The Law Commission

(LAW COM. No. 114)

CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*) OF THE LAW COMMISSIONS ACT 1965

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW

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THE LAW COMMISSION

CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1.1 This report is made in response to your predecessor's reference to the Law Commission on 29 March 1979 made under section 3(1)(*e*) of the Law Commissions Act 1965. We were requested:

"to consider what changes, if any, are desirable in the classification of limitation of actions in private international law, and to make recommendations".

1.2 The background to this reference is to be found in the Twenty-first Report of the Law Reform Committee,[1] being their final report on limitations of actions, which was published in September 1977. In that report, the Committee proposed a number of changes in the law of limitation of actions in England and Wales;[2] though they recommended the retention of a system of limitation as opposed to the adoption of one of prescription. Many of their recommendations were implemented by the Limitation Amendment Act 1980. That Act was then repealed by the Limitation Act 1980 which consolidated the statutes relating to limitation of actions. The Law Reform Committee concluded,[3] as had the Law Revision Committee in 1936,[4] that there was a case for re-examination of the English rule of private international law under which statutes of limitation, though not statutes dealing with prescription, are classed as procedural. Nevertheless they felt unable to make any positive recommendation on this subject which they saw as falling outside their terms of reference.

1.3 In examining the question of classification of limitation in private international law we have followed our usual practice of consultation and we published a Working Paper on this topic in May 1980.[5] In the Working Paper we examined the criticism of the present rule that matters relating to limitation of actions are usually classified as matters of procedure and are thus governed by our law as the law of the forum. We considered a number of possible different approaches, including some recently introduced or proposed elsewhere in the common law world. We provisionally concluded that the present rule should be changed and replaced with a rule that statutes of limitation should be classified as substantive in this country for choice of law purposes. We received a number of comments on consultation,[6]

[1]Cmnd. 6923.

[2]References in this report to, for example, "the English rule" are intended to refer to the rule as applicable in England and Wales. We have, however, expressed all our recommendations specifically in terms of the law of England and Wales.

[3](1977), Cmnd. 6923, paras. 2.93 and 2.96.

[4]Fifth Interim Report (Statutes of Limitation) (1936), Cmd. 5334, para. 24.

[5]Working Paper No. 75.

[6]A list of names of those organisations and individuals who commented on Working Paper No. 75 is to be found in Appendix B.

mainly from those either expert in matters of private international law or with practical experience of the types of limitation problems that we examined. We are very grateful for all the helpful comments that we received on this complicated and technical subject. It might be of interest to point out at this stage that our general approach in the Working Paper was widely supported on consultation, though a number of detailed comments and criticisms were made which we examine at the appropriate place in this report.

1.4 Following the publication of Working Paper No. 75, the Scottish Law Commission decided to issue a consultation paper on the Scottish position relating to Prescription and Limitation in Private International Law.[7] This paper, which was issued on 31 July 1980, was distributed with a restricted circulation. It provided not only an examination of present Scots law but examined options for reform as set against the provisional conclusions in our Working Paper. It has proved to be a most useful document for our further examination of this topic and the comments which the Scottish Law Commission received on their consultation paper have been made available to us.[8]

1.5 We referred in Working Paper No. 75 to what some might have regarded as the excessive length of the Working Paper, saying:

> "We are conscious of the fact that the exhaustive nature of [our] approach might be thought by some to have resulted in a rather long paper. However we are aware that many of those to whom our proposals are likely to be of most concern will not be specialists in private international law, and we believe that it is more desirable to make a complicated and technical subject comprehensible to non-specialists than to limit the length of the paper ".[9]

We believe that, given the existence of the Working Paper and of the general approval of our provisional recommendations therein, it is unnecessary in this report to canvass all the possible options for reform at length. We have, therefore, produced a somewhat shorter report than would otherwise have been the case.

1.6 In producing this report, we have adopted the following scheme. In Part II, we examine the existing law. Part III contains criticisms of our present rule and considers developments in other jurisdictions. Part IV is concerned with our proposals for reform and any incidental effects that they may have. There is a summary of our recommendations in Part V. The short draft Bill to implement our recommendations appears in Appendix A. Appendix B contains a list of those persons and organisations who sent us comments on Working Paper No. 75, and Appendix C contains a list of those who commented on the Scottish Law Commission's consultation paper.

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[7]Scottish Law Commission Fifteenth Annual Report 1979–1980, Scot. Law Com. No. 61, para. 3.30; Sixteenth Annual Report 1980–1981, Scot. Law Com. No. 70, para. 3.30.

[8]A list of those who commented on the Scottish Law Commission's consultation paper is to be found in Appendix C.

[9]Para. 3.

PART II

THE PRESENT LAW

(a) Introduction

2.1 For the purposes of private international law, matters are classified by our courts as pertaining either to substance or to procedure. The usual way of drawing this distinction is by reference to the difference between right and remedy; those matters which relate to a party's rights are classified as substantive while those relating to his remedy are classified as procedural. The distinction is important because matters classified by the forum as procedural are governed by the domestic law of the country in which proceedings are instituted, i.e. by the *lex fori,* whereas matters classified by that law as substantive are governed by the law to which the court is directed by its choice of law rules, i.e. the *lex causae.* It is in this sense, namely as a method of classification which enables a court to ascertain the correctly applicable law in a private international law case, that we generally use the terms "substance" and "procedure" in this report.

(b) The general rule

2.2 English law acknowledges two ways in which a plaintiff's right to bring an action may be limited by the running of time: *prescription,* by virtue of which the plaintiff's title is extinguished when the relevant period expires, and *limitation*[10] whereby lapse of time renders the plaintiff's right unenforceable by action but leaves the right itself intact.[11] For the purposes of private international law, our courts have classified rules falling into the former category (i.e. prescription) as matters of substance and those falling into the latter category (i.e. limitation) as matters of procedure.[12]

2.3 In a case involving a foreign element the courts in this country will be required to classify both our domestic statute of limitation and the corresponding provision of the *lex causae* in order to determine the applicable period of limitation. As far as English statutes of limitation are concerned, subject to the exceptions mentioned below, the courts have generally accorded them a procedural classification with the result that, in accordance with the principle outlined in paragraph 2.1 above, they are considered to be applicable even to a case governed by a foreign substantive law.[13] At the same time their approach towards a foreign statute of limitation has usually been to ignore[14] any classification made by the court of the relevant foreign

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[10]For the purposes of the paragraphs that follow we have referred to time bars generally in terms of limitation rather than of prescription. Where, however, the context calls for a particular distinction to be drawn between prescription and limitation (as defined above) we have said so.

[11]The effect of most English time bars is merely to deny the plaintiff a right of action after a certain period has elapsed i.e. limitation. Exceptionally, however, in actions involving conversion of goods or title to land, the effect of the expiry of the relevant period of time is actually to extinguish the plaintiff's title: Limitation Act 1980, ss. 3 and 17.

[12]*Huber* v. *Steiner* (1835) 2 Bing. N.C. 202; 132 E.R. 80; *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653; *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591.

[13]*Willoams* v. *Jones* (1811) 13 East 439; 104 E.R. 441; *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653, 658; *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 630 (*per* Lord Wilberforce).

[14]*Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 628, 630 (*per* Lord Wilberforce).

country. Instead our courts have applied to a relevant foreign statute the English test of whether the plaintiff's right is extinguished or whether his remedy is merely barred. This has led generally to a foreign statute of limitation being regarded by our courts as procedural[15] and thus inapplicable to a case otherwise governed by foreign law. However, there may well be some exceptions to this, although there is no direct authority on the point. The cases where it is thought[16] that our law would regard a statute of limitation as substantive, with the result that the *lex causae* would supply the appropriate limitation period, are those where a statute prescribes that ownership should be acquired by adverse possession,[17] expressly extinguishes the former owner's title,[18] or creates a new right and at the same time specifies that such right shall continue only for a limited period.[19]

2.4 To summarise: the present approach of our courts in general to the classification of statutes of limitation, which we shall refer to as "the English rule",[20] is that statutes of limitation are regarded as procedural and are, accordingly, governed by English law as the *lex fori,* irrespective of any classification accorded by a foreign court to its own statute of limitation.

(c) Difficulties to which the English rule may give rise

2.5 The operation of the English rule in practice is likely to give rise to a number of difficulties. In Working Paper No. 75 we provided a series of examples illustrating these difficulties which it will suffice here to summarise. First, in a case governed by a foreign *lex causae,* the foreign law as to limitation will not be applied where, as is commonly the case, that law is regarded by our courts as procedural. Our law of limitation will be applied in such a case. The result will be that the claim will be barred if the English period has expired,[21] and will succeed if the English period has not expired whether or not in either case the foreign limitation period has elapsed.[22] Secondly, if our courts, whilst classifying our statute of limitation as procedural, regard the foreign one as substantive, then both would seem to be applicable. It

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[15]*Huber* v. *Steiner* (1935) 2 Bing. N.C. 202; 132 E.R. 80; *Société Anonyme Metallurgique de Prayon, Trooz Belgium* v. *Keppel* (1933) 77 S.J. 800; and see *Black-Clawson International Led.* v. *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, discussed in paras. 4.62, 4.65, below.

[16]Dicey and Morris, *The Conflict of Laws,* 10th ed., (1980), p. 1180; Cheshire and North, *Private International Law,* 10th ed., (1979), p. 697.

[17]Examples of acquisitive prescription, drawn from English land law, are provided by the Prescription Act 1832. It is, however, unlikely that questions of title to foreign land will come before the English courts: *British South Africa Co.* v. *Companhia de Moçambique* [1893] A.C. 602; *Hesperides Hotels Ltd.* v. *Muftizade* [1979] A.C. 508.

[18]E.g. Limitation Act 1980, ss. 3 and 17.

[19]This might be exemplified by the law relating to fatal accidents, discussed at greater length in Working Paper No. 75, para. 8(c).

[20]The rule is not, however, exclusive to England and Wales, being shared by a number of other common law jurisdictions.

[21]*Don* v. *Lippmann* (1837) 5 Cl. and Fin. 1; 7 E.R. 303 (H.L.).

[22]*Huber* v. *Steiner* (1835) 2 Bing. N.C. 202; 132 E.R. 80; *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653.

is not clear what happens in such a case. There is some authority[23] for saying that, if the foreign period has elapsed, then even though the English period is still running the claim should not be entertained because the plaintiff no longer has a right to enforce. If the English, but not the foreign, period has expired, there is some authority[24] for saying that, again, the claim should not be entertained, but on the ground that the remedy is barred under our law which, as the *lex fori,* governs procedure. Where, thirdly, our courts classify both the English and foreign statutes of limitation as substantive, the English rule would seem to lead[25] to the result that expiry of the foreign, but not the English, period of limitation would cause the claim to fail, on the ground that it is the foreign law which, as the *lex causae,* determines the plaintiff's rights. The fourth and most difficult case, in theory at least, and on which there is no English[26] authority, is where our courts classify the English provision as substantive and the foreign one as procedural. On a strict interpretation of the English rule both limitation periods are inapplicable and the action would seem to remain perpetually enforceable ; though it is to be expected that an English court would strive to avoid this conclusion, on grounds of public policy.

2.6 The difficulties referred to in the previous paragraph are much more likely to arise in the context of a contractual claim than in a tort case because of the nature of our present rule for choice of law in tort.[27] This rule provides that a tort committed abroad will only be actionable in this country if it is both civilly actionable under the law of the country where it was committed (the *lex loci delicti*) and also actionable under the English law of tort: but exceptionally the court may dispense with the application of one or other of the limbs of this rule.[28] If a limitation point arises in the ordinary case to which both parts of the rule are applied, the various possible conflicts between the *lex fori* and the *lex causae,* outlined in paragraph 2.5 above, will in general not arise because our statute will be applicable in all cases, whether our law is regarded as the *lex fori*[29] or as one of the two *leges causae* under the choice of law rule. However there is one rare case where the limitation provision of the *lex loci delicti* will also be relevant and applicable. This is where the statute of limitation of the *lex loci delicti* is characterised by our courts as providing a substantive defence[30] and is shorter than the corresponding English period.

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[23]*Huber* v. *Steiner* (1835) 2 Bing. N.C. 202, 210–211 ; 132 E.R. 80, 83 ; *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653, 658.

[24]*British Linen Co.* v. *Drummond* (1830) 10 B. and C. 903 ; 109 E.R. 683 ; and see Dicey and Morris, *The Conflict of Laws,* 10th ed., (1980), p. 1181.

[25]By analogy with dicta in *Huber* v. *Steiner* (1835) 2 Bing. N.C. 202, 210–211 ; 132 E.R. 80, 83 ; *Harris* v. *Quine* (1869) L.R. 4 Q.B. 653, 658.

[26]In Working Paper No. 75, para. 9, n. 29, we refer to a number of relevant German authorities, as well as to academic analysis of this problem.

[27]*Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 ; *Chaplin* v. *Boys* [1971] A.C. 356.

[28]*Chaplin* v. *Boys* [1971] A.C. 356.

[29]*Allard* v. *Charbonneau* [1953] 2 D.L.R. 442.

[30]*M'Elroy* v. *M'Allister* 1949 S.C. 110.

2.7 Turning finally to the exceptional case where one or other limb of the choice of law rule is dispensed with in a tort case involving a limitation point, the position is as follows. If, as in *Chaplin* v. *Boys*,[31] the *lex loci delicti* is not applied and only English law is applied, there will be no problem with the classification of statutes of limitation because our law will be both the *lex fori* and the *lex causae*. On the other hand, if only the *lex loci delicti* is applied, difficulties similar to those referred to in paragraph 2.5 will arise.

PART III

CRITICISMS OF THE PRESENT LAW

(a) The arguments in favour of the English rule

3.1 At the heart of the English rule in its present form lies the distinction, to which we have referred already in paragraph 2.1, between right and remedy.[32] This distinction has, in the context of the development of private international law, come to be identified with the modern classification of matters as either substantive or procedural. Not only jurisprudential, but also practical, justifications have been advanced for the rule. It has been said that it is the most convenient solution from the point of view of the court hearing the matter;[33] it is simple and certain to apply when compared with other approaches;[34] it ensures that a debtor is protected from stale claims;[35] and that, in so far as a country's limitation periods are taken into account when its other procedural rules are formulated, it is more appropriate to apply the limitation statute of the *lex fori* than that of any other country.[36] It has also been suggested that our periods of limitation reflect our notions of public policy in so far as they fix the maximum period of time in which it is supposed that justice can be done in our courts.[37]

(b) The arguments against the English rule

3.2 We pointed out in Part III of the Working Paper that, notwithstanding the possible advantages to which we have just referred, the English rule has been criticised in many of the jurisdictions which still adhere to it or

[31][1971] A.C. 356.

