STATUTES OF LIMITATION BETWEEN CLASSIFICATION AND *RENVOI*—AUSTRALIAN AND SOUTH AFRICAN APPROACHES COMPARED

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Abstract This article compares the ways in which Australian and South African courts have approached issues of classification and *renvoi* where a defendant argues that the action is time-barred. There are two differences in approach. First, Australian courts classify all statutes of limitation as substantive, whereas South African courts distinguish between right-extinguishing statutes (substantive) and merely remedy-barring statutes (procedural). Second, the High Court of Australia has used *renvoi* in the context of the limitation of actions whereas South African courts have yet to decide on whether to use *renvoi*. This article assesses the impact of those differences in various situations.

I. INTRODUCTION

Two of the most complex concepts in private international law are classification (or characterization or categorization) and *renvoi*. One situation in which both concepts can be relevant is where the forum's conflict rules specify a foreign law as the law governing the obligation in question and the defendant argues that the action is time-barred, by which is meant that the claim must be dismissed on the ground that no proceedings were brought within a certain period of time from a certain date (for instance within three years from the accrual of the cause of action). Problems of classification arise where the *lex fori* and the *lex causae*[1] differ on the question of whether a certain statute of limitation belongs to the procedural or the substantive law of its legal system. *Renvoi* is an option where the *lex fori* and the *lex causae* use different connecting factors for the obligation in question. This article

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[1] In this article, the term '*lex causae*' denotes a foreign legal system to which the *lex fori*'s conflict rules directly refer for the issue before the court. If the forum court uses the concept of *renvoi*, the *lex causae* is not necessarily the legal system whose internal rules are applied in deciding the issue before the court. That legal system may be the *lex fori*, the *lex causae* or a third legal system.

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compares the different ways in which Australian and South African courts have tackled choice-of-law issues in the context of the limitation of actions.

Australian and South African courts used to be spared any exercise in classification or *renvoi* in the context of the limitation of actions, for two cumulative reasons. The first is the distinction in English common law between statutes of limitation that merely bar the remedy, and statutes that extinguish the right. The former are classified as procedural and thus governed by the *lex fori*, the latter are classified as substantive and thus governed by the *lex causae*.[2] This distinction spread to jurisdictions that were influenced by or wholly adopted English law, including Australia[3] and South Africa.[4] The second reason is that the English courts have interpreted the phrase 'an action shall not be brought' in the Limitation Act 1980 (UK) and its predecessors as merely barring the remedy and thus as procedural under the traditional classification system.[5] Australian[6] and South African courts[7] adopted this interpretation of the phrase 'an action shall not be brought' for their own statutes of limitation.

The combined effect of having a merely remedy-barring statute of limitation in the forum and classifying that statute as procedural was that Australian and South African courts always applied the forum's statute of limitation as part of their procedural law. That approach was defended with the argument that foreign litigants should not be better off than forum litigants.[8] Questions of classification and *renvoi* potentially arose where the *lex causae* had a merely remedy-barring statute of limitation and classified it as substantive. In that situation, the forum court can recognize a conflict of classification and resolve that conflict by applying the *lex causae*, and can perhaps apply the *lex causae*'s conflict rules rather than its internal rules. However, it seems that Australian and South African courts ignored those questions.

All of that belongs to the past. Circumstances have changed in both Australia and South Africa, although they have changed in different ways.

[2] *Huber v Steiner* (1835) 2 Bing NC 202, 210–211; 132 ER 80, 84; *Phillips v Eyre* (1870) LR 6 QB 1, 29; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (HL) 630.

[3] *Pedersen v Young* (1964) 110 CLR 162 (HCA); *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 (HCA).

[4] *Slabbert v Federated Employers' Insurance Co Ltd* (1979) (3) SA 207, 209; *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* (1981) (3) SA 536, 537–538.

[5] *Williams v Jones* (1811) 13 East 439, 450–451; 104 ER 441, 447; *Ruckmaboye v Mottichund* (1851) 8 Moo PC 4, 36–37; 14 ER 2, 15–16 (PC); *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) 558.

[6] *Pedersen v Young* (1964) 110 CLR 162 (HCA); *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 (HCA).

[7] For the Prescription Act 18 of 1943 see *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536, 538; *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* (1990) (2) SA 566, 568–569; *Society of Lloyd's v Price* [2006] SCA 87, para 16.

[8] This argument was presented, and rejected, in *Tolofson v Jensen* [1994] 3 SCR 1022 (SCC) 1069–1070.

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In Australia, the statutes of limitation of the states and territories[9] still use the phrase 'an action shall not be brought' or similar phrases and are still interpreted as merely barring the remedy (unless the statute provides otherwise),[10] but the classification of statutes of limitation has changed. Each Australian jurisdiction now has a statute providing that where the substantive law of another Australian jurisdiction or of New Zealand governs an issue before the forum court, the substantive law of that jurisdiction includes a statute of limitation, whether it extinguishes the right or merely bars the remedy.[11] Since it is a prerequisite that the law of the other jurisdiction governs the issue in question, an application of the forum's statute of limitation through *renvoi* seems possible. In addition to the legislative intervention, the High Court of Australia,[12] following the Supreme Court of Canada,[13] has changed the common law position by holding that all statutes of limitations are to be classified as substantive, whether they are domestic or foreign and whether they extinguish the right or merely bar the remedy.

In South Africa, the classification of statutes of limitation still depends on whether they extinguish the right or merely bar the remedy,[14] but the effect and classification of the domestic statute of limitation has changed. Section 10(1) of the Prescription Act 68 of 1969 now provides that 'a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt'. Since that section provides for an extinction of the debt and not only its unenforceability, the prescription of rights under that Act is classified as a matter of substantive law.[15]

[9] Limitation Act 1985 (ACT); Limitation Act 1969 (NSW); Limitation Act 1981 (NT); Limitation of Actions Act 1974 (Qld); Limitation of Actions Act 1936 (SA); Limitation Act 1974 (Tas); Limitation of Actions Act 1958 (Vic); Limitation Act 2005 (WA).

[10] *The Commonwealth v Mewett* (1997) 191 CLR 471 (HCA) 534–535; *Re Sommer and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2008] AATA 836, (2008) 104 ALD 134, paras 23–25. For the limitation period in section 82(2) of the Trade Practices Act 1974 (Cth), renamed as Competition and Consumer Act 2010 (Cth), see *Larrikin Music Publishing Pty Ltd v EMI Songs Australia Pty Ltd (No 2)* [2010] FCA 698, (2010) 270 ALR 481, paras 126–127.

[11] Limitation Act 1985 (ACT), ss 55 and 56; Choice of Law (Limitation Periods) Act 1993 (NSW), ss 3 and 5; Choice of Law (Limitation Periods) Act 1994 (NT), ss 4 and 5; Choice of Law (Limitation Periods) Act 1996 (Qld), ss 4 and 5; Limitation of Actions Act 1936 (SA), s 38A; Limitation Act 1974 (Tas), ss 32A and 32C; Choice of Law (Limitation Periods) Act 1993 (Vic), ss 3 and 5; Choice of Law (Limitation Periods) Act 1994 (WA), ss 4 and 5. These provisions are mirrored by sections 28A–28C of New Zealand's Limitation Act 1950.

