YB XII/NYC/South Africa Oija

244. SOUTH AFRICA: SUPREME COURT, DURBAN AND COAST LOCAL DIVISION – 27 August 1985 – *Laconian Maritime Enterprises Ltd. v. Agromar Lineas Ltd.* *

Enforcement of a foreign arbitral award – *Res judicata* – Prescription

(See Part I. C.1)

(An earlier decision by the same Court in the same case is reproduced in Part V. 203)

BOOYSEN J: This is an application for an order that an arbitration award handed down on 23 January 1979 in an arbitration in London between the applicant and the respondent be made an order of Court in terms of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

The respondent has raised two defences in these proceedings, the first being the *exceptio rei judicatae*, based upon a judgment of a United States District Court in Alabama, and the second, prescription.

The facts may be stated as follows. The applicant is a company incorporated and registered with limited liability according to the laws of Greece and carrying on business as a shipowner and operator at Piraeus, Greece. The respondent is a company incorporated and registered with limited liability according to the laws of Colombia carrying on business, *inter alia*, as charterer of ships at Barranquilla, Colombia. During June 1977 the applicant was the owner of a ship by the name of *Kavo Delfini*. The respondent's New York brokers were Chester Blackburn and Roder Inc, and their London brokers were Independent Chartering. Applicant's brokers were Gourdomichaelis and Co (Chartering) Ltd of London. Although it is not clear from the papers, counsel were agreed that I should accept for the purposes of my judgment that the respondent's New York brokers and the applicant's London brokers entered into negotiations probably by telex with a view to concluding a voyage charterparty in respect of applicant's vessel, which was *en route* to Buenos Aires, for the carriage of grain from Buenos Aires to Barranquilla in Colombia. After agreement had been reached by telex (I presume, in principle), respondent's brokers in New York drew up a voyage charterparty in New York which was dated 17 June 1977, and respondent's New York brokers signed it on behalf of respondent and placed their stamp on it. Thereafter it was sent to London where respondent's London brokers stamped it and applicant's brokers signed it on applicant's behalf and stamped it. The charterparty provided *inter alia* as follows:

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"It is this day . . . agreed between Gourdomichaelis and Co (Chartering) Ltd as agents for disponent owners of the — Greek — MV *Kavo Delfini* of Piraeus — . . . now *en route* to Buenos Aires expected load ready about June 22/23, 1977 all going well and Agromar, Bogota, charterers.

That the steamship being tight, staunch and strong and in every way fitted for the voyage shall with all convenient and safe speed sail and proceed to 1/2 safe berths Buenos Aires and there load, always afloat, from said charterers or their agents, a cargo subject to limits above guaranteed of three lots of 6 000 metric tons sorghum . . .

. . . and being so loaded shall therewith proceed to 1/2 safe berths Barranquilla . . . and deliver the same, always afloat, agreeable to bill of lading, having been paid freight as follows . . . rate of freight shall be US dollars $291 500 . . .

General average shall be payable in London according to York/Antwerp Rules Average Bond.

12. Demurrage . . . to be paid at the rate of $3 400 US currency per day . . .
20. Extra insurance, if any, on cargo, owing to vessel's age, to be for owner's account, up to a maximum Dl's 500 (Five Hundred Dollars) US currency.
22. All terms, conditions of the Centrocon arbitration clause . . . are to apply to this charter.
23. . . . USA clause paramount to be applicable to all bills of lading and charter party.
26. Freight payment. Freight to be 100% fully prepaid in London within three banking days of signing bills of lading . . .

. . . Freight to be paid to: William and Glyns Bank Ltd, 22 St Mary Ave, London EC for account of Gourdomichaelis Financier SA Freight deemed earned upon shipment . . ."

A copy of the "USA clause paramount" was annexed to the charterparty. It reads as follows:

"This bill of lading shall have effect, subject to the provisions of the Carriage of Goods by Sea Act of the United States approved April 16 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the said Act. If any terms of this bill of lading be repugnant to said Act to any extent, such terms shall be void to any extent, such terms shall be void to that extent, but no further."

The Centrocon arbitration clause reads as follows:

"All disputes from time to time arising out of this contract shall, unless the parties agree forthwith on a single arbitrator, be referred to the final arbitrament of two arbitrators carrying on business in London who shall be members of the Baltic and engaged in the Shipping and/or Grain Trades, one to be appointed by each of the parties, with power to such arbitrators to appoint an umpire. Any claim must be made in writing and claimant's arbitrator appointed within three months of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred. No award shall be questioned or invalidated on the ground that any of the arbitrators is not qualified as above, unless objection to his acting be taken before the award is made."

The voyage was completed, final discharge having apparently taken place on 10 September 1977. According to applicant's final account, it was still owed a balance of US $16 651,04 made up as follows:

Lump sum freight		291 500,00
Loading port demurrage		82 250,27
Discharging port demurrage		27 285,66
		$404 035,27
Less:		
5% commission	20 201,76	
Extra insurance	434,00	
Payments received	366 748,47	387 384,23
		$ 16 651,04

When respondent did not pay the applicant, the latter submitted the matter to arbitration and, on 10 January 1978, appointed one Kingsley of London as owner's arbitrator. Despite due notice the respondent failed to nominate an arbitrator and on 8 December applicant's legal representative appointed Kingsley as sole arbitrator under the terms of the Arbitration Act 1950 of England.

Despite being duly notified of the date of the hearing, the respondent failed to attend the hearing on 22 January 1979. It had also failed to deliver any defence or counterclaim. On 23 January 1979, and in London,

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the arbitrator handed down his final award of US dollars 16 585.04 together with interest at the rate of 7½% per annum from 1 October 1977 until the date of the award and the costs of the reference which he taxed and settled at £300.

On 1 May 1983, the applicant's attorney learnt that the respondent had chartered a vessel on a time charter basis to perform a trip between South Africa and Colombia. The vessel was in the Durban harbour and the respondent was the owner of the bunkers in the vessel. The applicant then obtained an order from my Brother KUMLEBEN attaching the bunkers and granting leave to sue for recognition of the arbitration award. The respondent furnished the applicant with a bank guarantee against release from attachment. During December 1983 the respondent launched a counter-application for the order of attachment to be set aside. This matter came before me and the judgment is reported at 1984 (3) SA 233 (D).

As to the first issue, Mr *Magid* submitted that in terms of our law which was applicable, the claim was barred by virtue of the Alabama judgment. In regard to the second defence Mr *Magid* submitted that the proper law of the contract which formed the subject-matter of the arbitration was that of the United States of America; that the provisions as to limitation of actions were to be regarded as substantive and that it did not matter whether the present claim would be regarded as having become prescribed according to South African law because it had already become prescribed by the substantive law of the United States of America. In the alternative he submitted that the award is evidence of a debt and that the proper law of a debt is the law of the place where the debtor resides which in this matter is Colombia. The parties were for the purposes of this matter agreed that the Colombian law "must be regarded as being identical with that of the Republic of South Africa". On that hypothesis, he submitted that the debt must be taken to have become extinguished three years after the date the award was handed down. As to the first issue, Mr *Wallis* submitted that the judgment of the Alabama Court was no bar as it did not concern the same subject-matter and did not determine the issue now before this Court. Mr *Wallis* submitted further that the prescription was not a matter of substantive law; that it was procedural and that South African law applied. In the alternative, he submitted that the *lex causae* was that of England. In argument, counsel were apparently in agreement that "comity" was the basis of the application of foreign law and presented no argument in support of the proposition.