[32]*Huber* v. *Steiner* (1835) 2 Bing. N.C. 202, 210–211 ; 132 E.R. 80, 83.

[33]*Don* v. *Lipperman* (1837) 5 Cl. and Fin. 1, 14–15 ; 7 E.R. 303, 308 (H.L.).

[34]Ailes, "Limitation of Actions and the Conflict of Laws", (1933) 31 Mich. L. Rev. 474, 497-8.

[35]*Ibid.*, p. 500.

[36]See Law Reform Commission of British Columbia, Report on Limitations (1974), Part II—General, p. 98, n. 15.

[37]We believe that the authorities do not in fact support this view: see para. 4.35, below.

adhere to it in a modified form. We gave there[38] some indication of the range of criticisms which have been made not only in this country but also, for example, in Australia, Canada and the U.S.A. There was widespread support on consultation for reform of the English rule and thus, as a corollary, agreement with the criticisms made of the rule. It may be convenient here to summarise the main criticisms:

(i) The rule is based on a distinction which is in many respects unreal, i.e., the distinction between right and remedy, in that a right cannot be said to have an objective existence independent of the remedy which supports it. "A right for which the legal remedy is barred is not much of a right."[39] It follows that any classification based on this artificial distinction is itself unreal. Furthermore, the artificial nature of a procedural classification of limitation for the purposes of private international law is apparent even if one accepts the traditional contrast between right and remedy. The effect of the expiry of a period of limitation (as opposed to prescription) is to destroy the plaintiff's right of action. For most practical purposes this leaves the plaintiff with no right at all, a conclusion which is underlined by the recent change in the law embodied in section 29(7) of the Limitation Act 1980, which provides that, once a right of action has become barred by any of the provisions of that Act, it shall not be capable of revival by any subsequent acknowledgement or payment.

(ii) The English rule may, under certain circumstances,[40] operate to bar a claim which is still alive in the jurisdiction in which it arose. It is, however, generally acknowledged that our system of private international law "exists to fulfil foreign rights, not to destroy them. . . . It is a stultification of private international law to refuse recognition to a foreign right substantively valid under its *lex causae,* unless its recognition will conflict with some rule of public policy so insistent as to override all other considerations."[41] On this basis a court in this country will give effect to the relevant foreign law in deciding both whether a particular right has been created and its extent. It seems anomalous that the relevant foreign law should not also determine the question of whether or not a party's right has been effectively extinguished.

(iii) Conversely, and contrary to one of the arguments referred to in paragraph 3.1, above, the English rule can operate to frustrate the aim of limitation statutes to protect defendants from stale claims and to ensure that after a given time a person may treat as finally closed an incident which could have led to a claim against him. The English rule may mean that both debtor and creditor must have regard not only to the law which governs the substance of their obligation, but also to the laws of any other country which

[38]Para. 13, n. 43.
[39]Leflar, *American Conflicts Law,* 3rd ed., (1977), p. 253.
[40]See para. 2.5, above.
[41]Cheshire and North, *Private International Law,* 10th ed., (1979), p. 692. See also Dicey and Morris, *The Conflict of Laws,* 10th ed., (1980), p. 1177.

might, on however exorbitant a ground, assume jurisdiction over a possible claim. This may well be unjust to a debtor who may have relied on the limitation period of the *lex causae* and allowed his records to be destroyed once it had expired, only later to find that he is still at risk under the law of another jurisdiction.

(iv) The English rule may, as the example in paragraph (iii) above indicates, encourage "forum shopping", i.e. encourage the plaintiff to seek to bring his action in a country which has jurisdiction to entertain it and whose law of limitation is most favourable to his claim. In this way, the English rule may operate to allow a claim which is barred under the law of the country under which it arose,[42] and this would encourage a tardy plaintiff to make his claim in this country, provided of course that he can satisfy our rules as to jurisdiction.

(v) The arguments for convenience and simplicity[43] in favour of the English rule are not convincing. As regards convenience, it is no more difficult to apply the limitation provisions of the *lex causae* than it is to apply any of the rest of the substantive law governing the case. Indeed, it is highly questionable whether the actual application of the English rule is necessarily simple, for it involves reference being made to two possibly quite different legal systems, coupled with the incongruity of the plaintiff establishing his claim on the basis of one law and the defendant establishing his defence of limitation on the basis of another.[44] Formidable technical difficulties could also arise where special limitation rules are provided under our law based on categories of action or criteria unknown to, or different from, those under the *lex causae*.[45]

(c) The position in other jurisdictions

(*i*) *General*

3.3 Before expressing a final view on whether the case for reform of the English rule has been made out, it is relevant to consider the position in other jurisdictions. We examined this matter at some length in Part IV of Working Paper No. 75 where we expressed the view that, broadly speaking, the English rule has, in modern times, not been accepted save in common law jurisdictions and Scotland. Civil law jurisdictions[46] generally treat statutes of limitation as matters of substance for the purpose of private international law. Accordingly, they determine questions of limitation in cases having a foreign element by reference to the same law as that which governs all the other substantive issues of the claim (the *lex causae*). It is instructive that one of the reasons for this contrast with the English rule is that civil

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[42]See para. 2.5, above.
[43]*Don* v. *Lipperman* (1837) 5 Cl. and Fin. 1, 14 ; 7 E.R. 303, 308 (H.L.).
[44]Furthermore, it is possible to envisage complex situations under the present rule where either our law (as the *lex fori*) and foreign law are both applicable, or where neither is applicable: see para. 2.5, above.
[45]Working Paper No. 75, para. 22.
[46]Ibid., paras. 25–26.

law jurisdictions do not adopt a rigid distinction between right and remedy as the criterion for distinguishing between substance and procedure in private international law.

3.4 Turning to common law jurisdictions, it is significant that there have been a number of major inroads into the English rule. For example, most American states have adopted so-called "borrowing statutes".[47] Though such statutes differ as to their precise terms, they generally operate so as to bar an action in the forum if it is *already* barred by the corresponding statute of the place where the cause of action arose, or alternatively by the place where the defendant, or both parties, resided. However, they only provide a partial solution to the problems posed by the English rule in that they only apply when the foreign state's period has run but that of the forum has not.[48]

3.5 Dissatisfaction with the English rule is to be found in other common law jurisdictions, where more radical changes in the rule have been either adopted or advocated. It should, however, be pointed out that these new approaches have generally resulted from an overall review of the limitations law of the jurisdiction in question, which has in turn entailed the adoption of a general system of prescription. Because the adoption of a prescriptive regime has not been accompanied by any specific alteration in the traditional rules of classification (which distinguish between substance and procedure by reference to right and remedy) the change to prescription has, in private international law terms, led in effect to the reclassification in these countries of their domestic statutes of limitation as substantive on the basis that they now bar the plaintiff's right and not merely his remedy. As matters of substance they will consequently only apply where the law of which they form a part is also the *lex causae.* This has not been the approach adopted to reform of the substantive law of limitation in this country. The Law Reform Committee rejected[49] the idea that our law should be changed from one of limitation of actions to one of prescription and, as may be seen from the Limitation Act 1980, the traditional approach has been retained. We shall now consider the main areas of development in other common law jurisdictions.

(ii) Australia

3.6 In Australia, the Law Reform Commission of New South Wales recommended in 1967[50] that on the expiry of the New South Wales period of limitation a plaintiff's right should be extinguished, and suggested that this should have a dual effect in a case involving private international law. In the first place, where New South Wales law was held by a foreign court to be the *lex causae,* the New South Wales limitation statute would be applicable because it affected the plaintiff's right or title. However, where New South Wales

[47]*Ibid.,* para. 27.

[48]There has also been some judicial movement away from the traditional classification of statutes of limitation as procedural: *Heavner* v. *Uniroyal Inc.* 305 Atl. 2d 412, 415 (1973).

[49]Twenty-first Report (Final report on limitations of actions) (1977), Cmnd. 6923, paras. 2.84 to 2.91.

[50]First Report on the Limitation of Actions (1967), para. 321.

law was merely the *lex fori*, the Commission recommended that the New South Wales limitation period should continue to apply so as to bar an action brought under the laws of another country. This dual approach is now reflected in sections 14 and 63 to 68 of the New South Wales Limitation Act 1969.

(iii) Canada

3.7 There have been two proposals for change in Canada.[51] First, in Ontario the Ontario Law Reform Commission[52] proposed in 1969 that the effect of the expiry of periods of limitation should be to extinguish the plaintiff's right and that the proposed new statute ought specifically to state that statutes of limitation, whether domestic or foreign, should be classified by the Ontario courts as substantive for the purposes of private international law, with the result that the statute of limitation of the *lex causae* would always apply. This proposal has not yet been implemented.[53] Secondly, in 1974 the Law Reform Commission of British Columbia[54] likewise proposed that the plaintiff's right and title should be extinguished upon expiry of the British Columbia limitation period. This proposal is now reflected in section 9 of the British Columbia Limitation Act 1975. The private international law implications of this change are different from those suggested in Ontario, in that the British Columbia Law Reform Commission recommended,[55] and section 13 of the 1975 Act adopts, a special provision to cover the specific difficulty which arises where the limitation rule of the *lex fori* is substantive and that of the *lex causae* is procedural. Section 13 provides that, where the British Columbia court determines that the limitation law of another jurisdiction is applicable but that law is classified as procedural for the purposes of private international law "the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced ".[56]

(iv) Scotland

3.8 As we indicated earlier,[57] reform of this area of the law is currently under consideration in Scotland. The problem in Scotland is of more limited scope than in England and Wales because the Scottish rules for prescription

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[51]A third initiative should be mentioned. A Uniform Limitation of Actions Act has been under consideration for some time by the Uniform Law Conference of Canada: see Proceedings of the Sixty-first Annual Meeting of the Uniform Law Conference (1979), p. 35 and Appendix P; and Proceedings of the Sixty-second Annual Meeting of the Uniform Law Conference (1980), p. 32. It is understood that at the 1981 meeting of the Uniform Law Conference further consideration of the Uniform Limitation of Actions Act was deferred until the 1982 meeting. However, the conflict of laws provision in the latest draft (s.21) applies the English rule and requires the Act to be applied by the forum "to the exclusion of laws of all other jurisdictions ".

[52]Report on Limitation of Actions (1969), Ch. VII, pp. 133 and 136.

[53]It did, however, receive approval in a Discussion Paper on Proposed Limitations Act (1977) published by the Ministry of the Attorney-General of Ontario: see s.14 of the draft proposed Act.

[54]Report on Limitations (1974), Part II–general, p. 97.

[55]*Ibid.*, p. 101.

[56]Limitation Act 1975, s.13 (British Columbia).

[57]See para. 1.4, above.

of a general character are now governed by the Prescription and Limitation Act 1973, with the major exception of actions for damages in respect of personal injuries.[58] The effect of the 1973 Act is to introduce rules of prescription and it is thought that these rules would be classified both by Scottish and other courts as being substantive in character, applicable only when Scots law is the *lex causae*. Although the ambit of the problem in Scotland is narrower than that in England and Wales, the Scottish Law Commission in its Consultation Paper on Prescription and Limitation in Private International Law[59] reached the provisional conclusion that "the rules of prescription or limitation of the *lex causae* should be applied by a Scottish court, however they may be classified for choice of law purposes under the *lex causae*, to the exclusion of the corresponding rules in Scots Law".

(d) Our conclusion

3.9 We expressed the view in Working Paper No. 75[60] that, on the basis of the criticisms listed in paragraph 3.2 above, there was a strong case for the reform of our law. We have been confirmed in this view by the comments received on consultation and by the general movement in favour of reform in other jurisdictions. A further factor in support of the case for reform is provided by the E.E.C. Convention on the Law Applicable to Contractual Obligations.[61] This Convention was concluded in June 1980 and has been signed by all the Member States of the E.E.C. except Greece.[62] The main provisions of this Convention permit the parties to a contract to choose the applicable law,[63] but, in default of such choice, the Convention provides that the contract will be governed by the law of the country with which it is most closely connected.[64] The Convention specifically states that the ambit of these choice of law rules shall include "the various ways of extinguishing obligations, and prescription and limitation of actions."[65] If the United Kingdom ratifies the Convention, it will wholly replace our present contractual choice of law rules. This would mean that, so far as contractual matters are concerned, questions of limitation would be referred by a court in this country to the appropriate *lex causae* as determined by the Convention. Our law would no longer automatically be applied as the procedural law of the forum. However, all non-contractual claims would continue to be governed by the present English rule with the consequence that different private international law rules relating to limitation would apply depending on whether or not the claim fell within the E.E.C. Convention.

3.10 We have concluded that, in the light of the criticisms and arguments discussed in this Part of the report, there is a clear case for the reform of the present English rule.

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[58]Reform of this area of the law is under examination by the Scottish Law Commission: see Memorandum No. 45 (1980), Time-Limits in Actions for Personal Injuries.

[59]See para. 1.4, above.

[60]Para. 23.

[61]Official Journal No. L 266 of 9 October 1980 and see Cmnd. 8489 (1982). The Giuliano/Lagarde Report on the Convention is published in the Official Journal No. C 282 of 31 October 1980.

[62]It was signed by the United Kingdom on 7 December 1981; see Cmnd. 8489 (1982) p. 16.

[63]Art. 3.

[64]Art. 4.

[65]Art. 10(1)(*d*).

PART IV

PROPOSALS FOR REFORM

(a) The field of choice

4.1 In Working Paper No. 75 we put forward six possible solutions[66] to the difficulties posed by the English rule. We do not propose again to analyse all these solutions in detail because the majority of them attracted little or no support on consultation. For the reasons given in the Working Paper[67] we reject the idea of enacting a "borrowing statute".[68] We also reject the "compromise" solution adopted in British Columbia[69] and the solution adopted in New South Wales.[70] The last two solutions both centre on the adoption of a system of prescription in domestic law, whereas English law retains a system of limitation and, as we indicated in paragraph 3.5 above, we do not believe that a recommendation for the adoption of a regime of prescription is open to us.

