

LAW COMMISSION OF INDIA

193RD REPORT

ON

TRANSNATIONAL LITIGATION –
CONFLICT OF LAWS –
LAW OF LIMITATION

JUNE 2005

Justice
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Chairman

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June 7,

Dear Shri Bhradwaj ji,

I have great pleasure in forwarding the 193rd Report of the Law Commission on 'Transnational Litigation - Conflict of Laws - Law of Limitation'.

In the context of expansion of international trade and liberalization in the economic policies of our country, it has become necessary to take notice of the fundamental changes in the law of limitation in all common law countries. Traditionally, all the common-law countries have been treating the laws of limitation, even in the context of International Litigation as 'procedural' whereas in the civil law systems limitation laws are treated as 'substantive'. In the countries treating the limitation law as 'procedural', the legal remedy gets barred after the expiry of the period of limitation, gets barred while the right still remains notionally. But in the countries which treat the limitation law as 'substantive' the substantive right also gets extinguished in addition to the extinguishment of the judicial remedy.

In the international sphere where a contract is entered into or any other kind of legal obligations arises in a foreign country, and the judicial remedies are resorted to in another country, the distinction as to whether the law of limitation is 'procedural' or 'substantive' becomes important. For example, if the period of limitation applicable for vindicating a right in a

foreign country is substantive and the foreign party files an action in India, the lex fori will apply to the 'procedure' in India while the substantive rights will be governed by the substantive law of the foreign country in relation to that right. In as much as Indian law treats the law of limitation as procedural, the foreign party can, in case the judicial remedy has become barred in the foreign country, file an action in India, if the period of limitation is longer in India than in the foreign country. The only exception as contained in sec 11, where the Indian courts can refuse relief is where the foreign law has extinguished the contract and, in addition, all the parties were domiciled in the foreign country during the relevant period.

If the law of limitation remains 'procedural' as in India, it gives scope for 'forum shopping'. Over a period of fifty years, almost all leading writers on Private International Law including Cheshire and North emphasized the advantages that would accrue if the foreign law of limitation is treated as substantive, for then the foreign limitation period will apply even if an action is filed in another country. Forum shopping would stop. In fact, in UK and other common-law countries, the law has been amended by treating the foreign limitation law as substantive under the Foreign Limitation Periods Act, 1984. In Australia, today we have the Choice of Law (Limitation Periods) Act 1993 (Victoria), the Choice of Law (Limitation Periods) Act, 1993 (NSW), Choice of Law (Limitation Periods) Act, 1996 (Queensland) etc. The above statutes in Australia have accepted the view of the minority judgment of Mason CJ in McKain vs. R.W. Miller & Co (South Australia) Pty Ltd. (1992) 174 CLR page 1. New Zealand has also amended its Limitation Act, 1950 in 1996 by adding ss 28A to 28C treating the foreign law of limitation as substantive. The law in Canada was changed by Judge-made law in Tolofson vs. Jensen 1994(3) SC R 1022. In the United States, the Uniform Conflict of Laws Limitation Act, 1982 proposed that the foreign law of limitation be treated as substantive in the forum country and accordingly statutes were enacted in Arkansas, Colorado, Montana, North Dakota, Oregon and Washington. In some other States in US, the law was changed by judgments of Courts.

In view of the changes brought about in all common law jurisdictions bringing the law on par with civil law countries, the Law Commission has thought it necessary to omit the existing sec 11 of the 1963 Act and replace it by a new section. Further, the existing sec 11 deals only with law of limitation concerning contracts entered into abroad and leading authors in India have said that the Act must provide rules of limitation for all other

obligations arising abroad, such as those arising under torts. We have accepted this suggestion. Again the Indian law, in its sole exception, says under sec 11(2) that if the foreign 'contract gets extinguished' under the foreign law, and all parties are domiciled in the foreign country during the relevant period, the Indian Courts will not grant relief to the foreigner who files his suit here. Indian commentators have said that the requirement of domicile abroad is an anachronism and should be deleted. We have accepted this suggestion also. In fact, no country presently has such a provision. We are of the view that the foreign period of limitation should apply in India as substantive law and if that law says that the rights themselves are extinguished, that will also apply. We, however, propose to allow this subject to the provisions of ss 4 to 24 of the Indian Limitation Act. The proposed new sec 11 will apply to periods of limitation governing rights arising out of contracts entered in or any other kind of obligation arising in the State of Jammu & Kashmir or in any foreign country.

So far as execution of foreign decrees is concerned, in India, the principle underlying sec 11 has been applied as there is no specific section or article dealing with the subject. Hence a separate section is being introduced as sec 11A which will apply the principles underlying sec 11 (i.e. ss 4 to 12 too) and a new Art 136A is being proposed to be introduced under which in respect of execution of foreign decrees, (i.e. decrees passed by superior courts in 'reciprocating territories' as stated in sec 44A of Code of Civil Procedure, 1908), the period of limitation as stated in the foreign law for execution of its domestic decrees will apply in India and the commencement of the period will be the date of filing a certified copy thereof in the District Court as per sec 44A of the Code of Civil Procedure, 1908. So far as decrees passed within Jammu & Kashmir are concerned, the subject is covered by sec 43 of the Code of Civil Procedure, 1908 according to decided cases and we do not propose to disturb that position. The proposed Art. 136A will apply for execution of decrees passed by superior courts in 'reciprocating countries' as stated in the Explanation to sec 44A of the Code of Civil Procedure, 1908. Hence, decrees passed in the State of Jammu & Kashmir do not fall under proposed sec 11A.