What the philosophical or theoretical basis is for one country's courts to apply the law of another country, to choose between the laws of other countries and to recognise foreign judgments or awards, has, ever since it has been done, been a bone of contention and it seems to me that it will long remain one. It is a most interesting if somewhat frustrating exercise to attempt to pin it down; a task not made easier by the fact that many of the authorities on private international law are simply not available in the libraries to which I have access.

The Statutists of the 14th Century of whom *Bartolus* could properly be described as the father, divided laws according to the statute theory, in terms of which *statuta personalia* were governed by the *lex domicilii*, *statuta realia* by the *lex rei sitae* and *statuta mixta* by the *lex loci actus* (*Frankel's Estate and Another* v *The Master and Another* 1950 (1) SA 220 (A) at 250). The Roman-Dutch writers of the 17th and 18th Centuries saw comity (P Voet *De Statutis* 4.2.8 (quoted at 462 *et seq* of the 2nd edition of *Guthrie's* translation of *Private International Law*, a treatise by *Von Savigny*); J Voet *Commentarius* 1.4 *pars altera* 12 and 13; Van der Keessel *Praelectionis* 1.2 Th 32, 38 and 42); or comity to the foreign sovereign (Huber *Heedendaagse Rechtsgeleertheyt* 1.3.6) as the reason for applying foreign law. *Von Savigny* saw the reason in the extra-territorial applica-

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tion of the law of the natural centre (sitz) of each legal relationship (*System des Neutigen Römischen Rechts* vol 8, eg chap I sec XXVI.) *Story* also subscribed to comity (*Commentaries on the Conflict of Laws* chap 2 para 38). *Dicey* subscribed to the theory of the extra-territorial working of vested rights as did Beale *A Treatise on the Conflict of Laws* and the American Law Institute in its (*First*) *Restatement of American Conflicts Law* which stated that any interests "created" by virtue of the "power" based on the "legislative jurisdiction" of States are entitled to recognition everywhere. Currie saw "governmental interests" as the basis for the application of foreign law (Currie *Selected Essays on the Conflict of Laws* chaps 10 and 12). In the *Second Restatement* the American Law Institute abandoned the "vested rights" theory for it proclaims the applicability of the law of that "State which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties" (*Restatement of the Law — Second — Conflict of Laws* 2nd ed para 145, para 188). Cook *The Logical and Legal Basis of the Conflict of Laws* subscribed to the "local law theory", the main burden of which is that "No Court ever applies any other law but its own nor enforces any right or obligations other than those created by its own law". Graveson *Conflict of Laws — Private International Law* 7th ed at 41 advances "The Theory of Justice" which asserts quite simply that Judges (in England) administer justice according to law and make new law according to justice.

> "Its premises are threefold: sociological, ethical and legal. Sociologically it rests on the international need for fair treatment in private transactions of individuals. Ethically it reflects the traditions and training of English lawyers, Judges and legislators as expounders of the justice of their day and age. Legally it rests on the terms of the Judge's oath."

Forsyth *Private International Law* at 51-54 comes to the conclusion that foreign law is applied because the local sovereign so orders; that uniformity of decision should be the guiding principle for the development of private international law but that such uniformity is an unattainable goal. Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* at 32 regards the "sosiale funksie" in the "internasionale sfeer" or "internasionale redelikheid" as decisive. Ehrenzweig *Private International Law* has said in regard to some of these theoretical bases:

> "Fundamentalism and scepticism, natural law and positivism, security and freedom, matter and form, these are the embattled poles between which law and legal philosophy have always moved and will continue to move. Deepseated aesthetic, political, ethical emotions and preferences which account for this vacillation should be recognised as such and freed of their purportedly 'philosophical' ambitions and rationalisations."

(At 47.)

> "The history of what we call conflicts law today has often been described and analysed as a struggle between unitarian and pluralistic tendencies. Yet this struggle has lacked reality. Conflicts doctrine has always been an illusion."

(At 49.)

In dealing with *Currie's* "governmental interests" theory he says at 63 and 64:

> ". . . any choice-of-law rule based on the 'legitimacy' or 'reasonableness' of interests is as wrong or circular as any theory based on legislative jurisdiction, vested rights or the 'significance' of contacts. Such a rule is wrong if legitimacy and reasonableness, like 'vesting jurisdiction' and 'significance' are deduced from a non-existing superlaw. And such a rule is circular in so far as it must, in recognition of the non-existence of such a superlaw, be based on rules of choice, a need for which it is designed to avoid."

Of the *Second Restatement*, he says at 67:

> "For its predecessors' rigid formulas, the *leges contractus, delicti* and *domicilii*, it has substituted a near-general reference to the law of the most significant relationship based on 'contacts' and 'interests', not only in the ever-changing laws of contracts and torts, but even in such a stable field as the law of the law of trusts. But such tests are mere 'catch-words' representing at best not methods or bases for decision but considerations to be employed in setting up new rules of law required by changing times. Counting up 'contacts' or locating the 'centre of gravity' or weighing the respective 'interests' of two States can never be a satisfactory way of deciding actual lawsuits . . . The Institute's new formula thus

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entails serious danger for the administration of justice, since it is all-too-easily used by busy Courts which, were it not for that formula, would articulate the policy grounds of their decisions for the guidance of Courts and parties."

In the result he advocates a "*lex fori* approach" to the following effect:

"Unless application of a foreign rule is required by a settled (formulated or non formulated rule of choice, all choice of law should be based on a conscious interpretation *de lege lata* of that domestic rule which either party seeks to displace. If that interpretation does not lead to the dismissal of the suit or to the application of a foreign rule, the forum rule, in a proper forum, applies as the 'basic' or as I now prefer to call it, the 'residuary' rule, as a matter of non choice."

Our Courts have in the past given recognition to a number of these theories either expressly or by implication eg the "comity" theory — (*Acutt, Blaine and Co* v *Colonial Marine Assurance Co* (1882) 1 SC 402 at 406; *Seedat's Executors* v *The Master (Natal)* 1917 AD 302 at 307 and 309; *Brown* v *Brown* 1921 AD 478 at 483; *Duarte* v *Lissack* 1973 (3) SA 615 (D) at 621); the "acquired" or "vested rights" theory — (*Cairn* v *Cairn's Executors* 1910 EDL 462 at 469; *Estate Seedat* v *R* (1916) 37 NLR 535 at 540, 547 and 548; *Anderson* v *The Master and Others* 1949 (4) SA 660 (E) at 668; *Commissioner of Taxes, Federation of Rhodesia* v *McFarland* 1965 (1) SA 470 (W) at 471); the "local law" theory — (*Schapiro* v *Schapiro* 1904 TS 673 at 677; *Seedat's Executors (supra* at 311)); the "statute theory" — (*Frankel's Estate* v *The Master* 1950 (1) SA 220 (A) at 250; *Seedat's case supra* at 310 and 311); and the "most significant relationship" theory — (*Improvair (Cape) (Pty) Ltd* v *Establissements Neu* 1983 (2) SA 138 (C) at 152A).

It would seem that the preponderance of authority in this country is still in favour of recognising comity as the theoretical basis of this branch of our law. I am personally attracted to the "justice theory" of *Graveson* but at the same time have difficulty in countering *Ehrenzweig's* criticism to the effect that:

"Neo-comity theories share much of their ideological and, I feel, Utopian background with some of those schemes which, though they have shifted their attention to conflicting private 'interest', seek final answers in standards of 'justice'. All such schemes which include *Wengler's* and *Kegel's* as well as that offered by *Chatham* and *Reese*, and others must fail, I submit, like all legal theories which ignore the irrefutable fact that, although we all have a sense of justice, our judgments that we derive from that sense are necessarily inconsistent with each other, not only as between nations, communities, families, but in ourselves."

