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A RECURRENT PROBLEM IN TRANSNATIONAL LITIGATION: THE EFFECT OF FAILURE TO INVOKE OR PROVE THE APPLICABLE FOREIGN LAW*

Rudolf B. Schlesinger†

I

INTRODUCTION: THE ELEMENTS OF COMPLEXITY

When, under the forum's choice of law rules, some or all of the substantive issues in a case are governed by the law of another country, but the parties fail to give timely notice of the foreign law or to show what it is, how is the court to arrive at a decision? This question presents itself with considerable frequency.[1] The courts and legal writers have paid a great deal of attention to the matter;[2] but the

* The substance of this Article was originally presented at Columbia University Law School on the occasion of the 1973 Parker School Conference "On Interaction of Foreign and Domestic Law in Settlement of Disputes in the United States." In the present version, the text of the original talk has been revised only slightly; but the footnotes have been considerably augmented. In doing this, the author received valuable assistance from Richard D. Avil, Jr., a member of the Cornell Law School Class of 1974. This help is gratefully acknowledged.

As a member of the U.S. Government's Advisory Committee on International Rules of Judicial Procedure (*see* Act of September 2, 1958, Pub. L. No. 85-906, 72 Stat. 1743), the author was one of the draftsmen of Rule 44.1 of the Federal Rules of Civil Procedure. It goes without saying, however, that the views expressed herein are those of the author and do not necessarily reflect the thinking of any of the other individuals or groups that had a hand in formulating and promulgating Rule 44.1.

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[1] *See, e.g.*, Lady Nelson, Ltd. v. Creole Petroleum Corp., 286 F.2d 684 (2d Cir. 1961); Philp v. Macri, 261 F.2d 945 (9th Cir. 1958); Fitzgerald v. Fitzgerald, 66 N.J. Super. 277, 168 A.2d 851 (Ch. 1961); Sonnesen v. Panama Transp. Co., 298 N.Y. 262, 82 N.E.2d 569 (1948), *reargument denied*, 298 N.Y. 856, 84 N.E.2d 324, *cert. denied*, 337 U.S. 919 (1949). *See also* cases collected in Annot., 75 A.L.R.2d 529 (1961); notes 3-128 *infra*.

[2] *See, e.g.*, R.B. SCHLESINGER, COMPARATIVE LAW 148-84 (3d ed. 1970); Keeffe, Landis &

voices of those who have treated the problem are not in harmony, and by virtue of the remarkable discordance of some of the suggested approaches the whole subject has acquired the reputation of being controversial and confused. It may be useful, therefore, as a first step to analyze the elements of the existing confusion. At least three such elements can be discerned.

A. *Simplistic "Single Rule" Response to Diverse Problems*

The basic problem is invariably defined in abstract language such as "failure to invoke or prove the applicable foreign law."[3] This abstraction may be useful for some purposes; but it tends to make us forget that, like many other abstract expressions, it covers a great deal of ground. In fact, it applies to a variety of situations which in functional and practical terms, and in terms of simple justice, do not necessarily call for uniform treatment.

A litigant's failure to give notice and to provide information as to the applicable foreign law may be due to many diverse reasons. Perhaps his lawyer is incompetent, and hence does not realize that a case involving foreign elements cannot be handled like an ordinary domestic case. Or maybe the lawyer has recognized that there is a possible foreign law problem, but has wrongly assumed that the court either would apply the forum's own domestic law, or would place the burden of invoking and proving the foreign law on his opponent. In other cases, the lawyer failing to plead and prove the foreign law may be a tricky type. Perhaps he has looked at the foreign law and has found it less favorable to his client than the internal law of the forum. Thus, regardless of the rules on choice of law and burden of proof, he speculates that he might be able to trick his less sophisticated opponent into handling the case as a domestic one until it becomes too late for either party to invoke the foreign law. Sometimes the lawyers on both sides—each analyzing the forum's internal law, the choice of law rule and the burden of proof in a different manner—try to outsmart each other in this way. In still other cases, an attorney, without being

Shaad, *Sense and Nonsense About Judicial Notice,* 2 STAN. L. REV. 664 (1950); Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine,* 65 MICH. L. REV. 613 (1967); Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment,* 57 COLUM. L. REV. 348 (1957); Nussbaum, *The Problem of Proving Foreign Law,* 50 YALE L.J. 1018 (1941); Stern, *Foreign Law in the Courts: Judicial Notice and Proof,* 45 CALIF. L. REV. 23 (1957); Annot., 75 A.L.R.2d 529 (1961).

[3] *See* Leary v. Gledhill, 8 N.J. 260, 267, 84 A.2d 725, 728 (1951): "Thus the failure to plead and prove the foreign law has not generally been considered as fatal." *See also* N.J. STAT. ANN. § 2A:82-27 (Supp. 1973): "In the absence of... pleading or notice [of the law of another country], it shall be presumed that the common law of such State is the same as the common law as interpreted by the courts of this State."

either incompetent or tricky, may soundly conclude that to prove the foreign law, or to submit materials relating to it, is simply too expensive for his client. The assumption that a single and simple rule will do justice to all of these motley situations surely is one of the causes of the existing confusion.

B. *Antithetical Theories*

The second element of confusion results from the scholars' inability, thus far, to develop a viable theory for dealing with our problem. In every legal system it has long been the habit of courts and scholars to pose the problem in the form of the question whether foreign law should be treated as fact or law.[4] This is most unfortunate, because either of these theoretical characterizations, if consistently applied, leads to absurd results. The ultimate absurdity reached under the "fact" theory[5] is that issues of foreign law have to be determined by the jury.[6] It is no less faulty, however, indiscriminately to equate foreign law with domestic "law." Since the ascertainment and interpretation of foreign law require skills which the court simply does not possess, the procedural treatment of a foreign law question cannot be quite the same as that of a question of domestic law.[7] The soundest approach would be to give up all attempts to characterize foreign law as either "fact" or "law" and to start writing a new theory on a clean slate. But in the United States, at least, this

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[4] *See* Kegel, *Zur Organisation der Ermittlung Ausländischen Privatrechts,* 1 FESTSCHRIFT FÜR NIPPERDEY 453 (1965); Sass, *Foreign Law in Civil Litigation: A Comparative Survey,* 16 AM. J. COMP. L. 332 (1968); Zajtay, *The Application of Foreign Law,* in 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 14-1 (1972); Zajtay, *Le traitement du droit étranger dans le procès civil–Étude de droit comparé,* 4 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 233 (1968).

[5] Under the "fact" theory, a court is not expected to know the applicable foreign law in the same way that it is presumed to know the law of its own jurisdiction. Rather, the foreign law must be brought to the court, through pleading and evidence, in the same manner that any other fact must be shown. *See* Liechti v. Roche, 198 F.2d 174, 176 (5th Cir. 1952).

[6] For a discussion of this point, see Fitzpatrick v. International Ry., 252 N.Y. 127, 136-41, 169 N.E. 112, 116-17 (1929). In most common-law jurisdictions, legislative action was required in order to overcome the effect of this logical but absurd deduction from the "fact" theory. *See* R.B. SCHLESINGER, *supra* note 2, at 69, 72.

[7] In Diaz v. Gonzalez, 261 U.S. 102, 106 (1923), Mr. Justice Holmes commented on the plight of an American court faced with a civil law problem:

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

Moreover, a court may not have access to libraries with sufficient foreign law materials to allow it to find and verify the applicable rules of foreign law.

seems almost impossible. American common-law doctrines,[8] and in large part the pertinent statutes,[9] are so clearly based on the fact theory that in dealing with existing law we cannot afford completely to dismiss that unsound theory from our minds.

The difficulties flowing from the use of the fact-law dichotomy are intertwined with, and compounded by, the well-known and tedious battle between two contending conflict of laws theories. The vested rights theory, as preached by Holmes[10] and Beale,[11] had, until recently, a strong impact on the case law in this area.[12] According to the apostles of that theory, it is axiomatic that a foreign cause of action is an *obligatio* created by the command of a particular foreign sovereign.[13] The cause of action does not exist apart from the foreign law which creates and defines it. If one accepts this premise, and combines it with the "fact" theory, it follows with logical necessity that a plaintiff who alleges a cause of action governed by foreign law, but fails to allege and prove the relevant command of the foreign sovereign, has failed to show one of the material "facts" of his case and thus must lose.[14] The same fate befalls a defendant who fails to allege

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[8] *See* notes 24-78 and accompanying text *infra*.

