eds.), *Reading HLA Hart's The Concept of Law* (Oxford 2013), 22–26.

[58] Teo, "Foreign Law as Fact", 648.

[59] See e.g. *Perry and another v Lopag Trust Reg and others* [2023] UKPC 16, [2023] 1 W.L.R. 3494, at [11] (Lord Hodge) ("the task of the trial judge when there are disputed questions of foreign law is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it"); see also *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428, [2017] 1 C.L.C. 969, at [34] (Longmore L.J.); *Byers and others v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 W.L.R. 22, at [103] (Newey L.J.).

[60] See e.g. A. Briggs, *Private International Law in English Courts*, 2nd ed. (Oxford 2023), 37; R. Fentiman, *International Commercial Litigation*, 2nd ed. (Oxford 2015), [20.20].

[61] *Lazard Brothers and Co. v Midland Bank Ltd.* [1933] A.C. 289, 298, 301–02 (H.L.) (Lord Wright).

[62] *Bankers & Shippers Insurance Co. of New York v Liverpool Marine & General Insurance Co. Ltd.* (1926) 24 Ll. L. Rep. 85, 93–94 (H.L.).

[63] *Perry v Lopag Trust* [2023] UKPC 16, at [38] (Lord Hodge).

[64] *Di Sora v Phillipps* (1863) 11 E.R. 1168, 1172 (Lord Cranworth).

[65] See F. Wilmot-Smith, "Term Limits: What Is a Term?" (2019) 39 O.J.L.S. 705, 707–08.

the implication of terms in fact is governed by the *lex fori*, but the implication of terms in law is governed by the foreign *lex contractus*.[66] And on the latter question of substance, "the function of the [foreign law] expert would be to give an opinion on whether a particular term is implied by law",[67] namely on the interpretive ruling the foreign court would reach. Thus, insofar as interpreting foreign law contracts involves the application of foreign law, it is still the foreign court's interpretive ruling, rather than the interpretive rule it would apply to reach that ruling, which the English court must ascertain and replicate.[68]

There is another more fundamental reason why we should understand "foreign law" as referring to foreign rulings rather than foreign rules. Ascertaining and replicating foreign rulings directly fulfils the objective of rules on the application of foreign law, which is the *accurate prediction of foreign decisions*, or the goal that "courts of one country [should] strive to apply a foreign law as a foreign court would do".[69] Accurate prediction is a humble but important goal, because it gives effect to the applicable foreign law and thus to the substantive values underlying the English choice-of-law rules that allocated the issue to that foreign law, which would be frustrated if the English court then adjudicated in a manner that differed from how the foreign court would.[70] This is why the English court's role in applying foreign law is said to be "not normative, but predictive":[71] its only goal, as Lord Leggatt noted in *Brownlie*, is to reach a "materially similar … *outcome*" (i.e. ruling) to that which the foreign court would reach.[72]

V. The Inference of Similarity

Thus, when courts talk of "similarity between English law and foreign law", they are really talking about similarity between the rulings English and foreign courts would render on the same facts. What does this tell us about how we should understand the "presumption of similarity"? Is it ever justifiable to presume or infer that English and foreign courts would render similar rulings on the same facts?

[66] *Vizcaya Partners Ltd. v Picard* [2016] UKPC 5, [2016] 3 All E.R. 181, at [60]–[61] (Lord Collins).
[67] Ibid., at [61].
[68] Teo, "Foreign Law as Fact", 653–54; see also J. McComish, "Pleading and Proving Foreign Law in Australia" (2007) 31 Melbourne University Law Review 400, 419–20 (*Di Sora v Phillipps* concerned "the parole evidence rule" not "any proposition about the proof of foreign law more generally").
[69] R. Fentiman, "Foreign Law" in W. Day and S. Worthington (eds.), *Challenging Private Law: Lord Sumption on the Supreme Court* (Oxford 2020), ch. 20, 393.
[70] M. Bogdan, "Private International Law as Component of the Law of the Forum" (2010) 348 Recueil des Cours 11, 112; Teo, "Foreign Law as Fact", 643–44.
[71] Fentiman, *International Commercial Litigation*, [20.20]; see also R. Michaels, "Private International Law and the Question of Universal Values" in F. Ferrari and D.P. Fernández Arroyo (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham and Northampton, MA 2019), ch. 5, 175.
[72] *Brownlie v FS Cairo* [2021] UKSC 45, at [123]–[124], emphasis added.

Here, I argue that the "presumption of similarity" can only justifiably be understood as an *inference* that, sometimes, English and foreign courts would render similar rulings on the same facts. This requires me to show (1) that such an inference is sometimes justifiable and (2) that a true presumption is not. I do the first here and the second in the next section.

Inferences, we recall, are conclusions of fact, i.e. actual beliefs which courts think they have sufficient reason to hold in light of the evidence. So, to determine whether an inference of similarity is justifiable, we must ask: can courts ever reliably conclude that English and foreign courts would reach similar rulings on the same facts?

Lord Leggatt's answer in *Brownlie* was "yes, sometimes": "there is often good reason to expect that the foreign law will provide the same answer to a legal question, even if the result is reached by a different legal route."[73] Lord Leggatt appears to have drawn on a famous insight from the field of comparative law, that "the legal system of every society … solves [legal] problems by quite *different means* though very often with *similar results*".[74] This insight is that legal systems are sometimes "functionally equivalent" in terms of the practical solutions and outcomes that they adopt towards legal questions rather that the details of doctrine applied to reach those outcomes.[75] The focus of such claims of equivalence is not "on rules alone but on their effects, not on doctrinal structures and arguments alone but on the consequences they bring about"[76] – or in Lord Leggatt's words, not on the "legal route" but the "legal answer".

Thus, comparative law tells us that we can *sometimes* reliably conclude, even in the face of uncertain evidence, that different legal systems applying different legal rules will nevertheless produce similar rulings. Importantly, however, comparative lawyers are also quick to tell us that we cannot *always* or even *generally* do this; that we cannot reliably presume (even rebuttably) that different legal systems would reach similar results on (even a discrete subset of) legal questions. Instead, all that comparative lawyers are comfortable saying is that one can have a "common sense" intuition that, sometimes, different legal systems really do tend to reach similar rulings, this being but one possible conclusion the comparativist can draw when seeking to ascertain foreign law's content.[77] As Gerhard Dannemann notes, one can make the "observation that, given the considerable differences between some legal systems, it is noteworthy how often they

[73] Ibid., at [123].
[74] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed., T. Weir (trans.) (Oxford 1998), 34, emphasis added; J.C. Reitz, "How to Do Comparative Law" (1998) 46 American Journal of Comparative Law 617, 622.
[75] R. Michaels, "The Functional Method of Comparative Law" in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), ch. 10, 347–48.
[76] Ibid., at 345, 347; see also G. Dannemann, "Comparative Law: Study of Similarities or Differences?" in Reimann and Zimmermann (eds.), *The Oxford Handbook*, ch. 14, 395.
[77] J. Husa, *A New Introduction to Comparative Law* (Oxford and Portland, OR 2015), 183–86; see also U. Kischel, *Comparative Law* (Oxford 2019), 168; Dannemann, "Comparative Law", 401–02, 418–19.

