Feature

KEY POINTS

- Modern international financial litigation increasingly leads to the pleading and proving of foreign law in the English court. Two recent examples are the Italian swaps litigation and cryptocurrency disputes.
- *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2022] AC 995 is one of the few cases expressly referred to in the Commercial Court Guide (at para C1.3(f) and H3.1) and provides much abstract guidance on pleading and proving foreign law.
- This article seeks to translate that theory into practical guidance for litigators.

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The practicalities of pleading and proving foreign law in modern financial litigation

In theory, *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2022] AC 995 (*Brownlie II*) includes everything one needs to know about pleading and proving foreign law. However, in practice, it is replete with difficulties for litigators. This article provides guidance to ensure that one pleads one's case in accordance with *Brownlie II* whilst not exposing one's clients to unnecessary costs and satellite litigation.

BROWNLIE II

Brownlie II concerned, inter alia, a claim in tort following a car crash in Egypt (paras 8-9) and an application to serve out (para 25). The only claims that the claimant could advance were those under Egyptian law.

The defendant objected that the claimant had failed to plead Egyptian law, with the only references to Egyptian law being in generic terms in the prayers of the amended claim form and particulars (para 26). There was no reference to any specific Egyptian law provisions (para 100). The defendant argued that foreign law is to be treated as a matter of fact to be pleaded and proved. It said that failure to do so meant that the claim was fatally flawed, therefore there was no serious issue to be tried so one of the key requirements for permission to serve out was missing and should therefore have been refused (para 26).

The key aspects of Lord Leggatt's judgment (with whom the rest of the court agreed on the issues concerning pleading and proving foreign law) provided as follows:

- Foreign law must be pleaded and proved: paras 101, 109.
- In the absence of evidence to the contrary, the content of foreign law is presumed to be the same as English law: paras 108-112.
- The "presumption of similarity" and the "default rule" are conceptually distinct (para 112):
  - The "presumption of similarity" is a rule of evidence concerned with what the content of foreign law should be taken to be.
  - The "default rule" is not concerned with establishing the content of foreign laws but treats English law as applicable in its own right where foreign law is not pleaded.
- Where neither party advances a case based on foreign law, the court will apply English law: paras 113-118.
- There is no warrant for applying the "presumption of similarity" unless it is a fair and reasonable assumption to make in the particular case. The question is one of fact: 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 (meaning that any differences between the two systems are unlikely to lead to a different substantive outcome)? para 126.
- The "presumption of similarity" is more likely to be appropriate where the applicable foreign law is another common law system as opposed to civil law: para 144.
- It is always open to the party who is asserting a claim or defence based on foreign law to adduce direct evidence of the content of the relevant foreign law rather than take the risk of relying on the presumption. Equally, it is always open to the other party to adduce such evidence showing that the foreign law is materially different from the corresponding English law rather than take the risk that the presumption will be applied: para 146.
- 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: para 147.
- It should not be assumed that the only alternative to relying on the "presumption of similarity" is necessarily to tender evidence from an expert in the foreign system of law. The old notion that foreign legal materials can only ever be brought before the court as part of the evidence of an expert witness is outdated. Whether the court will require evidence from an expert witness should depend on the nature of the issue and of the relevant foreign law. In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases, it may be sufficient to know what the text says: para 148.
- Adducing direct evidence of foreign law narrows the potential for relying on the presumption; but whether it eliminates the potential for doing so altogether must depend on the circumstances. For one reason or another, the evidence tendered by the parties may be incomplete. A party or its expert may not have anticipated every

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point of foreign law which may arise in relation to a particular issue. There is no principled reason why reliance on the presumption should be prevented in such circumstances: para 151.

As to pleading foreign law, Lord Leggatt held that:

- If it is realistic to suppose that the defendant might be content for the court to apply English law by default and the claimant would prefer this, a claimant may choose when commencing proceedings not to assert that the claim is governed by foreign law, even if under the relevant rules of private international law that would be the case, and simply to plead a claim based on English law: para 163.
- If the defendant pleads (or it is clear at the outset that the defendant intends to plead) that foreign law is applicable, the claimant must decide whether to contend otherwise and whether to advance a claim for relief under foreign law: para 163.
- The claimant should specify in her statement of case any rules or provisions of foreign law on which she intends to rely so that the defendant knows in outline the case it has to meet: para 165.
- A claimant does not have to rely on any rules or provisions of foreign law: parties are entitled, if they choose, simply to rely on the presumption that the foreign law is materially similar to English law. But reliance on the presumption does not alter the ordinary rules of pleading. If a claimant chooses not to plead a case based on any specific rules of the foreign law, hoping to be allowed to do so later if it becomes expedient, the claimant takes the risk of needing to persuade the court at a future date to grant permission to amend – just as in any other situation where a party seeks to change its case: para 165.

THE HYPOTHETICAL SCENARIO

In modern financial litigation, it is commonplace to have a foreign law element to one's claim. The recent string of Italian swaps cases are a good example which import foreign law concepts of a corporation's substantive powers into English law contractual analysis.[1]

Similarly, cryptocurrency litigation increasingly throws up foreign law issues where the location of damage for the purposes of determining the applicable law (pursuant to Rome II) may be difficult to discern.

As a result, the correct approach to pleading and proving foreign law is very important. Imagine the following scenario:

- A client approaches you with a complex, international, financial claim which may be subject to an imminent time bar.
- There is no opportunity for pre-action correspondence.
- Your view is that foreign law is likely to apply but, given the time pressure, there is limited opportunity to obtain extensive foreign law input prior to pleading the case.