[12] *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503, paras 100, 132–133, 161, 192–193; *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54, (2005) 223 CLR 331.

[13] *Tolofson v Jensen* [1994] 3 SCR 1022 (SCC) 1067–1072; *Castillo v Castillo* [2005] SCC 83, [2005] 3 SCR 870, paras 7, 15.

[14] *Society of Lloyd's v Price* [2006] SCA 87, para 10. The decision is discussed in detail below.

[15] *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536, 538–539; *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566, 568; *Society of Lloyd's v Price* [2006] SCA 87, paras 15–16.

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In consequence of the changes, Australian and South African courts now classify the forum's statute of limitation as substantive and, as a general rule, apply it only where the *lex fori* identifies its own internal rules as governing the obligation in question. That has opened the door to questions of classification and *renvoi* in the context of the limitation of actions. It must not be overlooked though that Australian courts and South African courts have a different reason for classifying the forum's statute of limitation as substantive. Australian courts do so because they now classify all statutes of limitation as substantive. South African courts do so because the Prescription Act 68 of 1969 extinguishes the right and does not merely bar the remedy. The different reason for classifying the forum's statute of limitation as substantive may require different approaches in conflict cases.

Circumstances have also changed in England itself. Implementing a recommendation by the Law Commission for England and Wales,[16] the Foreign Limitation Periods Act 1984 (UK) now obliges English courts to apply the statute of limitation of a foreign *lex causae* and not the English Limitation Act 1980,[17] unless the foreign statute conflicts with English public policy.[18] It might be thought that the 1984 Act opens the door to questions of classification and *renvoi* in the context of the limitation of actions. But this is not the case as the Act expressly excludes *renvoi*[19] and further provides that foreign statutes of limitation must be applied regardless of whether they are procedural or substantive.[20] Since the Act applies only to foreign statutes of limitation, the classification of the English Limitation Act 1980 is still governed by the common law rules which, as Forsyth observes, are effectively frozen as an English court will not be asked to classify the Limitation Act 1980 in an entirely English case.[21] Forsyth points to the possibility of a foreign court regarding the change of the common law position in Australia and Canada as being relevant for England too,[22] but no court seems to have done so.

This article examines how Australian and South African courts have dealt with foreign statutes of limitation since the changes outlined occurred. The approaches will be compared and it will be asked whether the courts in either country can draw lessons from developments in the other country. Since issues of classification and *renvoi* in the context of the limitation of actions do not arise where the forum's conflict rules specify the forum's internal rules as the law governing the obligation in question, it will be assumed throughout that the forum's conflict rules specify a foreign law as the law governing the obligation in question. This reference to a foreign *lex causae* may be a reference to its conflict rules or its internal rules, depending on the forum's rules on

[16] Law Commission, *Classification of Limitation in Private International Law* (Law Com No 114, 1982). [17] Foreign Limitation Periods Act 1984 (UK), s 1(1).
[18] ibid s 2(1). [19] ibid s 1(5). [20] ibid s 4(2).
[21] C Forsyth, ' "Mind the Gap": A Practical Example of the Characterisation of Prescription/Limitation Rules' (2006) 2 J Priv Int L 169, 177. [22] ibid.

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renvoi. Where the *lex fori* specifies a foreign *lex causae* for the obligation in question, three situations must be distinguished. In the first situation, the *lex causae* classifies its statute of limitation as substantive (II). In the second situation, the *lex causae* classifies its statute of limitation as procedural and specifies its own internal rules as the law governing the obligation in question (III). In the third situation, the *lex causae* classifies its statute of limitation as procedural and specifies a law other than the *lex causae* (either the *lex fori* or the law of a third country) as the law governing the obligation in question (IV).

It should be noted at the outset that a discussion of the problems of classification and *renvoi* in general is beyond the scope of this article. In particular, this article avoids the question of whether legal issues or legal rules or both are the object of classification. The answer to that question does not seem to make a difference to the specific problems discussed in this article. If legal issues are the object of classification,[23] the court will ask whether the exclusion of a remedy, or the extinction of a right, by lapse of time is a procedural or substantive matter. If legal rules are the object of classification,[24] the court will ask whether a certain remedy-barring or right-extinguishing statute is part of the procedural or substantive law of its legal system.

II. THE *LEX CAUSAE* CLASSIFIES ITS STATUTE OF LIMITATION AS SUBSTANTIVE

A. Australia is the Forum

Since Australian courts classify all statutes of limitation as substantive, they face no conflict of classification where the *lex causae* classifies its statute of limitation in the same way. That statute will apply, subject to *renvoi*. It used to be thought in Australia that the concept of *renvoi* applied only in limited areas of private law and notably not in the law of obligations.[25] However, the High Court of Australia prominently applied the concept of *renvoi* to tortious liability in general, and the limitation of actions in particular, in *Neilson v Overseas Projects Corporation of Victoria Ltd*.[26]

Mrs Neilson was a resident of Western Australia and the wife of an employee of Overseas Projects Corporation of Victoria Ltd ('OPC'), which had its registered office and principal place of business in Victoria. OPC employed Mr Neilson as a consultant on a two-year contract to work in Wuhan in the

[23] eg S Eiselen, '*Laconian* Revisited—A Reappraisal of Classification in Conflicts Law' (2006) 123 SALJ 147, 151–155.

[24] eg C F Forsyth, *Private International Law* (4th edn, Juta, Cape Town, 2003) 71.

[25] M Davies, S Ricketson and G Lindell, *Conflict of Laws: Commentary and Materials* (Butterworths, London, 1997) para 7.3.8; P E Nygh and M Davies, *Conflict of Laws in Australia* (7th edn, LexisNexis Butterworths, London, 2002) para 15.8; EI Sykes and MC Pryles, *Australian Private International Law* (3rd edn, Law Book Co, 1991) 223; M Tilbury, G Davis and B Opeskin, *Conflict of Laws in Australia* (OUP, Oxford, 2002) 1012.

[26] [2005] HCA 54, (2005) 223 CLR 331.

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People's Republic of China. OPC also employed Mrs Neilson as personal assistant to the director of the Wuhan project. In Wuhan, Mr and Mrs Neilson lived in a double-storey apartment provided by OPC. On 6 October 1991, Mrs Neilson fell down the stairs in that apartment and suffered head and back injuries. The fall was caused by the lack of a balustrade, about which Mr and Mrs Neilson had complained. On 29 June 1997, Mrs Neilson commenced proceedings against OPC in contract and tort in the Supreme Court of Western Australia. Her claim in contract failed on the grounds that her employment contract with OPC contained no express or implied term concerning the safety of the apartment, and that she was not a party to the employment contract between her husband and OPC.[27]

With regard to her claim in tort, OPC accepted being liable in principle under both Australian law (by which is meant the law of the relevant Australian state or territory) and Chinese law, but it relied on article 136 of China's General Principles of Civil Law ('GPCL'), which specifies a limitation period of one year for demands of compensation for bodily harm. Since China was the *locus delicti*, the conflict rules of the Western Australian forum identified Chinese law as the law governing OPC's liability in tort.[28] Expert evidence at trial established that Chinese law classifies its statute of limitation as a matter of substance rather than procedure.[29] Prima facie, therefore, the one-year limitation period of article 136 GPCL barred Mrs Neilson's claim against OPC. However, the trial judge overcame that bar on two independent routes.