We have also taken care to see that the proposed changes are prospective in the sense that the proposed sec 11, which applies to suits filed in India in respect of causes of action arising in the State of Jammu & Kashmir or in any foreign country, will not apply to causes of action which would have arisen before the date of commencement of the proposed

amending Act. Likewise, we have provided that the proposed sec 11A and new Art 136A will not apply to execution of decrees passed abroad in 'reciprocating territories' (as stated in sec 44A of the Code of Civil Procedure, 1908) before the date of commencement of the proposed amending Act.

With this important report, we propose to bring Indian law of limitation in relation to Transnational Disputes on par with the law in civil law countries and on par with the recent changes in UK and other common-law countries.

With regards,

Yours sincerely,

(Justice M. Jagannadha Rao)

Sri H.R. Bhardwaj
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Chapter I

Introductory

Since the Indian Limitation Act, 1963 was passed by Parliament over nearly forty-two years ago, there have been changes in the law of limitation concerning choice of law issues in Private International Law in all common law jurisdictions across the world. There has also been a tremendous momentum in international trade. With the opening up of our economy in 1991, different laws in force in India are being reviewed so as to conform to international trade practices and the changes in the law. The Indian Arbitration and Conciliation Act, 1996 among others is one such important piece of legislation.

A particular but very important aspect of the laws governing disputes arising in Transnational litigation is about the applicability of the law of limitation and the choice of law.

Brief History of the Indian Limitation statutes:

The Third Report of the Law Commission of India on 'Limitation Act, 1908' (1956) resulted in the repeal of the Limitation Act of 1908 and in the enactment of the present Act of 1963 which came into force w.e.f. 1.1.1964.

Going back into history briefly, we may state that before the year 1862, there was no law of limitation applicable to the whole of India. The

English law of limitation, as contained in 21 James I C and 4 Anne c 16(1) was adopted when the British established the Supreme Court of Judicature at Calcutta. So far as the Provincial Courts were concerned, they were initially governed by certain Regulations like the Bengal Regulation III (1793), which was extended to certain other provinces by Regulation VII (1795), Regulation II (1803) and Regulation II, 1805; the Regulation II of 1802 applied to Madras and Regulation I of 1800 and Regulation V of 1827 applied to Bombay. They were replaced by the Limitation Act I of 1845, then by Act XIII of 1848 and Act XI of 1859.

Then in 1871, the Limitation Act IX of 1871 was passed providing for the limitation of suits, appeals and certain applications to Courts and also providing for the acquisition of easements and the extinguishment of rights to land and hereditary offices. The Act IX of 1871 was replaced by Act XV of 1877 which provided for the extinguishment of rights not only to land and hereditary offices but also to any property including moveable property. It also defined 'easement' as including '*profits a prendre*'. That Act was replaced by the Act of 1908. The 1908 Act was amended from time to time.

The Third Report of the Law Commission of India resulted, as stated earlier, in the present Limitation Act of 1963, repealing the Act of 1908.

Prescription, acquisition and barring of remedies:

In the Law of Limitation, there are generally three distinct concepts, namely, prescription, acquisition and barring of judicial remedies.

Prescription:

The Act of 1963 deals with prescription, among other matters. It is well known that a law which prescribes a period of prescription extinguishes the title to the property at the end of a specified period rather than merely barring the judicial remedy. Such a provision so far as property, moveable and immoveable is concerned, is contained in sec 27 of the Act which reads as follows:

“Section 27. Extinguishment of right to property:

At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.”

In as much as there is to be no hiatus in the right to ownership of property, when the title to property of the previous owner is extinguished, it passes on to the possessor and his right to possession gets transformed into ownership. Section 27 applies to movable as well as to immovable property. Under Art 65 in the Schedule to the Act, a person in adverse possession of immovable property acquires title to the property. Such possession must be open and continuous and in defiance of the title of the real owner for twelve years so that the person can prescribe title by adverse possession. So far as Government property is concerned, Art. 112 prescribes a requirement of thirty years for prescribing title by adverse possession.

The principles of law evolved by the Courts also permits acquisition of limited rights by adverse possession. For example, where a person enters into possession as a usufructuary mortgagee under an unregistered mortgage deed, he will acquire the limited rights of a usufructuary mortgagee at the end of twelve years possession.

Acquisition of easementary rights:

So far as acquisition of easementary rights is concerned, sec 25 refers to the acquisition of such rights by prescription. Sec 25 states that where “the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption and for twenty years”, the said user acquires an easementary right on the property of another person. So far as acquisition of easementary right over property of Government is concerned, sec 25(3) requires thirty years enjoyment.