4.2 The three other possible solutions we put forward all involved the reclassification of statutes of limitation as substantive for the purposes of private international law. The differences between them related primarily to the way in which this was to be achieved and the extent to which this was to be done. In the Working Paper we described these three solutions as follows:

> " (*a*) Reclassification of statutes of limitation, both domestic and foreign, as substantive for choice of law purposes.
>
> (*b*) The so-called 'foreign court's interpretation test' whereby the forum follows the classification accorded to a foreign statute of limitation by the courts of the country of the *lex causae.*
>
> (*c*) Reclassification of English statutes of limitation as substantive for choice of law purposes coupled with the classification of the statute of limitation of the *lex causae* in the same way as it is classified by that law. This solution would also provide that if the classification of the statute of limitation of the *lex causae* is procedural the English statutes of limitation as the *lex fori* should apply.'[71]

(b) The general principle: the application of the period of limitation of the *lex causae*

(*i*) *Introduction*

4.3 It was generally agreed on consultation that the decision whether or not to apply the limitation period of the *lex causae* or the *lex fori* should not depend on the distinction between the barring of a remedy and the extinc-

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[66]See para. 38 of the Working Paper for a list of these solutions.
[67]Paras. 48–49.
[68]See para. 3.4, above.
[69]See para. 3.7, above, and Working Paper No. 75, paras. 50–51.
[70]See para. 3.6, above, and Working Paper No. 75, paras. 51–52.
[71]Para. 38.

tion of a right. The corollary of this approach, which attracted almost universal support, was that the English rule should be replaced by a new system which would result in the application of the *lex causae* in most, if not all, cases. The main issues to be resolved,[72] if one adopts such a new system, are:

(*a*) Is it to be achieved by the process of classification, or by some other process?

(*b*) Is any purpose served by expressly classifying English statutes of limitation as substantive for choice of law purposes?

(*c*) Should the *lex causae* be applied in all cases?

(ii) Classification or a more direct approach?

4.4 The three possible solutions referred to in paragraph 4.2 all involve the process of classification. We did not support in the Working Paper either the "foreign court's interpretation test"[73] or the variant of it put forward in paragraph 4.2(*c*) above;[74] nor was either test supported on consultation. Our provisional proposal was that:

> "All statutes of limitation, whether English or foreign, and whether classified as substantive or procedural by a foreign court, should be classified as substantive for choice of law purposes."[75]

Whilst the general approach of this proposal was supported, some commentators doubted whether the use of the technique of securing the application of the *lex causae* by means of the classification process was the best method to be adopted. It was suggested that, instead of stating that all statutes of limitation are substantive, with the conclusion that the statute of the *lex causae* is to be applied, it would be simpler and would avoid a two-stage process if one merely provided that a court in this country was, in future, to apply the limitation periods of the *lex causae* and not those of our law as the law of the forum.[76] We believe that this is a clearer and more attractive approach than that of the Working Paper. It combines the merit of simplicity with that of directness and we adopt it. It will mean that, in a contract case, English limitation periods will apply if English law is the proper law of the contract, but French periods will be applied, even though England is the forum, if French law is the proper law. This more direct approach has the added attraction that it accords more readily with the way in which matters of limitation are dealt with in the E.E.C. Convention on the Law Applicable to Contractual Obligations.[77]

(iii) Should English statutes of limitation be reclassified as substantive?

4.5 The second issue referred to in paragraph 4.3 above is whether any purpose is to be served by expressly classifying English statutes of limitation

[72]We examine matters of detail in paras. 4.18–4.34, below.

[73]Our reasons for rejecting this solution are given at para. 44 of the Working Paper.

[74]We explained our reasons for rejecting this approach in para. 55 of the Working Paper.

[75]Para. 89(*a*).

[76]This was the approach adopted by the Scottish Law Commission in their consultation paper, paras. 29–30, 33.

[77]Article 10 provides: "The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:

. . . (*d*) the various ways of extinguishing obligations, and prescription and limitation of actions".

as substantive for choice of law purposes. It was a necessary consequence of the classification technique adopted in the Working Paper that not only foreign, but also English, statutes of limitation should be classified as substantive. In that way we ensured that, if a foreign law was the *lex causae*, English statutes of limitation, no longer being procedural in character, would not fall to be applied cumulatively with those of the *lex causae*. However, our adoption in this report of the more direct approach of stating that the limitation provisions of the *lex causae* are always to be applied means that we do not *need* to make any express statement that English statutes of limitation are to be classified as substantive rather than procedural. Is it, nevertheless, desirable to do so? There are arguments on both sides and consultation produced conflicting views. In arriving at our own conclusion on the point, we have borne in mind that, since no question of choice of law and therefore no question of classification for choice of law purposes arises when a court in this country is applying a domestic statute of limitation, the issue concerns only the application by a foreign court of an English statute of limitations. The main argument in favour of an express classification of the English rule as substantive is that the foreign court would then be more likely to apply the appropriate English period when English law was the *lex causae*.[78] It could, however, provide no more than an indication to the foreign court on the question of classifying the English rule. Whilst some commentators thought that such a declaratory provision would do no harm, others thought that it would do no good because, in the process of classification, the law of the forum will look to the effect of the rule under the *lex causae* and not to the classification given to it by the *lex causae*. On reflection, we have come to the conclusion that such a declaratory provision is not likely to serve a very useful purpose. If a foreign court will not regard the English statute of limitation as substantive[79] notwithstanding that it is only, under our proposals, to be applied by our courts when this country is the country of the *lex causae*, a declaratory provision that the English statute of limitation is regarded in this country as substantive is likely to have little influence on the foreign court. Accordingly, we make no recommendation for English statutes of limitation to be classified as substantive in character.

(iv) Should the* lex causae *be applied in all cases?

4.6 The adoption of a general rule that the limitation periods of the *lex causae* should be applied by our courts and in arbitration proceedings whose procedure is governed by English law[80] raises for consideration the third issue referred to in paragraph 4.3 above, namely whether the *lex causae* should be applied in *all* cases. The main situation which might be thought to cause difficulty is that where the English limitation period is shorter than that of the *lex causae*. We examine in the paragraphs below the sorts of

[78]Working Paper No. 75, para. 40.

[79]It must be borne in mind that English law retains a system of limitation and that a change to a system of prescription has been rejected; see para. 3.5, above.

[80]Under the modern rule, an arbitrator must determine the issues submitted to him in accordance with the legal rights of the parties unless the submission to arbitration expressly provides otherwise: see *Russell on the Law of Arbitration*, 19th ed., (1979), pp. 79 and 230–232. References in this report to the courts in relation to the application of periods of limitation extend to arbitration proceedings, except where from the context it is clear that this is not the case.

difficulty which may arise. It was suggested to us by one commentator that, in such a case, the court should automatically apply the English period. This proposal was not, however, supported by other commentators on consultation and it was, indeed, expressly disapproved of. We consider that for several reasons the adoption of such a rule would be undesirable. In the first place, it would defeat our primary policy objective of according to the *lex causae* the decisive role which we think it ought to play in the selection by our courts of the appropriate period of limitation. Secondly, there would appear to be no good reason of principle why the defendant should in every case automatically have the benefit of the shorter of the period of limitation prescribed by the *lex causae* and our equivalent period, and indeed the proposal would cause injustice in a number of cases. Thus if, for example, the parties have expressly selected a particular foreign law to govern their contract with which our law has no connection it would seem unfair that a right of action should be time-barred in our courts on the sole ground that the English period of limitation had expired, when the period prescribed by the parties' chosen *lex causae* had not. Then, thirdly, the suggested rule would tend to induce plaintiffs to go forum-shopping (that is, to find a forum other than England and Wales notwithstanding that this country was the natural forum), a practice which it is generally considered ought not to be encouraged, on the ground, among others, that the application of rules of private international law ought in general to produce a similar result wherever proceedings are brought. We bear in mind, fourthly, that the proposed rule is contrary to the provisions of the E.E.C. Convention on the Law Applicable to Contractual Obligations. Finally, the proposal was made on the basis that its adoption would obviate the need for the doctrine of public policy to operate in this area. As to that, however, we explain later[81] that to exclude from the ambit of our recommendations the general power of the courts in this country to refuse to apply a foreign period of limitation on the ground of public policy in the exceptional circumstances of a particular case would in our view be objectionable. And, conversely, the proposal attaches far too much weight to our limitation periods as representing the public policy of our courts in the field of private international law in the unexceptional case. Before we examine in more detail the practical difficulties to which application by our courts of a foreign limitation period may give rise, we ought to state at this point our general conclusion. This is that the ordinary power of our courts to refuse to apply a provision of a foreign law on the ground that its application would be contrary to public policy should be retained with reference to the limitation provisions of a foreign *lex causae* ; and breach of our principles of public policy should be the only ground on which our courts should be free not to apply those limitation provisions.

4.7 Although we do not accept the suggestion that the limitation period of the *lex causae* should be applied only where it is shorter than the English period, we can foresee difficulty from the application of a limitation period of a foreign *lex causae* both where that period is longer, and where it is shorter, than the period prescribed by our law. As to longer periods, in some particular cases the limitation period of the *lex causae* may be very much

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[81]See paras. 4.38–4.40, below.

longer than the relevant period laid down in our law, as for example, in French law where a period of 30 years is provided for some classes of action.[82] Since the general rule which we propose would have no specific maximum period to qualify a long period laid down by a foreign *lex causae*, a defendant in our courts, sued upon a cause of action to which that *lex causae* applied, might have to try to find evidence to meet allegations with reference to events long past. A claim brought up to 30 years after the happening of the facts in issue would be regarded in our courts as giving rise to great difficulty, if not impossibility, in so far as the establishment of the truth depends upon direct oral evidence.[83]

4.8 The difficulty of a much longer period of limitation in the foreign law may be complicated by a difference between the rules of evidence and procedure of that law (which will not be applicable to the trial in our court) and our rules of evidence and procedure which will be applied in determining the rights of the parties under the foreign *lex causae*. For example, the law of France and Germany, to a greater extent than our law, requires written evidence of certain facts. It is possible that very long periods of limitation are found to be more workable in a system of law which, more severely than our law, restricts the admissibility, or evidential weight, of oral evidence in the proof of causes of action. Moreover, such restriction on the use of oral evidence would also presumably exclude or restrict the use of such evidence in proof of some defences, such as variation or rescission of contract or promissory estoppel. Explanation for a period of limitation as long as 30 years in a foreign system of law is perhaps to be found partly in the fact that, in a community served by such a system, tradition and experience ensure that any rescission of contract would not be left unrecorded in writing. Whatever be the explanation, the fact is that a case, tried in our courts under our rules of evidence and procedure, upon a foreign *lex causae*, could in theory produce results different from those which would emerge from trial of that claim in the courts of the country of the *lex causae*. A claimant might succeed upon oral evidence of a mutual rescission of contract which he could not have proved in the foreign court. These theoretically possible results are, we think, no more than the result of the general system of private international law which normally applies only the substantive part of a system of foreign law and not its law of procedure.

4.9 Further, and perhaps more importantly than the possible happening of a result in our courts different from that which would emerge after trial in the court of the country of the *lex causae*, it may be thought that there is conceivably a risk of a party, sued in this country upon a contract to which a foreign *lex causae* applies, being caught out by the consequences, unexpected by him, of a very long period of limitation: a defendant who had by oral conversation, admissible in evidence under our law, made a variation or

[82] Code Civil, Art. 2262. Other countries which similarly provide 30-year periods include Austria, Belgium, West Germany and Holland. The general period in Egypt is 15 years; whilst in Italy and Sweden it is 10 years.

[83] Though our law also provides for long periods of limitation in some particular cases; see Nuclear Installations Act 1965, s.15: 30-year period.

rescission of a contract, might after the passage of many years find himself without the witnesses to prove his defence and having destroyed documents tending to establish that defence.

4.10 The difficulty produced by missing witnesses, whether from death or departure from the service of a company, is not, of course, a special difficulty created by the application of a foreign limitation period but is common to all systems of law and can arise during our much shorter period of limitation. The Civil Evidence Act 1968 provides much assistance but is not in all cases a substitute for a missing witness. The loss or destruction of documents in the belief that a matter is dead may cause special problems. Where the period of limitation, applicable under the *lex causae,* is much longer than our period then such difficulties are to some extent increased and made more likely to occur.

4.11 We have considered and assessed these difficulties and remain of the view that the general rule should be as we propose: namely, that the limitation period of the *lex causae* should be applied, to the extent described below, and subject only to public policy. The difficulties described above, although real, are not such as to justify or require any general exception, or general discretion, in our court to dispense with the limitation period of the *lex causae,* or to substitute a shorter period. As to the bringing of very stale claims upon oral evidence, the plaintiff would always have to make out his case to the satisfaction of the court on the balance of probabilities: and, if there has been long and unexplained delay, a plaintiff may well fail to prove his case. Our law contemplates the trial of some cases many years after the expiration of our normal periods of limitation and there is no reason to suppose that the courts are not able in such cases to achieve just results. As to the difficulties of a defendant who, during the running of a very long period of limitation, may have lost both witnesses and documents, they are avoidable only by care and knowledge of the applicable law. We do not think they are such as to require the enactment of a special discretion.

4.12 The second sort of difficulty, in applying the limitation period of the *lex causae,* may arise not from a much longer period but from a period much shorter than the relevant period of limitation in our law.[84] There would be, under the general rule proposed by us, no discretion in our courts to refuse to apply the limitation period of the *lex causae* merely because it was much shorter than our comparable period and application of it appeared harsh and unfortunate. It is to be noted that Parliament has provided, in the Arbitration Act 1950,[85] power in the court to extend the time for giving notice to appoint an arbitrator, or for taking some other step to commence arbitration proceedings where that time is fixed by the arbitration

[84]There is, for example, a six-month limitation period under German law in relation to most contractual claims resulting from the delivery of defective goods: BGB. Art. 477. In France, there is a six-month limitation period for claims by hotel keepers for payment for board and lodging: Code Civil, Art. 2271.

[85]Sect. 27, replacing Arbitration Act 1934, s.16(6).

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agreement itself and where the court is of the opinion that in the circumstances of the case "undue hardship" would otherwise be caused.[86] No such discretion would be available under the proposed rule by which the general law of limitation of the *lex causae* is applied and not merely a special contractual term. As with foreign limitation periods which are much longer than our comparable period, so with foreign limitation periods which are much shorter, the court would be required to apply that shorter period unless application of the rule on the facts of the particular case would be contrary to the principles of public policy as applied by our courts. It is necessary to emphasise that such a power not to apply a foreign rule of limitation is very much more restricted than a discretion to extend time based upon "undue hardship". The extent of the power of our courts to refuse to apply a limitation provision of a *lex causae* on the ground that application of it would offend the principles of public policy is discussed below.[87]

(v) Our principal recommendation

4.13 We recommend that, where under our rules of private international law a foreign law falls to be applied in proceedings in this country, the rule of that foreign law relating to limitation should also be applied, to the exclusion of the law of limitation in force in England and Wales.