I prefer the "most significant relationship" theory to the "vested rights" theory but here again find myself in some difficulty in countering *Ehrenzweig's* criticism that:

"Counting up 'contacts' or locating the 'center of gravity' or weighing the 'respective interests' of two states can never be a satisfactory way of deciding actual lawsuits."

Whatever the theoretical basis of the rules of our country's private international law might be, the fact remains that certain rules have been formulated which do supply answers, however imperfectly, it might be said, to most of the questions presented for decision in this matter.

I do not have to speculate about the justification for recognising foreign arbitral awards because this State has by legislation enjoined me to do so and has, in doing so, also expressly prescribed some of the conditions for such recognition.

Although it is said in s 2 (1) of Act 40 of 1977 that this Court "may" make any foreign arbitral award an order of Court, it seems to me that it is a power given coupled with a duty, when asked, to do so. (Cf *Commissioner for Inland Revenue* v *I H B King; Commissioner for Inland Revenue* v *A H King* 1947 (2) SA 196 (A) at 209 and 210; *Western Credit Bank Ltd* v *Kajee* 1967 (4) SA 386 (N) at 391B; *Portwig* v *Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D) at 88.)

It seems to me also that I need not speculate in a case such as this about the question whether I should apply foreign law where I would feel inclined to do so moved by "comity" or my "sense of justice" or my belief in the extra-territorial validity of rights or whatever because the Act itself

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clearly contemplates the application of foreign law. I am, for example, given the power, and I believe once again coupled with a duty to refuse the application if the respondent proves to my satisfaction that the parties had "under the law applicable to them" no capacity to contract or that the agreement is invalid under the law to which the parties have "subjected" it or the award was made. (Section 4 (2) (*b*) (i).)

In listing the grounds upon which the Court may refuse to recognise a foreign award the legislator has not mentioned prescription either by virtue of the foreign law considered applicable or in terms of the *lex fori*. It was not submitted before me that I should apply the maxim *unius inclusio alterius exclusio* and regard the list as exhaustive. It is in this regard, of interest to note that the corresponding statutory provisions in the United States of America contain a specific time limit. Similarly s 3 (1) of the Reciprocal Enforcement of Civil Judgments Act 9 of 1966 also provides for a time limit which happens to be six years. (Although passed in 1966 it is still awaiting proclamation.) In view of the conclusions which I have arrived at in this matter, it is not necessary for me to decide whether the maxim is of application.

Although there were some decisions to the contrary, I agree, with respect, with the judgment in *Benidai Trading Co Ltd* v *Gouws and Gouws (Pty) Ltd* 1977 (3) SA 1020 (T) to the effect that the Supreme Courts of this country had the power at common law to recognise foreign arbitral awards.

It would appear that the principal requirement was that there should have been a valid submission to arbitration and that the other requirements for recognition and the defences to recognition of foreign judgments also applied to arbitral awards. (*Forsyth* (*op cit* at 367); the *Benidai* case at 1040G-H.)

The requirements for the recognition of foreign judgments at common law have been stated as follows by Schmidt in vol 2 of Joubert *The Law of South Africa* para 572.

"The first requirement is that the foreign Court had 'international competency' according to South African law (as well as, possibly, jurisdiction according to its own law) . . . certain minimum standards of justice must have been observed . . . these include the impartiality of the Court, reasonable notice to persons affected and an application of the principle of *audi alteram* . . .

A judgment will not be recognised if it was obtained by fraudulent means or if it is contrary to South African policy or if it would enforce a penal or revenue law of the foreign State . . .

A foreign judgment will not be enforced unless it is a final judgment and has the effect of *res judicata* according to the laws of the forum that pronounced the judgment . . .

A foreign judgment which is superannuated according to the foreign law will not be recognised."

It would seem that the requirement of "international competency" in respect of a foreign arbitral award made by an arbitrator duly appointed in terms of a valid arbitration agreement is based on the submission contained in that agreement. That submission constitutes a basis for international competency (*De Naamloze Vennootschap Alintex* v *Von Gerlach* 1958 (1) SA 13 (T) at 15; *Rousillon* v *Rousillin* (1880) 14 ChD 351).

It is not clear to me whether the principle that a foreign judgment which is superannuated in terms of the laws of the country in which it was pronounced is in terms of our common law applicable to arbitral awards. I do not have to decide this, however, as it is common cause between the parties that the award is not superannuated or the claim thereon prescribed in terms of English law.

In argument before me, counsel did not refer to the concept or principles of characterisation or classification. It seems to be generally recognised, though, that the first step a Court should take in an attempt to resolve disputes to which private international law applies is that of classification, characterisation or qualification. (Eg *Forsyth* (*op cit* at 56); *Cheshire and North* (*op cit* at 43); *Kuhne and Nagel AG Zurich* v *APA*

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Distributors (Pty) Ltd 1981 (3) SA 536 (W) at 538D.) *Ehrenzweig* has said:

> ". . . that characterisation, unless contained in a formulated rule, is just another phase in that process of interpretation which is common to all legal reasoning. For all interpretation, unless regulated by rule of construction, be it of instruments or laws, is always that of the interpreter, the forum."

(*Op cit* at 115.)

It seems nevertheless, though, to be a step that should be taken. This is, however, not as simple as it sounds as it in turn raises other questions, the first being what is it that I am classifying or characterising? Whilst I realise that there has been considerable debate amongst writers upon this point, I regard it as clear that it is rules of law which are characterised, as so convincingly stated by *Forsyth* (*op cit* at 58).

> ". . . when a characterisation dispute arises it is clear that one litigant asserts that there exists a rule (or rules) of some legal system which allows him to win and which ought to be applied; while the other litigant disputes exactly that. . . Thus the object characterised is a rule of law."

(See also the *Kuhne and Nagel* case at 538H and Forsyth 99 (1982) *SALJ* at 18.)

The objects which I have to characterise in this case are thus those rules of law which prescribe when a claim for recognition is barred by *res judicata* or prescription.

The next question which arises is according to the private law of which country should I classify these rules? The question might often be academic because of identity of classification and content but in this matter, certainly as far as the rules of prescription are concerned, one has the feature that the particular United States rules of prescription are classified as substantive in terms of that country's laws and the English rules as procedural.

It would seem that our Courts have generally characterised according to the *lex fori* (Schmidt in Joubert *The Law of South Africa* vol II para 579 and the cases there cited; see also *Forsyth* (*op cit* at 64)), save in one instance (*Anderson v The Master* (*supra*)) in which the *lex causae* was applied.

In this regard, little can be learnt from our old authorities save that *Van der Keessel* could possibly be said to have applied a type of enlightened *lex fori* approach. (*Spiro* (*op cit* at 57-59).) The bulk of Continental and many American jurists adhere to the theory that the *lex fori* should characterise (Kahn *The Law of Succession in South Africa; Corbett, Hahlo, Hofmeyr, Kahn* at 620; *Forsyth* (*op cit* at 58)), whilst a number of Continental writers favour characterisation by the *lex causae* (*Kahn* (*op cit* at 620)). English Courts characterise on the basis of the *lex fori* but show a readiness to recognise concepts of foreign law in this field of law (Cheshire and North's *Private International Law* 10th ed at 44 and 45; Graveson *Conflict of Laws* 7th ed at 46) as the English rules of conflict give a wider scope to definitions than would be the case under English municipal law (*Graveson* (*op cit* at 47)). *The Second Restatement* in the words of *Ehrenzweig* (*op cit* at 114):

> ". . . has deemed fit to replace its predecessor's happy ignorance by the cryptic finding that 'the classification and interpretation of local law concepts and terms are determined in accordance with the law that governs the issue involved'."