nevertheless produce the same results in certain areas of law, in particular if the non-legal context is similar".[78]

The key question, then, is this: when exactly will this "common sense" conclusion be accurate? In *Brownlie*, Lord Leggatt said, as a "broad generalisation", that foreign law and English law are likely similar where (1) the foreign legal system is a common law system or (2) English law reflects "great and broad principles of law", and likely different when (3) English law contains a "statute" creating "a local scheme of regulation".[79] Again, Lord Leggatt appears to have drawn from more detailed insights in comparative law about the conditions which might make it more reliable to conclude that two legal systems will produce similar rulings on the same facts. Generalisation (1) reflects the instinct that legal systems tend to be path dependent. The shared legal tradition that common law systems have, constituted by similar principles and precedents, will often lead courts to apply similar rules and reach similar decisions.[80] Generalisation (2) reflects another instinct, that aspects of different legal systems tend to reflect certain universal legal norms, especially "those areas of … substantive … private law which … are not culturally or politically sensitive".[81] Generalisation (3) is the obverse of the other two. Where the relevant aspect of English law is "local", not a feature of a shared tradition or universal ethos, it is unlikely that English and foreign courts would render similar rulings on the same facts.

Importantly, however, because these are only generalisations, even when all three are reflected in a given case, a conclusion that two legal systems would produce similar rulings on the same facts will not always be accurate. Consistent with the comparative law insight, the facts highlighted in those generalisations will always weigh in favour of, but will not always constitute sufficient evidence to support, a conclusion that foreign and English courts would render similar rulings on the same facts. As Dannemann puts it: "It is obvious that the results which different legal systems produce for similar or identical cases will sometimes be similar and sometimes be different … similar results [can be] produced by legal rules, institutions, or systems which show considerable difference … [and] different results [can be] produced by similar rules, institutions, or systems."[82]

Thus, an inference of similarity is *sometimes* justifiable. Comparative law tells us that *sometimes* English courts may indeed reliably conclude that foreign courts would render a similar ruling to their own on the same

[78] Dannemann, "Comparative Law", 401–02, 419, emphasis added.
[79] *Brownlie v FS Cairo* [2021] UKSC 45, at [144]–[145].
[80] See J. Bell, "Path Dependence and Legal Development" (2013) 87 Tulane Law Review 787, 791–97; for an argument that the common law is particularly susceptible to path dependent development, see O.A. Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2000) 86 Iowa Law Review 601, 622–49.
[81] Dannemann, "Comparative Law", 401.
[82] Ibid., at 418.

facts, when the relevant aspect of English law reflects a shared tradition or universal ethos. But it also tells us that those facts will not *always* or even *generally* suffice to support a reliable conclusion of similar rulings. The upshot, of course, is that it may not be clear to litigants whether courts will draw the inference of similarity or not at trial – everything will depend on the facts and "broad generalisations" are all they have to go on. Yet, a lack of clear guidelines on when the inference of similarity will be drawn is simply "in [its] nature" as an inference.[83] After all, it will rarely be possible to say in advance that a court can always reliably infer p on the basis of q, unless q is defined in very broad terms, capturing every possible set of facts from which the court might draw a reliable conclusion that p exists[84] – which provides little more practical guidance than saying, as a generalisation, that q, defined narrowly, may sometimes but may not always justify a conclusion that p.

At this point, a practical objection might be raised: might this uncertainty about when courts will draw the inference of similarity make proving foreign law more unpredictable, inconvenient and costly for litigants in practice?[85] If so, is this not a good reason to allow courts to apply a true presumption of similarity instead?[86] This practical objection, however, presupposes some understanding of when the inference may legitimately be drawn and what uses can legitimately be made of it. I will thus return to the practical objection below in Section VIII, after exploring the doctrinal implications of the inference of similarity in Section VII. For now, though, we should note that this practical objection constitutes, at most, a pragmatic reason to accept what might be unjustifiable in principle. And, as I will now argue, it *is* unjustifiable in principle for courts to apply a true presumption of similarity in the proof of foreign law.

VI. No True Presumption

The strongest principled argument that I can think of in favour of a true presumption of similarity goes something like this. Why can't courts, unlike comparative lawyers, *presume* rather than just infer that foreign courts would render similar rulings to English courts on the same facts? Courts and comparative lawyers are obviously different institutions with

[83] *Brownlie v FS Cairo* [2021] UKSC 45, at [146] (Lord Leggatt).

[84] See e.g. the "basic facts" that trigger the "presumption of inducement" in misrepresentation and the "doctrine" of *res ipsa loquitur*, discussed in text accompanying notes 29–31.

[85] See B. Phelps, "*Brownlie v Four Seasons Holdings Inc* (2017) and *Brownlie v FS Cairo (Nile Plaza) LLC* (2021)" in W. Day and L. Merrett (eds.), *Landmark Cases in Private International Law* (Oxford 2023), ch. 18, 407; see also W. Day, "Pleading and Proving Foreign Law" [2022] C.L.J. 24, 27 (Lord Leggatt's judgment "potentially open[s] the gate to difficult comparative law arguments when parties now seek to rely on the presumption"); J. Atmaz Al-Sibaie, "Foreign Claims and Foreign Law" [2022] L.M.C.L.Q. 183, 188 (post-*Brownlie*, "[i]n the absence of further guidance, the presumption is unlikely to be used by the faint of heart").

[86] Thanks to the anonymous reviewer for pushing me to address this.

different goals and limitations. In particular, courts, unlike comparative lawyers, are not tasked with searching for some ideal truth about the content of foreign law. Courts must resolve concrete disputes, which requires them to make decisions, based on often inconclusive foreign law evidence, within time and resource constraints. And so, one might argue, courts should be cut some slack in ascertaining foreign law. They should be entitled to rely on shortcuts that comparative law scholars cannot, like a true *presumption* of similarity.

Is this argument sound? The answer to that turns on a more fundamental question: when are presumptions ever justified?