[9] *See* R.B. SCHLESINGER, *supra* note 2, at 67-69.

One should not overestimate the significance of statutory provisions such as the last sentence of Federal Rule of Civil Procedure 44.1, which provides that the court's determination of the foreign law (if such determination is made) "shall be treated as a ruling on a question of law." This does not mean that a question of foreign law shall for all purposes be treated as a question of law. The effect of this provision is merely to make it clear that an issue of foreign law is to be determined by the court, and not by the jury, and that for purposes of appellate review the trial court's determination shall be treated as a ruling on a question of law. Plainly, it was not the intention of the draftsmen of Rule 44.1 to equate foreign law and domestic law in all respects. If that had been the intention, the responsibility for ascertaining the foreign law would have been thrown wholly upon the court, and the court would have been instructed to ascertain the foreign law regardless of the assistance or lack of assistance offered by the parties. The most cursory glance at the second sentence of Rule 44.1 shows that such was not the intent of the draftsmen. That sentence leaves it to the discretion of the court whether judicial notice should be taken of the foreign law. It is a well-known fact that in the exercise of that discretion the courts tend not to conduct independent research concerning alien law when they have received no aid from counsel. Thus, it is crystal clear that foreign law is not treated like domestic law, which under all circumstances, and regardless of party presentation, must always be ascertained and determined by the court. *See* Sass, *supra* note 4, at 342-47.

[10] *See* Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).

[11] 3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1968-69 (1935).

[12] *See, e.g.*, Philp v. Macri, 261 F.2d 945 (9th Cir. 1958); Cosulich Societa Triestina Di Navigazione v. Elting, 66 F.2d 534 (2d Cir. 1933); Industrial Export & Import Corp. v. Hongkong & Shanghai Banking Corp., 302 N.Y. 342, 98 N.E.2d 466 (1951); Riley v. Pierce Oil Corp., 245 N.Y. 152, 156 N.E. 647 (1927).

[13] *See* Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904).

[14] We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a

and prove the foreign law on which an affirmative defense is based.[15]

The local-law theory, on the other hand, postulates that the internal law of the forum governs all aspects of a case unless a sufficient justification is shown for displacing it; and according to at least some of the modern anti-Bealeans, such as Professor Ehrenzweig and the late Professor Currie, the law of the forum is never effectively displaced unless the applicable foreign law has been invoked in proper and timely fashion.[16] Thus, if the parties fail to invoke the pertinent foreign law, the court will look to its own domestic law as the rule of decision.[17]

Among the scholars, the antithetical nature of these two theories has engendered a continuing controversy conducted with the earnestness and reckless abandon of a Holy War.

To make things worse, the violent disagreement between the contending scholarly camps concerns not only the solution of the problem, but even its nature and curricular allocation. The "fact" theory, with its emphasis on establishing the foreign law by formal proof or by certain presumptions, had the effect of largely allocating the whole problem to the field of Evidence.[18] Those scholars, however, who prefer to formulate the problem in terms of "displacement of the law of the forum," claim that it constitutes an important and indeed basic Conflict of Laws issue.[19] This debate about the proper allocation of the problem, which at first blush appears to be mere academic infighting, is not without practical significance; in the federal courts, the *Erie* doctrine and the terms of the Enabling Act[20] make it necessary to determine whether the problem is procedural or substantive.

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cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it.

Cuba R.R. v. Crosby, 222 U.S. 473, 479 (1912). *See* cases cited in note 15 *infra*.

[15] *See* Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962); Eisler v. Soskin, 272 App. Div. 894, 71 N.Y.S.2d 682 (1st Dep't 1947), *aff'd*, 297 N.Y. 841, 78 N.E.2d 862 (1948). *See also* note 40 *infra*.

[16] *See* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 3-76 (1963), *reprinted from* Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958); A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 360 (1962); Ehrenzweig & Westen, *Fraudulent Conveyances in the Conflict of Laws*, 66 MICH. L. REV. 1679, 1685-90 (1968).

[17] *See, e.g.*, Michael v. S.S. Thanasis, 311 F. Supp. 170, 176 n.10, 177 (N.D. Cal. 1970). *See also* 1700 Ocean Ave. Corp. v. GBR Associates, 354 F.2d 993 (9th Cir. 1965); Leary v. Gledhill, 8 N.J. 260, 84 A.2d 725 (1951). For further references, see note 50 *infra*.

[18] *See, e.g.*, MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 335, at 779 (2d ed. 1972).

[19] *See, e.g.*, Ehrenzweig, *The Lex Fori–Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 678-79 (1960).

[20] *See* 28 U.S.C. § 2072 (1970).

C. *The Complex Structure of the Pertinent Legal Rules*

In every American jurisdiction, there has been a considerable growth of common-law rules concerning the consequences of a failure to plead or prove the applicable foreign law.[21] In almost half of the jurisdictions—including all of those which have a considerable volume of foreign law litigation—we also find judicial notice statutes that have been superimposed upon the common-law rules.[22]

The complexity arising from this interaction of judge-made and statutory law is further enhanced by the fact that all of the rules specifically dealing with the problem of invoking or proving the applicable foreign law have to be read against the backdrop of other, more general rules of procedure. Especially important are those procedural rules which determine when and how a foreign law issue has to be raised in order to be considered by the trial judge and to be preserved for appellate review.[23]

In order to chart a path through this complex maze of legal rules—judge-made and statutory, specific and general—the discussion which follows will initially separate (*1*) the common-law background, (*2*) the judicial notice statutes, and (*3*) the relevant procedural rules of a more general nature. Only on the basis established by such separate analysis, can we examine the interaction of the three sets of rules.

II

SURVEY OF EXISTING LAW

A. *The Common Law*

1. *Conventional Analysis: Split Among Conflicting "Rules"*

The common-law rules are presented by most of the commentators as reflecting a basic split, and a superficial examination seems to lend some credence to the conclusion that the courts are divided. On the one hand, there are decisions influenced by the vested rights theory and thus leaning toward the rule that a cause of action or a defense based on foreign law is lost if the party asserting it fails to plead and prove the applicable foreign law.[24] The classical example is the infamous case of *Crosby v. Cuba Railroad Co.*,[25] in which the

[21] *See* notes 24-78 and accompanying text *infra*.

[22] *See* notes 79-106 and accompanying text *infra*.

[23] *See, e.g.*, FED. R. CIV. P. 51; N.Y. CIV. PRAC. LAW §§ 4017, 5501(a)(3) (McKinney 1963); *id.* § 4110-b (McKinney Supp. 1973).

[24] *See* cases cited in note 12 *supra*.

[25] 222 U.S. 473 (1912).

opinion was written by the most fanatical of vested rights fanatics, Mr. Justice Holmes himself.[26] In the *Crosby* case, the plaintiff became aware of a defect in his employer's machinery. He reported this dangerous situation and was promised that it would be quickly rectified. In the meantime, the plaintiff was instructed to continue with his work.[27] An accident caused by the defective machinery ensued, and the plaintiff lost a hand. Although the accident had taken place in Cuba, and no evidence was introduced concerning the applicable Cuban law, the trial judge allowed the jury's verdict for the plaintiff to stand.[28] Both he[29] and a majority of the court of appeals[30] placed on the defendant the burden of proving that the foreign law was different from the law of the forum. Under the forum's law the plaintiff was entitled to recover. In reversing and remanding for a new trial, the Supreme Court, per Mr. Justice Holmes, disagreed with the rationale of the lower courts. According to Justice Holmes, the plaintiff had the burden of pleading and proving the specific Cuban law which defined his right of recovery.[31] The plaintiff's failure to meet this burden brought about his defeat.

The courts, however, have always recognized important exceptions to the orthodox rule applied[32] in the *Crosby* case. Under the exceptions, the internal law of the forum will be applied whenever it is reasonably probable that the foreign law in question is similar to domestic law. Such likelihood of similarity exists (*1*) when the foreign country belongs to the common-law orbit,[33] and (*2*) in any event,

[26] Eight years before the *Crosby* case, Holmes had delineated his theory of "vested rights" in Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). He posited:

> The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.... But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, ... but equally determines its extent.