(vi) Torts

4.14 It is, however, necessary to add a qualification to the recommendation in the preceding paragraph. The need to do so arises from the present law as to the actionability in this country of torts committed abroad. As we have explained in paragraphs 2.6–2.7 above, the general rule requires the court to take into account both the *lex loci delicti* and our law. Normally, therefore, there are in effect two *leges causae* governing such cases, one of which will always be English law; and in regard to limitation the effective period will be the one prescribed by either the relevant foreign law or by its English equivalent, whichever should be the shorter.[88]

4.15 We recommend, by way of qualification to the recommendation in paragraph 4.13 above, that the rules of limitation in force in England and Wales should not be excluded in cases where both a foreign law and the law of England and Wales fall to be taken into account under the rules of private international law in the determination of any issue by the court.

4.16 We would refer for the sake of completeness to the power of the court to dispense with the application either of the *lex loci delicti* or of English law in determining whether an action will lie.[89] No special problem

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[86] *Liberian Shipping Corporation "Pegasus"* v. *A. King and Sons Ltd.* [1967] 2 Q.B. 86; *Nea Agrex S.A.* v. *Baltic Shipping Co. Ltd.* [1976] Q.B. 933.

[87] See paras. 4.35–4.50, below.

[88] Subject to the power of the court to refuse to apply a foreign limitation law on the ground that its application in any particular case would be contrary to our public policy; see paras. 4.35–4.50, below.

[89] See para. 2.6, above.

arises where the court exercises that power, since, if it dispenses with the application of the *lex loci delicti*, no foreign element will be involved, while, if it takes only that law into account, there would, as in other categories of claim, be only one *lex causae* in point.

4.17 As we indicated in Working Paper No. 75,[90] the complex question of the choice of law rules in tort is currently under review by a Joint Working Party of the Scottish Law Commission and ourselves. The special provision which we have recommended in paragraph 4.15 above to deal with that question in the context of this report may in time be rendered superfluous by the implementation of recommendations made by the two Commissions on the advice of that Working Party.

(c) The application of the general principle

(i) The terminus ad quem *of a period of limitation*

Actions

4.18 Before we turn to consider the detailed application of the general principle recommended in paragraph 4.13 above, it is necessary to explain one general preliminary point. In our internal law the step required to be taken by a plaintiff to stop time from running against him (the "*terminus ad quem*") is, in general, the institution of proceedings.[91] The Law Reform Committee reviewed this rule in their Twenty-first Report,[92] in which they considered in some detail the suggestion that this rule should be replaced by the principle that the *terminus ad quem* should be the service, rather than the issue, of process. However, although they agreed that this suggestion had certain merits of principle,[93] they concluded that, having regard to the practical problems to which the proposed change would give rise, the balance of advantage lay in favour of retaining the existing rule.[94]

4.19 Of course, the *terminus ad quem* prescribed under a foreign *lex causae* may in a particular case be different from that under our law. In some instances, indeed, the *terminus ad quem* under the foreign law may have no counterpart in this country. Thus, to construct a hypothetical illustration, a creditor might be able to stop time running by serving upon his debtor a copy of a formal notice of his claim which had previously been filed with a government department or local authority in the district where the debtor resides. On the other hand, there may well be cases in which the *terminus*

[90]Para. 33(*b*). However, the Working Party does not now intend, as is stated in n. 108 of the Working Paper, to examine a proposal for an E.E.C. Convention on the law applicable to non-contractual obligations: see our Sixteenth Annual Report 1980-1981, Law Com. No. 113, para. 2.68.

[91]One exception to this rule occurs in relation to set-off and counterclaim, where the *terminus ad quem* is the date of the commencement of proceedings in respect of the original claim: Limitation Act 1980, s. 35(1) (*b*).

[92](1977), Cmnd. 6923. See para. 1.2, above.

[93]In that a potential defendant could not be confident that he could no longer be sued after the lapse of the relevant period, since he would not normally know of the institution of proceedings before he was given notice of them: (1977) Cmnd. 6923, para. 2.77.

[94]*Ibid.*, paras. 2.72–2.81.

ad quem is capable of being "translated" into procedural rules of the courts of this country—such as, for example, a rule that time stops running against a creditor when proceedings have been served upon the defendant. So far as the first category of case is concerned, no criterion other than that of the issue of proceedings would appear to be possible. And, while in theory it might be possible to provide, in relation to the second category of case. for the foreign *terminus ad quem* to be applied in proceedings in this country, we believe that the adoption of such a principle would be likely to give rise to considerable difficulties in practice. It would involve the application of different procedural rules according as the limitation period was, or was not, one of those which fell into that second category, with the result that our courts would in some cases have to investigate the minutiae of foreign procedural rules for the purpose of determining whether to apply them in the context of an English action and, if so, in what way they should be applied. Bearing in mind that in 1977 the Law Reform Committee rejected a proposal to alter the internal rule on the ground of the practical difficulties which such a change would involve, we consider it clearly undesirable to impose burdens of this kind upon our courts in the context of foreign limitation periods. We have therefore concluded that, in the application of the limitation rules of a foreign *lex causae* to proceedings in this country, our courts should always apply the English rule as to the *terminus ad quem*. Thus if, for example, the relevant *lex causae* provided (*a*) that the period of limitation applicable to a claim for payment of a sum due under a contract should be two years, and (*b*) that this period should be calculated by reference to the date of service of the proceedings, a court in this country would apply the two-year period of limitation calculated, however, by reference to the corresponding English rule, which has regard to the date on which proceedings were commenced. We appreciate that this approach might be said to represent at least a theoretical departure from the general principle which we recommend, whereby the limitation period prescribed by the *lex causae* should apply; but we consider that no other rule is practicable.

4.20. We recommend that the domestic law of England and Wales should be applied for the purpose of determining the *terminus ad quem* of a limitation period prescribed by a foreign *lex causae*.

Arbitration proceedings

4.21 We have explained in paragraphs 4.18–4.19 above that under our recommendations, as under the present law, the step which has to be taken by a claimant for the purpose of stopping time from running against him (the "*terminus ad quem*" of the relevant limitation period) would be the commencement of proceedings in this country; the fact that the procedural rules of the *lex causae* made different provision in that regard would be immaterial.

4.22 This gives rise to the question: what is to be the *terminus ad quem* in relation to an arbitration, as distinguished from an action, where the subject-matter of the dispute is governed by a foreign law? The relevant rule, which is set out in section 34 of the Limitation Act 1980, provides

that limitation enactments should apply to arbitrations as to actions in the High Court;[95] and that section lays down rules for determining, for the purpose of limitation enactments, the dates at which an arbitration should be treated as having been "commenced".[96] In our view there is no reason why those rules should not be extended to an arbitration in this country where the subject-matter of the dispute–and hence, under our principal recommendation, the period of limitation–is governed by a foreign *lex causae*.[97]

4.23 We recommend that section 34 of the Limitation Act 1980 should extend to arbitrations whose subject-matter involves the application of a period of limitation prescribed by a foreign *lex causae*, in accordance with our principal recommendation.

***(ii) The effect to be given to the expiry of a period of limitation or prescription of a foreign* lex causae**

4.24 In Working Paper No. 75 we proposed that the effect to be given by our courts to a foreign time-bar should be the same, in relation to the question whether the right was extinguished or whether only the remedy was barred, as the effect that would be given to that time-bar by the courts of the *lex causae*.[98] Subject to a number of comments that were made on rules relating to the suspension of the running of time in certain circumstances, a matter which we consider separately in paragraphs 4.27–4.32 below, this proposal attracted no adverse comment on consultation and appears to have been approved as a necessary incident of applying a foreign *lex causae* in relation to limitation. One commentator did point out the need to bear in mind cases where the *lex causae* of a country conferred a discretionary power on the courts of that country to extend a period of limitation and that those cases might lead to "some sort of oddity which will cause difficulty when it comes to be applied away from home ". We accept that cases will arise in which our courts have to exercise such a discretion; but we do not consider that this situation will present any undue difficulty. Clearly our courts ought to exercise such a discretionary power in a manner similar to that in which it would be exercised in a comparable type of case by the courts of the *lex causae*, and we so recommend. Of course in particular cases it may be impossible in practice for the court to exercise its discretion in a *precisely* similar manner but this does not, in our view, require the abandonment or, indeed, modification of the general principle; the court will exercise its power by adopting the approach of the courts of the *lex causae* so far as it is practical to do so.

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[95] Sect. 34(1).

[96] That is, when one party serves on the other a notice requiring the other to appoint, or to agree to the appointment of, an arbitrator or, where the arbitration agreement provides for reference to an arbitrator specified in the arbitration agreement, when one party serves on the other a notice requiring that other to submit the dispute to the person so specified: s.34(3). This rule applies notwithstanding that the arbitration agreement provides that no cause of action should accrue until an award is made: s.34(2).

[97] Similarly, any exercise by the court of the power conferred on it by s.35(5) of the Limitation Act 1980 would apply in this context. That subsection empowers the court, when ordering that an award should be set aside or, after the commencement of an arbitration, that the arbitration should cease to have effect, to direct that the period between the commencement of the arbitration and the date of the order should be excluded in regard to the running of time for the purpose of limitation.

[98] Paras. 35 and 56(*b*)(i).

4.25 We recommend that in its application of a foreign rule as to limitation the court should have regard to the whole body of the law of limitation of the *lex causae*, including any discretion conferred by that law, which shall so far as is practicable be exercised in the manner in which it is exercised in comparable cases by the courts of the relevant foreign country.

(iii) Suspensive provisions

General

4.26 In Working Paper No. 75[99] we considered whether, in the case where the period of limitation laid down by a foreign *lex causae* was applied by a court in this country, the court should merely (*a*) adopt the time-bar prescribed by that law or (*b*) have regard to the whole body of legislation of the *lex causae* as to limitation, including provisions which prevent time from running against the plaintiff. We gave as examples of the kind of provision we had in mind rules providing that the limitation period should not run while the plaintiff was a minor or of unsound mind. We strongly favoured the second approach on the ground that "... as a matter of general principle, if an English court is to apply a limitation period fixed by the *lex causae* it should have regard to the whole body of that law, including any specific provisions which prevent time from running".[100] On consultation, there was little comment directed specifically to this proposal, but it is clear from the tenor of the comments we received that the proposal was accepted as part of the policy of applying the limitation period prescribed by a foreign *lex causae*.

The suspension of the running of time when a party is out of the country whose lex causae *is applicable*

4.27 There is one kind of suspensive provision, however, which in our view requires special consideration – namely, one which suspends the running of time during the absence of a party from the country whose *lex causae* falls to be applied in the particular case. In the absence of some qualification in this respect of the general principle of the application of the whole body of the limitation law of the *lex causae*, cases are likely to arise in which a defendant in proceedings in this country may be deprived indefinitely of the benefit of the relevant period of limitation, a result which we believe to be undesirable. In the Working Paper[101] we illustrated this point by means of the following hypothetical example:

> "An issue which is governed by Ruritanian law as the *lex causae* falls to be determined by an English court. The court would, under our proposals, be bound to apply the period of limitation, together with any provisions suspending such period, adopted by the *lex causae*. Ruritanian law contains a provision which suspends the running of its period of limitation during the defendant's absence from Ruritania. The

[99]Paras. 60–61.
[100]Para. 61.
[101]Para. 62.

defendant has permanently left Ruritania and now lives in England. In this situation, unless the defendant returns to Ruritania and is sued there, he will remain technically liable to suit indefinitely in this country. This is because the English court is bound to apply Ruritanian law, and whilst the defendant is absent from Ruritania, the Ruritanian statute of limitation does not operate."

4.28 Suspensive provisions of the kind under discussion undoubtedly give rise to difficulties and are increasingly regarded with disfavour. At one time English domestic law provided for the suspension of time in certain types of case when either the defendant[102] or the plaintiff[103] was "beyond the seas". The provision with regard to the absence of the plaintiff was repealed in 1856[104] and that with regard to the absence of the defendant in 1939.[105] Other common law jurisdictions have also abandoned such provisions.[106] In the United States where such "tolling provisions" are still to be found, they are felt to cause particular difficulties in the context of private international law.[107]

4.29 In the Working Paper we set out three possible ways of dealing with the problems created by suspensive provisions,[108] namely:

(i) To make no special provision beyond a general rule that our courts should apply the period of limitation adopted by the *lex causae* where to do so would not be inconsistent with public policy. Where, therefore, a plaintiff sought to enforce his claim in this country in circumstances such as those mentioned in the hypothetical example referred to in paragraph 4.27 above, the English court would have a residual discretion to refuse to apply the foreign *lex causae*, in whole or in part.

(ii) To provide that, where the period of limitation adopted by the *lex causae* is suspended by reason of either party's[109] absence from the jurisdiction, an action in this country should be barred a fixed number of years after the limitation period of the *lex causae* would have expired had it not been for the suspensive provision.

(iii) To provide that, where the period of limitation adopted by the *lex causae* is suspended by reason of either party's absence from the jurisdiction, the English court should apply the period of limitation without regard to such suspensive provision.

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[102]Administration of Justice Act 1705, ss. 18 and 19.

[103]Limitation Act 1623, s.7.

[104]Mercantile Law Amendment Act 1856, s.10.

[105]Limitation Act 1939, s.34 and Sched. This repeal had been proposed by the Law Revision Committee in their Fifth Interim Report (Statutes of Limitation), (1936) Cmd. 5334, para. 15.

[106]New South Wales Limitation Act 1969; British Columbia Limitation Act 1975.

[107]Leflar, *American Conflicts Law,* 3rd ed., (1979), pp. 256–257.

[108]Para. 63.

[109]We stated in the Working Paper that, although in the hypothetical example referred to in para. 4.27, above, we had taken the case of the running of a period of limitation which was suspended by reason of the defendant's absence, we believed the considerations to be essentially the same whether it was the absence of the plaintiff or of the defendant that suspended the running of time.

4.30 A further possible solution was put forward on consultation to deal with the case where the defendant, though absent from the foreign country whose *lex causae* is in point, has been in this country during the relevant period. It was suggested that a suspensive provision should be disregarded only in respect of the period of the defendant's presence in this country. But to adopt that course would be to allow the suspensive provision to continue to operate in the great number of cases where the defendant, though present in neither the country whose *lex causae* was applicable nor in this country, could nevertheless be served with notice of proceedings under the rules of either country as to the service of process. In our view, there would be little merit in the creation of such a distinction.