Our South African writers seem to favour a *via media* or enlightened *lex fori* approach (*Kahn* (*op cit* at 620-621)) submits that the *lex fori* should be "involved to a considerable degree in characterisation" but believes that the *lex causae* should have some function in the process of characterisation and finds the "most appealing" of the other theories and one "that lies mid-way between the *lex fori* and the *lex causae* to be the theory advanced by Falconbridge *Essays on the Conflict of Laws* 2nd ed chap 3. According to this learned author

> "The purpose of characterisation is to determine whether the legal question to which a given rule relates is subsumed under the legal question specified in a given conflict rule, and consequently whether the rule of law is applicable to the factual situation."

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His approach requires that the Court should first determine the legal question raised by the factual situation by reference to each potentially applicable legal system. Thereafter the Court has to decide whether the relevant provisions of each such foreign system of law relate to a legal question which is subsumed under the legal question specified in the conflict rule of the forum. This is decided in accordance with the law of the forum but he stresses that the conflict rules of the forum should be construed from a cosmopolitan or world-wide point of view and that a "domestic rule of a foreign law should not be characterised in a certain way merely because a domestic rule of the law of the forum, expressed in different terms or in a different context, is characterised in that way" (*Falconbridge* (*op cit* at 281)). Turpin "Characterisation and Policy in the Conflict of Laws" 1959 *Acta Juridica* at 222 speaks highly of *Falconbridge's* approach but submits that "the two stages of characterisation described by *Falconbridge* may conveniently and realistically be regarded as a single process; that:

"It is the investigation of the foreign rule which . . . should be made from a 'world-wide point of view' and it is the Court itself which must categorise the foreign rule. In doing so it will, of course, give the fullest attention to the 'nature, scope and purpose' of the foreign rule in its context of foreign law."
(At 224.)

He advocates that the characterisation "should be made in a policy conscious manner, for the ultimate question is whether" the foreign rule is one which "good policy requires should be recognised by the Court of the forum . . ." *Forsyth* (*op cit* at 59) refers with apparent approval to Sir *Otto Kahn-Freund's* "enlightened *lex fori*" approach in these words:

"He argues that although it is Utopian to dream of a single universally accepted set of concepts whereby classification could take place in all legal systems, there is nothing to stop the development, by the *lex fori*, of principles of classification for us* in conflicts cases and which differ from those used in purely internal cases. Such special principles of classification would be 'enlightened' and would take into account the classifications used in foreign legal systems as well as the desirability of gradually moving towards a single set of internationally accepted concepts."

Forsyth submits further that characterisation is an area of what Dworkin *Taking Rights Seriously* describes as "hard cases" and that Judges should in exercising their "discretion" in such cases be bound by "the general principles of private international law", such as the search for international harmony in decision-making, and the principle of the equality of legal systems — ie an eschewal of a preference for the *lex fori*. He expresses the view that a willingness to adopt this approach may be gleaned from CORBETT JA's remark in *Sperling* v *Sperling* 1975 (3) SA 707 (A) at 722E (in a different area of private international law); that, where there is no clear authority, the Court should consider where "the balance of justice and convenience" lies.

The conclusions I have arrived at are the following:

It must be accepted that it is rules of law which are characterised.

It must be stressed that characterisation is but a tool in the process of reasoning in terms of which those rules are interpreted.

Characterisation cannot be regarded as an independent means of establishing the proper choice of law and one must beware of indulging in "dishonest characterisation" in an attempt to make it so.

Characterisation is part of the process of interpretation and all interpretation, unless regulated by rules of construction, be it of instruments or laws, is always that of the interpreter, the forum.

It is thus not surprising that, in all cases but one in our Courts, categorisation has taken place according to the *lex fori*.

The *lex fori* approach has much to commend itself other than the argument that characterisation is part of a process of interpretation and accordingly done according to the precepts of the interpreter. It could

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be applied on

"grounds of simplicity, because it establishes an easily ascertained body of definitions of a character already known to the Judges of the Court, and requiring no special proof by foreign experts, and certainty, because any litigant would know beforehand exactly how any particular legal rule or institution would be classified".

(*Graveson* (*op cit* at 46).)

It has been suggested that it is to be applied also because Judges are under oath to administer their own legal system and no other and the decision or definition of facts or rules by a legal system foreign to them would be a failure on their part to observe strictly their oaths of office. By the oath of office of a Judge in this country he swears that he will "administer justice to all persons alike without fear, favour or prejudice, and, as the circumstances of any particular case may require, in accordance with the law and customs of the Republic of South Africa or of the territory of South West Africa".

This argument could, of course, beg the question because, if South African municipal law and in particular that branch known as private international law were to require a Judge to apply foreign law in certain circumstances, he would still be administering justice in accordance with South African law if he did so.

Some of the arguments against the application of the *lex fori* seem to me not to hold water. It is said that the theory will not work where there is no close analogy in the *lex fori* to a foreign institution or rule of law. It seems to me that if there is an analogy no problem exists and if there is none it is not necessarily a calamity for classification is to my mind not a necessity but merely a tool to be used when available. I do confess also to be unable to visualise a situation in which a rule of the *lex fori* competes with a rule of foreign law but that foreign law is incapable of classification by the *lex fori*.

It has also been said that the theory may result in a failure to appreciate the true nature of the foreign rule. It seems to me that there should not be such a failure if sufficient evidence of the true nature of the foreign rule and its classification by its law is placed before the forum to enable it to make a correct classification of the rule according to the *lex fori*.

I believe that it is important to point out that classification of a rule or rules of foreign law in terms of the *lex fori* does not in my view entail asking the question how is the analogous rule of the *lex fori* classified in terms of the *lex fori* but how would this foreign rule be classified if it were part of the *lex fori?* (For what seems to be a contrary view, see Forsyth 1982 *SALJ* 16 at 19.)

It seems to me in conclusion in respect of this enquiry that the general rule of South African private international law is that classification is done in terms of the *lex fori*. As I do not believe that there are any grounds for departing from this general rule in this matter, I propose to apply it. Whilst it would no doubt be more satisfactory to be able to state the rule and its qualifications, I do not believe it necessary to do so in this case — that is assuming it to be capable of being stated precisely.

The first rules or set of rules that I am called upon to classify in this case are the rules relating to the operation of *res judicata*. It seems to be a well settled principle of the private international law of this country and many other countries that the Court should distinguish between rules of procedural law and rules of substantive law and that procedural matters are governed by the *lex fori* whilst matters of substance are governed by the *lex causae*. (*Spiro* (*op cit* at 172-173); *Kuhne* v *Nagel's* case *supra* at 537; *Forsyth* (*op cit* at 16).) In view of the general rule that I have mentioned, it would seem to me also that the often difficult question, when is a rule procedural and when substantive, is also one to be decided by the *lex fori* (*Spiro* (*op cit* at 174); *Graveson* (*op cit* at 592); *Second Restatement — Conflict of Laws* para 584; but see also *Forsyth* (*op cit* at 16)).