First, article 137 GPCL provides that the limitation period may be extended under special circumstances. The trial judge held that that provision granted him discretion to extend the limitation period, and he exercised that discretion in Mrs Neilson's favour. The High Court disapproved that approach, pointing out that an Australian court cannot step into the role of a Chinese court and make its own decision on how to exercise the discretion, but that an Australian court must consider, as a matter of fact, how a Chinese court hearing the case would exercise the discretion. Expert evidence at trial established that an extension of the limitation period is extremely rare and would only occur in exceptional circumstances, for example where war prevents a party from commencing proceedings. The High Court therefore held that it had to be

[27] Callinan J in the High Court reported the trial judge's decision on the claim in contract: [2005] HCA 54, (2005) 223 CLR 331, para 228. It should be noted that the recognition of a contract for the protection of a third party would have made the claim in tort and thus the whole discussion of *renvoi* irrelevant.

[28] *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503 (HCA); *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, (2002) 210 CLR 491.

[29] This is now expressly provided for in article 7 of China's Law on the Application of Law for Foreign-Related Civil Legal Relationships, which Law came into force on 1 April 2011; see G Tu, 'China's New Conflicts Code: General Issues and Selected Topics' (2011) 59 Am J Comp L 563, 571.

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assumed that a Chinese court would not grant Mrs Neilson an extension of the limitation period.

Secondly, and crucially for present purposes, article 146(1) GPCL, which article has since been repealed,[30] provided in its first sentence that liability for the infringement of rights was governed by the law of the place in which the infringement occurred,[31] but provided in its second sentence that where both parties were nationals of, or domiciled in, the same country, the law of that country could be applied instead.[32] Despite Australia's federal structure, it was agreed that a claim by a Western Australian resident against a Victorian corporation fell into the scope of the second sentence and that that sentence *in casu* pointed to an application of Australian law. It was not discussed whether 'Australian law' would be the law of Victoria or of Western Australia, but this did not matter as Mrs Neilson's claim was not time-barred under either state's law. The trial judge held that the second sentence of article 146(1) GPCL gave him 'a right' to apply Australian law, and he exercised that right in Mrs Neilson's favour, holding OPC liable.

The High Court held that the trial judge had erred in assuming 'a right' to apply Australian law, and that the proper question was what a Chinese court would have made of the second sentence of article 146(1) GPCL. Six of the seven judges in the High Court saw it as established that a Chinese court would have applied Australian law and, more precisely, the internal rules, not the conflict rules, of Australian law.[33] Kirby J dissented in that respect, regarding the expert evidence on this issue as too vague.[34] A different composed majority of again six to one held that the Australian court had to take notice of the remission from Chinese law back to Australian law, and had to apply Australian law's internal rules. In other words, the doctrine of *renvoi* applied. McHugh J, dissenting in that respect, rejected the doctrine of *renvoi*. He took the view that the reference to the *lex loci delicti* in Australian law's conflict rules is a reference to the internal rules, not the conflict rules, of the *lex loci delicti*.[35]

[30] Article 44 of China's Law on the Application of Law for Foreign-Related Civil Legal Relationships now provides hat tortious liability is governed by the law chosen by the parties after the event or, in the absence of such a choice, by the law of the parties' common habitual residence or, in the absence of a common habitual residence, by the *lex loci delicti* (without requirement of double actionability); see G Tu ibid 582–584.

[31] Pursuant to article 146(2) GPCL, an act committed outside China was not to be treated as an infringing act unless Chinese law considered it an infringing act (requirement of double actionability); see H Qisheng, 'Recent Developments with regard to Choice of Law in Tort in China' (2009) 11 Yrbk Pr Int L 211, 219–220.

[32] The use of the Chinese term *ke yi* ('may' in English) indicates that the court was entitled, but not obliged, to displace the *lex loci delicti* in favour of the *lex patriae* or the *lex domicilii*: H Qisheng, ibid, 218.

[33] Art 9 of China's Law on the Application of Law for Foreign-Related Civil Legal Relationships now expressly rejects *renvoi*; see G Tu, 'China's New Conflicts Code: General Issues and Selected Topics' (2011) 59 Am J Comp L 563, 572.

[34] [2005] HCA 54, (2005) 223 CLR 331, paras 195–215.

[35] ibid paras 39–59.

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Neilson laid down that Australian courts must apply the doctrine of *renvoi* in tort cases. But it left open whether it takes the form of a single (or partial) *renvoi* or a double (or total) *renvoi*. The outcome in *Neilson* is consistent with both forms of *renvoi*. Under the concept of single *renvoi*, it is assumed that the reference to a foreign law in the *lex causae*'s conflict rules is a reference to the internal rules, not the conflict rules, of that foreign law. In *Neilson*, therefore, an application of single *renvoi* would have assumed that the reference to Australian law in the second sentence of article 146(1) GPCL was a reference to Australian law's internal rules. Under the concept of double *renvoi*, the forum court applies the law that would be applied by a court in the jurisdiction to whose law the forum's conflict rules refer. The six judges who favoured *renvoi* in *Neilson* proceeded on the premise that a Chinese court would have applied Australian law's internal rules. Both single *renvoi* and double *renvoi* thus came to an application of the 'Australian' limitation period.

Indeed, five of the six judges who favoured *renvoi* expressly refused to commit to either single *renvoi* or double *renvoi*, arguing that neither form of *renvoi* is superior in all cases. Which form of *renvoi* is to be used, they said, depends on the circumstances of the individual case. Only Callinan J expressed a preference. He preferred the concept of single *renvoi*, at least in cases of remission as opposed to transmission.[36]

It is beyond the scope of this article to discuss the respective merits and demerits of single *renvoi*, double *renvoi* and a rejection of *renvoi*.[37] Only one positive and one negative aspect of the High Court's decision shall be noted. A positive aspect is that the application of the 'Australian' statute of limitation fostered international decision harmony, provided the High Court was right in assuming that a Chinese court would have applied the same statute. A negative aspect, as will be shown below, is that the use of *renvoi* raises complex issues where the *lex causae* classifies its statute of limitation as procedural.

B. South Africa is the Forum

South African courts have yet to consider the use of *renvoi*.[38] Since they, like Australian courts, classify the forum's statute of limitation as substantive, the situation where the *lex causae* classifies its statute of limitation as substantive may seem to be as straightforward in South African proceedings as it would be in Australian proceedings in the absence of *renvoi*: There is no conflict of classification, and the *lex causae*'s statute of limitation applies. Indeed, the

[36] ibid paras 255–261.

