

SOCIETY OF LLOYD'S *v* PRICE: CHARACTERIZATION AND  
'GAP' IN THE CONFLICT OF LAWS

TW BENNETT

*Professor of Law, University of Cape Town*  
and

K KOPKE

*Lecturer in Law, University of Cape Town*

For connoisseurs of legal arcana, the case of *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) (hereafter *Society of Lloyd's*) has a special significance. Not only did it settle the question how best to characterize causes of action, but it also offered a solution for that curious problem of 'gap'. Both of these are issues arising out of conflicts of law.

In itself the conflict of laws is an abstruse discipline, for it involves not simply the application of law to facts, but rather the application of a set of second-order choice-of-law rules which are designed to indicate what law should be applied to facts that happen to contain a foreign element. The *Society of Lloyd's* case, however, took matters a stage further: the logic of the choice-of-law process drove the court to a point where it discovered that, in the circumstances of the case, no law was applicable. In conflict jargon, this conundrum is known as a problem of 'gap'. (Its counterpart is 'cumulation', namely the simultaneous applicability of two or more laws.)

The complex facts of the *Society of Lloyd's* case were, in broad outline, as follows. Because of adverse litigation against underwriting members (including the respondents, Price and Lee) in the 1980s, Lloyd's (the appellant) adopted a 'reconstruction and renewal' (R & R) plan. In terms of this plan a newly formed insurance body, Equitas Reinsurance Ltd, was to facilitate a settlement of certain claims incurred before 1992.

In order to implement the plan and, in effect, to impose a contract with Equitas on underwriting members, Lloyd's used its statutory power to pass

bylaws. In any event, members had earlier entered into a standard-form agreement obliging them to comply with any Lloyd's subordinate legislation and to become party to any agreement that might be prescribed. On this basis Lloyd's appointed a substitute agent to take over the whole or any part of a member's underwriting business and give effect to the R & R plan. By this means the respondents became parties to a contract with Equitas, and therefore liable to pay premiums. When they failed to pay, the High Court of England and Wales awarded the appellant default judgments.

The Society of Lloyd's then sought to enforce these judgments in South Africa (which was the respondents' place of residence). Price and Lee raised three defences. First, they argued prescription under the South African Prescription Act 68 of 1969, since the judgments had been granted more than three years before the action had been instituted in the forum. Secondly, they argued that the forum had no obligation to enforce the judgment because the English court had lacked international jurisdiction; and thirdly, they contended that the judgment had been obtained by means contravening South African public policy.

The latter two defences concern recognition of foreign judgments rather than choice of law, and in this regard Van Heerden JA's decision is especially valuable, for it contributes to the development of a sadly neglected branch of South African law (cf the South African Law Reform Commission's Discussion Paper 106 (Project 121) *Consolidated Legislation pertaining to International Judicial Co-operation* (2004)). Even so, her judgment need not detain us long, since this note is mainly about choice of law and its attendant problems of characterization and gap.

Van Heerden JA had no trouble dismissing the second and third defences. She found that the respondents had in fact submitted to the jurisdiction of the English courts (in clause 2.2 of the contract establishing their relationship) and that, according to the 'putative proper law' of the contract (which was English law), the submission was perfectly valid (para 41). As for Price and Lee's next argument — that the Society of Lloyd's had created a binding contract on its own terms, without the respondents' consent — Van Heerden JA found (para 45) that enforcement of foreign judgments inevitably involved rules alien to South African law, but that mere difference was not sufficient to warrant the forum's refusal to enforce on policy grounds. The further allegation — that the respondents had not been given reasonable notice to contest the proceedings in England — was also dismissed on the ground that it was apparent from the proceedings and from a letter written by the respondents' lawyers that they had in fact been given sufficient notice (para 47).

Returning to the first defence of prescription: although the judgments had prescribed under South African law, they had not yet prescribed under English law, in terms of which the relevant period was six years. The Supreme Court of Appeal was therefore presented with a typical choice-of-law problem: should it apply South African or English law to decide the matter? According to our conflict rules (which happen to be the same in

English law on this point), all procedural issues must be governed by the *lex fori*, whereas matters of substance are governed by the *lex causae* (which in *casu* was English law). The court thus had to determine whether prescription was a question of procedure or substance.