Id. at 126 (citations omitted).

[27] 222 U.S. at 477.

[28] *Id.* at 477.

[29] On a motion, after trial, to set aside the jury verdict, the judge emphatically stated:

> He [the plaintiff] had the right to set forth a cause of action, which, according to the law of the forum, would be complete, and, in the event of a conflict between the lex loci and the lex fori, the defendant ought to have shown by a proper plea that, under the lex loci, the plaintiff acquired no right of action.

Crosby v. Cuba R.R., 158 F. 144, 147 (C.C.D.N.J. 1908).

[30] *See* Cuba R.R. v. Crosby, 170 F. 369 (3d Cir. 1909).

[31] *See* note 14 *supra.*

[32] Perhaps misapplied would be more accurate. *See* text accompanying notes 36-40 *infra.*

[33] Judge Learned Hand has stated:

> The extent of our right to make any assumptions about the law of another country depends upon the country and the question involved; in common-law countries we may go further than in civil law; in civilized, than in backward or barbarous.

E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115, 117 (2d Cir. 1931).

whenever the point at issue is so fundamental that even a country outside of the common-law orbit may reasonably be presumed to have adopted a solution similar to our own.[34]

In spite of these wide-ranging exceptions, the orthodox rule has been criticized as harsh.[35] *Quaere,* however, whether the occasional harshness of judicial decisions using the orthodox approach stems from the rule itself or from its misapplication. If a case like *Crosby* came up today in the federal courts, the orthodox common-law approach would not lead to a harsh result. Today, the defendant would be prevented by Rule 44.1[36] and by several other provisions of the Federal Rules of Civil Procedure[37] from raising the Cuban law point on appeal. Thus, the plaintiff would win. Even in 1912, the plaintiff would have won if Justice Holmes had realized that "assumption of the risk" is an affirmative defense and that the burden of proving the Cuban law supporting this affirmative defense was on the defendant.[38] This was a case in which the plaintiff had a so-called fundamental cause of action—one presumed to be recognized in all civilized legal systems—while the affirmative defense was nonfundamental[39] and thus dependent on a proper showing of the applicable foreign law.[40] It follows that correct application of the

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[34] *See, e.g.,* Parrot v. Mexican Cent. Ry., 207 Mass. 184, 93 N.E. 590 (1911). Further references are collected in Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

[35] Professor Ehrenzweig has called application of the orthodox rule a "miscarriage of justice." A. EHRENZWEIG, *supra* note 16, at 360.

[36] *See* notes 37 & 87-93 and accompanying text *infra.*

[37] The defendant in the *Crosby* case raised the foreign law point for the first time after trial, in a motion for judgment notwithstanding the verdict. If the case came up today, it would be arguable that, regardless of the merits of the foreign law point, the defendant had waived its objection concerning that point, and that the intermediate appellate court was authorized and indeed compelled by Federal Rules of Civil Procedure 12(h)(2) and 51 to affirm the judgment for the plaintiff. *Cf.* Black, Sivalls & Bryson, Inc. v. Shondell, 174 F.2d 587 (8th Cir. 1949).

[38] *See* James, *Assumption of Risk: Unhappy Reincarnation,* 78 YALE L.J. 185, 195-96 (1968) and authorities cited therein.

[39] Clearly, it cannot be taken for granted that assumption of risk as a complete defense is universally recognized by civilized legal systems. In our own country, the defense has been abolished, by statute or judicial decision, in a number of jurisdictions. *See* W. PROSSER, LAW OF TORTS 454-57 (4th ed. 1971). Even in states where the defense still exists, it would be unlikely to prevail in a case in which, as here, the defendant employer promised to repair the defective machinery and requested the employee to continue its use in the meantime. *See id.* at 452.

[40] *See* cases cited in note 15 *supra.*

On the other hand, when the plaintiff's cause of action and defendant's affirmative defense both were based on "fundamental" principles, and the plaintiff sought to counter the defense by a reply not borne out by such principles, the burden of proving the foreign law (*i.e.,* the foreign law supporting the reply) was held to be on the plaintiff. *See* E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115 (2d Cir. 1931); Mangrelli v. Italian Line, 208 Misc. 685, 144 N.Y.S.2d 570 (Sup. Ct. 1955).

orthodox rule and its recognized exceptions would have led to the correct result: affirmance of the judgment for the plaintiff.

Another famous case often cited by the critics of the orthodox approach is *Walton v. Arabian American Oil Co.*[41] Walton was an American citizen who was temporarily in Saudi Arabia. While there, he suffered serious injuries in an automobile accident[42] when his car collided with one of the defendant's trucks. Neither the plaintiff nor the defendant, an American corporation, attempted to prove the applicable law of Saudi Arabia. Under the New York conflict of laws rules as they stood at the time of the *Walton* case, the substantive law of the place where the tort occurred was controlling.[43] Thus, the burden was thought to be on the plaintiff to prove the applicable Saudi Arabian law. Because he did not do so, the trial judge dismissed the action. This judgment was upheld reluctantly by the court of appeals.[44] The result in *Walton* was not quite as revolting as that in *Crosby,* because in the *Walton* case the plaintiff's counsel had been warned repeatedly by the trial judge that the plaintiff would lose if he did not prove the law of Saudi Arabia.[45] Whatever harshness remained was, perhaps, the result of the rigid choice of law rule prevailing at that time, and not of the orthodox approach to the consequences of failure to prove the foreign law. In 1971, the United States District Court for the Southern District of Texas had to deal with a case the facts of which were virtually identical with those of *Walton,* except that the accident occurred in Libya rather than in Saudi Arabia.[46] In that case, the problem of invoking and proving Libyan

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[41] 233 F.2d 541 (2d Cir.), *cert. denied,* 352 U.S. 872 (1956).

[42] *Id.* at 542.

[43] *Id.* Prior to Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), New York generally applied the rule of lex loci delicti to all substantive issues arising in a tort case.

[44] The only opinion in the case was written by Judge Frank, who, in part, dissented from the majority holding. *See* note 126 and accompanying text *infra.* In that opinion, which undertook to express both the views of the majority and the reasons for his own dissent, Judge Frank stated:

> This conclusion [that dismissal of the action should be affirmed] seems unjust for this reason: Both the parties are Americans. The plaintiff was but a transient in Saudi Arabia when the accident occurred and has not been there since that time. The defendant company engages in extensive business operations there, and is therefore in a far better position to obtain information concerning the "law" of that country. But, under the New York decisions which we must follow, plaintiff had the burden. As he did not discharge it, a majority of the court holds that the judge correctly gave judgment for the defendant.

233 F.2d at 545 (footnotes omitted).

[45] *See id.* at 545-46.

[46] Couch v. Mobil Oil Corp., 327 F. Supp. 897 (S.D. Tex. 1971).

law was avoided because the court, focusing on the parties' common nationality and domicile, decided that Texas was the state of the most significant relationship,[47] and hence applied the substantive law of Texas.[48] Thus, by adopting a more flexible choice of law rule, the court was able to hold in favor of the plaintiff and to obviate repetition of the *Walton* scenario.[49]

We must now turn to a different line of cases which, to the superficial observer, seems irreconcilable with *Crosby* and its offspring. In these cases, which are quite numerous,[50] failure to invoke or to prove the otherwise applicable foreign law led the courts to apply the domestic law of the forum.[51] Sometimes, as in the late Chief Justice Vanderbilt's well-known opinion in *Leary v. Gledhill*,[52] this result is explained in terms of the parties' acquiescence.[53] On other occasions, it has been said that domestic law should be applied because it is the only law the court knows; or the case was decided in accordance with the forum's internal law without any explanation at all.[54] Those who follow the teachings of Professor Ehrenzweig or of

[47] *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (1971).

[48] 327 F. Supp. at 905.

[49] Even if, as a matter of choice of law, the court had held that some of the relevant substantive issues in the case were governed by the law of Libya (which remained unproved), a satisfactory result—more satisfactory than the result in *Walton*—could have been reached under the modern approach explained below. In light of the fact that the defendant had much easier access to the sources of the applicable foreign law than the plaintiff, a modern court might well place the burden of proving such law on the defendant, with the understanding that the substantive law of the forum will be applied if that burden is not met. *See* note 73 and accompanying text *infra*. In other words, tinkering with choice of law rules is not the only method by which a court today could avoid the harshness of the *Walton* result.