Barring of judicial remedies:

The Schedule to the Limitation Act, 1963 lists various Articles providing periods of limitation for suits and applications, as stated in the First Division (Parts I to X), Second Division and the Third Division (Parts I and II). At the expiry of the periods mentioned therein, the judicial remedy gets barred while the right still remains. However, the right cannot be enforced in a court of law after the expiry of the period. The sole exceptions are (i) sec 27 of the Act where the right itself gets extinguished

in regard to property, moveable and immovable and (ii) sec 25, where a right of easement is acquired over another's property.

Section 3 of the Act states that, subject to the provisions contained in ss. 4 to 24 (inclusive), every suit instituted or appeal preferred and applications made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. The effect of sec 3 (excluding the cases of acquisition of easementary rights under sec 25 and extinguishment of title to property under sec 27), is that at the expiry of the period mentioned in the Schedule in respect of the particular class of proceeding, the judicial remedy gets barred but the right still exists. The position was similar in England before 1984.

Distinction between extinguishing a right and barring the remedy:

That takes us to the well known distinction in common law between the barring of a remedy and the extinguishment of a right. If sec 3 bars the right to the remedy in the manner stated above, what happens at the end of the period is that the right does not get extinguished but the remedy to take legal proceedings in respect of that right becomes barred. But in the case of 'property' falling within sec 27 because of the express provisions, not only does the remedy to recover the property gets barred but the right or title in the property itself of the owner gets extinguished. Under sec 25 a right to easement is a right acquired in another person's property. But, though under sec 3 the judicial remedy gets barred, still a defence based on the right so barred is not precluded by sec 3 and hence a defence based on the right can still be set up.

Yet another significance of sec 3 is that the Court has to apply the law of limitation as provided in the Schedule taking judicial notice thereof, irrespective of whether a plea of limitation is raised by the defendant or opposite party in the defence or not.

Procedural law or substantive law:

We shall now refer to another important but well-known principle which is crucial to the subject matter of this Report. In England and in India and in several common law countries, for a long time the law of limitation has been treated as procedural law and not as substantive law. A 'procedural law' is one which deals with the procedure in Courts which has to be followed by the parties to seek vindication of their rights. The rights which they seek to vindicate in the Court through the said procedure are the substantive rights. We shall be elaborating these aspects in the succeeding chapters. A procedural law whenever made, applies to all pending proceedings unless its application is restricted to apply prospectively. On the other hand, a substantive law is always prospective in its application unless the legislature gives it retrospective effect. While it is a general principle of law that no statute shall be construed so as to have retrospective effect unless its language is such as plainly to require such a construction, that principle has not been applied to procedural statutes. The reason is that while substantive rights vested in persons cannot be interfered with by legislation except by clear language or by necessary implication, the position with regard to procedural law, is different. This is because nobody

can have a vested right in any particular form, much less in an older form, of procedure.

It is in the above context that sec 11 of the Limitation Act, 1963, makes special provision in respect of suits based in contracts entered into in Jammu and Kashmir or outside the territories of India and we shall refer to it in Chapter II and will be later making our proposals in Chapter IV for substituting new provisions in the light of contemporary developments which we will refer in Chapter III.

Chapter II

Section 11 of the Limitation Act (Suits on contracts entered into outside the territories to which the Act extends)

The Limitation Act, 1963 extends to the whole of India except the State of Jammu and Kashmir. But, sec 11 makes special provision for ‘suits on contracts entered into outside the territories to which the Act extends’.

Section 11 reads as follows:

“Section 11: (1) Suits instituted in the territories to which this Act extends on contracts entered into in the State of Jammu and Kashmir or in a foreign country shall be subject to the rules of limitation contained in this Act.

(2) No rule of limitation in force in the State of Jammu and Kashmir or in a foreign country shall be a defence to a suit instituted in the said territories on a contract entered into in that State or in a foreign country unless -

- (a) the rule has extinguished the contract; and
- (b) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.”

Section 11(1) and 2(a) embody the principles in vogue in England at the time of passing of this Act in 1963. At that time, the law in England was that in respect of actions filed in England on the basis of contracts entered into abroad (i.e. outside England), the law of limitation being procedural,

the English Law of Limitation applied and not the law of limitation of the country where the contract was entered into. There was, however, one significant exception, namely, that if the foreign law of limitation had itself extinguished the right in the foreign country, then English Courts would apply the foreign law and hold that the right was also extinguished even if the action was filed in England within the period of limitation prescribed by English law. This exception applied in India also.

In Huber vs. Steiner (1835)2 Bing (NC) 202 (210-212), Tyndal CJ observed as follows:

“So much of the law as affects the rights and merit of the contract, all that relates ‘ad litis deisionem’ is adopted from the foreign country, so much of the law as affects the remedy only all that relates ‘ad litis ordinationem’, is taken from the ‘lex fori’ of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division and is governed by the law of the country where the action is brought and not by the lex loci contractus is evident from many authorities Such being the general rule of law, a distinction has been sought to be engrafted on it by the learned counsel for the defendant that ‘where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself, ipso facto, and declare it a nullity after the lapse of the prescribed period, that in such cases the statute may be set up in any other country to which the parties remove, by way of extinguishment’. It does indeed appear but reasonable that the part of the lex loci contractus which declares the

contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded by the foreign country as the part of the lex loci contractus which gives life to and regulates the construction of the contract.”