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That it is often a difficult question to decide whether a particular rule is procedural or substantive is clear.

"The truth is . . . that substance and procedure cannot be relegated to clear cut categories. There is no pre-ordained dividing line between the two, having some kind of objective existence discoverable by logic. What is procedural, what substantive, cannot be determined *in vacuo*."

(*Cheshire and North* (*op cit* at 693).)

It seems to me that it is generally accepted and logical that the rules relating to *res judicata* are characterised as procedural and therefore governed by the *lex fori*. (*Graveson* (*op cit* at 594, 596); *Spiro* (*op cit* at 174, 177); *Cheshire and North* (*op cit* at 655-656).)

Counsel in this case obviously thought so too because they merely referred to this country's laws when making their submissions in regard to the *exceptio rei judicatae*.

The requisites for a valid plea of *res judicata* are that a prior final judgment was given in Court proceedings involving the same subject-matter based on the same grounds and between the same parties. (*Mitford's Executor* v *Ebden's Executors and Others* 1917 AD 682 at 686.)

A judgment is final if it has determined the substantive rights of the parties: Hoffmann and Zeffertt *South African Law of Evidence* 3rd ed at 263; *African Wanderers Football Club (Pty) Ltd* v *Wanderers Football Club* 1977 (2) SA 38 (A) at 45-6.

It makes no difference that the prior judgment was a foreign judgment (*Carl-Zeiss-Stiftung* v *Rayner and Keeler Ltd and Others (2)* [1966] 2 All ER 536 (HL) at 554; *Joffe* v *Salmon* 1904 TS 317 at 319; *Wolff NO* v *Solomon* (1898) 15 SC 297 at 306 — or whether it was right or wrong (*Hoffmann and Zeffertt* (*op cit* at 258 and 263); *African Farms and Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555 (A) at 564C-F; *Bertram* v *Wood* (1893) 10 SC 177 at 180).

In order to determine what the subject-matter was, one must obviously consult the pleadings. (*Marks and Kantor* v *Van Diggelen* 1935 TPD 29 at 33.)

The prior judgment relied upon by the respondent in these proceedings was one in Court proceedings between the same parties in the United States District Court for the Southern District of Alabama.

In that Court the applicant, on 22 November 1982, "filed" an action to enforce the arbitration award which is the subject-matter of the present proceedings. Since the action was not filed within three years, the Court held that it was "time barred" and dismissed it. It was so held by virtue of s 207 of 9 USC which read as follows:

"Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any Court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The Court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in said Convention."

An expert in the law of the United States of America has made an affidavit in these proceedings and has stated, *inter alia*:

"If Laconian's action were to be brought again in the United States in a jurisdiction other than the Southern District of Alabama, the action would, in my opinion, fail.

In the first place, the three-year limitations period quoted above is an integral part of the statute which creates the cause of action. The majority rule in the United States is that where federal statutes create a new right of action and then prescribe a time period within which that action may be brought 'any failure to commence the action within the applicable time period extinguishes the right itself and divests the Federal Court of any subject-matter jurisdiction which it otherwise may have'. This quotation is from the judgment in *First Savings and Loan Association* v *First Federal Savings and Loan Association of Hawaii* 547 F Supp 988 (D Hawaii 1982), and I believe that it correctly reflects the law as it would be applied in most jurisdictions of the United States of America, and particularly in Alabama.

The Congress of the United States has enacted various statutes in conjunction with its adoption of the Convention referred to in para 5 above. One such statute is found in 9 USC s 207, a copy whereof is annexure 'U 2' hereto. This contains the three-year limitations provision which was relied on in Agromar's defence to

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Laconian's action. As this statute was enacted by the Congress of the United States, its effect extends to any action brought in the Courts of the United States to enforce a foreign arbitral award. In this regard there is no distinction made between differing limitations provisions in effect in Alabama or in New York. In other words, the same limitations period would apply throughout the United States to all actions brought to enforce a foreign arbitral award.

Typically, such statutes of limitation are regarded as 'substantive' rather than 'procedural'. Therefore, our Court's dismissal of 19 May 1983 should be regarded as a 'substantive' dismissal on the merits.

It is only fair to say that some American cases on the subject limit the 'substantive' effect of such statutes to those which concern only an area not in existence at common law. Arbitration procedure did not exist as part of the original American common law. On the other hand, however, the statutes containing our three-year limitations provision did not 'create' the cause of action permitting the enforcement of a foreign award. Thus, notwithstanding that the 'substantive' effect of similar statutes may not be universally accepted in American cases, it is my opinion that the judgment in the *First Savings and Loan Association* case quoted in para 9 hereto would be almost universally followed in the United States.

Furthermore, Rule 41 (*b*) of the Federal Rules of Civil Procedure states in part as follows:

> 'Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.'

The Court's dismissal order dated 19 May 1983 did not 'specify otherwise' as provided for in Rule 41 (*b*) and consequently the dismissal of Laconian's action is an adjudication on the merits of its claim and would be recognised as such in any Federal or State Court in the United States. Under the procedure in the Courts of the United States of America, a judgment in one United States District Court which has become final by appeal and by lapsing of the right of appeal may be registered in any other District Court simply by filing a certified copy of the judgment. It then has the same effect as a judgment rendered in that district."

It seems to me that one has to be careful not to become confused in a matter such as this between the subject-matter of a foreign arbitration and the subject-matter of the application for recognition and enforcement of the foreign arbitral award. I am not in these proceedings concerned with the subject-matter of the arbitration. It seems clear that applicant in order to succeed in the Court of Alabama had to allege and prove that:

the foreign arbitral award had been made;
that it fell under the Convention;
that it had been the party in whose favour it had been made;
that the award had been made against the respondent; and that
the award had been made within three years of the "filing" of its action.

The Court did not find against the applicant upon any of the averments other than that the award had been made more than three years before the proceedings had been commenced. Indeed as I understand the position the other averments were not disputed.

The subject-matter of the prior judgment was accordingly a claim that the applicant was entitled to have the award recognised and enforced in Alabama in terms of Statutes of the United States enacted in conjunction with the Convention on the Recognition and Enforcement of Foreign Arbitral Award 9 USC s 201-8 (1970). The subject-matter of the proceedings before me is a claim that this Court should recognise and enforce the award in terms of our country's legislation (Act 40 of 1977) which differs from that applicable in Alabama, *inter alia* in that it has no provision limiting recognition to awards made within three years prior to commencement of the proceedings for recognition and enforcement. It seems to me obvious that the earlier proceedings did not involve the same subject-matter and was not based on the same grounds.

The plea of *res judicata* is accordingly dismissed.

Classification of the competing rules of prescription, superannuation, time-barring or limitation of Colombia, South Africa, the United States and England is not that simple. Counsel were in agreement that the rules of the United States were substantive and that of England procedural in character. The parties were also in agreement that the rules of Colombia

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and South Africa were identical, however unlikely that might be, and as I understand the position, I am obliged to accept this proposition. They were, however, not in agreement as to the nature or effect of South African and accordingly also Colombian law.