[50] *See* cases collected in §§ 3-6 of Annot., 75 A.L.R.2d 529 (1961), and in RESTATEMENT, *supra* note 47, at § 136, Reporter's Note on comment *h* (1971) (with references concerning rule in England).

[51] This approach might be called the forum-law approach, as distinguished from the orthodox approach exemplified by *Crosby*.

[52] 8 N.J. 260, 84 A.2d 725 (1951).

[53] Chief Judge Vanderbilt stated:

> The presumption that in the absence of proof the parties acquiesce in the application of the law of the forum, be it statutory law or common law . . . , may be universally applied regardless of the nature of the controversy. . . . We are of the opinion, therefore, that in the instant case the rights of the parties are to he determined by the law of New Jersey which unquestionably permits recovery on the facts proven.

Id. at 269-70, 84 A.2d at 730.

[54] We agree . . . that the general, if not universal, rule is that the rights of succession of a husband to personal property of his wife is [*sic*] governed by the law of the domicile of the owner at death. . . . [I]n the instant case, there was no pleading or proof as to what, if any, marital rights Wackwitz would have, or what conduct, if any, on his part would forfeit such rights under the laws of his wife's domicile. We cannot judicially notice the law of Germany. . . . In the absence of proof of such law we must apply the law of Missouri.

Lane v. St. Louis Union Trust Co., 356 Mo. 76, 82, 201 S.W.2d 288, 291 (1947); *see* Savage v. O'Neil, 44 N.Y. 298, 300-01 (1871).

the late Professor Currie will, of course, explain all these decisions on the ground that, as a matter of choice of law doctrine, the forum's internal law remains the rule of decision unless it is displaced by a properly invoked foreign law.[55]

This approach, too, contains some seeds of unfairness. Suppose the plaintiff has cleverly chosen a forum that has little connection with the transaction, but whose domestic law favors the plaintiff's side. If the court is willing to substitute its own law for the properly applicable but unproved foreign law, then the plaintiff by this maneuver has successfully relieved himself of the burden and expense of proving the foreign law, and has thrown that burden on the defendant.

Again, it is important to recognize that even those courts which pay unqualified lip service to the forum-law rule, do not apply it in all cases. There are situations in which it would be patently absurd to substitute domestic law for the applicable foreign law. Suppose, for instance, that the plaintiff sues for breach of contract, and the defendant seeks to excuse his nonperformance by asserting that performance on his part became impossible due to an embargo imposed by the government of Ruritania. If in this case the defendant fails to prove the Ruritanian statute or decree imposing the embargo, he will lose. It would be unjustifiable to let him substitute the law of the forum on this point. Even Currie and Ehrenzweig do not contend otherwise; in their opinion, the explanation is that in such a case the Ruritanian embargo provisions do not constitute the rule of decision, but a mere "datum."[56] However, since the borderline between a "datum" and a rule of decision has never been staked out with any precision, this is not an explanation, but merely a statement of the result. The significant fact is that in the view of all courts and all scholars there are *some* cases in which it is inappropriate to substitute domestic law for the otherwise applicable foreign law.[57]

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[55] *See* notes 16 & 19 *supra.*

[56] It has been claimed that there are "situations in which application of the foreign law is required under all circumstances." But these situations are limited to those where knowledge of a foreign law is required as a datum for the application of the domestic rule. To determine whether defendant was negligent per se (under forum law) because of having exceeded a speed limit prevailing at the foreign place of accident, that speed limit must of course be established to make the complaint conclusive. A. EHRENZWEIG, *supra* note 16, at 362; *see* Currie, *supra* note 50, at 1012-14 (1958); Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum,* 49 CALIF. L. REV. 845, 873-75 (1961). It should be pointed out, however, that Professor Ehrenzweig more recently has modified his view that except in the "datum" situations the court should always follow the forum-law approach. *See* note 72 *infra.*

[57] The following hypothetical situation, inspired by the facts of an actual case, may serve as a further illustration. Suppose Mr. and Mrs. Meyer, natives and nationals of Austria, were domiciled in that country until early 1972, when they immigrated into the United States and

It follows that the orthodox rule and the forum-law rule are not as irreconcilable as appears at first blush. When the two allegedly conflicting "rules" *and their "exceptions"* are compared, it becomes clear that almost all of the relevant decisions, in spite of their differences in articulation, can be reconciled in terms of the results reached.

2. *Suggested Analysis: A Multi-Factor Approach*

In contract cases, it will sometimes be arguable that the parties' failure to invoke the foreign law amounts to conscious and genuine acquiescence in the application of domestic law. This may be regarded as a contractual choice of the applicable law, and today such a choice will normally be honored by American courts;[58] it certainly must be honored in a case governed by the Uniform Commercial Code, provided there is some reasonable relation between the transaction and the forum state.[59]

At the opposite extreme, there are situations in which it would violate basic dictates of fairness and common sense to apply domestic law to legal phenomena wholly and ineradicably rooted in a foreign legal system.[60] In these latter situations, application of domestic law may well be unconstitutional under *Home Insurance Co. v. Dick*;[61] thus,

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became domiciliaries of New York. Their marriage was celebrated in Austria in 1971, a short time before their emigration. In 1973, Mr. Meyer brings an annulment action against Mrs. Meyer, in a New York court, on the alleged ground that she induced him to marry her by fraudulent misrepresentations concerning her willingness to bear children. The facts alleged by the plaintiff—facts which under New York law would make the marriage voidable—are proved at the trial to the satisfaction of the court. But neither party presents any evidence or materials concerning the pertinent provisions of Austrian law, and the court is unwilling (and perhaps unable) independently to investigate the relevant Austrian sources and authorities. Clearly, the annulment action must fail. It would be ridiculous to judge the validity of this Austrian marriage by the substantive standards of New York law. Even an express stipulation of the parties calling for application of New York law would not be honored by a New York court in a matrimonial case. *See, e.g.*, Fraioli v. Fraioli, 1 App. Div. 2d 967, 150 N.Y.S.2d 665 (2d Dep't 1956). Thus, the plaintiff must lose because he has failed to prove one of the essential elements of his cause of action.

In this hypothetical, it seems rather doubtful whether the Austrian law can be called a mere "datum." Concerning the issue of the validity of the marriage, Austrian law appears to be the rule of decision. But that is only an unimportant semantic quibble. What is important is to recognize that substitution of forum law for the uninvoked or unproved foreign law does not solve all of the cases, just as we have seen that the orthodox approach of deciding against the party who has the burden of proof does not always lead to sound results.

[58] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

[59] *See* UNIFORM COMMERCIAL CODE § 1-105.

[60] *See* notes 56 & 57 and accompanying text *supra*.

[61] 281 U.S. 397 (1930).

In the *Home Insurance* case, a Mexican fire insurance company contracted with Dick to insure the latter's tug. Dick, although technically perhaps a citizen of Texas, was living in Mexico at the time. The Mexican company reinsured a part of its liability with two other insurance

a court would have no choice but to follow the orthodox approach and to make the outcome of the case depend on the burden of proof.

Between these extremes, however, there is a large middle field, where the consequences of the parties' failure to invoke or prove the foreign law cannot and should not be treated by way of a simple, definite rule. The older cases, whether they favored or opposed *Crosby,* often attempted to formulate rigid rules,[62] and most of the text writers still follow this obsolete method.[63] In the more modern cases, however, an entirely different trend is discernible. Flexibility is the new watchword. In a 1968 case, the Supreme Court of Vermont announced that substitution of domestic law for the uninvoked foreign law "is justified so long as it is reasonable and does not impose oppressive consequences."[64] Judge Wisdom, speaking for the United States Court of Appeals for the Fifth Circuit, put it even more bluntly: "In the interest of arriving at a just adjudication, the trial judge should have discretion in determining whether the law of the forum, with or without the disguise of a presumption, should prevail."[65] The New York Court of Appeals, which previously had vacillated between the forum-law rule and the *Crosby* rule,[66] finally adopted a similarly flexible approach in *Watts v. Swiss Bank Corporation.*[67]

Flexibility, of course, does not leave the courts without

companies in New York. More than one year after the boat had been destroyed by fire, Dick sued the New York companies in Texas. Their defense was that under the terms of the insurance policy the insured's claim had to be filed within one year. Dick sought to counter this defense by attempting to have the Texas court apply its own substantive law, which would invalidate the contractual one-year time limit. The trial court held for Dick, and the state appellate courts affirmed. However, the Supreme Court, reversing, stated:

> All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit.... Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.