In the above case in Huber vs. Steiner, an action was instituted in the English Court of Common Pleas on a promissory note governed by French law and the defence was that the action was barred by the French law of prescription. The Court held that the effect of the French rule was only to bar the remedy and that the French rule was no defence to the English action. The position, according to the exception laid down by Tyndal CJ would be that the English Courts would refuse relief if the French law went further and extinguished the claim or title itself or declared the contract a nullity after the prescribed period.

The above decision has been followed in several cases in India, see for example: Muthukanni v. Andappa: AIR 1955 Mad 96 (FB).

Section 11 lays down the same principle as in Huber v. Steiner. Subsection (1) of sec 11 states that in respect of contracts entered into either in Jammu and Kashmir or in a foreign country, if an action by suit is brought in India (i.e. other than Jammu & Kashmir), then the law of limitation that is applicable to the case is not the law applicable in the country where the contract is entered into but the law that applies is the Indian Limitation Act. Under subsection (2) of sec 11, the defendant cannot rely on the law of limitation applicable in Jammu & Kashmir or applicable in the foreign country except – (1) where the rule of Jammu & Kashmir or

of the foreign country extinguished the contract and (2) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.

It has been accepted that though the section applies to suits only, the principle on which it is based is applicable to execution applications also for enforcing a foreign judgment. In other words, the period of limitation applicable according to Indian Limitation Act, 1963 will apply unless the exception in sec. 11(2)(b) is attracted.

It appears that, till recently, in all the Commonwealth countries governed by the common law, the law of limitation has been treated as procedural and if an action is filed in a country on the basis of a cause which occurred in another country, the law of limitation that is applicable is the law of the country of the forum and the law of the country of the cause is not applied, unless that law stated that at the expiry of the period, the right itself got extinguished. But, in civil law countries, the law has been that limitation statutes are substantive and the right as well as the remedy would get extinguished at the end of the period and hence the law of limitation of the lex fori would not apply and the limitation law of the country of the cause would apply.

We shall be discussing in Chapter III how the common law countries have recently brought about a change by treating the law of limitation as substantive in relation to transnational litigation which involves more than one country, thus making the foreign law applicable to actions instituted in common law countries.

Chapter III

Recent developments in Private International Law in

Common law countries:.

From Procedural to Substantive

According to Cheshire and North's Private Institutional Law (13th Ed. 1999)(pp 67-68), in any action involving the application of a foreign law, the characterization of rules of law as substantive or procedural is crucial. They say:

“One of the eternal truths of every system of private international law is that the distinction must be made between the substance and procedure, between the right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum’. (Huber vs. Steiner (1835) Bing NC 202; Chaplin vs. Boys: 1971. A.C. 356).

The reason for the distinction between substantive and procedural law is that the forum Court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the Court, and forum judges understand them. They aid the forum court to “administer (its) machinery as distinguished from its product”. (Poyser vs. Minors (1881) 7 Q.B.D. 329 (at p 333)) per Lusl L.J.)

Chestire and North also say (ibid p 68): “The field of procedure constitutes perhaps the most technical part of any legal system, and it comprises many rules that would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines. A party to litigation in England must take the law of procedure as he finds it. He cannot by virtue of some rule in his own country enjoy greater advantages than other parties here; neither must he be deprived of any advantages that English law may confer upon a litigant in the particular forum of action”.

Chestire and North (ibid pp 70-72) further discuss the views of jurists as to the manner in which the distinction between procedure and substance has to be made and point out that the matter must be examined on a case by case basis and in relation to particular matters of procedure. So far as routine matters like service of process, form that the action must take and whether any special procedure is permissible, the title of the action (e.g. by what person and against what persons it should be brought); the competency of witnesses and question as to the admissibility of evidence, the respective functions of Judge and Jury; the right of appeal, and (according to some writers) the burden of proof – these are clearly procedural matters. The authors then discuss various other specific matters to find out if they belong to the sphere of procedural or substantive law under different headings (A) to (H). Under heading (A), they deal with the law of limitation with which we are presently concerned.

How English law changed in 1984:

Until 1984, English law stated that the statutes of limitation, if they merely specified a certain time after which rights could not be enforced by action, they affected procedure and not substance. Hence, the forum law would apply the local law of limitation. (Black-Clawson International Ltd. vs. Papierwerke Waldhof – Aschaffenburg AG) (1975 AC 591 at 630). M Chestire and North (ibid p 73) then refer to the only exception in the pre-1984 law as follows:

“Where, however, it could be shown that the effect of a statute of limitation if the foreign applicable law was not just to bar the other plaintiff’s remedy but also to extinguish his cause of action, (examples are provided by acquisitive prescription under the English Prescription Act, 1832 or express extinction of the former owners’ title under the UK Limitation Act 1980 ss 3 & 17), then the English Courts would be prepared to regard the foreign rule as substantive and to be applied here”. (Harris vs. Quine) (1869) LR 4.Q.B. 653 (656).