4.31 We believe that the most appropriate solution to the problem of suspensive provisions is the one which we put forward in the Working Paper as our preferred solution. This is that, where the period of limitation adopted by the *lex causae* is suspended by reason of either party's absence from the jurisdiction, a court in this country should apply the period of limitation without regard to such suspensive provision. It must be admitted that the effect of this solution will be to allow our courts to ignore a suspensive provision of the *lex causae* even though our main proposal in this report is to cause the law on limitation of a foreign *lex causae* to be applied by our courts. We think that an exception to this general approach is appropriate here, bearing in mind the practical difficulties which would be created by attempting to apply foreign suspensive provisions and the fact that such provisions are generally falling into disfavour. This conclusion was supported on consultation by those who considered this issue.

4.32 We recommend that, where (in accordance with the recommendation in paragraph 4.25 above) the court applies the rule of limitation prescribed by a foreign law, it should have regard to any provisions of that law which might operate to interrupt or suspend the running of the relevant period, except that the court should disregard such part of that law as relates to the extension or interruption of that period by reason of the absence of a party to the proceedings from any specified jurisdiction or country.

(iv) The foreign law to be applied

4.33 In certain categories of case, mainly but not solely those relating to the law of succession, the court refers, not to the internal rules of the country of the *lex causae*, but to the rules of private international law of that country for the purpose of determining which internal law is to be applied. This principle is known as "renvoi". It has been the subject of several decisions and much comment and speculation concerning its scope.[110] We need do no more, however, in this report than to make clear that any reference in it to the limitation period prescribed by the *lex causae* is a reference to the internal law which is applied in the particular case, whether by the application of renvoi or otherwise.

[110]See, for example, Dicey and Morris, *The Conflict of Laws*, 10th ed., (1980), Ch. 5; Cheshire and North, *Private International Law*, 10th ed., (1979), pp. 58–76. The terms of s.1 of the Wills Act 1963, which relate to the formal validity of wills, specifically exclude the operation of renvoi from the ambit of that Act.

4.34 It may be helpful to illustrate the point by two hypothetical examples. The first relates to an action for breach of a contract governed by a foreign law, a situation in which renvoi has no application.[111] If French law was the proper law of the contract (the *lex causae*) then under our principal recommendation a court in this country would apply the limitation period prescribed by French internal law. The second example concerns succession by will to movable property, the essential validity of the will being governed by the law of the testator's last domicile.[112] Should this question arise during the course of the administration of the estate of a French national who has died domiciled in Ruritania, our courts would accordingly refer in the first instance to Ruritanian law. However, a Ruritanian court would apply French law to determine the question, since the private international law rules of Ruritania require the matter to be decided in accordance with the internal law of the testator's nationality. If, under the doctrine of renvoi, our courts would apply French law to determine the essential validity of the deceased's will,[113] it would follow that under our recommendations the relevant period of limitation would be the one prescribed by French, as distinguished from Ruritanian, internal law.

(d) Public policy

4.35 There is a general principle that our courts have a discretion to refuse to apply foreign law in a particular case where to do so would be contrary to the fundamental policy of English law. The principle was explained in a case concerning the law of contract in the following terms:

> "Every legal decision of our courts consists of the application of our own law to the facts of the case as ascertained by appropriate evidence. One of these facts may be the state of some foreign law, but it is not the foreign law but our own law to which effect is given, whether it be by way of judgment for damages, injunction, order declaring rights and liabilities, or otherwise. As has been often said, private international law is really a branch of municipal law, and obviously there can be no branch of municipal law in which the general policy of such law can be properly ignored. . . . The late Mr. Westlake sums up the law on this point in the following proposition (Private International Law, 4th ed., s.215): 'Where a contract conflicts with what are deemed in England to be *essential public or moral interests*, it cannot be enforced notwithstanding that it may have been valid by its proper law.'"[114] (emphasis added)

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[111] *Re United Railways of the Havana and Regla Warehouses Ltd.* [1960] Ch. 52, 96–7, 115 (C.A.); affirmed [1961] A.C. 1007 (H.L.); and see the 1980 E.E.C. Convention on the Law Applicable to Contractual Obligations, Art. 15. The Convention has been signed by the United Kingdom: see para. 3.9, above.

[112] *Whicker* v. *Hume* (1858) 7 H.L.C. 124; 11 E.R. 50.

[113] *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377. It cannot, however, be stated with certainty that renvoi would be applied, since even in the field of succession "there is . . . as yet no justification for generalising the few English cases on renvoi into a general rule that a reference to foreign law always means the conflict rules of the foreign country . . .": Dicey and Morris, *The Conflict of Laws*, 10th ed., (1980), p. 74.

[114] *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co. Ltd.* [1918] A.C. 292, 302, *per* Lord Parker. A more recent statement of the principle is that "an English court will refuse to apply a law which outrages its sense of justice or decency": *In the Estate of Fuld (No. 3)* [1968] P. 675, 698, *per* Scarman J.

However, the modern judicial approach to the rôle of public policy in English private international law is to have resort to it only in exceptional circumstances, since it might otherwise operate so as to frustrate the whole purpose of having rules of private international law.[115] In the words of a United States judge:

> "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. . . . The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, *some prevalent conception of good morals, some deep-rooted tradition of the common weal.*"[116] (emphasis added)

4.36 In Working Paper No. 75 we pointed out that the general rule as to public policy would be unaffected by the implementation of our principal proposal, the effect of which would be that the limitation period prescribed by a foreign *lex causae* would be applied; and that it was unnecessary to formulate a special rule of public policy relating only to the application of foreign periods of limitation. Thus, (we explained), in a case where, for example, the *lex causae* prescribed either no period of limitation at all or one that was extremely long, the narrow discretion which our courts already had in matters of public policy would permit "any such review as may be considered necessary".[117]

4.37 The comment received on this issue on consultation reflected divergent views. Some commentators agreed with our approach in Working Paper No. 75, whilst others suggested different approaches and it is the salient points of these comments which we shall now examine. We ought, however, to make it clear at this stage that, having reconsidered our Working Paper approach in the light of the various comments, we remain of the view that our approach is the most appropriate one.

4.38 First, it was pointed out by some commentators that the principle of public policy merely empowered a court to refrain from applying a principle of a foreign *lex causae* which it would otherwise be bound to apply, and that it did not provide for an alternative period of limitation.[118] Accordingly, it was argued, the court would not know what period of limitation

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[115] See Dicey and Morris, *The Conflict of Laws*, 10th ed., (1980), pp. 83–89; Cheshire and North, *Private International Law*, 10th ed., (1979), pp. 145–155. Both cite with approval the passage quoted in the next sentence in the text.

[116] *Loucks v. Standard Oil Co. of New York* 224 N.Y. 99, 111; 120 N.E. 198, 201–202 (1918), *per* Cardozo J.

[117] Para. 36. The Scottish Law Commission, however, doubt whether a Scottish court would be prepared "to decline to give a judgment against the defender on the ground of public policy"; and they express the view that where there is no, or an excessively long, period prescribed under the *lex causae*, the principle of "the long negative prescription" at present applicable under Scots internal law should be applied, subject to exceptions, to claims governed by a foreign law: see para. 35 of their consultation paper.

[118] We consider in para. 4.40, below, the suggestion made by one commentator that, where the court determined that the application of the period prescribed by the *lex causae* would be contrary to public policy, the equivalent English period should automatically be substituted.

to apply. In our view, however, it is neither necessary nor desirable to provide for an alternative period. In a case where the issue arose the court would have to determine whether public policy required that the period of limitation prescribed under the foreign *lex causae* should not be applied in the particular circumstances of that case.[119] In this way, the general rule which we recommend—namely, that the *lex causae* should govern the question of limitation—would, like any other principle of private international law under which a foreign law falls to be applied, be subject to the overriding effects of the doctrine of public policy. This is a result which we believe to be desirable from both a conceptual and a practical point of view. Moreover, this approach would be consistent with a provision commonly found in international conventions[120] whereby the application by a national court of a foreign law in accordance with the terms of the convention may be refused only if such application is "manifestly[121] incompatible with the public policy (*ordre public*) of the forum". As we indicate below,[122] substitution of a different period, whether it be the equivalent English period or any other, would not be necessary in such a case.

4.39 Another point made by some commentators, which is really another aspect of the argument referred to in the preceding paragraph, was that our proposal would make for uncertainty, since in a particular case the parties would not know whether a court in this country would refrain from applying the foreign period of limitation on the ground of public policy. We believe, however, that the force of this criticism is greatly diminished by its overestimation of the part that is likely to be played by considerations of public policy in the field of limitation. As we explain in paragraphs 4.42–4.47, below, the ordinary rule would be that the period of limitation prescribed by the *lex causae* should apply, and only in the most unusual circumstances would the application of such a period be held to be contrary to public policy in the narrow sense explained in paragraph 4.35, above. Equally, however, we take the view that it would be wrong in principle to permit considerations of certainty to outweigh the need to preserve the general residual discretion of the court to refuse to apply a foreign law where to do so would be contrary to the fundamental policy of our law. We do not believe that the adoption of the principle that, in the area of limitation, the *lex causae* should be applied unless such application would be contrary to public policy is likely to give rise to any greater uncertainty in the context of limitation than it does in other areas, such as the rules governing the essential validity of a contract.

4.40 We have also considered another possible approach to the issue of public policy which arises from a point made on consultation. This approach would take the form of a gloss upon our principal recommendation.

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[119]We explain how this principle would operate in relation to cases where the *lex causae* prescribes a very short, or a very long, period of limitation respectively in paras. 4.46-4.47, below.

[120]See, in particular, Art. 16 of the E.E.C. Convention on the Law Applicable to Contractual Obligations (1980).

[121]In n. 126, below, we explain why in our view it is unnecessary to include the word "manifestly" or any equivalent expression in our recommendation as to public policy.

[122]See para. 4.40.

It would be to the effect that, in a case where the court concluded that the application of the period prescribed by the *lex causae* would in any particular case be contrary to public policy in the narrow sense of that expression explained in paragraph 4.35 above, the equivalent English period would automatically be applied instead. We have, however, rejected this approach on the fundamental ground that it fails to take into account the manner in which considerations of public policy are intended to operate under our recommendations in this report. We would explain our approach by means of two examples. Both concern an action in this country to recover a debt due under a contract governed by Ruritanian law, which happens to prescribe the short period of one week from the due date within which the creditor must take steps to enforce his claim. In the first example, an action is commenced here after seven years has elapsed from the date on which the debt fell due. The relevant period of limitation would, in accordance with our principal recommendation, be the one prescribed by Ruritanian law, so that, apart from any question of public policy, the action would be time-barred. However, if the court decided that, in all the circumstances, the application of the Ruritanian period would be contrary to public policy,[123] the plaintiff would succeed. The fact that the equivalent period under our internal law, prescribed by section 5 of the Limitation Act 1980, is one of six years, would not be conclusive. By contrast, in the second example the action is commenced five years after the due date, and the court takes the view that to apply the Ruritanian period would not, on the facts of that case, be contrary to public policy. In this case, therefore, the period prescribed by Ruritanian law would be applied; and the claim would fail. Here again, it is immaterial that, had the contract been governed by the internal law of England and Wales, the plaintiff's claim would not have been time-barred.

4.41 We have also borne in mind the terms of the 1980 E.E.C. Convention on the Law Applicable to Contractual Obligations, which has been signed by the United Kingdom.[124] The rules of the Convention would, if it is implemented in this country, largely replace the present choice of law rules in the law of contract. The scope of the "applicable law" under the Convention is specifically extended to the ". . . prescription and limitation of actions",[125] and, as we pointed out in paragraph 4.38 above, also provides that the "application of any rule of a system of law specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum".[126]

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[123] In paras. 4.42–44.7, below, we consider the matters which the court would be likely to take into account in determining whether this was so in the particular circumstances of the case.

[124] See para. 3.9, above.

[125] Art. 10(1)(*d*).

[126] Art. 16. We do not think that it is necessary, in the draft Bill to implement the recommendations in this report, to include the word "manifestly". Although that word does appear in s.8(2)(*b*) of the Recognition of Divorces and Legal Separations Act 1971, implementing the 1970 Hague Convention on that topic, we expressed the view in Law Com. No. 34 (1970) p.43 that the word "manifestly" was "probably redundant because our courts would never invoke the doctrine of public policy unless they were quite clear that it was right to do so". It is, in our view, unnecessary to include the word in domestic legislation. If and when the United Kingdom accedes to the Convention on the Law Applicable to Contractual Obligations, consideration can be given to the question whether any amendment will be required. We rather doubt whether it will.

4.42 We turn now to consider the nature and extent of the power which under our recommendations the court would have to disapply, on the ground of public policy, the relevant period of limitation prescribed by the foreign *lex causae* in a particular case. This issue is likely to be of particular significance in the case where such a period is either much shorter or much longer than its English equivalent.

4.43 The courts of England and Wales have not had to consider the concept of public policy in the context of foreign rules of limitation, and there is therefore no direct authority upon the matter. However, in accordance with the general principles obtaining in this field to which we have referred in paragraph 4.35, above, we envisage that the court would ask what "fundamental principle of justice, . . . prevalent conception of good morals" or "deep rooted tradition of the common weal"[127] or what "essential public or moral interests"[128] applied in the context of the law of limitation. The court would then consider whether on all the facts of the particular case to apply the period of limitation prescribed by the *lex causae* would be plainly contrary to those principles. This approach has been adopted by our courts in relation to other matters on which they have been required to consider public policy in the field of private international law. They have had, for example, to consider the issue in the context of the recognition in this country of divorces or legal separations obtained outside the British Isles. This matter is governed by the Recognition of Divorces and Legal Separations Act 1971, section 8(2) of which confers upon the court a discretion to withhold, on certain specified grounds, recognition of such a divorce or legal separation. One of those grounds applies where recognition would "manifestly be contrary to public policy"[129] and was considered by Lane J. in *Joyce* v. *Joyce and O'Hare.*[130] No exhaustive definition of public policy has been attempted in that context, but it is clear from her judgment and from the authorities she cited that the court tests the following matters, namely (i) the procedure by which the foreign divorce was obtained, (ii) the actual capacity of the respondent to be heard in the foreign proceedings and (iii) the impact upon the respondent's rights of the making of that divorce against the basic concept, under our own law, of a fair disposal of divorce proceedings.[131] If to recognise the foreign divorce on the facts of a particular case would "jar upon the conscience"[132] of the court, the principle of public policy would be broken. Lane J. explained that:

> "If a foreign court takes the view that only strict and precise approaches to it are required and accepted, it should not object if a court of another country with more liberal views finds that the whole proceedings jar upon its conscience. That is to say, that they do not measure up to sufficient justice to a wife or children, either at the moment of the divorce

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[127]See the words emphasised in the second passage cited in para. 4.35, above.