[37] They are discussed, eg, by Forsyth (n 24) 85–89; DA Hughes, 'The Insolubility of *Renvoi* and its Consequences' (2010) 6 J Priv Int L 195; O Kahn-Freund, *General Problems of Private International Law* (Sijthoff, Leiden, 1976) 285–288.

[38] Forsyth ibid 83. South African legislation excludes *renvoi* where domicile is the connecting factor (Domicile Act 1992, s 4) and with regard to the formal validity of wills (Wills Act 1953, s 3*bis*).

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situation was regarded as that simple in *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd*.[39]

However, this view of the South African position overlooks an important difference between the laws of Australia and South Africa. True, the courts in both countries classify the forum's statute of limitation as substantive. But Australian courts do so regardless of the statute's effect whereas South African courts do so only because their statute extinguishes the right. South African courts still classify merely remedy-barring statutes of limitation as procedural. It follows that where the *lex causae*'s statute of limitation merely bars the remedy, the South African *lex fori* does not share the *lex causae*'s classification of that statute as substantive. There is a conflict of classification.

This situation was present in *Laurens NO v Von Höhne*,[40] which involved the alleged failure to pay shareholder contributions with regard to shares in a company registered in Germany. The action was time-barred under South African law, and the defendant relied on that fact as defence. Schutz J proceeded on the basis that German law was the *lex causae*, and applied the German statute of limitation, under which the action was not time-barred. Schutz J said on that issue:

> Our Prescription Act . . . is classified as substantive so that it is not a matter for the *lex fori*. German law, even although their prescription laws are only remedy-barring, characterises them as substantive. I follow the *via media*. Looking at both the *lex fori* and the *lex causae*, the policy decision is in my view obvious. German law should be applied. In this case there is no conflict between the two systems.[41]

Schutz J was referring to the *via media* approach developed by Falconbridge.[42] Under this approach, the forum court examines all potentially applicable legal systems and determines how each system classifies its relevant rule of law. This review of potential *leges causae* informs the decision on whether a certain rule of internal law can be subsumed under the relevant conflict rule of the *lex fori*. While the *lex fori* thus has the final say in the classification process, its conflict rules ought to 'be construed *sub specie orbis*, that is, from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules'.[43] In similar vein, Kahn-Freund has suggested that, for classification purposes, the *lex fori* should not use the concepts applied in purely internal cases but should develop 'enlightened' concepts influenced by classification concepts used in other legal systems.[44]

Coming back to *Laurens NO v Von Höhne*, the reasoning in the passage quoted is problematic, for two reasons. First, if there was no conflict between

[39] 1981 (3) SA 536, 539. [40] 1993 (2) SA 104. [41] ibid 121.
[42] JD Falconbridge, 'Conflict Rule and Characterization of Question' (1952) 30 Can Bar Rev 103, 264; JD Falconbridge, *Essays on the Conflict of Laws* (2nd edn, Canada Law Book Co, 1954) 53–70. [43] Falconbridge (1952) ibid 281; Falconbridge (1954) ibid 70.
[44] Kahn-Freund (n 37) 227–231.

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the two systems, as Schutz J pronounced, there was no need to invoke Falconbridge's *via media* approach, the purpose of which is to resolve such a conflict. Second, there was in fact a conflict between the two systems. The German statute of limitation, as Schutz J noted, merely bars the remedy, even though German law classifies it as substantive. South African law classifies merely remedy-barring statutes of limitation as procedural. This is the traditional position, and Schutz J put no doubt upon it. It follows that South African law classifies the German statute of limitation as procedural and thus as applying in German proceedings only. German law classifies it as substantive and thus as capable of being applied by a South African court. This is a conflict of classification, and one way of resolving it is to take Falconbridge's *via media* approach and make a decision based on policy considerations.[45] Eventually, therefore, Schutz J's reference to the *via media* approach was appropriate, but it was only appropriate for reasons not recognized by Schutz J.

On policy grounds, the application of the German statute of limitation by Schutz J is to be welcomed, for at least two reasons.[46] First, the application of that statute fostered international decision harmony since a German court applies the German statute of limitation where German law governs the obligation in question. Second, the purpose of the limitation of actions is to specify the temporal end of an obligation. That temporal end should be governed by the law that imposes the obligation in the first place.

III. THE *LEX CAUSAE* CLASSIFIES ITS STATUTE OF LIMITATION AS PROCEDURAL AND OTHERWISE SPECIFIES ITS OWN INTERNAL RULES AS THE GOVERNING LAW

A. Australia is the Forum

Since Australian courts classify all statutes of limitation as substantive, a conflict of classification arises where the *lex causae* classifies its statute of limitation as procedural. But the question of *renvoi* does not arise where the *lex causae* specifies its own internal rules as the law governing the obligation in question.

This situation was present in *O'Driscoll v J Ray McDermott SA*.[47] The defendant company employed the plaintiff as a quality control inspector. One day, he worked on a barge in Indonesian territorial waters. While he was walking across scaffolding boards on the barge, one board shifted and he allegedly fell and was injured. More than three years later, he commenced an action against his employer in contract and negligence in Western Australia.

[45] Another approach is to leave the classification to the *lex causae*. In *Neilson* Kirby J said that the substantive law of China 'was to be ascertained, not by reference to the (often artificial) classifications of Australian law as to what law is substantive or procedural. It was to be decided by reference to what the law of China treated as "substantive"': [2005] HCA 54, (2005) 223 CLR 331, para 187.

[46] These and other reasons are explained by JL Neels, 'Falconbridge in Africa' (2008) 4 J Priv Int L 167, 192–196.

[47] [2006] WASCA 25.

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When it became clear that his claim in negligence was limited by the Western Australian workers' compensation legislation, the plaintiff abandoned that claim and only pursued his claim for breach of a contractual duty of care.

The proper law of the employment contract was held to be the law of Singapore, the place where the contract had allegedly been made. It seems that the proper law was determined objectively in the absence of an express or implied choice by the parties. Expert evidence at trial established that the proper law of the contract under Singapore's conflict rules was Singaporean law, that the plaintiff's action would be time-barred under Singaporean law,[48] and that Singaporean law, adopting English common law, classifies its Limitation Act as procedural rather than substantive because it does not extinguish the right but bars the remedy only. The plaintiff's action was not time-barred under Western Australian law.[49]

In a summary judgment for the defendant, Singapore's Limitation Act was applied and the plaintiff's claim dismissed. The Court of Appeal of the Supreme Court of Western Australia upheld that judgment. The plaintiff's grounds of appeal related only to the correct interpretation of Singapore's Limitation Act and to the sufficiency of the expert evidence on that issue. He did not argue that Western Australia's Limitation Act should have been applied. For this reason, it was not necessary for the Court of Appeal to discuss the problems that arose from the different classification of Singapore's Limitation Act under the *lex fori* and the *lex causae*. All that Murray AJA, with whom Malcolm CJ agreed, said on the applicability of Singapore's Limitation Act was the following:

> [A]s to limitation of action, Western Australian law would apply Singapore law because it would hold the matter of limitation to be substantive law. Singapore courts would reach the same conclusion on the ground that their Limitation Act was procedural and therefore, for them, would be part of the law of the forum.[50]

Which statute of limitation should the court have applied had it been forced to resolve the conflict of classification? An application of the forum's statute of limitation in such circumstances might be supported with the argument that the *lex causae*, by classifying its statute of limitation as procedural, does not 'intend' that statute to be applied by foreign courts. An application of the *lex causae*'s statute of limitation might be supported with the argument that once the forum's conflict rules have classified an issue as substantive and

[48] Pursuant to section 24A(2) of Singapore's Limitation Act 1959, an action for personal injury caused by the breach of a contractual or tortious duty of care cannot be brought after the expiration of three years from the date on which the plaintiff obtains the knowledge required for bringing an action. The plaintiff unsuccessfully argued that 'knowledge' for the purpose of section 24A(2) includes knowledge that Australian courts classify all statutes of limitation as substantive. That classification was only laid down in 2000 in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503.