The above exception was also contained in Huber v. Steiner, already referred to. Then the authors state that the common law rule has been criticised in a number of common law jurisdictions (British Law Commission Report No. 114 (1982) paras 3.3 to 3.8), and that the said rule tends to have no counterpart in civil law systems which usually treat statutes of limitation as substantive. (British Law Commission Working Paper No. 75 (1980) (paras 25-26)). They say that furthermore, the

Contracts (Applicable Law) Act, 1990, implementing the European Community Convention on the Law Applicable to Contractual Obligations (1980) provide that the law which governs the essential validity of a contract is to govern “the various ways of extinguishing obligations, and prescription and limitation of actions”. In 1982, in its Report No.114, the British Law Commission concluded that “there is a clear case for the reform of the present English rule”, and their recommendations formed the basis of the Foreign Limitation Periods Act, 1984 (see Carter (1985), 101 Law Quarterly Review 68 and Stone (1985) LMCLQ. 497).

The general principle adopted in the 1984 Act is that it abandons the common law approach which prefers the application of the domestic law of limitation. Now, the English Courts have to apply the law which governs the substantive issue according to English choice of law rules, and this new approach is applied to both actions and arbitrations in England. The authors, Cheshire and North welcome the change stating as follows: (ibid p.74)

“There is, of course, a significant difference between a rule under which a claim is to be held to be statute-barred in England if statute barred under the governing law, a reform which seems widely to be welcomed and a further rule that, if the claim is not statute barred abroad, it must be allowed in England.”

Of course, if the foreign period is too long, then the statute of 1984 permits such a period not to be applied on grounds of public policy.

In the article ‘The Foreign Limitation Periods Act, 1984’ above referred to by Mr. P.B. Carter (1985)(101 Law Quarterly Review pp 68-78), the author states (p.68):

“The tradition of English private international law is that issues of limitation of actions are to be classified as procedural. Thus the rules of English domestic law limiting the time within which a remedy may be sought in an English Court have been applicable even though the law governing substantive issues in a case has been the law of some foreign country. Conversely, actions have been entertained in England although statute-barred under the law governing substantive issues, provided they were not also statute-barred under English domestic law.”

He says that in adopting the above approach, the tradition of the common law has been in marked contrast to that of many civil law countries, and few judges or jurists have been able (or seemingly have even tried) to justify it. After referring to Tindal CJ’s observations in Huber vs. Steiner (1835) 2 Bing N.C. 202 (already referred to) and after stating that the distinction of the law of limitation as procedural is not based on any clear logic, Carter says: ‘An action, which is statute-barred (whether by way of extinction of the right or by way of extinction of the remedy) under the lex causae (of another country), ought not to be entertained in England’. Or else, we would be inviting ‘forum shopping’ by plaintiff seeking to bring statute-barred foreign actions into England. The law, therefore, needs reform and he says that that has been achieved by the (UK) Foreign Limitation Periods Act, 1984.

We find that several jurists and judges have stated that in the matter of transnational litigation, there is need to change the common law concepts so that “forum shopping” may be eliminated. In some countries, the Courts have stepped in to alter the principle by judge-made law while in some other countries where the Courts differed or were stuck with the common law position, legislatures intervened to change the applicable principles. Among common law countries, the UK Act of 1984 is perhaps one of the earliest to change the position mandating the limitation law of the country where the cause of action accrued to be applied, when an action was filed in United Kingdom.

The relevant provisions of the English Act of 1984, as contained in sec. 1 thereof, read 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 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.

(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.

(5) In this section “law”, in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of England and Wales, this Act.”

We are not referring to the provisions of ss. 2 to 7 as they are not necessary for our purpose.

Australia: Mckain v. R.W. Miller & Co (South Australia) Pty Ltd: (1992) 174 CLRI:

In Australia, in Breavington vs. Godleman (1988) 169 CLR 41, the majority of the Judges who decided the case, deviated from common law

and held that the forum law was not applicable to determine liability for torts committed in Australia. This view, however, suffered reversal at the hands of the majority in Mckain vs. R.W.Miller and Co. (South Australia) Pty Ltd (1992) Vol. 174 CLR 1. In that case, a tort was allegedly committed in South Australia, but an action was filed in New South Wales because the action stood barred in the former State and was alive in the latter. The majority retained the common law rule and held, in a conservative ruling, that the lex fori in New South Wales applied and the defendant could not plead that the action was barred in South Australia. (In order to rectify this position, most of the States in Australia have since brought about statutes on lines with the English Act of 1984). The minority judgment of Mason CJ in the above case which sought to apply the lex causae is illuminating. After stating that matters of substance should be governed by the lex causae and not the original common law principle that limitation statutes bar the remedy and do not extinguish the underlying right, Mason CJ stated that the common law ‘distinction has been described as both artificial and semantic’. He observed:

“The distinction has been described as both artificial and semantic. Cheshire and North, *Private International Law*, 11th ed (1987) p 80; Mcleod, *The Conflict of Laws* (1983), p 215; Sykes and Pryles (*Australian Private International Law*, 3rd ed, 1991, p 258) where it is said that the distinction is not meaningful. Leflar observes that ‘a right for which the legal remedy is barred is not much of a right’ (Leflar, McDougal and Felix, *American Conflicts Law* 4th ed., 1986, p 349). To a similar effect is Lorenzen’s observation that ‘a right which can be enforced no longer by an action at law is shorn of its

most valuable attribute’. (1919) 28 Yale Law Journal, p 492 at p 496)”.