Presumptions, we recall, are meant to facilitate and expedite practical reasoning in the face of evidential uncertainty and resource constraints, by allowing courts to proceed on the basis of a given factual proposition as if it were true when resolving legal disputes.[87] This is what is meant in *Cross and Tapper on Evidence*, that presumptions "resolve an impasse in either proof or procedure".[88] And recall also that this explains why a presumption cannot rest solely on the evidential value of its basic facts; it allows the court to decide "as if" the presumed fact exists, without concluding that that fact actually exists.[89]

This, one might argue, justifies a true presumption of similarity. Courts often face impasses in the foreign law evidence and they do need rules to break those impasses, because they must resolve legal disputes within time and resource constraints. But this will not suffice, because impasse-breaking is only half the justificatory picture. That presumptions exist to break evidential impasses says nothing about *how* they should go about doing that. In this regard, Edna Ullmann-Margalit argues that presumptions impose a "systematic bias" in favour of proceeding on one factual basis (i.e. that the presumed fact exists) over another (i.e. that it does not exist), in circumstances where the chances of either being wrong are equal (i.e. given evidential uncertainty). It follows that "it is the independent justifiability of such a biased solution which is crucial for the [presumption] to be justified".[90]

Ullmann-Margalit's observation, that presumptions create a bias in need of justification, holds true for both persuasive and evidential presumptions. This bias is obvious for persuasive presumptions, which shift the burden of proof, from the relying party who originally had to prove the presumed fact on a balance of probabilities, to the contesting party who must now disprove the presumed fact on a balance of probabilities. But even evidential

[87] Ullmann-Margalit, "On Presumption", 154–56.
[88] Munday, *Cross and Tapper*, 137.
[89] Ullmann-Margalit, "On Presumption", 157–58.
[90] Ibid., at 156.

presumptions reflect such a bias.[91] Admittedly, an evidential presumption only shifts the burden of adducing evidence from the relying party who originally had to adduce evidence for the presumed fact, to the contesting party who must now adduce evidence against the presumed fact, upon proof of the basic fact. But in the absence of that evidential presumption, proof of the basic fact would still not be strong enough to support a finding that the presumed fact exists. What the evidential presumption does, then, is artificially "upgrade" the evidential weight of the basic fact into proof of the presumed fact, once the contesting party fails to adduce evidence against the presumed fact. This "upgrading" effect, I should acknowledge, appears more muted in cases where the presumed fact under an evidential presumption would coincidentally be a reliable conclusion for a court to draw from proof of the (positive) basic fact alongside proof of the (negative) fact that no further evidence against the presumed fact exists. However, even in these coincidental cases, the operation of the evidential presumption will still reflect a bias in favour of the presumed fact, because it will still relieve the relying party of her ordinary duty of having to prove the negative fact that no further evidence against the presumed fact exists and place the burden of adducing evidence against that negative fact on the contesting party.

Thus, all true presumptions – both initial and argumentative presumptions and for the latter, both persuasive and evidential presumptions – reflect some bias in favour of the presumed fact existing. All true presumptions can therefore only be justified on grounds that it would be better, in some sense, for courts to err on the side of proceeding as if the presumed fact exists than otherwise. Thus, for the "presumption of similarity" to be justified as a true presumption of any sort, there must be reason to think that it is better, in some sense, for courts faced with uncertain foreign law evidence to err on the side of proceeding as if the foreign court would render the same ruling as English courts would on the same facts.

But no such reasons exist. Ullmann-Margalit highlights three potential justifications for presumptions, which she calls "determinateness consideration[s]", considerations of "procedural convenience" and "normative consideration[s]".[92] None of them can justify a true presumption of similarity.

Determinateness considerations involve the idea that, when courts face evidential impasses, they should not proceed on any indeterminate factual basis, if a determinate alternative exists. This determinateness consideration is thus one of sheer practical workability: indeterminate presumed facts can "hardly be of use as a guide for action".[93] Examples

[91] For a similar conclusion about the "presumption of similarity" understood as an evidential presumption, see Phelps, "*Brownlie* and *Brownlie*", 408.
[92] Ullmann-Margalit, "On Presumption", 159–62.
[93] Ibid., at 161.

of true presumptions resting on determinateness considerations include the presumption of sanity[94] and the presumption of regularity for machines.[95] Contrary presumptions (of insanity and irregularity) would be absurd: since there is rarely direct evidence for or against these common presumed facts, courts would have to proceed as if people are generally insane and machines generally malfunction, which is both implausible and impractical. Another example of a presumption resting on a determinateness consideration is the presumption that a person unheard of for seven years is dead.[96] A contrary presumption (of perpetual life) would indefinitely postpone the operation of numerous legal processes contingent on the establishment of death.

The "presumption of similarity", however, obviously cannot be a true presumption grounded on a determinateness consideration. A court faced with evidential uncertainty on foreign law has another course of action available: it can hold that the relevant party "fails to prove its [foreign law] claim or defence" with the result that "the claim is dismissed or the defence rejected".[97] And this option of dismissal is by no means unworkable. Indeed, Lord Leggatt called it the "ordinary consequence" of failing to establish one's claim or defence.[98]

Procedural convenience considerations involve the idea that, while in general the party who asserts a fact must prove it, it may be reasonable to require the party contesting it to disprove it instead if the contesting party likely knows more about that fact. Such convenience considerations place the burden of disproving the presumed fact on the contesting party to "help the game along best";[99] they enjoin "both parties [to] contribute in a collaborative manner to moving the [proceedings] along toward its goal".[100] Examples of presumptions resting on these procedural convenience considerations include those requiring the contesting party to disprove facts which occur within circumstances she has relative control over, like the presumption that a breach of a duty of care caused loss in bailment[101] and fiduciary[102] relationships.

Again, however, the "presumption of similarity" obviously cannot be a true presumption grounded on a procedural convenience consideration. There is no good reason to think that the party contesting the existence

[94] *Sutton v Sadler* (1857) 140 E.R. 671.
[95] *Cracknell v Willis* [1988] A.C. 450, 467 (H.L.) (Lord Griffiths).
[96] See *Chard v Chard* [1956] P. 259, 272 (P.) (Sachs J.).
[97] *Brownlie v FS Cairo* [2021] UKSC 45, at [117] (Lord Leggatt).
[98] Ibid.
[99] Ullmann-Margalit, "On Presumption", 162.
[100] D. Walton, *Burden of Proof, Presumption and Argumentation* (New York 2014), 115.
[101] *Port Swettenham Authority v T. W. Wu and Co. (M) Sdn. Bhd.* [1979] A.C. 580, 590 (P.C.).
[102] As is the position in many common law jurisdictions: see e.g. *Premium Real Estate Ltd. v Stevens* [2009] NZSC 15, [2009] 2 N.Z.L.R. 384, at [85]; *Libertarian Investments Ltd. v Hall* (2013) 16 HKCFAR 681, at [93]–[96]; *Sim Poh Ping v Winsta Holding Pte Ltd.* [2020] SGCA 35, [2020] 1 S.L.R. 1199, at [240]–[248].

of a particular norm of foreign law has better knowledge of foreign law's content than the party relying on it.