It held that, under the South African Prescription Act, our rules on prescription are substantive, with the result that these rules could not be applied (para 22). Under English law, on the other hand, similar rules in the Limitation Act of 1980 are deemed procedural (although Lloyd's argued the contrary). South African choice-of-law rules, however, provide that the forum may apply only the substantive laws of the *lex causae*, not its rules of procedure (para 10). In consequence, neither English nor South African law could be applied: that strange anomaly in the conflict of laws had arisen, a 'gap'.

The *Society of Lloyd's* case is not the first occasion on which our courts have faced this problem. It occurred twenty years ago in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D), a case that also involved the question whether to apply English or South African rules on the limitation of actions. In that case, however, the court was not fully aware of the implications of gap. It was more concerned with an antecedent issue in the conflict of laws, characterization, and, indeed, if we reconsider what is being characterized, the problem of gap may be avoided (cf Jan L Neels 'Tweevoudige leemte: Bevryende verjaring en die internasionale privaatreë' 2007 *TSAR* 178).

Loosely speaking, characterization (or classification) denotes the subsumption of a matter under a predetermined legal category, to which the forum's system of private international law attaches a choice-of-law rule. The way in which one legal system perceives and characterizes a problem is, of course, very likely to differ from that of other legal systems. Law X, for instance, may classify a breach of promise to marry as delictual, while law Y may classify it as contractual. In other words, there is no universal set of legal categories transcending particular legal regimes.

Deciding on how best to characterize is a notoriously difficult problem, but it is critical to the choice-of-law process because until the appropriate legal category has been determined, the forum cannot discover the relevant choice-of-law rule, with its attached connecting factor indicating the applicable law. (On the choice-of-law process see C F Forsyth *Private International Law* 4 ed (2003) 8.) Scholars have urged one of four basic approaches. A court may use the *lex fori*, the *lex causae*, Falconbridge's 'via media' or Kahn-Freund's 'enlightened *lex fori*' (John D Falconbridge 'Conflict rule and characterization of question' (1952) 30 *Canadian Bar Review* 103 at 116. See also Christopher Forsyth '“Mind the gap”: A practical example of the characterisation of prescription/limitation rules' (2006) 2 *Journal of Private International Law* 169 at 173–4 (hereafter 'Mind the gap I') and Otto Kahn-Freund *General Problems of Private International Law* (1976) at 227).

Until the *Laconian* case (*supra*) none of these methods was put to the test, for the South African courts were happily innocent of the problem. A prime

example of the early case law was *Anderson v The Master* 1949 (4) SA 660 (E). Here the court simply assumed that the matter before it concerned matrimonial property (a category determined by the *lex causae*). It therefore applied the choice-of-law rule associated with that cause of action, which was the law of the husband's domicile at the date of marriage. (The latter rule was confirmed by *Frankel's Estate v The Master* 1950 (1) SA 220 (A).) A good argument, however, could have been made for treating the problem as a matter of essential validity of wills, in which case the law of the testator's domicile would have prevailed (C C Turpin 'Characterization and policy in the conflict of laws' 1959 *Acta Juridica* 222 at 226).

When the South African courts later became aware of the problem of characterization, they fell back, although usually *faute de mieux*, on the time-honoured expedient of using their own law to perform the job. See, for example, *Transol Bunker BV v MV Andrico Unity*; *Grecian Mar SRL v MV Andrico Unity* 1989 (4) SA 325 (A) and *Minister of Transport, Transkei v Abdul* 1995 (1) SA 366 (N) at 370A.

The *Laconian* case (*supra*), however, was a turning point. Here the court was fully aware of the problem of characterization, and Booysen J carefully considered which approach to adopt. On the basis of authority and principle he held that characterization is a process of interpretation, and that the forum always applies its own law to interpret (at 518D). (In this regard, Ehrenzweig's conception of the 'residual *lex fori*' is a powerful reminder of the realities of decision-making in conflict cases: Albert A Ehrenzweig *Private International Law* (1974) 125. See, too, *Society of Lloyd's* para 22.)

In *Society of Lloyd's v Price*; *Society of Lloyd's v Lee* 2005 (3) SA 549 (T) the court *quo* took the same approach. Mynhardt J characterized the matter in accordance with the *lex fori* (para 30), supporting his judgment by reference to the reasoning of *Laconian* and *Abdul* (*supra*) (paras 30 and 38 respectively), where the courts had applied the *lex fori* as a residual system on the understanding that they could not apply the procedural rules of a foreign *lex causae*. On this basis Mynhardt J held that the South African Prescription Act applied and, in consequence, the plaintiffs' claim had prescribed.