Mason CJ referred to the law in the United States, where the Supreme Court took the position that with the remedy which became barred, the underlying right too vanished. In The Harrisburg (1886) 119 US 199 (p 214) it said:

“The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.... Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.”

While the historical preference to the lex fori was based on the need to enable judges to decide cases in accordance with the law of the country where the action was initiated, because they were more familiar with the procedure of their own country rather than the intricacies of the procedure in the country where the cause of action accrued,- a principle quite pragmatic, the real issue here is whether to treat the law of limitation of another country as procedural and ignore it. That has become the central issue for jurists and Judges. According to Mason CJ, treating several matters as ‘procedural’ in its widest sense was a matter of history in England and was the relic of times where ‘the importance of international judicial comity may not have been given the same recognition it now-a-days commends and where the notion of “forum-shopping” was not considered as

objectionable a practice as it now is'. He points out that in contrast to the first edition of Dicey and Morris, *Conflict of Laws*, (1890) (p 712) where the crude meaning to the word 'procedure' was advocated, the change became discernible in the eleventh edition (1987, Vol 1 p. 173) of that book where it was acknowledged that the practice of giving a broad scope to 'procedure' has fallen into disfavour because of its tendency to frustrate the purposes of choice of law rules. Evidence of this change was recognized by the British Law Commission in its Report No. 114 (1982) on 'Classification of Limitation in Private International Law', pp 6-11. This came also to be recognized in the English Foreign Limitation Periods Act 1984 (UK), sec 23A of the Prescription and Limitation (Scotland) Act, 1973 (Scot) and Art 10(1)(d) of the EEC Convention on the Law Applicable to Contractual Obligations. The basis of the rule was that the choice of rules should prevail and not be frustrated by forum shopping. Stale claims have to be prevented and there is need to relieve the defendants from the uncertainty that such claims may be brought against them. Injustice may result where, in the circumstances of a case, the limitation period of the forum is longer than that allowed by the law of the cause (Wolff, *Private International Law*, 2nd ed. (1950) p 232-233; British Law Commission, (op. cit. p 18). Mason CJ says that several matters relating to heads of damages, limiting damages etc. are now treated as substantive and not procedural. The principles are expanding the change from procedural to substantive law. It follows that, even if it is correct to say that a statute of limitation only affects the availability or otherwise of the remedy, that circumstance, of itself, should not dictate that statutes of limitation should be treated as procedural. Logic based on remedy has been criticized by Falconbridge in his 'Essays on the Conflicting Laws', 2nd ed. (1954)(p 308) as follows:

“On principle, it is difficult to understand why a rule of law which denies a right of action should be construed as procedural. Even if a right of action is sometimes regarded as in the nature of a remedy, remedy is a wider concept than procedure.”

Mere distinction between barring the remedy and extinguishing the right should not lead to law of limitation being classified as procedural. Mason CJ quotes the reservation of Story (Conflict and Laws 7th ed. 1872) wherein that jurist, in spite of his leaning towards characterizing limitation as part of procedure, agrees with Baldous that the statute of limitation or prescription ‘does go to the decision of the cause’. But that limitation does not go to ‘original merits’. This logic ignores the problems of ‘forum shopping’. Mason CJ observed:

“A dividing line between substance and procedure which lends itself to manipulations in this way is not in harmony with the concerted effort demonstrated by Courts in other areas to guard against forum shopping.”

Mason CJ refers to a statement by Prof. Cook (‘Substance and Procedure’ in Conflict of Laws) (1933), 42 Yale Law Journal 333 (pp 343-344) that indeed the line between substance and procedure does not exist, to be discovered merely by logic or analysis but the difference has to be drawn by answer to the question: “How far can the Court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?” The learned Judge says that ‘in the case of statutes

of limitation, it is difficult to see what inconvenience or hindrance would be caused to a forum Court in giving effect to the limitation period prescribed by the law of the cause. He says further that: “If a statute of limitation forming part of the law of the cause is classified as ‘substantive’, the forum Court will apply to it in any event”. Thus, there is no inconvenience in applying the foreign limitation period or the foreign substantive limitation law. Indeed, that is the reason why several jurists have said that ‘procedure’ is more appropriately described by the words ‘machinery of litigation’ or ‘mechanism of litigation’.

We are in agreement with the views so strongly expressed by Mason CJ in Mckain.

In Australia, the Queensland Law Reform Commission in its Report on Review of the Limitation of Actions Act 1974 (QLD) (Report No.52) (Sept., 1998) (Chapter 3), after stating that limitation statutes are treated as procedural in some countries, refers to the principle of substantive law as follows:

“Substantive

Some limitation provisions generally operate to automatically extinguish the right on which a claim is based, once the limitation period for bringing proceedings to enforce the right has expired.