Normative considerations, finally, are naked policy preferences. Where courts must choose which of two equally plausible factual bases they should proceed on, they should generally select that which leads to substantively better outcomes. The question is "whether one type of error is to be preferred, on grounds of moral values or social goals, over the other(s)" – if so, the court should adopt the presumption biased towards that error.[103] Examples of presumptions resting on normative considerations include those that exist to protect people from serious allegations, like the presumption of innocence, the presumption of legitimacy from birth within wedlock and the presumption of marriage by cohabitation and reputation.[104] Other such presumptions exist to protect people from losing assets, like the presumption of resulting trust[105] or the presumption of undue influence.[106] Still other examples can be found in statutory interpretation,[107] in the form of interpretive presumptions reflecting constitutional or public law values, like the presumption of legality,[108] the presumption against extraterritoriality,[109] and the presumption of conformity with international law.[110]

Crucially, though, the "presumption of similarity" also cannot be a true presumption grounded on normative considerations. There is nothing normatively undesirable about the alternative option of dismissing the foreign law claim or defence. In particular, it cannot be argued that the dismissal option might be "unfair" because it would "penalise [the relying] party for failing to establish something which, in a sense, is beyond determination".[111] After all, even where the content of foreign law is truly beyond determination, the alternative to dismissal – conjuring a claim for the relying party against the contesting party based on non-existent or unproven facts – seems no less unfair.

More importantly, there *is* something normatively undesirable about a true presumption of similarity. Typically, parties who plead but do not

[103] Ullmann-Margalit, "On Presumption", 159; see also D.M. Godden and D. Walton, "A Theory of Presumption for Everyday Argumentation" (2007) 15 Pragmatics & Cognition 313, 337–38.

[104] Which explains the first presumption is rebuttable only by proof beyond reasonable doubt and why the latter two presumptions were until recently thought also to impose such demanding standards of proof: see e.g. *S v S* [1972] A.C. 24, 40–41 (H.L.) (Lord Reid); *Hayatleh v Modfy* [2017] EWCA Civ 70, at [35] (McFarlane L.J.).

[105] Y.K. Liew, "Trusts: Modern Taxonomy and Autonomy" (2021) 35 Trust Law International 27, 38–40, 48–49.

[106] *Barclays Bank Plc v O'Brien and Another* [1994] 1 A.C. 180, 189 (H.L.).

[107] Note that, on the orthodox account of statutory interpretation, the legal content of a vaguely worded statutory provision turns on a question of fact, i.e. what Parliament intended it to mean: see e.g. R. Ekins, *The Nature of Legislative Intent* (Oxford 2012).

[108] *R. v Secretary of State for the Home Department, ex parte Simms and another* [2000] 2 A.C. 115, 131 (H.L.).

[109] *R. (KBR Inc.) v Director of the Serious Fraud Office* [2021] UKSC 2, [2022] A.C. 519, at [24]–[25].

[110] *In re Scottish Independence Reference Bill* [2022] UKSC 31, [2022] 1 W.L.R. 5435, at [87].

[111] Cf. Fentiman, *Foreign Law*, 303.

prove foreign law invoke the "presumption of similarity" in an attempt to establish that foreign law or a part thereof is similar to English law. And so, a true presumption of similarity would raise the risk of "serious prejudice to [the contesting party] arising from forum shopping by the [relying party]",[112] namely the risk of preventing the *accurate prediction of foreign decisions*. After all, its effect would be that, where the foreign law evidence is inconclusive, a claim or defence governed by foreign law might be allowed to succeed *simply because* foreign law is presumed similar to English law. That, in turn, would necessarily frustrate the substantive values underlying the choice-of-law rule that allocated the issue *away* from English law in this instance.[113] And since the accurate prediction of foreign decisions is the goal of the process of applying foreign law, a presumption that operates within that process, but which undermines that goal, cannot be justified.

Thus, the "presumption of similarity" cannot justifiably be understood as a true presumption. But why, then, did courts view it as one for so long? One explanation might be that the "presumption" stems from a "superiority complex" English courts have and their "belief that [English law] is the better law" for international commercial disputes.[114] Such an uncharitable view of any legal doctrine is best avoided. A better explanation is provided by Tan Yock Lin: that, historically, the "presumption of similarity" ameliorated "systemic risks of failure of proof of foreign law".[115] Pre-twentieth century English procedural law was not kind to foreign litigants. They had to have their factual disputes tried by English jurors and were limited only to English witnesses and lawyers; moreover, defendants in particular were often unable to escape trial in England because courts rarely refused to exercise jurisdiction seized as of right.[116] In other words, in the past there were indeed normative considerations which justified a true presumption of similarity: without it, foreign litigants would almost certainly have their foreign law claims or defences dismissed for want of evidence. But these concerns are now "largely or virtually things of the past", with the advent of more even-handed rules of evidence and the doctrine of *forum non conveniens*.[117] A true

[112] Tan, "Presumption of Similarity", 206; see also A. Gray, "Choice of Law: The Presumption in the Proof of Foreign Law" (2008) 31 UNSW Law Journal 136, 154–55; M. Davies, "*Neilson v Overseas Projects Corporation of Victoria Ltd*: *Renvoi* and Presumptions about Foreign Law" (2006) 30 Melbourne University Law Review 244, 263–64.

[113] See *Pacific Recreation Pte Ltd. v S Y Technology Inc. and Another* [2008] SGCA 1, [2008] 2 S.L.R.(R.) 491, at [33] (V.K. Rajah J.A.), calling this a "startling effect" of the "presumption".

[114] S. Geeroms, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis* (Oxford 2004), 228; Gray, "Choice of Law", 139–40; for a criticism, see A. Briggs, "Book Review of *Foreign Law in Civil Litigation: A Comparative and Functional Analysis*" [2005] L.M.C.L.Q. 119, 121.

[115] Tan, "Presumption of Similarity", 183.

[116] Ibid., at 182–83.

[117] Ibid., at 183–84.

presumption of similarity based on such concerns has thus "outlived its usefulness" and cannot be justified today.[118]

VII. Implications

In principle, then, the "presumption of similarity" should be understood as an inference of similarity, which can only be drawn sometimes, where there are enough facts before the court – including but not limited to the fact that the relevant aspect of English law reflects a shared tradition or universal ethos – to allow it to conclude reliably that English and foreign courts would likely render similar rulings on the same facts. By contrast, courts cannot justifiably apply a true presumption of similarity, which would operate to break evidential impasses on foreign law in a manner that cannot be justified on determinateness, convenience or normative considerations.

Accepting this – that the "presumption of similarity" should only be an *inference* of similarity – has at least four implications for extant case law.

A. *Partially Proven Foreign Law*

First, it establishes how the "presumption of similarity" remains justifiable when the relying party has pleaded foreign law but only proven it partially. Consider, for example, a dispute involving a claim in negligence governed by Ruritanian law. Assume also that there is clear evidence that Ruritanian rules on duty of care are more generous than English law's, but that there is also some inconclusive evidence that Ruritanian rules on breach may be stricter than English law's. What happens if the claimant proves only that the defendant owed her a duty of care under Ruritanian law, but not that the duty was breached? Can the claimant invoke the "presumption of similarity" to have the English rules on breach applied?