Id. at 408.

The holding of the Supreme Court apparently was to the effect that since Texas had no substantial relation with the contract or the parties, it was a violation of due process to subject the contract to the substantive law of Texas.

[62] *Compare* Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914), *with* McLoughlin v. Shaw, 95 Conn. 102, 111 A. 62 (1920).

[63] *See generally* 9 J. WIGMORE, EVIDENCE § 2536 (3d ed. 1940).

[64] Pioneer Credit Corp. v. Carden, 127 Vt. 229, 234, 245 A.2d 891, 894 (1968).

[65] Seguros Tepeyac S.A., Compania Mexicana de Seguros Generales v. Bostrom, 347 F.2d 168, 175 (5th Cir. 1965).

[66] The vacillating course of the earlier New York decisions is traced in Justice Walter's scholarly opinion in Arams v. Arams, 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

[67] 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970).

guideposts. In determining whether to apply domestic law or to decide the case against the party bearing the burden of proof, the courts are aided by a number of identifiable factors such as the following:[68]

(a) *The degree to which a strong public interest is involved in the parties' dispute.* If there is no such public interest, the forum-law approach normally is preferable.[69] This is true not only in contract cases (in which the parties' acquiescence in the application of forum law may amount to a choice of law agreement),[70] but equally in noncontract actions, provided the dispute touches nobody's interests except the private concerns of the parties.[71] When, on the other hand, there is a strong public interest, as in matrimonial or criminal cases, it is clear that the parties should not have the power by their action or inaction to determine the applicable law. In cases of the latter kind, therefore, little or no weight should be accorded to the fact that the parties have "acquiesced" in the application of domestic law.[72]

(b) *The parties' access to foreign law materials.* In some cases, especially when exotic legal systems are involved, the court should give some consideration to the parties' relative ability to procure information concerning the foreign law (*e.g.*, the law of Saudi Arabia).[73]

(c) *Forum shopping.* The forum chosen by the plaintiff may be highly artificial as well as inconvenient to the defendant. If this does not lead to a discretionary dismissal under the doctrine of forum non conveniens, it should in any event be treated as a factor which strongly militates against rewarding the forum-shopping plaintiff by the application of domestic law.[74]

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[68] The enumeration which follows in the text is a slightly rearranged and updated version of the similar list of factors previously submitted by the author in R.B. SCHLESINGER, *supra* note 2, at 168-69.

[69] *See* Kalyvakis v. T.S.S. Olympia, 181 F. Supp. 32, 36 (S.D.N.Y. 1960).

[70] *See* notes 58 & 59 *supra.*

[71] A caveat should be noted: The criterion stated in the text may prove difficult to apply in some types of cases, especially tort cases. At first blush, most tort actions perhaps appear to be purely private disputes; but the public interest may enter, *e.g.*, when a breadwinner has been killed or incapacitated, and a tort recovery is the only way to keep his dependents off the welfare rolls. It is hard to deny, also, that the public interest becomes involved in a tort case when the defendant invokes the protection of a workmen's compensation statute. *Cf.* Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962).

It is submitted that in cases which straddle the fence between purely private litigation and the public interest, one must look primarily to the other factors, to be listed in the text *infra* under (b), (c), and (d).

[72] *See* A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 182-83 (1967); Nussbaum, *supra* note 2, at 1040-42. *See also* note 57 *supra.*

[73] *Cf.* Walton v. Arabian Am. Oil Co., 233 F.2d 541, 545, *cert. denied,* 352 U.S. 872 (1956); note 44 *supra.*

[74] If the forum lacks a substantial connection with the transaction or the parties, applica-

(d) *The nature of the foreign legal system and of the issue involved in the case.* Finally, and perhaps most important, a judge's readiness to substitute forum law for the otherwise applicable foreign law will be enhanced if he can rationally assume that with respect to the point at issue the two laws do not radically differ from each other. Such an assumption may be based on the fact that the foreign legal system in question belongs to the common-law orbit.[75] Sometimes an assumption of similarity may be warranted even though the foreign system in question is part of an alien world, *e.g.*, that of the civil law. To the extent that the issue at hand appears to be governed by a "fundamental principle," forum law may be applied on the theory that, unless the contrary is shown, the law of the foreign country in question, and perhaps the laws of all civilized nations, can be expected to be in harmony with the forum's law on that issue.[76]

In connection with the last point, a judicial notice statute can play an important role. Formerly, courts had to rely on an uninformed judicial hunch when they assumed (or refused to assume) that a particular cause of action or defense was based on fundamental principles of law presumably recognized by the foreign legal system in question or indeed by all civilized nations. Under a judicial notice statute, however, a court may undertake what Judge Breitel has referred to as "cursory independent research" concerning the foreign law.[77] Such cursory research perhaps will not enable the court exhaustively to resolve the foreign law issue; but if it discloses that on the point in question there is no real clash between domestic law and the governing foreign law, this will constitute a potent factor against using the *Crosby* approach and in favor of relying on forum law as the rule of decision.[78]

It is submitted that if these variables are kept in mind, the actual results reached (although perhaps not the language used) in most of the reported cases can be reconciled. Thus, in the place of two allegedly conflicting "rules," there emerges a flexible but unified

tion of its own substantive law may be unconstitutional. *See* note 61 *supra*. It should be noted, however, that cases may arise in which the forum chosen by the plaintiff is not so completely contactless as to bring this rule of constitutional law into play, but in which the forum nevertheless is a highly artificial one, selected by a shrewd lawyer with a keen eye for unfair advantages to be gained by forum shopping. In such a case, the artificiality of the forum should at least constitute a *factor* militating not only against the forum's exercise of jurisdiction, but also against application of its own internal substantive law.

[75] *See* note 33 *supra*.

[76] *See* authorities cited in note 34 *supra*.

[77] *See* Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 275, 265 N.E.2d 739, 742, 317 N.Y.S.2d 315, 319 (1970).

[78] *See id.*

approach. In the hands of present-day courts, this approach probably will lead to the application of forum law in the majority of cases. It should not be assumed, however, that forum law automatically can be substituted in every case in which there has been a failure to invoke or ascertain the applicable foreign law. Although perhaps not overly numerous, there are situations—especially those which involve marriage and family or are characterized by blatant forum shopping—in which, despite the parties' "acquiescence," the factors listed above may point away from the forum-law solution.

B. *Judicial Notice Statutes*

Almost half of the states, including all of those in which transnational litigation occurs with some frequency, have enacted statutes or rules either providing for "judicial notice" of foreign-country law or in other ways authorizing the court, in determining foreign law, to consider any relevant material or source, regardless of admissibility under technical rules of evidence, and regardless also of whether or not such material was submitted by a party.[79] These judicial notice statutes, it should be emphasized at the outset, have not displaced the common-law doctrines discussed above. The statutes are merely superimposed on the common-law doctrines, which thus retain their vitality in the many situations in which the statutory provisions do not lead to actual notice being taken of the foreign law.

1. *Interaction of Judicial Notice Statutes and Decisional Law*

Even in a jurisdiction which has a judicial notice statute, the statute is not a solvent for every foreign law case. Most of the statutes are permissive only, so that the court's determination, whether or not to take judicial notice of the foreign law, is a discretionary one.[80] In exercising this discretion, courts naturally are disinclined to engage in independent research concerning a strange legal system if they receive no help from counsel. Even when the statute is drafted in mandatory terms, the result is not very different.[81]

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[79] For a brief survey of these statutes, see R.B. SCHLESINGER, *supra* note 2, at 67-69.

As applied to the ascertainment of foreign law, the term "judicial notice" may well be inappropriate. A few of the pertinent enactments, such as Federal Rule of Civil Procedure 44.1, have been deliberately drafted so as to avoid that term. For good or for ill, however, most of the relevant statutes in fact speak of "judicial notice."