Although I propose to classify these rules in terms of the *lex fori* it seems to me that the rules of each of the countries would be classified by each of the other countries in exactly the same way. It seems to be settled law that statutes of limitation merely barring the remedy are part of the law of procedure whereas they are part of the substantive law if they extinguish altogether the right of the plaintiff (*Kuhne and Nagel's* case at 537H and 538A and cases there quoted; cf *Graveson* (*op cit* at 52)). I agree with respect, with O'DONOVAN J that the South African Prescription Act 68 of 1969, contrary to its predecessor is substantive in character. (*Kuhne and Nagel* (*supra* at 538); Forsyth 1982 *SALJ* at 16 *et seq*.) It follows that in this case the *lex fori's* rules are substantive but that the *lex causae's* rules are either substantive, if the law of the United States applies, or procedural, if English law applies. If the *lex causae* is that of the United States then it follows that the applicant's claim would be prescribed. If the *lex causae* is English law the matter is not that clear. It would mean if these general rules were to apply that the *lex fori* being substantive would not apply but that the *lex causae* being procedural would also not apply.

This is indeed the last problem mentioned in Dicey and Morris *The Conflict of Laws* 10th ed at 1181. The learned authors say:

"If the statute of the *lex causae* is procedural and that of the *lex fori* substantive, strict logic might suggest that neither applies, so that the claim remains perpetually enforceable. A notorious decision of the German Supreme Court once actually reached this absurd result. But writers have suggested various ways of escape from this dilemma, and it seems probable that an English Court, in the unlikely event of its being confronted by such a situation, would apply one statute or the other."

The German case is not available to me but *Forsyth* in his article in the *SALJ* says of this case:

"There is a notorious decision of the Reichsgericht of 1881, upholding a claim on a Tennessee Bill of Exchange. The Bill was prescribed under both German law (the *lex fori*) and Tennessee law (the *lex causae*) but the German provision was classified as substantive, while the Tennessee rule was procedural."

I certainly have no wish to join the German Court in its notoriety although strict logic might so advise. The reason I will not do so, however, is that it seems to me that in such an event 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. I am, no doubt, influenced to some extent by *Ehrenszweig's* scepticism and preference for the residual *lex fori* approach where no formulated or non-formulated rule exists which seems to me to accord with good sense. At 1125, *Ehrenszweig* (*op cit*) says:

"In the absence of a pervasive rationalisation of a general regime of either the *lex fori* or the *lex causae*, and the failure of any 'weighing-of-interests' tests, forum law rationally remains the starting point. This was well stated by the Alaska Supreme Court in a suit involving a British Columbia accident. 'What minimum period of time for commencing actions would best effect (the) purpose is a matter of policy of government. British Columbia has declared it to be one year. But Alaska has chosen a longer period of two years, and it is the forum in which the rights of the parties are being determined. In these circumstances, we can see no good reason why the State's policy as to limitation of tort actions should give way to the differing view of a foreign country.'"

It follows from what I have said hitherto that the applicant's claim is prescribed if the *lex causae* is that of the United States of America. I should therefore deal with this problem first. Here again the solution is far from simple.

The first question which now arises seems to me to be whether the proper law of the arbitration and the award differs from that of the contract containing the arbitration clause. Could it be that the proper law of this charterparty is the law of the United States but that the proper law

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of the arbitration and the award is that of England and that in dealing with this claim for recognition of the award I am to regard English law as the *lex causae*?

I mention in passing that s 4 (1) (*b*) of Act 40 of 1977 specifically contemplates the contract being invalid under the law to which the parties have subjected it or of the country in which the award was made. I mention it merely in passing not only because this matter is not concerned with invalidity but for the further reason that I do not wish to have to express an opinion upon whether the "or" is to be interpreted disjunctively or not. (See in this regard Kahn *Annual Survey of South African Law* (1977) at 571.)

It seems to me that the answer is dependent upon whether the award novated the applicant's rights or not. If it was obtained not to create a right but merely to enable the applicant to enforce its rights to payment in terms of the contract, ie to strengthen or reinforce its rights, then the proper law of the contract is the *lex causae* and not the law of the country in which the award was made. (Cf *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 944F-G which concerned a judgment but in this respect as in other respects a judgment and an award are probably to be equated. Cf *Friedman v Mendes* 1976 (4) SA 734 (W) at 736D.)

Although a party who seeks to enforce a foreign arbitration award is suing on the award and not on the contract to which the award gives effect (*Norske Atlas Insurance Co Ltd v London General Insurance Co Ltd* [1927] 43 TLR 541 at 542), the award in this case did not itself create the right to payment but strengthened and reinforced it. It follows that it is my view that the *lex causae* of the contract is the governing law.

That our law recognises party autonomy in respect of the proper law of a contract seems clear. Thus where the parties have expressly or impliedly (or tacitly) agreed upon a governing law our Courts would give effect to the intention of the parties. (*Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171 at 185; *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 31; *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C) at 145.)

I agree, with respect, with the remarks of GROSSKOPF J (as he then was) that a term concerning the law to be applied should be implied only "if it is necessary in the business sense to give efficacy to the contract" and that:

> "This formulation would not often be helpful in determining what the proper law of the contract is because, although it may often be necessary for business efficacy that some law be designated to govern the contract, the requirements of business efficacy would seldom dictate that the governing law should be system A rather than system B."

(*Improvair* case at 145.)

Where the parties have not expressly or impliedly selected the proper law of the contract the Court has to determine it. Our Courts have in common with the Courts in England approached the determination of this question in two ways. The one is that the proper law of a contract is chosen on the basis of what might be called the "intention theory" and the other that it is chosen on the basis of the "most real connection" theory.

In terms of the "intention theory" the intention of the parties to the contract is the true criterion. In order to find an answer where no proper law was either expressly or impliedly agreed the theory is as it were extended by imputing an intention to the parties. Then it is said:

> "Courts of law have of necessity to fall back upon what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances to be presumed to have been the intention of the parties."

(*Efroiken's* case at 185; *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 31; *Pretorius and Another v Natal South Sea Investment Trust Ltd (Under Judicial Management)* 1965 (3) SA 410 (W) at 417G-H; *Vita Food Products v Unus Shipping Co* 1939 AC 277 at 289.)

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In terms of the "most real connection" theory the proper law of the contract is "the system of law with which the transaction has its closest and most real connection. (See eg *Bonython* v *Commonwealth of Australia* 1951 AC 201 at 219; the *Improvair* case *supra* at 147B.)

Although, as has been pointed out, "the modern tendency is to adopt an objective approach to the determination of the proper law of a contract where the parties did not themselves effect a choice" (*Improvair* case at 146H-147A), the fact remains that the "intention theory" has not been laid to rest by the Courts in England or South Africa. In the *Improvair* case the Court felt itself bound by the rules laid down in *Efroiken's* case, as I do too, but stated — "it is comforting to know that application of the *Bonython* formula, which, with respect, I prefer, would not lead to a different result". (At 147B.) *Graveson* (*op cit* at 407) points out:

> "Both the subjective (intention of the parties) and the objective (factors of real connection) views of the proper law have been employed by our Courts. How alive this difference of view remains, may be judged from a comparison of the judgments of two members of the Court of Appeal in *Whitworth Street Estates (Manchester) Ltd* v *James Miller and Partners Ltd* [1969] 1 WLR 377 at 380, 383. In that case, Lord DENNING MR expressed the test of the proper law as 'What is the system of law with which the transaction has the closest and most real connection.' WIDGERY LJ explained: 'the proper law of the contract is the law which the parties intend should govern its operation'."

If comfort or consolation is required for those who prefer one or the other of these two theories but have to apply the other it is perhaps to be found in the fact, firstly, that the intention theory is hardly subjective when it allows for the determination of the law which the parties ought reasonably to have chosen, and, secondly, as was pointed out in the *Improvair* case at 147A:

> "From a practical point of view the different formulations would however seldom, if ever, lead to different conclusions."