[128]See the words emphasised in the first passage cited in para. 4.35, above.

[129]Sect. 8(2)(*b*). As to the word " manifestly", see n. 126, above.

[130] [1979] Fam. 93, 106–114. Although the principles were expounded by Lane J. in relation to other grounds specified in the Act on which recognition might be refused it would seem that those principles apply also to public policy: see the concluding paragraph of the judgment, at p.114.

[131]*Ibid.*, 106–114.

[132]*Ibid.*, 114.

or in any period thereafter when variation of maintenance could take place, or even, in the final analysis, in relation to a divorced wife when she becomes a widow."[133]

4.44 In our view there are "fundamental principles of justice" in the context of the law of limitation which courts will discern for the purposes of considering whether application of a foreign law of limitation would in a particular case offend against public policy. In the first place, our own law of limitation is designed to serve certain basic purposes, namely the protection of defendants from stale claims; the encouragement of claimants to institute proceedings without unreasonable delay so that actions may be tried when witnesses' recollections are still clear; and the conferring on a potential defendant of the confidence that after the lapse of a specific period of time an incident which might have led to a claim against him is finally closed.[134]

4.45 Secondly, justice requires and our law provides that those basic purposes be qualified in certain cases: for example, reasonable allowance must be made for periods of limitation to differ according to the cause of action (a shorter period being appropriate, for example, for a personal injuries claim than for an action concerning the title to land) and for the extension of the periods to cover such matters as the incapacity of a claimant through nonage or unsoundness of mind, or the concealment by the fraud of the defendant of the facts giving rise to the cause of action; and latent injury unknown to a claimant. By reference to these basic principles of our law of limitation the courts could test the application of a foreign law of limitation against fundamental principles of justice. For example, to permit to proceed within a foreign period of limitation a claim, based on an oral agreement, advanced many years later than six years after alleged breach of it, without reasonable explanation for delay, might be regarded as offending principles of public policy. To permit to proceed a claim advanced after similar delay in which the delay is explained by mental illness of the claimant, would probably not be seen as so offending. In addition to application of principles derived from our own law of limitation, other general principles of public policy would be applicable to foreign limitation law so that, for example, in the unlikely event of a limitation law being discriminatory on the ground of the race, religion, or nationality of either party the courts would refuse to apply a provision in such a way as to permit the offensive discriminatory element to have effect.

4.46 With regard to the relevance to the question of public policy of the length of a particular period under a foreign *lex causae*, in the case where such period approximated to the equivalent English period, it is obviously likely that our courts would normally apply the foreign period except where, in the circumstances of a particular case, the application of that period would be contrary to public policy for some reason other than its length. We

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[133]*Ibid.*, 111.

[134]The Limitation Act 1980 appears to show that Parliament has accepted that the basic purposes of limitation laws are those stated by the Edmund Davies Committee (1962), Cmnd. 1829 and adopted by the Law Reform Committee in its final Report on Limitations of Actions (1977), Cmnd. 6923.

believe, further, that this would be true also of most cases in which the relevant foreign law prescribed a very short period: the length of that period would of itself be unlikely to offend any principle of public policy. Possibly, however, if in such a case it was established that the defendant, with knowledge of the length of the limitation period, intentionally behaved in such a way as to induce the plaintiff to delay the institution of proceedings, the court might hold that to apply the foreign period in such circumstances would be contrary to public policy.

4.47 Similarly, in the case where the relevant foreign period of limitation is much longer than the equivalent period in England and Wales, we think that the court would only in rare cases refuse to apply the foreign period on public policy grounds. We envisage that, where a plaintiff has delayed in starting his proceedings long beyond the equivalent period of our law but within the period allowed by the *lex causae*, the court would consider all the circumstances, including:

(*a*) the nature of the cause of action;

(*b*) the nature of the disputed facts, and of the evidence to be advanced with reference to them;

(*c*) whether notice was given of the claim, and when;

(*d*) the explanation for any delay in starting the proceedings or for failure to give notice of the claim;

(*e*) whether the defendant has suffered any real disadvantage by the delay, or from the failure to notify the claim, and the extent of any such disadvantage;

(*f*) whether the defendant was reasonably caused to believe that no claim would be made, or pursued, and, if so, any conduct of the plaintiff relevant to causing the defendant so to believe; and whether the defendant has acted to his detriment in such belief, and the nature of any detriment to the defendant if the action is allowed to proceed;

(*g*) generally, the nature and extent of any hardship to the defendant in allowing the claim to proceed.

The court would then determine, in the light of the circumstances, whether or not permitting the action to proceed would "jar the conscience" of the court. But we do not envisage that the court would disapply a long foreign period (and thereby hold the action time-barred) merely because a period longer than the equivalent English period had elapsed, and the defendant had thereby been detrimentally affected in the presentation of his case by reason, for example, of the loss of his witnesses or of documents, or of impaired recollection. However, if the court formed the view that in all the circumstances the delay by the plaintiff in bringing his action was both unexplained and wholly unreasonable in the light of the fundamental principles underlying the law of limitation to which we have referred in paragraph 4.44, above, and concluded that in consequence a fair trial of the issues was impossible, it might well decide that to permit the claim to proceed would be contrary to public policy.

4.48 We would point out, finally, in relation to claims that are brought after a long delay but nevertheless within a long period of limitation prescribed by a foreign *lex causae* that, although the court will only in rare cases disapply the foreign period on the ground of public policy, the defendant will in many instances be protected against delay by virtue of the burden of proof that rests upon the plaintiff to prove his case by adducing satisfactory evidence.

4.49 We recommend that where, in a particular case, the court[135] determines that the application of the period of limitation prescribed under a foreign law would be contrary to public policy, the court may refrain from applying it.

4.50 We have considered whether use of the discretion which, according to our recommendation, the court would have to refrain from applying a foreign limitation law, on the ground of public policy, should be facilitated, or directed, by enactment of a definition of public policy or the provision of guidelines. The conclusion of the majority of us is that neither is necessary. We consider that the precedent of the Recognition of Divorces and Legal Separations Act 1971[136] can safely be followed and that development of the concept of public policy in the context of limitation should be left to judicial decision. One of us[137] fears, however, that the caution with which our courts apply the concept of public policy may, in the absence of a definition or of guidelines, cause foreign limitation periods of excessive length to be applied in circumstances where a defendant will be put in unfair difficulty by reason of delay. Whilst we all accept the argument that the general rule which we recommend, namely the application of the limitation rules of the *lex causae,* should not be followed only in the rare cases where its application offends our principles of public policy, it is only the majority of us who believe that the risk in some cases of long periods of foreign limitation operating unfairly in relation to some defendants is not such as to require or justify the enlargement of the concept of public policy by definition or by guidelines.

(e) Incidental effects of altering the English rule

(i) Introduction

4.51 In Working Paper No. 75 we referred to the question of what might be the practical or procedural implications of our proposals, first, that all statutes of limitation should be classified in this country as substantive for choice of law purposes, subject to the existing discretion of the courts as to public policy, and secondly, that the effect to be given by our courts to the expiry of a period of limitation or prescription under a foreign *lex causae* should be the same as would have been given to it by the courts of the relevant foreign country. We expressed the view that, although the

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[135]The term "court" includes an arbitrator.
[136]Sect. 8(2); see para. 4.43, above.
[137]Brian Davenport, Q.C.

effect of our proposals would be to lead to the application by our courts of foreign rules as to limitation in a much larger number of cases, the procedural impact of the changes we proposed would be fairly small, pointing out in support of this view that the courts in this country already applied a foreign statute of limitation in cases where they regarded such statute as being substantive.[138] We asked particularly for comments on the procedural implications of our proposals from those with practical experience of such matters.[139] No significant matters of this kind were raised on consultation which had not been canvassed in the Working Paper. Indeed, the view was expressed that our proposals would be unlikely to give rise to practical or procedural difficulties. We then considered in turn certain specific matters which might be affected by the implementation of our main proposals. We here re-examine those matters in the light of the comments received on consultation, except for the question of the suspensive provisions prescribed by a foreign statute of limitation which we have dealt with in paragraphs 4.26–4.32, above.

(ii) Contractual and other provisions analogous to limitation

4.52 The concept of limitation may arise in a context other than that of a statute of limitation; for example, a contract may provide that a party's right of action is dependent upon a specified period of notice being given to the other party, or the law may confer the right to rescind a contract but require such right to be exercised within a reasonable time. We referred in our Working Paper[140] to such time limits since they were analogous to statutory periods of limitation; but we made no proposals concerning them. We put forward two reasons for adopting this approach. In the first place, we explained, contractual provisions of this kind were infinitely varied, and, for example, where they concerned the method of performance these were governed by the law of the place of performance: accordingly, it would be inappropriate to create a statutory rule whereby such provisions would always be governed by the *lex causae.* We expressed the view, secondly, that under the existing law the court would probably regard many provisions of this kind as being substantive and therefore already governed by the *lex causae.*

4.53 On consultation, though few commentators expressed a view on this matter, those who did agreed with our approach. We therefore make no recommendation concerning provisions analogous to statutory rules of limitation.

(iii) Equitable remedies

4.54 Section 36(1) of the Limitation Act 1980 provides that the provisions of that Act relating to several specified causes of action (including, for example, actions founded on contract or on tort) do not apply in a claim for

[138]Para. 57.
[139]Para. 88.
[140]Paras. 58–59.

specific performance, for an injunction or for other equitable relief.[141] However, a remedy by way of equitable relief may be refused on the ground that the plaintiff has acquiesced in a breach of equitable duty at, before, or after the time of such breach. In this connection the fact that the plaintiff has been guilty of delay, known in equity as "laches",[142] in bringing his action after he became aware of the violation of his right may be a material consideration. In *Lindsay Petroleum Co.* v. *Hurd*, for example, it was said that:

> " . . . in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation,[143] the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."[144]

The court's equitable jurisdiction "to refuse relief on the ground of acquiescence or otherwise" is expressly left unaffected by the 1980 Act.[145] Our principal recommendation is intended to have no direct bearing upon the jurisdiction of the court to withhold equitable relief. If, however, (i) the circumstances of a particular case involve the application of a foreign period of limitation in accordance with that recommendation and such period has not expired, or if (ii) no period of limitation is prescribed by the relevant *lex causae*, in our view the court ought to have regard to that fact in determining whether or not to grant the relief sought; and we recommend that this should be made clear in the legislation implementing our proposals in this report.

4.55 In addition to the court's jurisdiction to refuse relief in the circumstances referred to in the preceding paragraph, there is a separate category of case in which the court applies a statutory period of limitation by analogy. This principle has been expressed as follows:

> "When claims are made in equity which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same matter

[141]In para. 3.100 of their Twenty-first Report (1977), Cmnd. 6923, the Law Reform Committee considered but rejected a suggestion which they had canvassed in their consultative document whereby there should be a statutory limitation period (necessarily shorter than the standard six-year period) after which certain equitable remedies, including specific performance and injunction, should not be obtainable.

[142]"*Laches*, or *Lasches*, is an old English word for slackness or negligence, or not doing": *Co. Litt.*, 380b, cited in *Partridge* v. *Partridge* [1894] 1 Ch. 351, 360, *per* North J.

[143]It is stated in *Halsbury's Laws of England*, 4th ed., (1976), vol. 16, para. 1476 that: "The defence of laches, however, is only allowed where there is no statutory bar. If there is a statutory bar, operating either expressly or by way of analogy, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable." We have little doubt that a court would be able to adopt a similar approach where a foreign limitation period was applicable under our primary recommendation.

[144](1874) L.R. 5 P.C. 221, 239, *per* Sir Barnes Peacock. The case concerned an action to set aside an agreement for the sale of land on the ground of fraud.

[145]Sect. 36(2). The words "or otherwise" presumably relate to laches.

which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim."[146]

There would, we believe, be no difficulty in this regard where the limitation period prescribed by a foreign *lex causae* falls to be applied in accordance with our principal recommendation. In such cases the foreign law would govern the position, and no question of the application of a statutory period by analogy would arise (except, of course, where such a principle happened to obtain under the foreign law).

(iv) The Limitation (Enemies and War Prisoners) Act 1945

4.56 Section 1 of the Limitation (Enemies and War Prisoners) Act 1945 provides that time should not run for the purpose of certain statutes of limitation, which are specified in section 2(1) of the Act (as amended) and include the Limitation Act 1980, during any period during which a person who would have been a necessary party to any action or arbitration proceedings[147] was an enemy or was detained in enemy territory, and for a further period of twelve months thereafter.[148] The question arises whether this suspensive provision of our internal law ought to apply where the period of limitation prescribed under a foreign *lex causae* falls to be applied under our principal recommendation in this report.[149] We think that it should, bearing in mind in particular that at present a prisoner of war detained in enemy territory enjoys the protection of the Act in the great majority of cases to which our law applies as the *lex fori*. It would clearly be undesirable, in our view, to remove this protection, and we believe that, accordingly, special provision is required to preserve it.[150]

4.57 We recommend that the Limitation (Enemies and War Prisoners) Act 1945 should extend to cases where the period of limitation prescribed by a foreign *lex causae* is applied in accordance with our principal recommendation.

(v) Foreign judgments

(i) General

4.58 The issue as to how a statute of limitation should be classified may arise in connection with the recognition or the enforcement, by a court in this country, of a foreign judgment which was based on a limitation point.

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[146] *Halsbury's Laws of England*, 4th ed., (1976), vol. 16, para. 1485 (footnotes omitted), where numerous decisions are cited. A reference to this principle appears in s.36(1) of the 1980 Act.

[147] Sect. 2(1).

[148] The detailed provisions of the Act include definitions of the expressions "enemy" and "enemy territory", a proviso relating to a person who was only an enemy in relation to a business carried on in enemy territory and a rule governing the situation where more than one such period is concerned.

[149] Or, indeed, under the present law in the uncommon case where such a period is classified by the court as substantive in character: see para. 2.3, above.

[150] Of course, where a potential *defendant* is concerned, the suspension of time under the Act operates to his disadvantage, but we think it right to preserve the application of the Act as a whole.