[49] The limitation period was six years under the Limitation Act 1935 (WA), s 38(1)(c)(v).

[50] [2006] WASCA 25, para 59.

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specified a foreign law as *lex causae*, the forum court ought to stick to its own classification and apply all rules of the *lex causae* that the *lex fori* classifies as substantive, even if the *lex causae* classifies them as procedural.[51]

It is suggested that the choice ought to be made on policy grounds, consistent with Falconbridge's *via media* approach mentioned before. As argued earlier, policy considerations favour an application of the *lex causae*'s statute of limitation because that approach fosters international decision harmony and because the temporal end of an obligation should be governed by the law that imposes the obligation.

B. South Africa is the Forum

Legal systems that have a right-extinguishing statute of limitation will rarely classify it as procedural rather than substantive. If the *lex causae* identified in South African proceedings is a legal system that does classify its right-extinguishing statute of limitation as procedural, the forum court will face the same conflict of classification as an Australian court: The *lex fori* classifies the *lex causae*'s statute of limitation as substantive whereas the *lex causae* classifies it as procedural. The solution ought to be the same as in Australia: an application of the *lex causae*'s statute of limitation.[52]

Where the *lex causae* classifies its statute of limitation as procedural, the statute will usually bar the remedy only and not extinguish the right. In that situation, a South African court is in a different position from an Australian court. While Australian law still classifies the foreign statute of limitation as substantive, South African law classifies it as procedural and thus in the same way as the *lex causae*. There is no conflict of classification. Instead, there is a 'gap' resulting from the fact that the foreign statute cannot apply because it is procedural and thus only applied in proceedings in the foreign country, and the South African statute cannot apply because it is substantive and South African law is not the *lex causae*. This problem has vexed South African courts for some time.

Most recently, the problem arose in *Society of Lloyd's v Price*[53] and in *Society of Lloyd's v Romahn*.[54] Both cases involved the enforcement in South Africa of English judgments given in contractual disputes between Lloyd's and some of its members. The enforcement actions were time-barred under South African law, and the judgment-debtors relied on that fact as one defence. The enforcement actions were not time-barred under English law, which was the *lex causae* for the underlying contracts and accordingly for the judgment-debts. While Mynhardt J in *Society of Lloyd's v Price* applied the

[51] Eiselen (n 23) 158–159; TW Bennett and K Kopke, '*Society of Lloyd's v Price*: Characterization and "Gap" in the Conflict of Laws' (2008) 125 SALJ 62, 69.

[52] Neels (n 46) 180.

[53] 2005 (3) SA 549 (Pretoria High Court); [2006] SCA 87 (Supreme Court of Appeal of South Africa).

[54] 2006 (4) SA 23.

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South African statute of limitation,[55] Van Zyl J in *Society of Lloyd's v Romahn* applied the English statute of limitation.[56]

Mynhardt J's decision was overturned by South Africa's Supreme Court of Appeal.[57] Van Heerden JA, speaking for the court, recognized a 'potential conflict' between *lex fori* and *lex causae*[58] and found the solution in Falconbridge's *via media* approach[59] which, in her view, involved the following three stages. First, she noted that South African law as the *lex fori* classifies its statute of limitation as substantive.[60] Second, she determined that English law as the *lex causae* classifies its statute of limitation as procedural.[61] Third, she noted the 'gap' resulting from the fact that neither the English nor the South African statute of limitation applied.[62] She invoked policy considerations to fill the 'gap' with the outcome of applying the English statute of limitation.[63]

Several commentators have welcomed that outcome.[64] While the outcome is indeed laudable, the way to it is not. Before outlining the criticism, it should be noted that the Supreme Court of Appeal in *Society of Lloyd's v Price* put no doubt upon the traditional classification by South African law of merely remedy-barring statutes of limitation as procedural. On the contrary, in the first stage of her *via media* exercise, Van Heerden JA observed that the Prescription Act 68 of 1969, unlike its predecessor, extinguishes the right and must *therefore* be classified as substantive.[65] This implies that South African law still classifies merely remedy-barring statutes of limitation as procedural.

On that basis, an application of Falconbridge's *via media* approach was misplaced. Falconbridge developed that approach in order to resolve the dilemma that exists where *lex fori* and *lex causae* classify the relevant legal rule differently. In *Society of Lloyd's v Price*, there was no difference in classification.[66] Both English law and South African law classify the South African Prescription Act as substantive, and both English law and South African law classify the Limitation Act 1980 (UK) as procedural, apart from few exceptions which were irrelevant *in casu*.[67] Both the *lex fori* and the *lex causae* agreed that a merely remedy-barring statute of limitation of the *lex fori*

[55] 2005 (3) SA 549, 563–564. Mynhardt J gave no reason other than referring to *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 and *Minister of Transport, Transkei v Abdul* 1995 (1) SA 366. These cases are considered in the text below.

[56] 2006 (4) SA 23, paras 84–89.

[57] *Society of Lloyd's v Price* [2006] SCA 87.

[58] ibid para 14.

[59] ibid.

[60] ibid paras 15–16.

[61] ibid paras 17–21.

[62] ibid para 22.

[63] ibid paras 26–31.

[64] Bennett and Kopke (n 51) 68; C Forsyth, ' "Mind the Gap Part II": The South African Supreme Court of Appeal and Characterisation' (2006) 2 J Priv Int L 425, 430–431; Neels (n 46) 186–187; C Roodt, 'A Wider Vision in Choice of Prescription Law' (2007) 9 yrbk Pr Int L 357, 366, 370, 372–373.

[65] [2006] SCA 87, paras 15–16.

[66] Neels (n 46) 181.

[67] Sections 3(2) and 17 of the Limitation Act 1980 (UK) provide for the extinction of title and must therefore be classified as substantive: J Harris, 'Substance and Procedure' in L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell, London, 2006) para 7–045.

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applied. The problem was that South Africa has no such statute. Both the *lex fori* and the *lex causae* agreed that a right-extinguishing statute of limitation of the *lex causae* applied. The problem was that England has no such statute. There was a 'gap', but it did not result from classification differences between the *lex fori* and the *lex causae*. The 'gap' resulted from the fact that England happens to have no right-extinguishing statute of limitation and South Africa happens to have no merely remedy-barring statute of limitation.