Allowing the forum to stipulate a category without paying any regard to other potentially applicable laws, however, may obviously distort the choice-of-law process, not to mention suggest judicial chauvinism and even encourage forum-shopping. Hence the argument that the *lex causae* should be used to characterize. This solution, however, is logically untenable. Although reference to a legal system that will ultimately determine the case has a superficial attraction, it begs the question whether the *lex causae* should in fact be chosen. How, in other words, can the *lex causae* be used to determine its own applicability before the forum has decided whether that law applies?

The third and fourth approaches, namely Kahn-Freund's enlightened *lex fori* (Kahn-Freund *op cit* 227) and Falconbridge's *via media* (Falconbridge *op cit* at 116) seek to take account of both the *lex fori* and the *lex causae*. (See also 'Mind the gap I' at 174.) The enlightened *lex fori* sets out, as its title

suggests, to introduce flexibility into a straightforward classification according to domestic law. The forum is required to develop a set of generic categories for use in conflict cases, not with its own law, but with foreign concepts in mind. It is reasoned that conflict rules should always be more enlightened if they are to do justice in a cosmopolitan world where uniform decision-making is the ideal (Kahn-Freund *op cit* 228).

According to the *via media*, the rules of all the legal systems potentially applicable to the case at hand must first be characterized. Only when the forum considers itself fully informed of these rules, together with their underlying policies, may it finally decide which to choose. In making this decision the court is guided by its own policies and whether a rule of the *lex causae* fits into the forum's conflict of laws system (*Laurens NO v Von Höhne* 1993 (2) SA 104 (W) at 116E–117E). Not only does this approach take a cosmopolitan or world-wide point of view, but it also allows for a more flexible approach to choice of law.

The *via media* is, in essence, a two-stage process. First, the court must determine 'the legal question raised by the concrete factual situation by reference to any potentially applicable legal system' (Turpin *op cit* at 223). This stage requires interpretation of the relevant rules of the applicable legal systems. The second stage requires a determination whether the potentially applicable law relates to a legal question that can be subsumed under the forum's conflict of laws system (*ibid*). The court is not obliged, however, to accept the characterization of a foreign legal rule by the legal system to which it belongs. Instead, the forum itself must characterize the foreign rule, although paying attention to the purpose of that rule in its domestic context (*ibid* 224).

Falconbridge's *via media* is now firmly established in our law as the preferred approach. It was employed by South African High Courts in *Laurens* (*supra*) and *Society of Lloyd's v Romahn* 2006 (4) SA 23 (C); by the Zimbabwean High Court in *Coutts & Co v Ford* 1997 (1) ZLR 440 (H) at 443–5; and, of course, by the Supreme Court of Appeal in the *Society of Lloyd's* case (para 14). In the latter instance Van Heerden JA supported her decision by referring to Falconbridge, Forsyth and *Laurens* (para 26). She disagreed with the trial court's judgment (paras 23–7), and distinguished the cases relied upon by Mynhardt J to support his finding of a 'residual *lex fori*'.

In accordance with Falconbridge's recommended method, Van Heerden JA first used the *lex fori* to determine the general nature of the South African law of prescription. Here she followed a long accepted principle, which we borrowed from English law, whereby rules that bar a remedy are deemed 'weak' and therefore procedural, whereas rules that extinguish a right are deemed 'strong' and therefore substantive (see Forsyth *Private International Law op cit* 22). Because s 10(1) of the South African Prescription Act extinguishes rights, Van Heerden JA found that our law was substantive, and therefore reached a preliminary decision that the applicable law had to be the *lex causae* (paras 15–16). In *casu* this was English law.

At this point we should note that, by a separate but seemingly parallel stage in the choice-of-law process, the court had determined the *lex causae* for the

main cause of action. Because the underlying cause in this respect was quite obviously contractual, the applicable law was the proper law of the contract. As it happened, the parties had expressly chosen this law in clauses 2.1 and 2.2 of their original undertaking. English law was therefore the applicable regime (para 11).

Van Heerden JA now moved to the second stage of the *via media*: characterizing the rules on prescription in accordance with the *lex causae*. Here she was following an approach set out in earlier cases (see *Laconian* (supra), *Kühne & Nagel AG Zurich v A P A Distributors Ltd* 1981 (3) SA 536 (W) and *Laurens* (supra). Section 24 of the English Limitation Act 1980 bars remedies after the lapse of a certain period of time, and can therefore be considered procedural (para 17). Because only the *lex fori* can govern such matters, it followed that neither the *lex causae* nor the *lex fori* could be applied to solve the question of prescription. The court had, in other words, arrived at the situation of gap.