The idea that she can has proven controversial. Commentators have suggested that this would allow the claimant to fill "gaps" in her case,[119] or to put herself in a better position than her failure to prove foreign law,[120] which would be unfair. As authority, commentators generally cite *Tamil Nadu Electricity Board v ST-CMS Electric Company Private Ltd*.[121] There, Cooke J. reasoned that, where a party bears the burden of proving foreign law, it would be unjust to allow her to invoke the presumption of similarity "when, as a result of [the relying party's] own actions or inactions, the [foreign] law evidence provided by [her] … did

[118] Ibid., at 184.
[119] Lord Collins and J. Harris (eds.), *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed. (London 2015), [9-027].
[120] See e.g. A. Mills, "Arbitral Jurisdiction and the Mischievous Presumption of Identity of Foreign Law" [2008] C.L.J. 25, 27; Tan, "Presumption of Similarity", 201–03; D. Foxton, "Foreign Law in Domestic Courts" (2017) 29 Singapore Academy of Law Journal 194, 198–99.
[121] [2007] EWHC 1713 (Comm), [2007] 2 All E.R. (Comm) 701.

not cover the issue now sought to be raised".[122] Such a "tactical decision" might amount to "an abuse of process".[123]

This perception of unfairness is well-founded if the "presumption of similarity" is understood as a true presumption, which places a burden of disproving or adducing evidence against similarity on the contesting party.[124] Moreover, while this unfairness seems merely theoretical when the relying party simply pleads but does not prove foreign law at all (because she could have legitimately achieved the same result by not pleading foreign law in the first place), it becomes more real when the relying party partially proves foreign law and deliberately keeps silent on the remainder (i.e. the "gap-filling" situation). In this situation, the relying party armed with a true presumption of similarity would be able to rest her case on some hybrid of foreign and English law, unless and until the contesting party proves or adduces significant evidence on the true content of the rest of the applicable foreign law. She gets the "best of both worlds" by combining two aspects of two systems of law that were never meant to go together.[125]

However, this perception of unfairness disappears if the "presumption of similarity" is understood as an inference. An inference can only be drawn when, in the circumstances, the court can reliably conclude from the proven facts that the inferred fact exists. Thus, the relying party will get no benefit from deliberately leaving gaps in her foreign law evidence. Instead, to have the court draw an inference of similarity, the relying party must do something more: she must show, in light of what has already been established about foreign law's content (including the partially proven rules of foreign law), that the foreign court would likely render a ruling similar to English law's. In our negligence hypothetical, for example, even assuming that the Ruritanian legal system is a common law system, once the claimant proves that Ruritanian rules on duty of care are different from English law's, the English court will probably not infer that the Ruritanian court's ultimate ruling on the defendant's liability would be similar to its own. Absent further evidence, that inference seems unreliable. And if the inference of similarity can only be drawn where reliable, the relying party can never use it as a "tactical move" to avoid proving part of foreign law.

What of *Tamil Nadu*, then? It is noteworthy that recent cases have read Cooke J.'s statements restrictively: the "presumption of similarity" is withheld only when applying it would be "procedurally unfair", in that the contesting party would have an insufficient opportunity to adduce

[122] Ibid., at [99].
[123] Ibid.
[124] Fentiman, *Foreign Law*, 152–53.
[125] Foxton, "Foreign Law", 198–99.

evidence to challenge it.[126] And this, too, makes sense if the "presumption" is simply an inference about the foreign court's likely ruling. Inferences, we recall, are conclusions drawn after the court has seen all the evidence and heard all the arguments. Inferences thus can never be reliably drawn when the contesting party has not a genuine opportunity to challenge and rebut the evidence which might support it.

B. *Mandatory Proof of Foreign Law*

Second, understanding the "presumption of similarity" as an inference suggests why it should be relevant even when parties are under a duty to prove foreign law. In *Brownlie*, Lord Leggatt explained why, most of the time, there is no duty to prove foreign law: choice-of-law rules are voluntary, because most English legal rules are voluntary: "in an adversarial system … if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion."[127] However, as Richard Fentiman points out, there are obviously rules of law which require parties to prove foreign law without the possibility of applying English law by default. Examples include criminal proceedings[128] and matrimonial proceedings[129] where the existence of a foreign marriage is an issue.

A comprehensive study of when and why proof of foreign law is mandatory is beyond this article's scope. The general impression one gets, at least, is that a party comes under a duty to prove foreign law when she pleads an English rule that raises an issue of foreign law as an incidental question,[130] or when third parties or the general public have interests in the issue governed by foreign law.[131] This would explain perhaps the most prominent example of mandatory proof – the claimant's retaliatory duty to plead foreign law – for if the claimant accepts that foreign law applies under an English choice-of-law rule, she has no choice but to advance a case on it.[132] The important point for our

[126] *Brownlie v FS Cairo* [2021] UKSC 45, at [152] (Lord Leggatt); see e.g. *AIG Financial Products Corp. and other companies v Gruber and others* [2020] EWCA Civ 31, at [93]–[94] (Flaux L.J.) (presumption unavailable to a party who "chose not" to prove foreign law's content for one issue, "notwithstanding that it did on other issues"); *Quadra Commodities S.A. v XL Insurance Company SE and others* [2023] EWCA Civ 432, [2023] 2 All E.R. (Comm) 909, at [105], [132] (Sir Flaux C.) (presumption unavailable to a party in relation to a foreign law issue it raised only at trial); cf. *Kazakhstan Kagazy plc and others v Zhunus (formerly Zhunussov) and others* [2018] EWHC 369 (Comm), at [119] (Picken J.) (presumption used to fill gap in claimant's case against arguments raised by defendants only during the hearing).

[127] *Brownlie v FS Cairo* [2021] UKSC 45, at [113] (Lord Leggatt).

[128] Fentiman, *Foreign Law*, 78–80.

[129] Ibid., at 114–19.

[130] See Tan, "Presumption of Similarity", 192 (describing the situation where the party is "obliged to plead the foreign law 'to provide a basis of a claim under the *lex fori*'").

[131] Like proceedings to determine title to property or personal status (Briggs, *Private International Law*, 33), involving foreign law illegality (T.C. Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 I.C.L.Q. 271, 288–89).

[132] See text accompanying note 8.

purposes, however, is simply that it is sometimes mandatory for parties to prove foreign law, because this raises the question: should a party obliged to prove foreign law be entitled to rely on the "presumption of similarity"?

If the "presumption" is a true presumption, the answer should be no. A true presumption, after all, obviates the need to prove the presumed fact until it is rebutted. And as Fentiman has argued, "it is hard to see how [a rule mandatorily applying foreign law] could be meaningful unless it also entails an obligation to establish the content of foreign law".[133] However, these concerns disappear if we understand the "presumption of similarity" as an inference. Inferences are reliable conclusions drawn from the other evidence. Thus, where the court infers that foreign law is similar to English law, it is making an actual finding about foreign law's content, rather than proceeding as if it has made such a finding. This does not defeat a mandatory obligation to prove foreign law – it simply means that the party who has successfully asked the court to draw the inference has fulfilled that obligation.