It is revealing that Van Heerden JA, in the first two stages of her *via media* exercise, only looked at one of the 'competing' systems of law. In the first stage, she only asked how South African law classifies its statute of limitation. She did not ask how English law classifies the South African statute. In the second stage, she only asked how English law classifies its statute of limitation. She did not ask how South African law classifies the English statute. The neglected questions were relevant to establish whether the *lex fori* and the *lex causae* differed with regard to classification matters.[68]

With respect, the correct approach had been taken in *Minister of Transport, Transkei v Abdul*, which involved a road accident in the (then independent) Republic of Transkei. The claim was time-barred under the law of Transkei, and the defendant relied on that fact as defence. Alexander J, with whom Thirion J agreed, proceeded on the basis that the *lex causae* for the liability in question was the law of Transkei (probably as *lex loci delicti*). With regard to the statute of limitation of a foreign *lex causae*, Alexander J said that the court must address two questions: how the *lex fori* classifies the statute, and how the *lex causae* itself classifies the statute.[69] Unfortunately, Alexander J did not say how a difference in classification ought to be resolved. The question did not arise *in casu* as both South African law as the *lex fori* and the law of Trankei as the *lex causae* classified the merely remedy-barring statute of limitation of Transkei as procedural.

Coming back to the situation where the *lex fori* classifies its statute of limitation as substantive and the *lex causae* classifies its statute of limitation as procedural, it is not suggested that the ensuing 'gap' should simply be accepted with the effect that neither law's statute of limitation applies. In an old case involving that situation, the then highest court of Germany (the *Reichsgericht*) did indeed hold that the action is perpetually enforceable.[70] Today, such an outcome is rightly condemned. It is suggested that where the statute of limitation of a foreign *lex causae* cannot be applied because both the *lex fori* and the *lex causae* classify it a procedural, the *lex fori* must step in to fill the 'gap'. This is consistent with Ehrenzweig's view that the *lex fori* applies as the residual law whenever the forum's conflict rules refer neither to an internal rule of the *lex fori* nor to a foreign rule.[71]

[68] Similarly Neels (n 46) 181, esp fn 72.
[69] 1995 (1) SA 366, 369.
[70] RGZ 7, 21 (1882).
[71] AA Ehrenzweig, *Private International Law, General Part* (Sijthoff, Leiden, 1967) 103.

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Prior to *Society of Lloyd's v Price*, Booysen J had adopted Ehrenzweig's view in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*,[72] which involved the enforcement in South Africa of an arbitration award made in London in a dispute arising out of a voyage charterparty. Booysen J held that the proper law of the charterparty and, accordingly, of the arbitration award was English law.[73] Noting the problem arising from English law's classification of its statute of limitation as procedural and South African law's classification of its statute of limitation as substantive, Booysen J opted for an application of the *lex fori*.[74] He gave the following explanation: 'I should apply my own law on the basis that, if I am not enjoined by my own law to apply foreign law, I am enjoined by my oath to apply my country's law'.[75] Adopting that approach, Alexander J in *Minister of Transport, Transkei v Abdul* applied the South African statute of limitation on the ground that 'the court in which the action is brought will apply its own law (the *lex fori*) should it decide that the law governing the cause of action (the *lex causae*) is procedural'.[76]

Van Zyl J in *Society of Lloyd's v Romahn* opined that an application of the *lex fori* as the residual law is not consonant with legal logic or 'good sense'.[77] Instead, 'justice, fairness, reasonableness and policy considerations dictate' that 'if a matter of procedure in the *lex causae* should be a substantive matter in the *lex fori*, it would revert to the *lex causae*'.[78] Eiselen, who maintains that legal issues rather than legal rules are the object of classification,[79] comes to the same outcome as Van Zyl J by arguing that once the forum's conflict rules have classified an issue as substantive and appointed a foreign legal system to govern the issue, the court must apply all rules of the *lex causae* that the *lex fori* classifies as substantive, irrespective of how the *lex causae* classifies them.[80] Similarly, Bennett and Kopke argue that the reference to a foreign *lex causae* by the forum's conflict rules must be seen as a reference to the whole of the foreign legal system and that the court should apply all 'relevant' rules of that system including rules on limitation of actions.[81] The problem with all these theories is that they lead to an application of the *lex causae*'s statute of limitation only where the *lex fori* classifies the relevant issue as substantive. South African law classifies as procedural the issue of whether the lapse of a certain period of time has led to an exclusion of the remedy without an extinction of the right.

It might be objected that this is too narrow a definition of the issue before the court. The issue, it might be argued, is not specifically whether lapse of time has led to an exclusion of the remedy without an extinction of the right,

[72] 1986 (3) SA 509. [73] ibid 524–530. [74] ibid 524, 530.
[75] ibid 524. [76] 1995 (1) SA 366, 369.
[77] 2006 (4) SA 23, para 86.
[78] ibid. This approach is called the 'residual *lex causae*' by Forsyth (n 64) 427.
[79] Eiselen (n 23) 151–155. [80] ibid 158–159.
[81] Bennett and Kopke (n 51).

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but more broadly whether lapse of time forces the court to dismiss the action because either the right is extinguished or the remedy is barred. Eiselen indeed argues that the issue is 'whether the claim to be enforced [has] been extinguished or [has] become unenforceable by the lapsing of time'.[82] However, the issue before the court must be defined at least at the level of detail at which the *lex fori* defines categories for choice-of-law purposes. Australian courts can adopt Eiselen's definition of the issue since Australian law has only one choice-of-law rule for the issue of the limitation of actions, whether it takes the form of an extinction of the right or a mere exclusion of the remedy. South African law, by contrast, still has two choice-of-law rules for the issue of the limitation of actions, one for an extinction of the right and one for a mere exclusion of the remedy. In order to determine which of the two choice-of-law rules applies, the issue before the court must be defined by reference to the right-extinguishing or remedy-barring effect of the lapse of time.

It follows that a classification of merely remedy-barring statutes of limitation as procedural by the *lex fori* necessitates an application of the forum's statute of limitation in circumstances as those present in *Society of Lloyd's v Price*. However, an application of the *lex causae*'s statute of limitation in those circumstances is the preferable outcome because, as said earlier, it fosters international decision harmony and because the temporal end of an obligation ought to be governed by the law that imposes the obligation. But South African courts cannot achieve the preferred outcome as long as they continue to classify remedy-barring statutes of limitation as procedural.

Instead of abandoning that traditional classification, Van Heerden JA in *Society of Lloyd's v Price* invoked three policy considerations to justify an application of the English statute of limitation. First, a classification of merely remedy-barring statutes of limitation as procedural is widely criticised.[83] Second, '[c]onsiderations of international uniformity of decisions suggest that claims which are alive and enforceable in terms of the law of the country under which such claims arose should as a general rule also be enforceable in South Africa'.[84] Third, a classification of all statutes of limitation as substantive is internationally on the advance, as demonstrated by the Rome Convention on the Law Applicable to Contractual Obligations (1980) and by a movement in common law countries away from the traditional English approach.[85] But Van Heerden JA stopped short of joining that movement for South Africa. What she in effect said is that the English statute of limitation ought to be treated as a substantive matter even though both English law and South African law classify it as procedural. She classified the statute in a way

[82] Eiselen (n 23) 158.