It seems clear that the South African writers are generally in favour of the *Bonython* formula (*Spiro* (*op cit* at 159); *Van Rooyen* (*op cit* at 217, 218); *Forsyth* (*op cit* at 257); Kahn *The Law of Succession* at 623). Given the choice between determining the proper law by imputing an intention and by applying the most real connection formula I would also, with respect, prefer the latter, for the reason stated by *Van Rooyen* (*op cit* at 217) as follows:

> "Indien daar geen werklike regskeuse was nie, is dit volgens oordeel van " skrywer onsuiwer om van 'n vermoedelike bedoeling te praat. Afgesien daarvan dat dit 'n *contradictio in terminis* is om 'n objektiewe faktor (vermoede) naas 'n subjektiewe faktor (bedoeling) in een asem te besig, is dit verder onrealisties om van 'n bedoeling te praat as geen bedoeling aanwesig is nie."

Whether I would, given an entirely free choice, apply the most real connection formula, or the proper law concept at all, is a matter upon which I am fortunasely not called upon to express any opinion.

Ehrenzweig (*op cit* at 137-139) has stated:

> "Once both the 'logical' place-of-contracting and the supplementary place-of-performance rule had been found unsatisfactory, some Courts returned to the law expressly or impliedly intended by the parties as an alternative or even as an exclusive solution. But 'there are few words less precise or more ambiguous than intention'. And more recent formulas which have been devised to give this test the semblance of certainty, such as a reference to the 'center of gravity' of the contract or its English model, the theory of the 'proper law' merely made more obvious the defeat of official doctrine.
>
> But this is not all. Both central and incidental emphasis upon the law of the place of contracting as the, or a, law bearing on the 'creation' of a contract right, has forced Courts and writers into the necessarily circular search for a definite localisation of that place. It has been suggested that Courts should ascertain 'where the last act necessary to make a binding agreement takes place'. But we cannot know where this act was performed unless we know which law is to determine the act necessary to make an agreement binding. Even if one were to establish arbitrarily a test based on external fact independent of the applicable law, practical failure would be inevitable, as in the all-important case of a contract concluded by mail, as to which the so-called 'mail-box' theory would find the place of contracting 'where the document is posted or is received by the carrier'. This theory has been justly criticised as choosing a place that is 'accidental to the contract and therefore inept for the determination of a law to govern the contract

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The American Law Institute, having abandoned by a narrow vote, the formulas of the *First Restatement* as 'artificial' has, in its *Second Restatement*, adopted language similar to that of the New York Court ('most significant relationship') which in turn had followed the English reference to the proper law of the contract. In all these formulas, what should be the result reached by a choice of law, namely the ascertainment of 'a center of gravity', or of the 'most significant relationship' or of the 'proper law' is offered to us as a premise for the choice.

Only one conclusion seems compelling in the light of this complete failure of official doctrine. Where the *lex contractus*, be it the law of the place of contracting, or of the place of performance, or the 'intended' law has retained any relevance, localisation cannot be postulated by logical reasoning or established by general formula. Rather it must be deduced for each specific problem in the light of the policy underlying the forum rule whose displacement is sought."

Van Rooyen (op cit) leading up to his plea for application of a "funksionele benadering" based upon "internasionale redelikheid" states:

"Al word die statuteleer verwerp en saam met *Van Savigny* gesoek na die regstelsel wat die setel van die kontrak is, word so dikwels gevind dat meerdere regstelsels as setel aangedui kan word; en alhoewel die swaartepunt van die kontrak dikwels ook verband hou met die sosiale funksie van die betrokke regsreels is 'n blote vasstelling van die swaartepunt aan die hand van die opeenhoping van feitelike elemente, nog geensins 'n werklike verklaring vir die gelding van 'n besondere regsreel ter uitsluiting van 'n ander een nie."

As I have said, however, I regard myself as bound to follow the approach in the *Efroiken* case in my quest for the *lex causae* and, as I have also endeavoured to point out, although sometimes regarded as being a subjective approach, it is in fact largely objective. I cannot see any indication in the charterparty that the parties gave the matter of the governing law as such any thought and it follows that I am to decide

"what ought, reading the contract by the light of the subject-matter and of the surrounding circumstances, to be presumed to have been the intention of the parties".

The most important factors which are in my view to be taken into account in coming to a conclusion are:

that applicant carries on business and is registered in Greece;
that respondent carries on business and is registered in Colombia;
that the applicant was represented by its broker in London in the negotiations leading up to the conclusion of the charterparty;
that the respondent was represented by its New York broker in those negotiations;
that the charterparty was drawn and was dated in New York by the respondent's broker;
that the charterparty was then sent to London where the parties' London brokers stamped and signed it;
that the charterparty was for the carriage of goods to Colombia;
that the US Carriage of Goods Act was incorporated in the charterparty;
that payment had to be made in US dollars;
that payment of freight was to be made in London to an English bank;
that payment of general average had to be made in London;
that arbitration had to take place in London by arbitrators carrying on business in London; and
that the claim is for recognition of an award in respect of a payment found to be due.

The factors which favoured the law of Colombia are that respondent is registered there and that it is the *lex loci solutionis* in respect of delivery or discharge of the goods.

The factors which favour the law of the United States of America are that respondent's broker conducted negotiations from there; that he drew and signed and stamped the charterparty there; that the charterparty stipulated payment in US dollars, and that the charterparty incorporated the US Carriage of Goods Act.

The factors favouring the law of England are that the applicant's broker negotiated from there; that the parties' London brokers performed the

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last acts, ie signing and stamping the charterparty to create a binding contract, in London; that payments had to be made in London and that arbitration had to take place in London by London arbitration and, finally, that the claim upheld in the arbitrator's award was one for payment.

Whilst counting contacts or factors favouring one or the other country's law is an unsatisfactory way of deciding legal issues, a large number of important factors pointing one way is a strong indicator. On this basis English law seems to be indicated. It would seem to be not only the *lex loci contractus*, although this is not quite clear, but also the *lex loci solutionis* in respect of the claim for payment of the amount found to be due in terms of the charterparty. It is true that one cannot in this instance speak of a single *lex loci solutionis* because the applicant's principal obligations had to be discharged not in England but in carriage from Argentine to Colombia and delivery in Colombia. (Cf *Executors of Muter* v *Jones* (1860) 3 Searle 356.)

Whilst it seems to be unsatisfactory to arrive at a conclusion that the law to be applied as the proper law might be that of England in respect of the respondent's obligation to effect payment and that of Colombia in respect of applicant's obligation to deliver or discharge safely, that was indeed by implication albeit *obiter* the approach of the Court in the *Efroiken* case (at 188). Whether one agrees with this approach or criticises it as has been done, for example, in the *Improvair* case at 147F-G and by *Van Rooyen* (*op cit* at 105) and *Forsyth* (at 270), the fact remains that this scission principle has been approved to an extent in a number of decisions (*Shacklock* v *Shacklock* 1948 (2) SA 40 (W) at 41 and 1949 (1) SA 91 (A); *Executors of Muter* v *Jones* (1860) 3 Searle 356 at 358-9; *De Wet* v *Browning* 1930 TPD 409 at 411).