C. Similarity Between Foreign Laws

Third, understanding the "presumption of similarity" as an inference also justifies the drawing of an inference that the applicable foreign law is similar, not just to English law, but also to the law of a third state. Were the "presumption of similarity" a true presumption, courts would likely not be entitled to do this. Even assuming (contrary to my arguments above) that there are sound normative justifications for a true presumption of similarity, those justifications likely would not enable an English court to presume that the applicable foreign law is similar to the law of a third state. For example, if a true presumption of similarity were based on English law's perceived superiority over foreign law,[134] it surely should not apply in favour of the law of another "inferior" foreign state. And if a true presumption of similarity were based on the need to help foreign litigants avoid systemic risks of failure in the proof of foreign law,[135] it would be self-defeating to apply the presumption in favour of yet another foreign law. By contrast, an inference that foreign law is similar to a third state's law is not inherently more or less justifiable than an inference that foreign law is similar to English law. All that matters is whether, in the circumstances, such an inference can reliably be drawn.

Indeed, such an inference was drawn in *Brownlie* itself. The claimant and her family met with an accident in a vehicle driven by an employee of a hotel

[133] Fentiman, *Foreign Law*, 61; see also *EFT Holdings Inc. and another v Marinteknik Shipbuilders (S) Pte Ltd.* [2013] SGCA 64, [2014] 1 S.L.R. 860, at [58] (Sundaresh Menon C.J.).
[134] See text accompanying note 114.
[135] See text accompanying notes 115–118.

in Cairo where they were holidaying. The claimant sued the hotel in negligence and for breaching an implied contractual duty of reasonable care and had to establish a reasonable prospect of success for each claim to obtain leave for service out.[136] Both claims were governed by Egyptian law,[137] but the claimant chose to adduce no evidence thereon and instead relied on the "presumption of similarity".[138] Lord Leggatt said that, absent any evidence of Egyptian law, it would have been "reasonable to presume" that "under any system of law" the hotel would be liable in either contract or tort for the accident.[139]

However, to resist the claimant's tort claim in particular,[140] the hotel argued that "under Egyptian law it is not permissible to bring a claim in tort where there is a claim in contract".[141] In support of this argument, the hotel pointed only to the fact that "the Egyptian legal system is a civil law system, with a civil code that is based in large part upon the French Civil Code".[142] Lord Leggatt almost accepted this argument. He took "judicial notice of the fact that … the doctrine of 'non cumul' is a basic principle of civil law", in particular of French law.[143] This led him to the preliminary conclusion that, in general, the claimant "will not under Egyptian law be able to establish, as she could in principle under English law, that the defendant has concurrent liabilities in contract and in tort".[144] Ultimately, however, Lord Leggatt concluded that this did not defeat the claimant's arguable case in tort, because it remained unclear whether the doctrine of "non cumul" in Egyptian law would operate to deny her particular claims in tort.[145] That question had to be answered at trial.

But notice Lord Leggatt's reasoning in support of his preliminary conclusion on Egyptian law's general approach to concurrent liability. He drew that preliminary conclusion first by finding (taking judicial notice) that French law recognised a doctrine of "non cumul", then inferring that Egyptian law would likely do the same because the Egyptian law is largely based on French law. In other words, Lord Leggatt inferred that the applicable foreign law (Egyptian law) was similar to the law of a third state (French law), rather than English law. That inference could reliably be drawn, given the legal heritage those two jurisdictions shared.

[136] *Brownlie v FS Cairo* [2021] UKSC 45, at [99].
[137] Ibid., at [98].
[138] Ibid., at [102]–[103] (Lord Leggatt). The claimant did, however, adduce Egyptian law evidence supporting a vicarious liability claim against the hotel, but this is irrelevant to our discussion here.
[139] Ibid., at [157].
[140] For the contract claim, the hotel argued unsuccessfully that it was time-barred under Egyptian law: ibid., at [155], [158].
[141] Ibid., at [155].
[142] Ibid., at [159].
[143] Ibid., citing in this regard Lord Goff's observations about concurrent liability in French law in *Henderson and Others v Merrett Syndicates Ltd. and Others* [1995] 2 A.C. 145 (H.L.).
[144] *Brownlie v FS Cairo* [2021] UKSC 45, at [160].
[145] Ibid.

D. Interlocutory Applications

Fourth, understanding the "presumption of similarity" as an inference makes sense of this statement from Lord Leggatt in *Brownlie*:

> [T]he procedural context in which the presumption is relied on matters. Self-evidently, there is more scope for relying on the presumption of similarity at an early stage of proceedings when all that a party needs to show in order to be allowed to pursue a claim or defence is that it has a real prospect of success. By contrast, to rely solely on the presumption to seek to prove a case based on foreign law at trial may be a much more precarious course.[146]

Many would have been surprised to see Lord Leggatt's statement be described as "self-evident". Before *Brownlie*, the prevailing opinion was actually to the contrary: that the "presumption of similarity" should *not* be available in interlocutory proceedings where the relying party only has to establish her case on a standard lower than a balance of probabilities (e.g. a "good arguable case" or a "real prospect of success").[147] And indeed, if Lord Leggatt was talking about a true presumption of similarity, his statement is conceptually and practically problematic.

Conceptually, it makes no sense. How can it be easier to "rely on" a true presumption in interlocutory proceedings as compared to trial? Granted, in many interlocutory proceedings, the applicable initial burden rule only requires the applicant to establish an arguable case and one way she can do this is by relying on a true presumption. But the effect of a true presumption – placing a persuasive or evidential burden on the contesting party to disprove or adduce evidence against the presumed fact – does not vary depending on the initial burden rule applicable in the relevant proceedings. In other words, a presumption does not impose a different burden in interlocutory proceedings compared to trial,[148] because that burden is imposed by the presumption itself, not the initial burden rule in the interlocutory proceedings. Thus, a true presumption of similarity should always be equally easy or difficult to rebut in interlocutory proceedings or at trial because it would impose the same (persuasive or evidential) burden on the contesting party wherever invoked.

Practical problems of unfairness to defendants also arise. If the relying party could easily invoke a true presumption of similarity in interlocutory

[146] Ibid., at [147]; for this statement applied, see *CHEP Equipment Pooling BV v ITS Ltd. and others* [2022] EWHC 741 (Comm), [2022] 4 W.L.R. 47, at [48].

[147] *National Shipping Corporation v Arab* [1971] 2 Lloyd's Rep. 363, 366 (C.A.); *The "Polessk" and "Akademik Iosif Orbeli"* [1996] 2 Lloyd's Rep. 40, 43–44 (Q.B.); R. Fentiman, "Laws, Foreign Laws, and Facts" (2006) 59 C.L.P. 391, 410; Tan, "Presumption of Similarity", 193–96.