[83] [2006] SCA 87, para 27. The Law Commission for England and Wales has summarised the main criticisms: Law Commission (n 16) para 3.2.

[84] [2006] SCA 87, para 28.

[85] ibid para 29.

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different from its identical classification under both the *lex fori* and the *lex causae*. That seems odd.

It might be objected that an application of the South African statute of limitation also amounts to a classification of that statute in a way different from its identical classification under both the *lex fori* and the *lex causae*, since neither English law nor South African law classifies that statute as procedural. However, the suggested application of the South African statute of limitation is not based on an artificial classification of that statute as procedural but on the concept of the residual *lex fori* applying to any substantive issue for which no applicable foreign law can be found.

What South Africa's Supreme Court of Appeal in *Society of Lloyd's v Price* could and should have done is to go the whole hog and, like the High Court of Australia, abandon the traditional distinction between an exclusion of remedies and an extinction of rights in favour of a uniform classification of all statutes of limitation as substantive. Had the court done this, South African law would have classified the English statute of limitation as substantive and there would have been a conflict of classification between the *lex fori* and the *lex causae*. It would have been open to the court to resolve that conflict through Falconbridge's *via media* approach and apply the English statute of limitations on the policy grounds actually invoked. It would also have brought South African law in line with the international movement, noted by Van Heerden JA, towards a classification of all statutes of limitation as substantive.

IV. THE *LEX CAUSAE* CLASSIFIES ITS STATUTE OF LIMITATION AS PROCEDURAL AND OTHERWISE SPECIFIES A FOREIGN LAW AS THE GOVERNING LAW

There remains the situation where the *lex causae* classifies its statute of limitation as procedural and specifies a law other than the *lex causae* (the *lex fori* or the law of a third country) as the law governing the obligation in question. This situation would have been present in *Neilson* if Chinese law classified its statute of limitation as procedural, and it would have been present in *O'Driscoll* had the proper law of the contract under Singapore's conflict rules been a law other than Singaporean law. The only difference to the situation discussed before is that the *lex causae* now specifies a foreign law, rather than its own internal rules, as the law governing the obligation in question.

That reference to a foreign law becomes relevant only if the forum court uses *renvoi* and regards the reference by the forum's conflict rules to the *lex causae* as a reference to the *lex causae*'s conflict rules. If the forum court rejects *renvoi* and regards the reference by the forum's conflict rules to the *lex causae* as a reference to the *lex causae*'s internal rules, the content of the *lex causae*'s conflict rules has no relevance and the present situation must be treated like the one discussed before. If, therefore, South African courts

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decide to reject *renvoi*, they will apply the *lex causae*'s statute of limitation, whatever the *lex causae*'s conflict rules say.

Things are less clear if the forum court uses *renvoi*, as the Australian courts must do (at least in tort cases) in consequence of the High Court's decision in *Neilson*. There seems to be no Australian case involving the situation now under discussion. Neither *Neilson* nor *O'Driscoll* clearly addressed it. Indeed, McLure JA in *O'Driscoll* left the outcome in such a situation expressly open.[86] However, the other judgments in *O'Driscoll* and the judgments in *Neilson* may hint at the approach to be taken where the *lex causae*'s conflict rules refer the matter back to the *lex fori* which accepts the remission.

While the High Court in *Neilson* noted Chinese law's classification of its statute of limitation as substantive, none of the judgments supporting *renvoi* placed particular emphasis on that classification or mentioned even the possibility of the outcome (the application of Australian law) being different if Chinese law classified its statute of limitation as procedural. Likewise, Murray AJA in *O'Driscoll* distinguished *Neilson* solely on the ground that the *lex causae* in *Neilson* (Chinese law) referred the matter back to Australian law whereas the *lex causae in casu* (Singaporean law) identified its own internal rules as the governing law.[87] Murray AJA did not mention the other difference between the two cases, namely that the *lex causae* in *Neilson* (Chinese law) classifies merely remedy-barring statutes of limitation as substantive whereas the *lex causae in casu* (Singaporean law) classifies such statutes as procedural. It might be inferred from *Neilson* and *O'Driscoll* that the forum's statute of limitation applies where the *lex causae* classifies its statute of limitation as procedural and otherwise refers the obligation in question back to the *lex fori* which accepts the remission.

Whether or not such a solution was really intended in *Neilson* and *O'Driscoll*, its merits shall be examined. An attempt to justify an application of the forum's statute of limitation in the circumstances under discussion might be made by using Eiselen's theory. As noted earlier, Eiselen argues that once the forum's conflict rules have classified an issue as substantive and have appointed a foreign legal system to govern the issue, the court 'should persist in that classification and apply the appropriate and relevant rules of the foreign system', irrespective of how the *lex causae* classifies them.[88] Eiselen says nothing on *renvoi* and seems to have envisaged a reference to the internal rules, not the conflict rules, of the *lex causae*. But his theory could also be applied where the forum's conflict rules refer to the *conflict* rules of the *lex causae*.

Applying Eiselen's theory in the context of *renvoi*, it could be argued that the forum court, when applying the *lex causae*'s conflict rules, should stick to

[86] [2006] WASCA 25, para 19.
[87] ibid para 43.
[88] Eiselen (n 23) 158–159.

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its own classification of the relevant issue as substantive because if the issue was procedural, there would be no reference to any foreign law in the first place. Accordingly, the court should ignore the *lex causae*'s classification of the issue as procedural and should investigate which law generally governs the obligation in question under the *lex causae*'s conflict rules. If those rules identify the *lex fori* as the governing law and if the *lex fori* accepts the remission, the forum's statute of limitation will be applied.

The problem of such an approach is that it ascribes to the *lex causae* a conflict rule that does not in fact exist. The argument applies to the limitation issue a conflict rule of the *lex causae* that the *lex causae* itself applies to the obligation in question *except the issue of the limitation of actions*. In a tort case, for example, the forum court would take the *lex causae*'s conflict rule for tort and apply it to the limitation of tort actions even though the *lex causae* itself does not apply that rule to the limitation of tort actions since it classifies its statute of limitation as procedural. The *lex causae* has no conflict rules for the limitation of actions within its conflict rules for substantive matters. Considering again a tort case, the *lex causae*'s conflict rule for tortious liability is a rule for issues of tortious liability *other than the issue of the limitation of actions*. It follows that the forum's statute of limitation cannot be applied by way of *renvoi*.

However, where the *lex causae*'s conflict rules specify the *lex fori* as the law governing the obligation in question and the *lex fori* accepts that remission, the forum's statute of limitation could be applied by way of resolving the conflict of classification through the *via media* approach. It has been argued earlier that where the *lex causae* classifies its statute of limitation as procedural and specifies its own internal rules as the law governing the obligation in question, the *lex causae*'s statute of limitation should be applied because that approach fosters international decision harmony and because the temporal end of an obligation should be governed by the law that imposes the obligation.