Courts and legal writers generally refer to all of the relevant enactments, whether or not the term "judicial notice" is used therein, as judicial notice statutes. For the sake of brevity and convenience, the same usage will be followed in this Article.

[80] *See* note 79 *supra*. *See also* Sass, *supra* note 4, at 343-47.

[81] *See* Cannistraro v. Cannistraro, 352 Mass. 65, 70, 223 N.E.2d 692, 695 (1967) (Cutter, J.,

Some of the more sophisticated statutes provide that in general it is discretionary with the court whether to take judicial notice of foreign-country law, but that judicial notice becomes mandatory if one of the parties has given timely notice of his intention to rely on the foreign law and has supplied the court with sufficient information concerning such law. The idea of such bifurcation between permissive and mandatory judicial notice, which first emerged in the Uniform Rules of Evidence,[82] has been adopted, *inter alia*, in California[83] and New York.[84] It is clear, however, that such a bifurcated rule is in essence permissive, because it is left to the court to determine whether the information submitted to it is "sufficient." It follows that, no matter how the statute is formulated, cases of a discretionary refusal to take judicial notice of the foreign law will arise with some frequency.

A few of the statutes, moreover, use pleading or notice requirements as a restriction on judicial notice. In California,[85] and arguably in New York,[86] the parties' failure to invoke the foreign law merely has the effect of making judicial notice of foreign law permissible rather than mandatory. But in other jurisdictions,[87] and notably under Federal Rule 44.1,[88] the notice requirement may have stronger teeth. In *Ruff v. St. Paul Mercury Insurance Co.*,[89] the Second Circuit held that unless reasonable written notice of the foreign law issue has been given in the district court, the appellate court cannot look at the foreign law. The result reached in the *Ruff* case was a harsh one, as the court admitted;[90] but the judges of the Second Circuit probably felt

concurring). *See also* Strout v. Burgess, 144 Me. 263, 274-76, 68 A.2d 241, 249-50 (1949) and cases cited therein.

[82] UNIFORM RULES OF EVIDENCE 9-10.

[83] CAL. EVID. CODE §§ 310-11, 452-53 (West 1966).

[84] N.Y. CIV. PRAC. LAW R. 4511 (McKinney 1963).

[85] *See* note 83 *supra*.

[86] New York has a pleading requirement with respect to foreign law. *See* N.Y. CIV. PRAC. LAW R. 3016(e) (McKinney 1963). It is nevertheless arguable, although not certain, that the court may, and under appropriate circumstances should, take judicial notice of an unpleaded proposition of foreign law. This result is based on the theory that an unpleaded allegation, although it may not be proved over the opponent's objection, may yet be judicially noticed. *See* R.B. SCHLESINGER, *supra* note 2, at 76.

[87] *See* R.B. SCHLESINGER, *supra* note 2, at 68.

[88] FED. R. CIV. P. 44.1 provides:

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

[89] 393 F.2d 500, 502 (2d Cir. 1968).

[90] Ruff, a Pennsylvania citizen, was teaching law at the Arthur Grimes School of Law of the

that to hold otherwise would render the notice requirement toothless.[91] *Quaere,* however, whether the provision really would lose all of its teeth if it were construed differently, *e.g.,* as meaning that nonobservance of the notice requirement should make the court *reluctant* to take judicial notice, but would not completely destroy its *power* to do so.

Whether or not it was correctly decided, the *Ruff* case serves as a reminder that even in jurisdictions where a judicial notice statute is in existence, situations frequently arise in which the court either lacks the power to take judicial notice, or as a matter of discretion will refuse to do so.[92] In every case of this sort, the judicial notice statute in effect becomes inoperative; and just as in the old common-law days, the court is then faced with the question of how it should react to the parties' failure to invoke or prove the foreign law. Most of the statutes are silent on this point.[93] To find an answer, the court must turn to decisional rules—the same rules which would govern in the absence of a judicial notice statute.[94] It follows that these decisional rules continue to play an important role even in those jurisdictions which have adopted a modern statute.

In California and New Jersey, the judicial notice statute itself contains an express direction, telling the court what to do in case the foreign law is neither proved nor judicially noticed.[95] The New Jersey statute, as recently amended, favors application of domestic law in

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University of Liberia when he contracted poliomyelitis, an endemic disease. Ruff sued upon an insurance policy issued to his employer. The district court dismissed the action on the ground that endemic diseases were expressly exempted from the coverage of the policy. On appeal, Ruff for the first time brought up the point that under Liberian law the exemption was ineffective. The court of appeals, however, held the point to be precluded by the first sentence of Rule 44.1. In reluctantly affirming the dismissal of the action, the appellate court stated: "While the result is not one which we like to reach, we cannot rewrite the policy because of our sympathy for Ruff." 393 F.2d at 502.

[91] Alternatively, the court held that even if it were to take judicial notice of the Liberian law, plaintiff would still lose in this action against the insurance company, because Liberian law, although it might enlarge the liability of the employer, could not change the effect of an insurance policy issued by an American insurance company to an American insured (*i.e.*, Ruff's employer). *See* 393 F.2d at 502.

The combined effect of the court's two alternative holdings seems to be that the plaintiff might have won his case if (*1*) he had sued his employer rather than the insurance company, and if (2) he had given timely notice of his intention to raise an issue concerning Liberian law.

[92] *See* O. SOMMERICH & B. BUSCH, FOREIGN LAW—A GUIDE TO PLEADING AND PROOF 64-74 (1959) and cases cited therein.

[93] California and New Jersey, however, provide for this contingency in their judicial notice statutes. *See* notes 95-100 and accompanying text *infra.*

[94] *See* notes 24-78 and accompanying text *supra.*

[95] CAL. EVID. CODE § 311 (West 1966); N.J. STAT. ANN. § 2A:84A-16 R. 9(3) (Supp. 1973).

such a case,[96] while the much more sophisticated California provision, by vesting the court with a great deal of discretion,[97] arrives at a result similar to that which has been reached by the most recent judicial decisions.[98] Although essentially declaratory of decisional law, the California statute has two original and valuable features. It warns the court of the constitutional doubts which may be created by imposing domestic law on a legal relationship which lacks any reasonable contact with the forum;[99] and it provides that when an action is dismissed because of the plaintiff's failure to prove the pertinent foreign law, the dismissal should be without prejudice.[100]

2. *Unproved and Unnoticed Foreign Law in the Federal Courts*

A special problem confronted the draftsmen of Federal Rule 44.1. It was realized that it would be conducive to clarity if the Rule spelled out the consequences that ensue when the foreign law is neither proved nor judicially noticed. But there was a hitch. Although the provision authorizing a court to take judicial notice can be viewed as a rule of adjective law, and thus covered by the Enabling Act, a rule spelling out the consequences of failure to take judicial notice is more difficult to characterize. A rule of the latter kind might be thought to be a choice of law rule and thus beyond the scope of the Supreme Court's rule-making power.[101] Because of this doubt, the draftsmen refrained from determining, in the Rule itself, the consequences

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[96] "In the absence of an adequate basis for taking judicial notice of the law of any jurisdiction other than this State, and the United States, the judge shall apply the law of this State." N.J. STAT. ANN. § 2A:84A-16 R. 9(3) (Supp. 1973).

[97] If the law of . . . a foreign nation . . . or a public entity in a foreign nation . . . is applicable and such law cannot be determined, the court may, as the ends of justice require, either:

(a) Apply the law of this state if the court can do so consistently with the Constitution of the United States and the Constitution of this state; or

(b) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice.

CAL. EVID. CODE § 311 (West 1966).

[98] *See* notes 64-67 and accompanying text *supra.*

[99] CAL. EVID. CODE § 311(a) (West 1966). *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930); notes 61, 97 *supra.*

[100] CAL. EVID. CODE § 311(b) (West 1966); *see* note 97 *supra.* Even in the absence of a statutory direction, a wise trial judge normally will dismiss "without prejudice" in such a case. *See* R.B. SCHLESINGER, *supra* note 2, at 155 and authorities cited therein. Nevertheless, since some trial judges perhaps are not as wise and experienced as others, the statutory reminder is valuable.