[148] See e.g. *Solo Industries UK Ltd. v Canara Bank* [2001] EWCA Civ 1041, [2001] 1 W.L.R. 1800, at [32] (Mance L.J.) (the "presumption in favour of the fulfilment of independent banking commitments" to be "undiluted by any reference to 'arguable case'" when raised in interlocutory proceedings).

proceedings, she could then easily place a persuasive or evidential burden on the contesting party to disprove similarity. However, in many interlocutory applications, this places an onerous burden on the contesting party. That party might ordinarily bear only a weak burden of showing that she has an arguable case under the applicable foreign law and so ordinarily the foreign law evidence she adduced in her favour would be expected to be "necessarily incomplete".[149] For example, in summary judgment applications, a contesting party who resists summary judgment on a foreign law claim need only show that she has a "real prospect" of resisting it under the applicable foreign law; and in *forum non conveniens* applications, a contesting party seeking a stay need only "lead some evidence of differences between the foreign law and the *lex fori*".[150] In both those contexts, if the relying party could invoke a true presumption of similarity, she could transform the contesting party's weak burden into a persuasive or evidential burden and thereby require the contesting party to perform the onerous task of adducing "substantial evidence of foreign law at the jurisdictional stage".[151]

These conceptual and practical problems, however, are avoided if Lord Leggatt was speaking only of an inference of similarity. Conceptually, it makes perfect sense to say that it will be easier for an English court to infer (and for the relying party to convince it to infer) that English and foreign law are similar to the standard of a good arguable case, than it would be for the English court to infer (and for the relying party to convince it to infer) that English and foreign law are similar on a balance of probabilities. After all, an inference is a genuine finding of fact and findings of fact to a lower standard of proof can be reliably drawn with less or weaker evidence than findings of fact to a higher standard of proof. Practically, too, there would be nothing unfair about allowing the relying party to an English court to draw an inference that foreign and English law are similar in interlocutory proceedings, because the court will only do this when it thinks the inference can reliably be drawn. As Phang J.A. reasoned in *Rickshaw Investments*, the court asked to draw the inference of similarity in interlocutory proceedings must always "have regard to the fact" that the content of the applicable foreign law might "in all likelihood, differ from the *lex fori* in some respects".[152]

Lord Leggatt's ultimate conclusion in *Brownlie* – a decision on a preliminary jurisdictional application – is easily explained on the basis of

[149] Fentiman, "Laws, Foreign Laws, and Facts", 410.
[150] Tan, "Presumption of Similarity", 193–94.
[151] R. Garnett, "Determining the Appropriate Forum by the Applicable Law" (2022) 71 I.C.L.Q. 589, 624–25.
[152] *Rickshaw Investments v Nicolai Baron von Uexkull* [2006] SGCA 39, at [43] (Andrew Phang J.A.); see also *JIO Minerals FZC and others v Mineral Enterprises Ltd.* [2010] SGCA 41, [2011] 1 S.L.R. 391, at [96] (Andrew Phang J.A.).

the inference of similarity. Notwithstanding the claimant's failure to adduce any evidence of Egyptian law and notwithstanding Egyptian law's recognition of a doctrine of "non cumul", Nicol J. was not plainly wrong[153] to have held that the claimant had established a serious issue to be tried.[154] After all, since all legal systems would subject a defendant in the hotel's position to some sort of liability,[155] it was plausible for Nicol J. to infer, without more, that an Egyptian court would *arguably* reach a similar *result* as an English court would on the facts – even if he could not reliably infer that Egyptian law would *probably* contain similar *rules* as English law did.[156]

VIII. The Practical Objection

Having made my case that courts should, in principle, only ever infer that foreign law and English law are similar, I now return to the practical objection raised earlier: will limiting courts to the inference of similarity make proving foreign law more unpredictable, inconvenient and costly for litigants?

I do not think so. First, let us be clear about the practical objection's nature. The objection is not that the relying party's interests require foreign law to be presumed similar to English law, since this would involve the kind of unjustifiable bias criticised in Section VI. Nor is the objection that proving foreign law is generally impractical and inefficient, since this would remain so even if courts were not only limited to the inference and is really the consequence of foreign law being classified as a question of fact.[157]

Rather, the practical objection must be that it would be in the interests of *all parties* (i.e. the litigants and the court) if courts, when faced with inconclusive foreign law evidence, were entitled to establish foreign law's content by applying a true persuasive presumption of similarity, instead of just being limited to drawing inferences of similarity. In particular, the objection would go, a true presumption of similarity would (1) provide a *certain and predictable* means of establishing foreign law and (2) disincentivise use of *disproportionate evidence* of foreign law, in a manner that an inference of similarity would not. Against this, I will argue that a true presumption would achieve neither (1) nor (2).

[153] Since whether the claimant had a good arguable case was "an evaluative judgment with which an appellate court should be slow to interfere": *Brownlie v FS Cairo* [2021] UKSC 45, at [157] (Lord Leggatt).
[154] Ibid., at [160].
[155] Ibid., at [157].
[156] For a similar conclusion, see T. Ward and A.P. Ferguson, "Proof of Foreign Law: A Reduced Role for Expert Evidence?" (2024) 20 Journal of Private International Law 95, 102.
[157] See Fentiman, "Laws, Foreign Laws, and Facts", 426; for a defence of the fact doctrine, see Teo, "Foreign Law as Fact", 640–47.

A. Certainty and Predictability

A true presumption of similarity would theoretically give courts a relatively certain method of establishing foreign law in the face of inconclusive evidence: foreign law is presumed to be similar to English law. However, depending on the context, the certainty engendered by a true presumption of similarity seems either unnecessary (because the law achieves an equivalent level of certainty without the presumption) or ineffective (because it will be unclear whether the inconclusive foreign law evidence also rebuts the presumption).

In two contexts, the certainty engendered by a true presumption of similarity seems unnecessary. The first is where litigants seek to prove foreign law in *interlocutory proceedings*. As mentioned above,[158] it should typically be possible for a litigant to convince a court to infer, at the standard of an arguable case, that the foreign court would render a ruling similar to that which the English court would, without adducing much foreign law evidence. The second context is where litigants seek to prove foreign law at trial, but the relevant question of foreign law appears *simple*. Here, the English court can establish foreign law's content by relying solely on documentary evidence of the text of foreign law and even take judicial notice of a foreign law norm which is "notorious".[159] This is because foreign law is a question of fact like any other and courts often make simple factual findings on the basis of single pieces of documentary evidence,[160] and sometimes even take judicial notice of notorious facts.[161] In both these contexts, litigants will easily establish foreign law to the extent required. Neither copious foreign law evidence nor a true presumption of similarity seems necessary.

In a third context, however, the risk of uncertainty is greater: where litigants seek to prove foreign law at *trial* on *complex* foreign law questions. Here, the inference of similarity cannot be drawn, parties will probably adduce copious foreign law evidence and that might still prove inconclusive. And here, the certainty objection might seem more persuasive: courts should now apply a true presumption of similarity, since there is no other predictable means of establishing foreign law's content.