The court *a quo* in *Society of Lloyd's* (supra) had solved this problem by recourse to the expedient of applying the residual *lex fori*. A completely different approach, however, was adopted by its counterpart in *Society of Lloyd's v Romahn* (supra), and even earlier in *Coutts's* case (supra). In the former instance Van Zyl J reasoned 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*' (para 86). He held that what Forsyth subsequently dubbed a 'residual *lex causae*' was dictated by justice, fairness, reasonableness and policy (Christopher Forsyth 'Mind the gap' Part II: The South African Supreme Court of Appeal and characterisation' (2006) 2 *Journal of Private International Law* 139, hereafter 'Mind the gap II').

*Coutts's* case reached a similar conclusion on facts almost identical to those in the *Society of Lloyds*. Chidyausiku J adopted the *via media*, welcoming the discretion it gave him to take account of international comity, justice and convenience (at 443–5). He ultimately selected the *lex causae* in preference to the *lex fori*, however, because (at 445F):

'English law allows for both the natural obligation of indebtedness to remain intact and indeed allows a remedy. It would be most invidious were the *lex fori*, which according to its own internal rules is not applicable, to subvert that obligation and that remedy.'

In the Supreme Court of Appeal judgment in *Society of Lloyds*, Van Heerden JA arrived at the same conclusion — application of the *lex causae* — but she adopted a somewhat different approach to solving the gap. She also used the philosophy of the *via media*, and thus took account of policy considerations (para 26), noting that she was required to be 'sensitive to considerations of international harmony or uniformity of decisions, as well as the policies underlying the relevant legal rule' (para 27). But in the final instance, she decided to apply English law by asking whether it had the *closest and most real connection to the legal dispute* (para 28). She reasoned that the contract had stipulated English law as the system governing the creation,

operation, interpretation and enforcement of the parties' rights (para 30). If both parties reasonably expected English law to govern any legal disputes, and if the right of action had not prescribed under the English Limitation Act, the default judgment could be enforced in South Africa.

Van Heerden JA established the *via media* as the only sensible solution for issues of characterization, and found an answer to the conundrum of gap. The learned judge is therefore to be congratulated for her contribution to the South African conflict of laws. Nevertheless, although her decision provides a powerful precedent for the *via media*, her judgment on gap merits reconsideration: the problem can perhaps be avoided altogether.

To do so, we must begin by revisiting the process of characterization, more especially the question of what is to be characterized. Opinion on this matter has varied. Some claim that the facts before the court are characterized, others the legal questions raised by the facts, and others still the laws themselves (Forsyth *Private International Law* op cit 70–1; Sieg Eiselen 'Laconian revisited — A reappraisal of classification in conflicts law' (2006) 123 *SALJ* 147 at 151).

The first option (the facts) is now generally discounted. Because a category emerges only when the potentially applicable rules have been applied to the facts, the object of the exercise would, to all appearances at least, seem to be rules of law (Falconbridge op cit, 'Mind the gap I' at 172, *Laconian* (supra) at 517J). With the general consensus of the common-law world to back him, Forsyth *Private International Law* 70–1 endorses this conclusion (and see 'Mind the gap I', where he cites *Laconian* at 517J). He says that legal categories, such as contract or delict, are generally considered to contain rules, and, in the event of disputes, litigants argue in favour of rule A or rule B, not fact A or fact B.

In the *Society of Lloyd's* case Van Heerden JA also seems to have characterized rules rather than facts. She concentrated on an analysis of the English and South African enactments in question in order to determine whether prescription was strong or weak (see 'Mind the gap II'). When she discovered that it was weak in the *lex causae* and strong in the *lex fori*, the problem of gap emerged.

Although the case for characterization of rules seems overwhelming, Eiselen (op cit) suggests a third and even more persuasive approach. He argues that the process of characterizing concerns neither rules nor facts but, instead, legal issues (at 153):

'In any litigation . . . the disputes between the parties will generally be outlined in the pleadings, the relief sought and the defences raised. It is ultimately the relief sought and the defences raised that will define what the legal issues are . . . [i.e] the essential dispute between the parties. . . .'

While Eiselen concedes that the parties may rely on different rules in different legal systems, the conflict process requires the court to assign their dispute to a legal system as a whole. (He cites *Laurens's* case at 116 as an example.)