The reason for enacting legislation which has this effect is that, given that the purpose of a limitation statute is to prevent claimants from suing after the specified period of time has elapsed, it is “both more realistic and theoretically sound” for the legislation to provide

that the right no longer exists after the limitation period has expired, rather than to merely ban the remedy (Ontario Law Reform Commission, Report on Limitation of Actions (1969) p.126-127). It is considered undesirable, by leaving a claim in existence without the support of a Court ordered remedy, “to leave settled expectations open for ever afterwards to disturbance by accident or by contrivance” (New South Wales Law Reform Commission, Report No.3: Report on the Limitation of Actions, Oct. 1967, para 14).”

In regard to the choice of law Rules, the Queensland Commission referred to the following statutes where in respect of action in the forum countries in Australian States and Territories, the limitation law of the other jurisdiction will apply and will be treated as part of the substantive law of the country where the cause of action arose:

- (1) Sec. 5 of Limitation Act, 1985 (ACT);
- (2) Sec. 5 of Choice of Law (Limitation Periods) Act 1993 (NSW);
- (3) Sec. 78(2) of the Limitation Act, 1969 (NSW);
- (4) Sec. 5 of the Choice of Law (Limitation Periods) Act, 1994 (Northern Territory);
- (5) Sec. 5 of the Choice of Law (Limitation Periods) Act, 1996 (Queensland) and sec. 43A(2) of the Limitation of Actions Act, 1974 (Queensland);
- (6) Sec. 38A of the Limitation of Actions Act, 1936 (South Australia);
- (7) Sec. 32C of the Limitation Act, 1974 (Tasmania);
- (8) Sec. 5 of the Choice of Law (Limitation Periods) Act, 1993 (Victoria);

- (9) Sec. 5 of the Choice of Law (Limitation Periods) Act, 1994 (Western Australia).

The Qld Law Reform Commission says:

“In disputes involving interjurisdictional elements, the Court determining the dispute will apply its own procedural law, but will apply the substantive law which governs the dispute according to the principles of private international law. As a result, there has been extensive litigation in relation to the classification of potentially applicable limitation law.

The question of choice of law rules has now been dealt with by a cooperative approach involving all Australian jurisdictions. Each State and Territory agreed to enact legislation providing that, if the substantive law of another Australian jurisdiction governs a claim before a Court within the enacting jurisdiction, a limitation law of that other jurisdiction is to be regarded as part of that jurisdiction’s substantive law and applied accordingly.”

As an example, we shall refer to the provisions of the Choice of Law (Limitation Periods) Act (Victoria) 1993:

“Sec.1: Purpose: The purpose of this Act is to make provision about limitation periods for choice of law purposes.

Sec.2: Commencement: This Act comes into operation on the day on which it receives the Royal Assent.

Sec.3: Definitions:

In this Act –

‘Court’ includes arbitrator;

‘limitation law’ means a law that provides for the limitation of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on or the arbitration of, the claim is commenced.

Sec.4: Application:

This Act extends to a cause of action that arose before the commencement of this section but does not apply to proceeding instituted before the commencement of this section.

Sec.5: Characterisation of limitation laws:

If the substantive law of another place being another State, a Territory or New Zealand, is to govern a claim before a Court of this State, a limitation law of that place is to be regarded as part of that substantive law and applied accordingly by the Court.

Sec.6: Exercise of discretion under limitation law:

If a Court of the State exercises a discretion conferred under a limitation law of a place being another State, a Territory or New Zealand, that discretion, as far as practicable, is to be exercised in comparable cases by the Courts of that place.”

It is clear that these Australian statutes have accepted the minority view of Mason CJ and other Judges who agreed with him in the case of McKain v. R.W. Miller and Company (South Australia) Pty, Limited (1992): 174 CLR1.

So far as provisions of the limitation provisions other than those relating to choice of law are concerned, the Queensland Law Commission in its Report 53 (1998) recommended that the statutory law must reflect the common law rules only and must only bar the remedy and not extinguish the right itself.

New Zealand:

In New Zealand, the foreign law of limitation is treated as substantive since 1996. The N.Z. Limitation Act, 1950 has been amended in 1996 and Part 2A consisting of ss. 28A, 28B, 28C, under the heading ‘Application of limitation law of overseas countries’, has been inserted. We shall refer to the new section in this Part 2A in detail. Section 28A deals with ‘Interpretation’. It says that in that Part (i.e. Part 2A), the word ‘country’ includes a State, territory, province or other part of a country. The word ‘Limitation Law’ is defined, in relation to a matter, as ‘a law that limits or excludes liability or bars a right to bring proceedings or to have the matter determined by arbitration by reference to the time when proceedings or an arbitration in respect of the matter are commenced; and includes a law that provides that proceedings in respect of the matter may be commenced within an indefinite period’. Sec. 28B and 28C read as follows:

“Section 28B: Application of this Part of this Act:

- (1) This Part of this Act applies to the Commonwealth of Australia or any State or Territory of Australia, the United Kingdom, and to

any country to which this Part of this Act is declared to apply by an Order in Council made under subsection (2) of this section.