But even here the objection is ultimately unpersuasive, because a true presumption of similarity would be an *ineffective* means of achieving certainty and predictability. Note that such a presumption might be rebutted, not only by showing (positively) that foreign law contains a norm (y) different from English law (x), but *also* by showing (negatively)

[158] See the discussion in Section VII(D).
[159] *Brownlie v FS Cairo* [2021] UKSC 45, at [148], [131] (Lord Leggatt).
[160] E.g. the fact that C has communicated x to D, proven by an email from C to D saying x.
[161] See Munday, *Cross and Tapper*, 78–79.

that, whatever norm foreign law contains, it would probably differ from *x*. After all, if the presumed fact is similarity, it can be disproved by establishing difference, without establishing what that difference looks like. In that case, the court will simply conclude that foreign law says neither *x* nor *y* and so foreign law's content will remain unestablished.[162] Note also that, where inconclusive foreign law evidence has been adduced, the English court *may* well find itself in a good position to make the negative finding of fact, that foreign law says neither *x* nor *y*. As Fentiman observes: sometimes, "extensive (and expensive) evidence … if nothing else establishes that English law and foreign law are different".[163] But this will not *always* be the case: one can also imagine cases where the foreign law evidence is inconclusive enough to preclude a positive finding of foreign law's content, but not so inconclusive as to establish a negative finding of dissimilarity to rebut the presumption.

It is this ambiguous relationship between inconclusive foreign law evidence and a true presumption of similarity – i.e. that such evidence may sometimes but will not always rebut such a presumption – that undermines the presumption's effectiveness as a predictable method of establishing foreign law's content. There is, after all, no easy way to differentiate situations where the foreign law evidence is inconclusive-but-not-all-that-inconclusive (where the presumption will not be rebutted) from situations where the evidence is inconclusive-and-manifestly-so (where the presumption will be rebutted). This was the High Court of Australia's experience in *Neilson*, when, faced with unsatisfactory foreign law evidence, it split on whether the presumption of similarity was or would be rebutted.[164] The upshot is that it will *never be clear*, when the foreign law evidence is inconclusive, whether the presumption of similarity will be rebutted – everything will depend on the facts.

Perhaps, the objector might respond, a true presumption of similarity can do more: it should supply a corpus of (English) legal rules to fill the void that arises *whenever* foreign law evidence is inconclusive. But no presumption can do that: a presumed fact is still rebutted by otherwise inconclusive evidence that disproves its existence, even if the evidence cannot positively prove anything else. Instead, something more would be needed to fill the evidentiary void: a *default choice-of-law rule* selecting English law as the *lex causae*, applicable whenever the evidence seems

[162] See e.g. *Rhesa Shipping Co. S.A. v Edmunds (The Popi M)* [1985] 1 W.L.R. 948, 955–56 (H.L.) (Lord Brandon); G. Leggatt, "Black Marbles, Blue Buses and Yellow Submarines: An Essay on the Civil Standard and Burden of Proof" (2024) 140 L.Q.R. 570, 588–94. Recall also that the fact that foreign law was initially presumed to say *x* is now irrelevant, since a presumption does not itself count as evidence in favour of the presumed fact: see text accompanying note 16.

[163] Fentiman, "Laws, Foreign Laws, and Facts", 407.

[164] See *Neilson v Overseas Projects* [2005] HCA 54, at [16] (Gleeson C.J.), [37] (McHugh J.), [203]–[204] (Kirby J.), holding that the presumption was rebutted; cf. [125] (Gummow and Hayne JJ.), [248]–[249] (Callinan J.), [267] (Heydon J.), holding that it was not.

inconclusive.[165] Yet such a default choice-of-law rule was explicitly rejected in *Brownlie*,[166] and the reason seems obvious: it would be unprincipled, and would probably contravene the Rome Regulations,[167] for courts to apply English law to an issue which an English choice-of-law rule, pleaded and established as applicable, has already allocated to foreign law. Better instead for courts to hold that an unsatisfactorily proven foreign law claim or defence is simply dismissed on the burden of proof – an alternative, we should note, that *does* provide a certain and predictable way forward in the face of inconclusive foreign law evidence.

B. Disproportionate Evidence

A true presumption of similarity would *not* disincentivise the use of disproportionate and costly expert evidence of foreign law. A moment's pause reveals why. If copious foreign law evidence has not been adduced, the problem has not arisen. If copious evidence has been adduced, the problem has already occurred. And if copious evidence has not yet been adduced but parties are thinking about adducing it, a true presumption of similarity is not going to deter that. After all, a presumption can always be rebutted, and that possibility of rebuttal would only incentivise the contesting party to produce (more) evidence to achieve that, which the relying party would then respond to with (even more) evidence.[168] A similar point may be made about a default choice-of-law rule applying English law whenever foreign law evidence is inconclusive. That rule would only encourage the contesting party to adduce (more) evidence to clarify that foreign law does, in fact, say what that party wants it to say, which again will cause the relying party to respond with (even more) evidence.

No one denies that the law should contain safeguards against the use of disproportionate foreign law evidence. This problem, however, does not exist because English law contains insufficient presumptions. Rather, it is the consequence of English law having classified foreign law as a question of fact, on which expert evidence is admissible. After all, concerns about disproportionate expert evidence are not concerns unique to foreign law evidence: they apply to *all* complex questions of fact, which courts cannot sensibly address without the assistance of at least some expert evidence,[169] but for which there is always a risk that the cost and complexity of the evidence adduced might be disproportionate

[165] See e.g. Briggs, *Private International Law*, 40; Fentiman, "Laws, Foreign Laws, and Facts", 419–22.
[166] See *Brownlie v FS Cairo* [2021] UKSC 45, at [116]–[117].
[167] See Atmaz Al-Sibaie, "Foreign Claims and Foreign Law", 188.
[168] For similar criticisms made about section 4(2) of the Civil Evidence Act 1972 (foreign law's content is presumed similar to that established in a prior English decision), see Fentiman, *International Commercial Litigation*, [20.58].
[169] Briggs, *Private International Law*, 38–39; Ward and Ferguson, "Proof of Foreign Law", 110–15.

to their utility. The solution to disproportionate foreign law evidence should therefore be the same solution used to address disproportionate expert evidence in general. Not some unprincipled and ineffective presumption of similarity, but a rigorous scheme of judicial case management, empowering courts to "deal with cases justly and at proportionate cost" by restricting expert evidence "to that which is reasonably required to resolve the proceedings".[170]

IX. Conclusion

Let us therefore talk no more about a true presumption of similarity. The better position, instead, is that English courts can only sometimes draw an inference that English and foreign courts would render similar rulings on the same facts. This inference, like any other factual conclusion, can only be drawn where the court thinks it reliable, in that it is supported by the other evidence, including but not limited to the fact that the relevant aspect of English law reflects a shared tradition or universal ethos. Not only does understanding the "presumption" as an inference, drawn when reliable, reflect the thrust of Lord Leggatt's judgment in *Brownlie*, but it also helps resolve many of the controversies surrounding its "use" in civil proceedings. Moreover, it does not render the proof of foreign law more impractical than if courts were entitled to apply a true presumption of similarity.

[170] See C.P.R. rules 1.1, 35.1. Courts may do this, inter alia, by empowering the court to require parties to estimate the costs of providing expert evidence (rule 35.4(2)), to restrict parties to a single joint expert (rule 35.7) and to require claimant and defendant experts to discuss and adduce joint expert reports (rule 35.12).