In support of this argument, Eiselen refers (at 153–5) to the theoretical basis for our choice-of-law process, pointing out that courts are not obliged to assign a dispute to whichever rule happens to be in contention, but to a *legal system*. This understanding of the way in which private international law functions rests on a long tradition, beginning with Friedrich Carl von Savigny's *Private International Law* 2 ed (1880) (translated by W Guthrie) 68ff and including all modern South African authors (as well as Forsyth *Private International Law* op cit 44–6). In terms of this approach, the choice-of-law process entails no more than assigning issues to legal systems in toto. Once a court has decided on the *lex causae*, all relevant rules in that system are applicable, which would include the rules on limitation of actions.

In cases of prescription, however, our courts have become used to undertaking what amounts to a secondary characterization of the rules in the *lex causae*. As Eiselen op cit points out (at 158), Cheshire and North advocate an additional characterization to ensure that the forum applies only the rules that its own conflict of laws permit in the circumstances of the case (Peter M North & J J Fawcett *Cheshire and North's Private International Law* 13 ed (1999) 39–40). If Van Heerden JA had simply ignored this step, she would admittedly have arrived at the same conclusion — application of the *lex causae* — and she would also have sidestepped the problem of gap.

Indeed, the *issue* was quite clear in the *Society of Lloyd's* case: prescription of foreign judgments. Once it was clear what law governed the award of the judgments and the underlying rights, the same law could have been applied to all associated issues. In fact, the line of reasoning resulting in gap seems to begin with a separation of prescription from the main cause of action. Thus the secondary characterization called for by *Cheshire and North* entails an (arguably) unnecessary dépeçage.

There is no reason, in other words, why we should accept a characterization of the *lex causae* and why we need to maintain the common-law idea that 'weak' prescription is procedural and 'strong' prescription substantive. In *Laurens's* case (supra), for instance, Schutz J deemed rules of the *lex causae* to be substantive where they did no more than bar the remedy, because that was how they were perceived by the *lex causae*. (See further Forsyth *Private International Law* 22n10.)

Neels proposes a complete break with all these complexities. Like Eiselen and Van Heerden JA, he argues for application of the *lex causae*, but he arrives at this position without traversing the quagmire of characterization. Instead he suggests a much simpler expedient: a rule that the *lex causae* must govern questions of prescription (Neels op cit para 15). In a meticulous study of a variety of laws, ranging from the 1980 Rome Convention on the Law Applicable to Contractual Obligations (and its successor 'Rome I'), to the courts of Canada and Australia and the civil codes of Switzerland and Turkey, he finds that in all these laws the *lex causae* of a contract governs extinctive prescription of contractual debts (Neels paras 14.5.1–14.5.4). Support for this rule is also available in South African academic literature (ibid para 14.7).

Neels's approach has much to recommend it. The *via media* gives courts a considerable discretion, which inevitably leads to uncertainty in choice of

law. As Neels says, however, certainty regarding the applicable rules of prescription is of the greatest importance (ibid para 15).

Aside from promoting certainty, Neels' approach, at one fell swoop, removes the problem of gap. Indeed, another value in the conflict of laws that recommends his suggestion is simplicity. The complexities of this subject are already sufficient to confound all but the most specialized practitioners.

Even so, Neels's argument relies heavily on authorities relating to prescription in contracts. What about non-contractual obligations? And, if we are looking for a comprehensive solution to the problem of gap, what about situations other than prescription? Although gap has occurred most often in such cases, it seems to result from the logic of the choice-of-law process rather than any specific rules (cf T W Bennett 'Cumulation and gap: Systemic problems in the conflict of laws' (1988) 105 *SALJ* 444). It could well arise, for example, in matters of capacity to commit delicts or to execute wills and contracts (see *Maryland Casualty Co v Jacek* 156 F Supp 43 (1957)).

Eiselen's approach has the merit of answering these questions. The problem of gap can be solved by reference to the doctrinal basis for the conflict of laws. Thus, once the forum chooses the *lex causae*, it then must give effect to all the relevant the substantive and procedural rules of that system.

There is, however, one proviso to this solution. Reference to the *lex causae* should not necessarily be considered an invitation to accept the doctrine of *renvoi*. In other words, reference to the *lex causae* as a whole does not include reference to its choice of law rules. As it happens, the gap in the *Society of Lloyd's* case could well be regarded as an unacknowledged form of *renvoi*: because the choice-of-law rules in English law provided that only the *lex fori* may govern procedural issues, the matter was referred back to the forum (which refused, however, to accept the *renvoi*).