This raises the following issues as to how to plead the case:

- Does one plead the case as if English law applies but with reference to the foreign law provisions that one will rely on if necessary?
- To what extent is it appropriate to rely on the presumption of similarity?
- Is one's ability to rely on the presumption dependent on the extent to which one pleads the details of foreign law (perhaps if one later obtains further expert input and amends to include more detail)?
- If one pleads English law causes of action alongside foreign law but the defendants admit that foreign law applies, does one have to strike through one's English law causes of action?
- If so, which party should pay the costs of pleading to the English law causes of action where they have now been struck through?
- How is one to prove foreign law in light of the comments in *Brownlie II* that foreign law expert evidence is not always required?

PRACTICAL GUIDANCE

In our view, where one does not have an opportunity to engage in pre-action correspondence such that one cannot know the defendant's view on applicable law, the most appropriate course is to plead the action from the perspective of English law but also adding a clear paragraph noting the foreign law provisions relied on as necessary. This is because:

- The claimant may choose whether to plead foreign law or not (*Brownlie II*, para 163).
- The defendant may be content for English law to apply, which may be your preference as well. As such, it is best to keep the English law causes of action in play.
- If there is a time bar point, it is always better to include more causes of action rather than less to avoid the possibility of having to make an amendment application after the expiry of the time bar under CPR r 17.4.
- Whilst one has to plead and prove foreign law (*Brownlie II*, paras 101, 109), *Brownlie II* indicates that the claimant is only required:
  - to advance a "claim for relief" under foreign law (para 163); and
  - to do so to ensure that the defendant knows "in outline the case it has to meet" (para 165).

  This indicates that the correct approach is to plead one's case as one normally would under English law but one should include a clear paragraph as to the foreign law provisions relied on, if possible, as well as the relief claimed under foreign law. The court did not appear to be saying that a claimant must plead their fully particularised foreign law claim at the beginning of the action.
- Given the presumption of similarity, it will be helpful for the court to have the detail of how English law would approach the wrongs alleged. Indeed, even if foreign law is pleaded in detail, it is not possible to know how the case will change from pleading to trial nor how the court will treat the evidence of the foreign law expert (as noted at *Brownlie II*, para 151). The court may, for example, hold that neither expert was reliable following cross-examination and therefore apply the

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foreign law provisions along with the presumption of similarity. As such, there may therefore still be a role for the presumption of similarity even where one's foreign law case is pleaded in detail.

In the event that the defendant admits that foreign law applies, our view is that the English law causes of action should remain on the face of the pleadings even if the parties are agreed that, technically, no claim is formally being advanced under them. This will ensure that the English court has useful detail should the presumption of similarity become relevant during the life of the case. In this regard, *Brownlie II* emphasises that the precise application of the presumption of similarity is context dependent such that one cannot say, definitively, how and when it will apply. It is therefore best to keep the English law claim on the pleadings. Furthermore, for this reason also, any attempt to "strike out" English law in this situation should fail.

As to the costs of the pleading process, our view is that these should ordinarily be costs in the case. The pleading of foreign law is not straight-forward following *Brownlie II* and the costs associated with it are best regarded as simply part of the costs of international litigation. It would, however, be open to the judge to allocate costs on an issue-by-issue basis such that the foreign law aspects could be treated separately.

As to the proof of foreign law, one has to distinguish two scenarios:

- First, there is proof of foreign law at an interlocutory hearing. *Brownlie II* makes clear that:
  - it is more appropriate to rely on the presumption of similarity at an early stage in the proceedings (para 147); and
  - it is not always necessary to file full expert reports on foreign law (para 148).

  It may be, therefore, that in an application for permission to serve out, for example, the claimant may simply obtain a letter from a foreign lawyer noting that, at a minimum, there is a "serious issue to be tried" on the merits. It may be, therefore, that in an application for permission to serve out, if the claimant intends to rely on a foreign law cause of action, they can simply obtain a letter from a suitably qualified foreign lawyer that states briefly the nature of the foreign law cause of action and gives the opinion that, on the facts known, it raises a "serious issue to be tried" on the merits.
- Second, there is proof of foreign law at trial. Whilst *Brownlie II* arguably envisages various means through which a party could prove its foreign law case, the reality in high value, complex, international financial litigation is that:
  - both parties are very likely to instruct foreign law experts; and
  - those experts are likely to go through the full CPR Pt 35 procedure including first round reports, a joint meeting, a joint memo and supplemental expert reports.

  As a result, where one is dealing with complex, high-value financial litigation, the traditional approach of full expert evidence is likely to remain.

CONCLUSION

Whilst *Brownlie II* provides a lot of useful guidance in theory, its application in practice throws up a variety of difficulties. Our view is that it is usually best to plead English law causes of action alongside the foreign law provisions that one relies on. To the extent that the defendant takes issue with that approach and insists that the English law causes of action be removed, our view is that the costs of such an exercise should be costs in the case as it is simply a function of pleading international cases with a foreign law element. ■

1 See JIBFL article: 'International aspects of capacity and authority: a need for reappraisal of *Haugesund v Depfa*' (2021) 7 JIBFL 460.

Further Reading:

- Decrypting conflict of laws (2023) 3 JIBFL 158.
- Case analysis (2022) 8 JIBFL 563.
- Lexis+® UK: Dispute Resolution: Practice Note: Cross border: "serious issue to be tried" requirement.