Only one of the detailed rules that govern the question of the recognition, or the enforcement, in this country of the judgment of a foreign court calls for consideration in the context of this report—namely, the rule whereby, to be accorded recognition in this country, a foreign judgment must be conclusive "on the merits".[151]

4.59 Where the party in whose favour judgment has been given by the foreign court seeks to *enforce* that judgment in this country, no problem arises.[152] This is because the other party, having raised but failed to establish a defence based on limitation in the foreign court, will be unable to raise that issue again in the subsequent proceedings here: clearly the foreign judgment will have been conclusive "on the merits". Our recommendation that the relevant foreign statute of limitation should be applied as part of the *lex causae* in every case would, if implemented, effect no change in the present law in this regard.

4.60 By contrast, however, the situation is quite different where a party seeks not to enforce, but simply to obtain recognition of, the foreign judgment. This situation arises where one party has successfully pleaded a statute of limitation as a defence to a claim in the foreign proceedings. The question arises: is such a judgment conclusive "on its merits"? If so, but only if so, the issue of limitation cannot be raised again in the subsequent proceedings in this country, on the principle of estoppel *per rem judicatam*. This point has arisen in relation to the recognition of a foreign judgment both at common law and under the Foreign Judgments (Reciprocal Enforcement) Act 1933. We shall examine each situation in turn.

(ii) The present law

Recognition at common law of a foreign judgment on a limitation point

4.61 In the leading case, *Harris v. Quine*,[153] the plaintiffs brought an action in the Isle of Man claiming professional fees due to them from the defendant under a contract clearly governed by Manx law. The Manx court gave judgment for the defendant on the ground that, under the Manx statute of limitation, the action was statute-barred. Before the English limitation period had expired, the plaintiffs brought a fresh action in England against the defendant for the recovery of the same amount. The defendant pleaded the Manx judgment as a bar to these later English proceedings. This plea was rejected because the Manx statute was regarded as only procedural in nature. Cockburn C.J. stated that:

> "There is no judgment of the Manx court barring the present action, as there was no plea going to the merits, according to the view which we are bound to take of the Manx statute of limitations."[154]

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[151]See Dicey and Morris, *The Conflict of Laws*, 10th ed., (1980), p. 1072.

[152]This is the more common situation. As a general rule, such a party will be a plaintiff in the proceedings here; but he may be a defendant who is seeking to enforce the foreign judgment by way of counterclaim.

[153](1868) L.R. 4 Q.B. 653.

[154]*Ibid.*, 657.

However, the two other judges in that case stated in terms that, if Manx law had extinguished the right as well as barring the remedy, the action in this country could not have been maintained.[155]

Recognition of a foreign judgment on a limitation point under the Foreign Judgments (Reciprocal Enforcement) Act 1933

4.62 The Foreign Judgments (Reciprocal Enforcement) Act 1933 governs the reciprocal enforcement of judgments between the United Kingdom and a small number of foreign countries. Section 8(1) of the Act provides that "... a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, ... shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings".[156] In *Black-Clawson International Ltd.* v. *Papierwerke Waldhoff-Aschaffenburg A.G.*[157] the plaintiffs brought an action in Germany on two bills of exchange, the proper law governing the bills being English law. The defendants successfully argued before the German courts that the action was time-barred under the German statute of limitations. The plaintiffs also sued in England, within our period of limitation, but the defendants argued that the German judgment ought to be recognised under the provisions of the 1933 Act, which applies to the recognition of the judgments of German courts. A major issue before the House of Lords was whether, in the case of recognition of German judgments in favour of a defendant, the 1933 Act and, in particular, section 8(1) required the foreign judgment to have been given "on the merits". A majority of their Lordships decided that the common law rule expounded in *Harris* v. *Quine*[158] was unaffected by section 8(1), and that the German judgment being on a limitation point was not a judgment "on the merits" and so did not operate as a bar to the later English action.[159] Accordingly, the plaintiffs were able to proceed in this country notwithstanding the German judgment.

(iii) Proposals for reform

Introduction

4.63 The *ratio decidendi* of the *Black-Clawson* case would appear to be that, both at common law and under section 8(1) of the 1933 Act, a foreign judgment on a limitation point is to be regarded by our courts as not being conclusive "on the merits" and hence giving rise to no estoppel in the subsequent proceedings in this country, except where the statute of limitation is classified as substantive on the ground that it extinguishes the plaintiff's

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[155]*Ibid.*, 658, *per* Blackburn and Lush JJ.

[156]Although a number of amendments to the 1933 Act are contained in the Civil Jurisdiction and Judgments Bill currently before Parliament (see clause 34(1) and Sched. 9), none of them directly affects s.8.

[157][1975] A.C. 591.

[158](1868) L.R. 4 Q.B. 653, referred to in para. 4.61, above.

[159]Lord Reid, who concurred in the result, took the view that s. 8(1) did not apply to a foreign judgment in favour of a defendant and therefore had no application: [1975] A.C. 591, 616–618.

right.[160] We consider this principle to be unsatisfactory and we propose that in every case a foreign judgment on a limitation point should be treated in this country as conclusive "on its merits". We consider in turn two possible situations.

Cases in which the foreign court was a court of the country of the lex causae *and applied its own statute of limitation*

4.64 It would seem that in principle, if this country were to adopt a rule whereby the statute of limitation under the *lex causae*[161] were applied in every case, the end result in a future case on facts similar to those in *Harris* v. *Quine* would be different. This is because the Manx judgment would be recognised by our courts as conclusive of an issue upon which our courts would also have to adjudicate, namely whether the Manx statute of limitation (applicable, under the rule we recommend, to cases heard in England where Manx law is the *lex causae*) bars the action. Accordingly, the Manx judgment in favour of the defendant would be recognised and this would bar an action by the plaintiff in this country. In our view this result would be the logical and desirable result so far as limitation is concerned.

4.65 The question arises whether, having regard to what we have said in the preceding paragraph, it is desirable to recommend a special provision to deal with the recognition of a foreign judgment in favour of the defendant on a limitation point. We believe that such provision should be made. The present meaning of the expression "a judgment on the merits" is, as we explained in paragraph 70 of the Working Paper, a matter of some uncertainty. It is clear both from *Harris v. Quine* and the *Black-Clawson*[162] case that, whatever may be the *lex causae,* a judgment given by a foreign court in favour of a defendant on the ground that the limitation period has expired is a judgment "on the merits" only if it extinguishes the plaintiff's right.[163]

4.66 In view of the uncertainty as to the meaning of "judgment on the merits" we proposed in the Working Paper that, for the avoidance of doubt, it should be expressly provided that a foreign judgment on a limitation point should be regarded by our courts as a judgment "on the merits" giving rise to an estoppel "*per rem judicatam*".[164] On consultation, all those who commented on this proposal expressed their agreement with it. The Scottish Law Commission, too, express the view in their consultation paper that in principle a foreign judgment should be treated as being given "on the merits" where the foreign court is that of the country of the *lex causae.*[165]

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[160]See, for example, Lord Wilberforce's exposition in *Black-Clawson* [1975] A.C. 591, 630.

[161]The term *"lex causae"* signifies the *lex causae* as ascertained by our rules of private international law. Thus it is immaterial whether the foreign court applied its own law as the *lex causae* or the *lex fori.*

[162]Although, it seems, German law classifies limitation as a matter of substance, s.222, the relevant provision of the German Civil Code, apparently does not completely extinguish the right: [1975] A.C. 591, 628 *per* Lord Wilberforce.

[163]See para. 4.61, above.

[164]Para. 70.

[165]Para. 42. However the Scottish Law Commission point out that because of differences between English and Scots law the special problems presented by *Black-Clawson* are less likely to arise in Scotland.

4.67 Finally, we should make it clear that the judgment of a foreign court of the country of the *lex causae* applying its own rule of limitation should be treated as being "on the merits" irrespective of whether the law of the country of that court regards such rule, on the one hand, as substantive or, on the other, as procedural. As we pointed out in the Working Paper,[166] it would be anomalous, in view of our principal recommendation that a court in this country must apply the period prescribed by the *lex causae,* if our courts were to allow the plaintiff anything other than what he had already obtained in the courts of the country of the *lex causae.*

Cases in which the foreign court was not a court of the country of the lex causae *applying its own statute of limitation*

4.68 In our Working Paper we formulated our proposal in general terms which would apply both to cases falling within and to those outside the category considered in paragraphs 4.64–4.67, above. However, we made no distinction there between the two categories of case, and we have considered whether our proposal should be limited in any way. An important example of the kind of case that would fall outside the category considered in those paragraphs would be one in which the foreign judgment was given by a court other than that of the country of the *lex causae.*[167] The Scottish Law Commission expressed greater hesitation in their consultation paper in recommending that a foreign judgment should be treated as having been given "on the merits" in that situation than where the foreign judgment was given by a court of the country of the *lex causae.*[168] On consultation, those who submitted comments to the Scottish Law Commission were divided—some favouring our own proposal, others apparently inclined to the view that only a foreign judgment based on the *lex causae* should be regarded in the case of a limitation point as having been made "on the merits".

4.69 There are other situations that fall outside the ambit of paragraphs 4.64–4.67, above. In particular, the foreign judgment in question may have been given by a court which, though a court of the country of the *lex causae,* applied a law other than its own to the limitation issue in accordance with the rules of private international law of its own country. It should be borne in mind that the common feature of the cases which we are now considering is that the limitation issue was not decided by means of the application by the court of the country of the *lex causae* of its own law. Our main recommendation in this report is that the rules of limitation should be governed by the *lex causae.* Accordingly, it could be argued, there is no reason why in relation to foreign judgments based on a limitation issue, estoppel *per rem judicatam* should apply to any foreign judgment other than one of a court of the country of the *lex causae* based on the application of its own law to that issue. We believe that the answer to that argument is to be found by reference to the position concerning the recognition of

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[168]Para. 42.
[167]E.g. the *Black-Clawson* case, [1975] A.C. 591; see para. 4.62, above.
[168]Para. 42.

foreign judgments in general, apart from any question of limitation. The general principle, as we have pointed out in paragraph 4.58, above, is that a foreign judgment is accorded recognition in this country provided that certain conditions are fulfilled, including the requirement that the foreign judgment in question was conclusive "on the merits". Under the present law a judgment in favour of a defendant on the issue of limitation will not be "conclusive" in this sense, except where the relevant limitation rule has operated to extinguish the plaintiff's right. Implementation of our main recommendation that the limitation period of the *lex causae* should apply in every case would obviate the need for enquiry by a court in this country, in cases where no foreign judgment was involved, into whether the *lex causae* classified its relevant limitation rule as procedural or substantive. Although the position as to the recognition of a foreign judgment is not precisely the same as that to which our principal recommendation relates, we believe that, similarly, it would be both consistent with our general approach and a desirable result if our courts were to recognise every foreign judgment, including one based on a limitation point, provided of course that the general conditions for such recognition applied.[169] To exclude from the scope of our recommendation (that a foreign judgment on a limitation point should be treated as conclusive "on the merits") cases other than those in which the court of the country of the *lex causae* had applied its own statute of limitation would be, in our view, to introduce an unnecessary element of complexity. We have therefore concluded that the recommendation should not be qualified in any way.

4.70 We would mention, finally, one point that at first sight may perhaps appear curious. Apart from any question of limitation, in a case where, according to our rules of private international law, the *lex causae* is English law and where the foreign court also regarded English law as the *lex causae,* our courts are asked to recognise a foreign judgment based upon the application of our law without enquiring into the merits of that application. The court in this country accedes to that request on the ground that it will be giving effect to a foreign judgment no less in such a case than in the situation where the foreign court has applied its own, or a third, law to determine the issue before it. In view of our principal recommendation that periods of limitation should be governed by the *lex causae,* there is no reason to exclude such cases from the scope of our recommendations concerning judgments. Support for this view is to be found in certain observations of Lord Wilberforce in the *Black-Clawson* case. He asked rhetorically:

> "Why, to take the present case, should a foreign judgment be conclusive on a matter whose proper law is English, and accepted as English by the foreign court, when that foreign law itself does not destroy the right, but only limits the remedy it will grant?"[170]

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[169] One of these is that recognition, whether at common law or under statute, is not contrary to public policy; see Administration of Justice Act 1920, s.9(2)(*f*); Foreign Judgments (Reciprocal Enforcement) Act 1933, s.4(1)(*a*)(v); Civil Jurisdiction and Judgments Bill, clause 2, Sched. 1, Art 27(1); *Re Macartney* [1921] 1 Ch. 522.

[170] [1975] A.C. 591, 632.

But, he continued:

> "For English law to abolish the distinction between substance and procedure, or to classify limitation as substance, might be an intelligible objective, *but short of this, and leaving the distinction and classification intact*, to change the effect of a judgment is something that at the least, requires explanation".[171]

4.71 We recommend that where a foreign court has given a judgment in any matter by reference to the law of limitation of its own or of any other country (including that of England and Wales) that judgment should be regarded as conclusive "on the merits" for the purposes of its recognition or enforcement in England and Wales.

(vi) Contribution between joint wrong-doers

4.72 In Working Paper No. 75, we raised the question whether if, as we proposed, statutes of limitation were to be reclassified as substantive, any amendments ought to be made to the Civil Liability (Contribution) Act 1978.[172] We also considered whether any changes in the law relating to contribution were desirable in consequence of our proposal that a foreign judgment on a limitation point should be regarded as having been given "on the merits".[173] We reached the conclusion[174] that neither proposal would necessitate any change in the 1978 Act or elsewhere in the law relating to contribution, but we invited views as to whether certain anomalies which already exist in relation to the 1978 Act as applied to cases with a foreign element[175] might be exacerbated by the proposals in Working Paper No. 75 and whether, in that event, amendment of the 1978 Act was desirable.

4.73 The implications of our proposals in Working Paper No. 75 for the law of contribution drew few express comments on consultation. The tenor of such comments as we did receive was, however, clear. Amendment of the law relating to contribution and, in particular, amendment of the Civil Liability (Contribution) Act 1978 was neither necessary nor desirable. We accept that view and make no proposals relating specifically to the law of contribution between joint wrong-doers.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In this Part of the report we summarise our recommendations for reform contained in Part IV. Where appropriate we identify the relevant clauses in the draft Foreign Limitation Periods Bill[176] which are aimed at putting particular recommendations into effect.

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[171] *Ibid.* Although we are not, in terms, now recommending that limitation should be reclassified as substantive, our principal recommendation that the limitation rules of the *lex causae* should apply in every case is another method of achieving that end: see para. 4.4, above.

[172] Para. 80.

[173] Paras. 81–82.