[101] Under 28 U.S.C. § 2072 (1970), the Supreme Court may promulgate *procedural* rules but may not use its rule-making power to "abridge, enlarge or modify any substantive right."

which follow when the foreign law is neither proved nor judicially noticed. This left a gaping hole in the Rule. According to the prevailing view, this hole must be filled, at least in a diversity case, by reference to state law.[102] However, Professor Arthur Miller, in his well-known "Death-Knell" article, developed plausible arguments in support of the position that federal decisional law rather than state law should determine the matter in the federal courts.[103] What influence Professor Miller's position will have on the courts remains to be seen. If his argument should prevail, the federal courts would have to fashion their own rule in diversity as well as nondiversity cases; and if past experience in nondiversity cases is a guide, there would then be some danger that lower federal courts would feel bound by the only Supreme Court decision directly in point: the somewhat sinister holding of *Crosby*.[104]

3. *Judicial Notice of Uninvoked Foreign Law*

In those cases in which the court actually utilizes its statutory power to take judicial notice of foreign law, the problem of the consequences of the parties' failure to invoke and prove that law becomes moot. True, when the foreign law in question belongs to an alien system, and the parties have given the court no aid in ascertaining it, the court normally will decline to ascertain the foreign law by its own independent efforts; but unless the point is precluded on grounds of lateness, this is completely a matter of discretion. Most of the statutes make it quite clear that the parties' failure to invoke the foreign law does not prevent the court from judicially noticing it, and that the court, even though totally unaided by the parties, has the *power* to undertake its own research.[105] Even the late Professor Currie, who strongly opposed the utilization of uninvoked foreign law, and who for this reason criticized the sweeping language usually found in judicial notice statutes, made it quite clear that his criticism was presented *de lege ferenda*.[106]

Although under most judicial notice statutes the court thus has the power independently to dig up foreign law points never invoked

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[102] *See* Krasnow v. National Airlines, 228 F.2d 326 (2d Cir. 1955), *relying on* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[103] Miller, *supra* note 2, at 702-15, 723-31, 746-48.

[104] This danger is illustrated by Ozanic v. United States, 165 F.2d 738, 744 (2d Cir. 1948). *But see* note 65 *supra*.

[105] *See, e.g.*, N.Y. CIV. PRAC. LAW R. 4511(b) (McKinney 1963). "Every court may take judicial notice without request of . . . the laws of foreign countries or their political subdivisions."

[106] Currie, *On Displacement of the Law of the Forum*, *supra* note 16, at 981.

by a party, the question remains whether the court may and should decide the case without having given the parties an opportunity to respond to the results of the court's own foreign law research. This question will be taken up below (under III).

C. *Other Pertinent Procedural Rules*

In many cases, of course, the initiative in finding and presenting the foreign law will be taken by the parties, and not by the court. When the parties make an intelligible presentation of the relevant sources and materials, the court in general will be inclined to make use of the powers conferred by the judicial notice statute. But frequently it happens that the parties and the court neglect a decisive foreign law point until after the trial. Perhaps the point is raised by the parties, or discovered by the court, for the first time in connection with a post-trial motion, such as a motion for judgment n.o.v. or for a new trial.[107] Or—and this is not infrequent—the foreign law point turns up for the first time on appeal.[108] Is the point now waived or precluded by lateness?

The answer to this question depends, in the first place, on whether the statute contains a notice requirement, and whether the courts have added teeth (or perhaps dentures) to that requirement. In this respect, the judicial notice statutes differ among each other. On the one hand, there is Federal Rule 44.1, with its express notice requirement, which, at least in the Second Circuit, has been taken so seriously that the foreign law point is dead unless introduced in good time.[109] On the other hand, most of the state statutes (except those patterned after Federal Rule 44.1) either have no notice requirement at all, or provide that the parties' failure to give timely notice does not preclude the court from looking into the foreign law.[110]

This, however, is not a complete answer to the question of preclusion. Even when, as in California and New York and a number of other states, the judicial notice statute itself contains no preclusionary rule, belated resort to the foreign law may be precluded by general principles of procedure. Suppose, for instance, that in a jury case the judge has instructed the jury in accordance with domestic law, and the

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[107] *See, e.g.*, Frummer v. Hilton Hotels Int'l, Inc., 60 Misc. 2d 840, 304 N.Y.S.2d 335 (1969). *See also* note 86 *supra.*

[108] *See, e.g.*, Ruff v. St. Paul Mercury Ins. Co., 393 F.2d 500 (2d Cir. 1968); Sonnesen v. Panama Transp. Co., 298 N.Y. 262, 82 N.E.2d 569 (1948), *reargument denied,* 298 N.Y. 856, 84 N.E.2d 324, *cert. denied,* 337 U.S. 919 (1949).

[109] Ruff v. St. Paul Mercury Ins. Co., 393 F.2d 500, 502 (2d Cir. 1968).

[110] *See* notes 79-86 and accompanying text *supra.*

parties have failed to raise the foreign law issue by timely requests or exceptions. In such a case, it might well be too late to argue on appeal that the judge committed error by charging the jury in accordance with the law of the forum.[111]

Even in a nonjury case, a foreign law issue may be similarly precluded if raised too late. Suppose, for instance, that in an action brought in a state court the complaint alleges invasion of privacy. Although the allegedly tortious acts occurred in Ruritania, where the plaintiff lived at the time, the case is tried on the assumption that it is governed by the law of the forum. After a trial without a jury, the court holds for the plaintiff. On appeal, the defendant for the first time claims that the law of Ruritania controls, and he submits ample materials demonstrating that under the law of that country an invasion of privacy such as shown in this case is not actionable. Even though the forum state's judicial notice statute contains no notice requirement, the point may be precluded. It is true, of course, that pursuant to the classical rule the defendant may at any time, and even for the first time on appeal, point to the legal insufficiency of the complaint.[112] But the classical rule has been changed in a number of states.[113] Under the influence of Federal Rule 12 (h),[114] several states now provide that after the end of the trial a defendant may no longer attack the sufficiency of the complaint unless he has previously raised the objection.[115]

These preclusionary rules are technical and refined. Suppose that in the hypothetical invasion of privacy case the trial court, although applying domestic law, for some reason had dismissed the complaint, and the plaintiff had appealed. In that event, it might be possible for the defendant, *as appellee*, to urge affirmance on the basis of Ruritanian law. Some cases, at least, seem to suggest this distinction in favor of the appellee.[116]

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[111] *See, e.g.*, FED. R. CIV. P. 51; N.Y. CIV. PRAC. LAW §§ 4017, 5501(1)(3) (McKinney 1963); *id.* § 4110-b (McKinney Supp. 1973).

[112] *See* F. JAMES, CIVIL PROCEDURE 135 (1965).

[113] *See, e.g.*, ARIZ. R. CIV. P. 12(i); N.C.R. CIV. P. 12(h); VT. R. CIV. P. 12(h).

[114] FED. R. CIV. P. 12(h); *see* Black, Sivalls & Bryson, Inc. v. Shondell, 174 F.2d 587 (8th Cir. 1949).

[115] *See, e.g.*, Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417 (1971).

In a jurisdiction in which foreign law does not have to be pleaded, or failure to plead it is not fatal, the objection may be thought to go to the sufficiency of the evidence rather than to the sufficiency of the complaint. Even so, however, the objection may be precluded by the defendant's failure, at the time when he moved for dismissal at the end of the plaintiff's case or at the end of the whole case, to specify the foreign law point as a ground for such motion. *See, e.g.*, J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 4401.09 (1963).

[116] *See* Soutbard v. Soutbard, 305 F.2d 730 (2d Cir. 1962); Archer v. United States, 217 F.2d 548 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955).

In many jurisdictions, moreover, there is a more general rule that prohibits the parties, or at least the appellant, from raising new points of any kind for the first time on appeal.[117] True, this rule is applied with considerable flexibility, and it is generally thought that an appellate court, in its discretion, can disregard the rule whenever its strict application would lead to injustice.[118] In spite of its flexibility, however, the rule lurks in the appellate practice of most jurisdictions. A lawyer devising litigation strategy in a foreign law case thus should keep in mind that even under the most liberal judicial notice statute, it may be dangerous to hold a foreign law point in reserve for an eventual appeal.