Whether one accepts it or not is to a large extent dependent upon one's view of the various legal theories which have been advanced in respect of this field of the law, and indeed whether one accepts the "proper law" or "most significant relationship" tests at all. *Van Rooyen* (*op cit* at 200), with respect, quite correctly, postulates a situation in which the "swaartepunt" (centre of gravity) cannot be established in which event he accepts scission. If one accepts the approach that in the absence of super-law we are merely dealing with conflicts between legal rules seen to be potentially applicable and not legal systems or parts of legal systems, then scission is a necessary and welcome principle. If not, one will always be faced with the fact that "counting" up contacts or interests can never be a satisfactory way to decide legal issues and in some cases could not possibly point to a single system of law."

Be that as it may, the *lex loci solutionis* of all payments is English law whereas the performance of applicant's obligations of carriage and delivery had to take place in Argentine, upon the high seas and in Colombia. If I have to strike a balance it seems to tilt towards English law from amongst the *leges loci solutionis*.

The fact that arbitration had to take place in London is also a strong pointer towards it being found that the parties ought to have chosen English law as the proper law of the charterparty. Although the notion which at one time found favour with English Courts that such a choice should be regarded as conclusive as to the choice of the proper law has been rejected, it remains a factor of considerable weight, particularly where the parties are of different nationality. (See eg *Compagnie d' Armement Maritime SA* v *Compagnie Tunisienne de Navigation SA* [1970] 3 All ER 71 (HL) at 75a, 88e, 96e-f.)

The scale thus seems to me fairly heavily tilted towards a conclusion that the parties ought to have chosen English law as the governing law. The factors counting in favour of the law of the United States of America seem to me not to be very weighty. Mr *Magid* stressed the fact that payment had to be made in US dollars but this seems to me to be of little

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importance. US dollars were then and are still currency often chosen in international trade. Oil and gold prices are, for example, generally fixed and quoted in US dollars all over the world and one knows from experience that it is often the currency stipulated in charterparties between parties of different nationalities.

Mr *Mugid* also relied heavily on the fact that the USA Clause Paramount formed part of the charterparty and deemed the US Carriage of Goods by Sea Act to be incorporated therein.

The history of similar provisions was succinctly set out by Lord SOMERVELL OF HARROW in *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725 (HL) at 750I-751D as follows:

"It is, I think, relevant to set out quite shortly the history of the provisions embodied in this and other similar Acts. The object of the Brussels Convention which led to the Hague Rules which led to the Act, was to produce standard provisions of liability as between shipowner or carrier and shipper. The desirability of standard terms for bills of lading which pass from hand to hand like negotiable instruments had long been felt. The provisions in relation to English law relieved the shipowner of his absolute obligation to provide a seaworthy ship. This was replaced by a duty to exercise due diligence to provide a seaworthy ship. The shipowner was placed under a duty to exercise due diligence in other matters connected with the carriage. He was allowed maximum exceptions to his liability which he could not increase.

The rules did not apply to charterparties. Charterparties do not pass from hand to hand and parties were, therefore, left free to contract on what terms they chose. It was thought at one time that the rules might be left to be embodied by agreement, as was done with the York Antwerp Rules on General Average of 1890 (Scrutton on *Charterparties* 16th ed 454). Later it was decided that countries should, if so minded, legislate. Our own Carriage of Goods by Sea Act was passed in 1924 and the United States Act in 1936. The United States had led the way in this field by the Harter Act of 1893. Legislation embodying the rules with or without modification did not, of course, cover charterparties, and could not go beyond shipments which were or came within the jurisdiction of the legislating country. The United Kingdom Act applies to ships carrying goods from any port in Great Britain or Northern Ireland. The United States Act applies (subject to exceptions which are not relevant here) to contracts for carriage of goods to or from ports of the United States. This short summary is, I hope, useful in emphasising how natural it was that parties concerned in the carriage of goods by sea should wish to embody this code of obligations, the product of much thought and experience, in contracts to which it would not be applicable by legislation. This would apply to all charterparties and to bills of lading which were not within the geographical limits of any country's legislation."

As has been pointed out in Cheshire and North's *Private International Law* 10th ed at 202,

"it is important to distinguish carefully the express selection of the proper law from the quite different process of the incorporation in the contract of certain domestic provisions of a foreign law".

This latter process may simply be regarded as a "short-hand method" of expressing certain agreed terms (see also *Cheshire* (*op cit* at 758)). Whilst the incorporation of a particular country's statutory provisions are obviously a factor in favour of choice of that country's law, it would seem to me a less important indicator where the enactment was for the purpose of adopting standard rules also adopted by other countries with a view to standardisation in international trade.

I conclude, weighing all relevant facts as best I can, that the proper law of this charterparty, certainly as far as performance of the obligation to make payment is concerned, is English law. I do so applying the test stated in the *Efroiken* case, but have no doubt that the same result would follow were I to apply the test of the most significant relationship.

It follows that the claim for recognition is not prescribed by virtue of United States law. Neither is it however prescribed by English law. In any event, the rules of English law, being procedural, are not applicable. As I have said, in these circumstances I propose to apply this country's law of prescription.

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Mr *Wallis* submitted that it was clear that prescription could not be completed in this matter as s 13 (1) (*d*) of the Prescription Act 68 of 1969 provided that, if the debtor is outside the Republic (including the territory of South West Africa), the period of prescription shall not be completed until a year has elapsed after the day referred to in ss (i). The respondent not having been within the area referred to since the debt became due, prescription has not been completed.

Mr *Magid* submitted that the provisions relied on by Mr *Wallis* could not possibly mean this, as it would mean that in a case such as the present one completion could be delayed indefinitely.

It is true, as was pointed out by Grosskopf AJA (as he then was), in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) at 578F that the main practical purpose of extinctive prescription is "to promote certainty in the ordinary affairs of people" but he also went on to point out that our Prescription Act also embodies the principle which is inconsistent with the promotion of certainty, that "there are circumstances in which it would be unfair to require of the creditor that he institute proceedings within the time normally allowed" and that s 13 (1) gives effect to this (latter) principle. It lays down that prescription is delayed in certain circumstances . . .

"Where an 'impediment' of the type mentioned in s 13 exists a year or less before prescription would otherwise have been completed, the completion of prescription is delayed until a year after the impediment has ceased to exist."

It seems to me that our Legislature took the view that a creditor who wished to enforce debts should not be frustrated in the least by the debtor's absence from the areas of jurisdiction of our Courts and that this rule applies even where the debtor has never been in the country. It follows that the claim for recognition is not prescribed in terms of the *lex fori*.

If the claim upon the award had become prescribed or superannuated in terms of English law it might well have been that I would on the analogy of the rule that a judgment which is superannuated in the country in which it has been given will not be recognised by our Courts. (*Coppen* v *Coppen* (1908) 29 NLR 416 at 418; *Scorgie* v *Munnich* 1912 EDL 422 at 424; *Law of South Africa* vol 2 para 572.)

In the result I grant the following order:

1. The arbitration award handed down by Ralph E Kingsley on 23 January 1979, in an arbitration between the applicant and the respondent herein, is hereby made an order of Court and judgment is granted in favour of the applicant against the respondent for:
   (*a*) R14 385.50;
   (*b*) interest thereon at the rate of 7½% per annum from 1 October 1977 until 23 January 1979;
   (*c*) interest on the said amount of R14 385.50 at the rate of 11% per annum from 23 January 1979, until the date of payment thereof.
2. The respondent is ordered to pay the costs of this application, such costs to include the costs of the application brought by the applicant under case No 3577/1983 before this Court and the application under case No 8131/83.

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