[174] Para. 83.

[175] We drew attention to these in detail in Working Paper No. 75, paras. 73–83.

[176] See Appendix A.

5.2 Our recommendations are as follows:

(1) ***Our principal recommendation.*** The English rule whereby statutes of limitation, as opposed to rules of prescription, are classed as procedural should be abandoned, and where under our rules of private international law a foreign law falls to be applied in proceedings in this country, the rule of that foreign law relating to limitation should also be applied, to the exclusion of the law of limitation in force in England and Wales.

(paragraph 4.13 and clause 1(1))

(2) By way of qualification to our principal recommendation, the rules of limitation in force in England and Wales should not be excluded in cases where both a foreign law and the law of England and Wales fall to be taken into account under the rules of private international law in the determination of any issue by the court.

(paragraph 4.15 and clause 1(2))

(3) The domestic law of England and Wales should be applied for the purpose of determining the *terminus ad quem* of a limitation period prescribed by a foreign *lex causae.*

(paragraph 4.20 and clause 1(3))

(4) Section 34 of the Limitation Act 1980 should extend to arbitrations whose subject-matter involves the application of a period of limitation prescribed by a foreign *lex causae,* in accordance with our principal recommendation.

(paragraph 4.23 and clause 5)

(5) In its application of a foreign rule as to limitation the court or, as the case may be, an arbitrator should have regard to the whole body of the law of limitation of the *lex causae,* including (i) any provisions (other than those mentioned in subparagraph (6) below) which might operate to suspend the running of the appropriate period and (ii) any discretion conferred by that law, which shall so far as is practicable be exercised in the manner in which it is exercised in comparable cases by the courts of the relevant foreign country.

(paragraph 4.25 and clause 4(1)
(as to (i))
and clause 1(4)
(as to (ii))

(6) Where the period of limitation prescribed by a foreign *lex causae* may be extended or interrupted by reason of the absence of a party to the proceedings from any specified jurisdiction or country, such part of the *lex causae* as relates to such extension or interruption should be disregarded.

(paragraph 4.32 and clause 2(2))

(7) Where, in a particular case, the court or, as the case may be, an arbitrator determines that the application of the period of limitation prescribed under a foreign law would be contrary to public policy, the court (or an arbitrator) may refrain from applying it.

(paragraph 4.49 and clause 2(1))

(8) Our principal recommendation does not apply to a claim for equitable relief; but if a period of limitation prescribed under a foreign law would otherwise be applicable in accordance with that recommendation, and such period has not expired, the court shall take that fact into account in determining whether or not to grant the relief sought.

(paragraph 4.54 and clause 4(3))

(9) The Limitation (Enemies and War Prisoners) Act 1945 should extend to cases where the period of limitation prescribed by a foreign *lex causae* is applied in accordance with our principal recommendation.

(paragraph 4.57 and clause 2(3))

(10) Where a foreign court has given a judgment in any matter by reference to the law of limitation of its own or of any other country (including that of England and Wales) that judgment should be regarded as conclusive "on the merits" for the purposes of its recognition or enforcement in England and Wales.

(paragraph 4.71 and clause 3)

(*Signed*) RALPH GIBSON, *Chairman.*
STEPHEN M. CRETNEY.
BRIAN DAVENPORT.
STEPHEN EDELL.
PETER NORTH.

R. H. STREETEN, *Secretary.*
7 *April* 1982.

APPENDIX A

Draft

Foreign Limitation Periods Bill

ARRANGEMENT OF CLAUSES

Clause

1. Application of foreign limitation law.
2. Exceptions to s. 1.
3. Foreign judgments on limitation points.
4. Meaning of law relating to limitation.
5. Application of Act to arbitrations.
6. Application to Crown.
7. Short title, commencement and extent.

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BILL

TO

Provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Application of foreign limitation law.

1.—(1) Subject to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—

(*a*) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings ; and

(*b*) except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales (other than the said rules and this Act) and the law of some other country fall to be taken into account.

(3) The law of England and Wales shall determine for the purposes of any law applicable by virtue of subsection (1)(*a*) above whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, section 35 of the Limitation Act 1980 (new claims in pending proceedings) shall apply in relation to time limits applicable by virtue of subsection (1)(*a*) above as it applies in relation to time limits under that Act.

1980 c. 58.

(4) A court in England and Wales, in exercising in pursuance of subsection (1)(*a*) above any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

EXPLANATORY NOTES

Clause 1

1. *Subsection* (1) implements the principal recommendation in the report, which is set out in paragraph 4.13. As explained in paragraphs 4.33–4.34, the expression "the law of any other country" will normally signify the internal law of the country of the foreign *lex causae,* but may in certain categories of case be determined by the application of the doctrine of renvoi.

2. *Subsection (2)* gives effect to the recommendation in paragraph 4.15. The need for its inclusion arises from the rules of private international law concerning torts committed abroad, under which there may be two *leges causae,* one of which is the law of England and Wales. The point is explained in paragraphs 4.14–4.17.

3. *(a) Subsection (3)* gives effect in relation to actions to the recommendation in paragraph 4.20. This matter is explained, under the heading "The *terminus ad quem* of a period of limitation", in paragraphs 4.18–4.19.

(b) Section 35 of the Limitation Act 1980, which is referred to in the latter part of this subsection, consists of the principles of limitation which apply (i) to claims by way of set-off or counterclaim, (ii) to claims involving the addition or substitution of a new cause of action, and (iii) to claims involving the addition or substitution of a new party. The principles of our internal law in that section will extend to cases where the relevant limitation period is the one prescribed by a foreign *lex causae.*

4. *Subsection (4)* implements the recommendation in the concluding words of paragraph 4.25 of the report. The manner in which a discretion conferred by a foreign *lex causae* should be exercised by a court in England and Wales (or in arbitration proceedings whose procedure is governed by the law of England and Wales) is considered in paragraph 4.24.

Exceptions to s. 1.

2.—(1) In any case in which the application of section 1 above would conflict to any extent with the principles of public policy applied by the courts of England and Wales in determining whether to give effect to the law of any other country, that section shall not apply to the extent that its application so conflicts.

(2) Where, under a law applicable by virtue of section 1(1)(*a*) above for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes.

1945 c. 16.

(3) In section 2(1) of the Limitation (Enemies and War Prisoners) Act 1945 (which in relation to cases involving enemy aliens and war prisoners extends certain limitation periods), in the definition of "statute of limitation", at the end, there shall be inserted the words—

> "and, in a case to which section 1(1) of the Foreign Limitation Periods Act 1982 applies, so much of the law of any country outside England and Wales as applies by virtue of that Act.".

EXPLANATORY NOTES

Clause 2

1. *Subsection (1)* gives effect to the recommendation as to public policy in paragraph 4.49 of the report. The question of public policy is considered in detail in paragraphs 4.35–4.50.

2. *Subsection (2)* implements the recommendation in the concluding words of paragraph 4.32, the reasons for which are explained in paragraphs 4.27–4.31. It creates an exception to the principle to which effect is given by clause 4(1)—namely, that in general the application of a foreign law as to limitation in accordance with clause 1(1) includes any provisions of that foreign law which relate to the suspension of the running of time. This subsection, however, excludes the operation of that general principle in the case of a suspensive provision relating to the absence of a party from a specified country or jurisdiction.

3. *Subsection (3)* implements the recommendation in paragraph 4.57 of the report. The reasons why the provisions of the Limitation (Enemies and War Prisoners) Act 1945 are extended by this subsection to the case where a foreign limitation period is applied (under clause 1(1) of the Bill) appear in paragraph 4.56.

Foreign judgments on limitation points.

3. Where a court in any country outside England and Wales has determined any matter wholly or partly by reference to the law of that or any other country (including England and Wales) relating to limitation, then, for the purposes of the law relating to the effect to be given in England and Wales to that determination, that court shall, to the extent that it has so determined the matter, be deemed to have determined it on its merits.

Clause 3

This clause implements the recommendation in paragraph 4.71 of the report. Detailed consideration of the matter appears in paragraphs 4.58–4.70 under the heading "Foreign judgments". The clause has been formulated in terms which make clear that its ambit extends to cases where a foreign judgment was based upon the application by the foreign court of a law other than that of its own country (see paragraphs 4.68–4.70), even where the foreign court applied the law of England and Wales (see paragraph 4.70).

Meaning of law relating to limitation.

4.—(1) Subject to subsection (3) below, references in this Act to the law of any country (including England and Wales) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a period of limitation applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include—

(*a*) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period; and

(*b*) a reference, where under that law there is no period of limitation which is so applicable, to the rule that such proceedings may be brought within an indefinite period.

(2) In subsection (1) above "relevant law", in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country.

(3) References in this Act to the law of England and Wales relating to limitation shall not include the rules by virtue of which a court may, in the exercise of any discretion, refuse equitable relief on the grounds of acquiescence or otherwise; but, in applying those rules to a case in relation to which the law of any country outside England and Wales is applicable by virtue of section 1(1)(*a*) above but does not provide for a limitation period that has expired, a court in England and Wales shall have regard, in particular, to the provisions of the law that is so applicable.

EXPLANATORY NOTES

Clause 4

1. *Subsections (1) and (2)* implement, so far as the law of a country other than England and Wales is concerned, the recommendation in the earlier part of paragraph 4.25 of the report, the reason for which is explained in the earlier part of paragraph 4.24. Paragraph *(a)* of *subsection (1)*, part of which gives effect also to the recommendation in the earlier part of paragraph 4.32, does not extend to provisions of a foreign law that suspend the running of time while a party is outside a specified country or jurisdiction: see clause 2(2) and paragraph 2 of the explanatory notes to that clause.

2. The first part of *subsection (3)* incorporates the policy concerning equitable remedies, which is explained in paragraph 4.54 of the report, and the latter part of the subsection implements the qualification of that policy recommended in the concluding sentence of that paragraph.

Application of Act to arbitrations.
1980 c. 58.

5. The references to any other limitation enactment in section 34 of the Limitation Act 1980 (application of limitation enactments to arbitration) include references to sections 1, 2 and 4 of this Act; and, accordingly, in subsection (5) of the said section 34, the reference to the time prescribed by a limitation enactment has effect for the purposes of any case to which section 1 above applies as a reference to the limitation period (if any) applicable by virtue of section 1 above.

EXPLANATORY NOTES

Clause 5

1. This clause applies the Bill to arbitration proceedings. It specifies the *terminus ad quem* in relation to the application in such proceedings of a period of limitation prescribed by a foreign law, and implements the recommendation in paragraph 4.23 of the report: the point is explained in paragraphs 4.21–4.22.

2. Section 34(5) of the Limitation Act 1980, to which the latter part of the clause makes specific reference, empowers the High Court, when ordering that an award should be set aside or that an arbitration should cease to have effect, to order in addition that the period between the commencement of the arbitration and the date of the order of the court be excluded "in computing the time prescribed by this Act *or by any other limitation enactment*. . . ." (emphasis added.) This clause applies that subsection by designating clause 1 of this Bill as falling within the scope of the italicised words.

Application to Crown.

6.—(1) This Act applies in relation to any action or proceedings by or against the Crown as it applies in relation to actions and proceedings to which the Crown is not a party.

(2) For the purposes of this section references to an action or proceedings by or against the Crown include references to—

(*a*) any action or proceedings by or against Her Majesty in right of the Duchy of Lancaster;

(*b*) any action or proceedings by or against any Government department or any officer of the Crown as such or any person acting on behalf of the Crown;

(*c*) any action or proceedings by or against the Duke of Cornwall.

EXPLANATORY NOTES

Clause 6

This clause provides that the Bill should apply to the Crown, to which (subject to exceptions that are immaterial in this context) the Limitation Act 1980 also applies.

Short title, commencement and extent.

7.—(1) This Act may be cited as the Foreign Limitation Periods Act 1982.

(2) This Act shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint; and nothing in this Act shall affect any action or proceedings commenced in England and Wales before this Act comes into force.

(3) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 7

Subsection (2) provides for the Bill to be brought into force by order. It would not be practicable, for the following reason, for the Bill automatically to come into force on a specified date:

(i) Section 35 of the Limitation Act 1980 specifies the principles applicable to "new claims" in pending actions—namely, claims which are made by way of set-off or counterclaim or which involve the addition or substitution of a new cause of action or of a new party.

(ii) Section 35(3) of that Act provides that in general the court should not allow a new claim to be made in the course of an action after the expiry of a time limit in the Act which would affect a new action to enforce that claim. However, provision is made for certain exceptions to that general principle and, in particular, for exceptions to be created by rules of court. The relevant rules of court (S.I. 1981, No. 562) have been formulated in terms of the English periods of limitation under the Act.

(iii) Under the Bill section 35 of the 1980 Act will extend to foreign periods of limitation applied by virtue of clause 1(1)(*a*). It would therefore appear to be necessary for appropriate rules of court to be made in relation to such foreign periods of limitation.

(iv) In practice those rules will have to be prepared before the provisions of the Bill come into force in order to be ready for promulgation with effect from the same date.

APPENDIX B

List of persons and organisations who sent comments on Working Paper No. 75

Association of British Chambers of Commerce.

British Insurance Association.

City of London Solicitors' Company.

Institute of Law Research and Law Reform, Alberta, Canada.

Law Reform Commission of British Columbia, Canada.

Mr. D. L. Taylor.

Lord Chancellor's Department.

*The Law Society.

Dr. F. A. Mann, C.B.E.

Mr. E. G. Nugee, T.D., Q.C.

*Senate of the Inns of Court and the Bar.

Society of Conservative Lawyers, whose comment was prepared on their behalf by Mr. Claud G. Allen.

Professor P. R. H. Webb.

*The Senate of the Inns of Court and the Bar and The Law Society sent a joint Comment, which mainly comprised memoranda prepared severally by:

Mr. James E. Bullen ;

Mr. David Donaldson ; and

Mr. Lawrence Collins.

APPENDIX C

List of persons and organisations who sent comments on the Scottish Law Commission's Consultation Paper on Prescription and Limitation in Private International Law

Dr. James Blaikie.
Professor E. M. Clive.
Mrs. Elizabeth B. Crawford.
The Rt. Hon. the Lord Emslie.
Mr. Ian Karsten.
The Law Society of Scotland.
Dr. R. D. Leslie.
Dr. F. A. Mann, C.B.E.
Scottish Law Agents Society.
Sir Ian Sinclair, K.C.M.G., Q.C.
Sheriff Principal Robert R. Taylor, Q.C.
Professor D. M. Walker, Q.C.

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