In any event, in order properly to appraise the consequences of a failure to invoke or prove the applicable foreign law, one must realize that the pertinent common-law rules[119] interact not only with judicial notice statutes but also with other, more general rules of trial and appellate procedure, and that under rules of the latter kind a foreign law point may be precluded unless seasonably raised.[120]

III

SOME MODEST SUGGESTIONS

The conclusion that emerges from the foregoing survey is only mildly encouraging. Once one discerns all the facets of the problem, and recognizes the complex interaction among the pertinent rules of decisional and statutory law, it becomes apparent that these rules are rational and consistent, and that on the whole they lead to workable solutions. Many of these solutions, however, are based on overly complex reasoning, and some of them may not be entirely fair.

Our aim, in foreign law cases as much as in other types of litigation, is not merely to develop rational rules and to devise workable solutions, but "to secure the just, speedy, and inexpensive determination of every action."[121] Few will argue that in the area under discussion we have reached, or even approached, that lofty objective.

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[117] *See, e.g.*, 14 CYCLOPEDIA OF FEDERAL PROCEDURE § 67.09 (3d ed. 1965); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 297 (4th ed. 1969).

[118] *See* Jannenga v. Nationwide Life Ins. Co., 288 F.2d 169 (D.C. Cir. 1961), *noted in* 14 STAN. L. REV. 162 (1961). *See also* H. COHEN & A. KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS §§ 161-69 (1952); 14 CYCLOPEDIA OF FEDERAL PROCEDURE, *supra* note 117, at § 67.09; 11 CARMODY-WAIT 2D: CYCLOPEDIA OF NEW YORK PRACTICE §§ 71:116-17 (1966).

[119] *See* notes 24-78 and accompanying text *supra*.

[120] The procedural consequences that ensue when the foreign law point is raised too late, are discussed somewhat more extensively in R.B. SCHLESINGER, *supra* note 2, at 182-83.

[121] *See* FED. R. CIV. P. 1 (second sentence).

But some progress toward that objective, it is submitted, could be achieved by adopting the relatively modest proposals that follow.

The first suggestion is simple and not at all novel; indeed, its adoption may be constitutionally mandated. It is to the effect that no trial or appellate court should ever decide a case on the basis of its own discoveries concerning the foreign law, without having given the parties an opportunity to present arguments and materials on what the court thinks the foreign law to be. The California statute so provides.[122] The Advisory Committee Notes on Rule 44.1 express a similar thought, but present it as if it were merely a matter of good practice.[123] This author, on the other hand, earnestly submits that the requirement is one of due process, and that this result is supported by authority as well as by considerations of fundamental fairness.[124]

A second suggestion is similar in spirit, but goes somewhat further. The time has come to recognize how far the actual practice in these matters has strayed from the mythological common-law model of a purely adversary procedure. By the enactment of statutes which authorize a court, in determining foreign law, to consider any relevant material or source, whether or not admissible under rules of evidence, and whether or not submitted by a party, our legislators have taken a long step away from the common-law tradition of treating the court as a passive umpire. Our judicial notice statutes do not go as far as the German Code of Civil Procedure, which, at least in theory, places the entire responsibility for ascertaining the foreign law upon the court.[125] Clearly, however, in those American jurisdictions which have adopted judicial notice statutes, we have instituted a system under which that responsibility is shared by court and counsel. By way of allocating their respective functions, we have given to the court the important power to decide whether it will consider foreign law materials submitted without evidentiary formalities, and, even more important, whether and to what extent it will conduct its own research on points not covered, or insufficiently covered, by adversary presentation.

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[122] CAL. EVID. CODE §§ 455(a), 459(c), (d) (West 1966).

[123] There is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them. Ordinarily the court should inform the parties of material it has found diverging substantially from the material which they have presented; and in general the court should give the parties an opportunity to analyze and counter new points upon which it proposes to rely.

NOTES OF ADVISORY COMMITTEE ON RULES, FED. R. CIV. P. 44.1.

[124] *See* Arams v. Arams, 182 Misc. 328, 330-31, 45 N.Y.S.2d 251, 253 (Sup. Ct. 1943); *cf.* Saunders v. Shaw, 244 U.S. 317 (1917). The point is also discussed in the broader context of the constitutionality of judicial notice statutes, in R.B. SCHLESINGER, *supra* note 2, at 172.

[125] *See* R.B. SCHLESINGER, *supra* note 2, at 185-87.

Such tremendous discretionary power naturally engenders responsibility. Thus, a court operating under a judicial notice statute is under a duty to inform the parties whether, to what extent, and under what circumstances it will take judicial notice of the foreign law. Failure to give this vital information to the parties, and to supply it in time to be acted upon, should be treated as reversible error. This was the point of the late Judge Jerome Frank's somewhat cryptic but trailblazing dissent in the *Walton* case[126]—a point the soundness of which has become even more apparent since the enactment of Rule 44.1.

When it comes to foreign law issues, it will no longer do to say that under the common-law tradition the issues are always formed by the parties. With respect to the procedural treatment of foreign law, we have largely abandoned the common-law tradition. It follows that in performing the tasks of identifying, researching, and resolving foreign law issues, responsibility must be shared by court and counsel. For this reason, foreign law issues should always be brought up for discussion at the pretrial hearing. When this is done, the judge has an opportunity to admonish the parties to state whether and to what extent they intend to rely on foreign law, and what, if anything, they propose to do in order to assist the court in ascertaining it. If it turns out, as it often does, that each party wishes to place the burden of invoking and proving the foreign law on his opponent, the court can end this game of musical chairs by an immediate ruling—ultimately reviewable on appeal—concerning the burden of proof.[127] These simple steps, designed to neutralize ignorance as well as trickiness on the part of counsel, should be taken by every trial court faced with a foreign law case, and it should be reversible error not to take them.[128]

This does not place too heavy a burden on the court. The fact that a case involves foreign elements, and that the law of a foreign country might be relevant to some of the issues, usually can be

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[126] The writer of the opinion thinks we should remand for this reason: Apparently neither the trial judge nor the parties were aware of New York Civil Practice Act, § 344-a [New York's judicial notice statute at that time]; consequently, in the interests of justice, we should remand with directions to permit the parties, if they so desire, to present material which may assist the trial judge to ascertain the applicable "law" of Saudi-Arabia.

Walton v. Arabian Am. Oil Co., 233 F.2d 541, 546 (2d Cir. 1956) (footnotes omitted).

[127] At the same time, the court should inform the parties whether the burden has to be met by the introduction of formal evidence, or whether (and under what conditions) judicial notice will be taken of the foreign law.

[128] Experienced trial judges have long followed the practice suggested in the text. *See* Sommerich, *Comment*, 4 AM. J. COMP. L. 473 (1955). For instance, in Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir. 1956), the trial judge had repeatedly informed counsel that in his opinion the burden of proving Saudi Arabian law was on the plaintiff, and that failure to sustain that burden would lead to dismissal of the action.

gathered by a cursory glance at the pleadings. Upon finding that a foreign law question potentially lurks in the case, the court clearly has the power—under Federal Rule 16[129] and its counterparts in state court practice—to demand that the parties clarify their positions as to what law applies and how any applicable foreign law should be ascertained.

In general, it is true that a court's powers under Rule 16 are discretionary; but when dealing with foreign law issues—that is, issues no longer covered by the ancient principle of purely adversary litigation—a judicial duty to seek clarification must go along with the power.[130] Once all of our trial courts recognize this duty, or are forced by appellate decisions to do so, we shall be rid of many of the complex subtleties which today, at least occasionally, still breed sharp practices and inequitable results in this area of the law.

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[129] FED R. CIV. P. 16. Under this Rule, the district court has the power, in its discretion, to order a pretrial conference. During such a conference, the court may seek clarification and limitation of the issues to be litigated. Moreover—and this may be of special significance in a case involving issues of foreign law—the attorneys for the parties may be directed to consider "the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof" and "the limitation of the number of expert witnesses." The court, in addition, may bring up for discussion "such other matters as may aid in the disposition of the action."

[130] Perhaps it would be useful, by way of amending Rule 16 and its counterparts in state practice, to spell out the procedural consequences flowing from the enhanced responsibility which the court bears in foreign law cases.