Where the *lex fori* accepts the remission back from the *lex causae* for liability issues other than the limitation of actions, an application of the *lex causae*'s statute of limitation would not subject the temporal end of an obligation to the law that imposes the obligation, nor would it achieve international decision harmony where the foreign court would accept the remission back from the *lex fori* and apply the *lex causae* to all issues concerning the obligation in question. In other words: Where the *lex fori* accepts the remission back from the *lex causae* for liability issues other than the limitation of actions, an application of the *lex causae*'s statute of limitation would achieve one of the two important goals in some cases and neither goal in others. By contrast, an application of the forum's statute of limitation would always achieve the goal of subjecting the temporal end of an obligation to the law that imposes the obligation. It is the preferable solution of the conflict of classification.

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An application of the forum's statute of limitation in the present circumstances has the further benefit that whenever the *lex causae* specifies the *lex fori* as the law governing the obligation in question (at least for issues other than the limitation of actions) and the *lex fori* accepts the remission, the *lex fori* applies to all issues including the limitation of actions, regardless of how the *lex causae* classifies its statute of limitation. Where the *lex causae* classifies its statute of limitation as substantive, the forum's statute of limitation applies by way of *renvoi*. Where the *lex causae* classifies its statute of limitation as procedural, the forum's statute of limitation applies by way of resolving the conflict of classification through the *via media* approach.

While it is possible to apply one law to all issues surrounding an obligation where the *lex causae*'s conflict rules specify the *lex fori* as the governing law and the *lex fori* accepts the remission, the same is not possible where the *lex causae* classifies its statute of limitation as procedural and refers all other liability issues to the law of a third country, which transmission is accepted by the *lex fori*. The acceptance of the transmission leads the forum court to apply the law of that third country to the obligation in question except the issue of the limitation of actions. With regard to that issue, the forum court cannot apply the third country's law since the *lex causae*'s conflict rules classify the issue as procedural and thus do not transmit it to the third country's law. The forum court must choose between the statutes of limitation of the *lex causae* and the *lex fori*. Either way, the law that imposes the obligation in question (the third country's law) will not govern its temporal end.

An application of the forum's statute of limitation in those circumstances could never achieve international decision harmony whereas an application of the *lex causae*'s statute of limitation would achieve that goal where a court in the country of the *lex causae* would apply the third country's law to liability issues other than the limitation of actions. In other words: While an application of the *lex causae*'s statute of limitation would achieve one of the two goals in some cases and neither goal in others, an application of the forum's statute of limitation would miss both goals in all cases. Policy considerations within the *via media* approach favour an application of the *lex causae*'s statute of limitation.

It has been demonstrated that where the *lex causae* classifies its statute of limitation as procedural and specifies a law other than the *lex causae* as the law governing the obligation in question, it is not possible in all cases to achieve the goals of international decision harmony and of subjecting the temporal end of an obligation to the law that imposes the obligation. Considering the extent to which the two goals can be achieved by applying the statute of limitation of either the forum or the *lex causae*, the forum's statute of limitation ought to be applied where the *lex causae* refers other liability issues to the *lex fori* which accepts the remission, whereas the *lex causae*'s statute of limitation ought to be applied where the *lex causae* refers other

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liability issues to the law of a third country and the *lex fori* accepts the transmission.

V. CONCLUSION

When the courts in Australia and South Africa still classified the forum's statute of limitation as procedural, they always applied that statute as part of their procedural law and avoided questions of classification and *renvoi* in that context. Things have become more complex since the courts in both countries started to classify the forum's statute of limitation as substantive. In the context of the limitation of actions, the High Court of Australia has since applied the concept of *renvoi*, and South African courts have faced the complexities of classification and 'gap'.

Questions of classification and *renvoi* can arise only where the forum's conflict rules specify a foreign law as the law governing the obligation in question. Where this is the case, three situations must be distinguished. First, where the *lex causae* classifies its statute of limitation as substantive, both Australian and South African courts apply that statute if *renvoi* is not used. While the High Court of Australia has in fact used *renvoi* in that context, the South African courts have yet to decide on the use of *renvoi*.

Second, where the *lex causae* classifies its statute of limitation as procedural and specifies its own internal rules as the law governing the obligation in question, South African courts again apply the *lex causae*'s statute of limitation. Australian courts seem to do the same since *renvoi* has no relevance here. An application of the *lex causae*'s statute of limitation in those circumstances is indeed preferable because it fosters international decision harmony and because the temporal end of an obligation should be governed by the law that imposes the obligation in the first place.

However, there are differences between the two countries in reaching that outcome. Since Australian courts classify all statutes of limitation, including those that merely bar the remedy, as substantive, there is a conflict of classification between the Australian *lex fori* and the foreign *lex causae*, and this conflict can be resolved by using Falconbridge's *via media* approach and applying the *lex causae*'s statute of limitation on the policy grounds mentioned. South African courts have in fact invoked the *via media* approach to explain their application of the *lex causae*'s statute of limitation in the circumstances under discussion.

The problem with that approach is that South African courts face no conflict of classification where the *lex causae*'s statute of limitation merely bars the remedy, because South African law still classifies merely remedy-barring statutes of limitation as procedural. The 'gap' that results from the non-applicability of either the *lex fori*'s or the *lex causae*'s statute of limitation should strictly be filled by an application of the residual *lex fori*. South African courts would provide a better basis for their application of the *lex causae*'s

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statute of limitation if they followed the Australian approach of classifying all statutes of limitation as substantive.

There remains the situation where the *lex causae* classifies its statute of limitation as procedural and refers other liability issues to a foreign law. This reference to a foreign law makes no difference to the second situation if the *lex fori* rejects the concept of *renvoi*. If, therefore, South African courts decide to reject *renvoi*, they will treat the third situation in the same way as the second one and apply the *lex causae*'s statute of limitation in all three situations. Things are more complex in Australia where the High Court has applied the concept of *renvoi* in the context of the limitation of actions. It was said before that an application of the *lex causae*'s statute of limitation in the second situation is preferable because it fosters international decision harmony and because the temporal end of an obligation should be governed by the law that imposes the obligation in the first place.

The use of *renvoi* by the *lex fori* makes it impossible to achieve both these goals in all instances of the third situation. Considering the extent to which the two goals can be achieved, the forum's statute of limitation ought to be applied where the *lex causae* refers other liability issues to the *lex fori* which accepts the remission, whereas the *lex causae*'s statute of limitation ought to be applied where the *lex causae* refers other liability issues to the law of a third country and the *lex fori* accepts the transmission. This complexity of selecting the appropriate statute of limitation in the case of *renvoi* puts doubt on the merits of *renvoi* at least in the law of obligations. The South African courts ought to take a good look at the intricacies raised by the use of *renvoi* in Australia once they decide on whether to use *renvoi* themselves.

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