- (2) The Governor-General may from time to time, by Order in Council, declare that this Part of this Act applies to a country specified in the Order.
- (3) In the case of a country that is responsible for the international relations of a territory, an Order in Council under subsection (2) of this section may apply to the country and all or some of those territories.

Section 28C: Characterisation of Limitation Law:

- (1) Where the substantive law of a country to which this Part of the Act applies, is to be applied in proceedings before a New Zealand Court or in an arbitration, the limitation law of that country is part of the substantive law of that country and must be applied accordingly.
- (2) If, in any case to which subsection (1) of this section applies, a New Zealand Court or an arbitrator exercises a discretion under the limitation law of another country, that discretion, so far as practicable, must be exercised in the manner in which it is exercised in that other country.”

This legislation is on the same lines as in UK and Australia.

Canada: Tolofson v. Jensen: (1994) (3) SCR 1022:

The Canadian Supreme Court did not wait for the change by the legislature and in the leading judgment, in Tolofson vs. Jensen 1994(3) SCR 1022, the Court made strides in the direction of treating the law of limitation of the foreign country as part of the substantive law thereby requiring the Court in which the action is filed to apply the law of limitation of the country of the cause.

La Forest J starts stating that the distinction between substantive and procedural laws no doubt remains in private international law. While ‘The substantive rights of the parties may be governed by the foreign law but all matters appertaining to procedure are governed exclusively by the law of the forum’. The crucial question is how do we distinguish a substantive law from a procedural one. When does the question of inconvenience in applying the foreign law come in? After referring to the historical origins of the rule in England from 1686 treating statutes of limitation as procedural and barring the remedy while keeping the right alive, La Forest J states that this is a ‘mystified view’. The learned Judge states:

“Such reasoning mystified continental writers such as M. Jean Michel (La Prescription Liberatoire en Droit International Prive, Thesis, University of Paris, 1911, paraphrased in Ailes, (1933) 31 Mich L Rev 474 or 494) who contended that the ‘distinction is a specious one, turning upon the language rather than upon the sense of limitation acts...’ In the continental view, all statutes of limitation destroy substantive rights.”

The learned Judge, while welcoming the continental approach stated that Canadian courts have begun to shatter the ‘mystique’ which rested upon the notion that statutes of limitation are directed against the remedy and not the right. He pointed out that the Privy Council in the judgment of Lord Brightman in Yew Bon Tew vs. Kenderaan Bas Mara: 1983(1) AC 553 (PC) at 563 had, in fact, accepted that at the termination of the limitation period, the defendant acquires a vested right even though it arises under an act which is procedural but that the Privy Council “continued to cling to the old English view that statutes of limitation are procedural. Nonetheless, the case seems to me to demonstrate the lack of substance in the approach. The British Parliament obviously thought so. The following year, the rule was swept away by legislation: The Foreign Limitation Periods Act, 1984 (UK) c. 16, declared that foreign limitation periods are substantive.”

La Forest J then declared that it was not necessary to wait for legislation. He said:

“I do not think it is necessary to await legislation to do away with the rule in conflict of laws cases. The principal justification for the rule, preferring the lex fori over the lex loci delicti, we saw, has been displaced in this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for sometime on the basis of relevant policy considerations. I think this court should continue this trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I stated earlier, the purpose of substantive/procedural classification is to

determine which rules will make the machinery of the Court run smoothly as distinguished from those determination of the rights of both parties.”

The Supreme Court approved the trend started by Stratton CJ NB in Clerk vs. Naqvi (1990)99 N.B.R. (2nd) 271(CA) where, after referring to Yew Ban Tew (PC), the judge had held (p 275) that the limitation period of Nova Scotia which was one year was substantive and the action commenced in New Brunswick beyond one year was barred as the Nova Scotia rule applied. La Forest J concluded that ‘if this is not the law, the courts would be inviting “forum shopping” that is to be avoided if we are to attain the consistency of result in an effective system of conflict of laws should seek to foster’.

USA:

We have already referred to the decision of the US Supreme Court in The Harrisburg (1886) 119 US 199 (214) (see discussion under Australia above).

As to American law, we shall refer to an article by Prof. William Tetley, Q.C. (Faculty of Law, McGill University, Montreal, Quebec, Canada) who has, in fact, written several articles on the subject. In the article ‘A Canadian looks at American conflict of law Theory and Practice, Especially in the light of American Legal and Social Systems’ (1999) 38 Col. J. Transnational Law 299-373), he states that the American Law ‘remains uncertain’ and he concludes:

“By comparison, a Canadian Court deciding a similar case arising in Canada, under the Canadian Conflict Rule laid down by the Supreme Court of Canada in Tolofson vs. Jensen, would almost apply the lex loci delicti, including the time limitation of the province where the tort occurred, regardless of the resulting outcome. Such an approach would not assist the plaintiff, but would promote greater certainty of law than is presently formed in some American conflict cases. On the other hand, the need to implement corrective justice is not as urgent a matter in Canada as in United States, because Canada, with its stronger social security net, affords injured parties more opportunities for indemnification under legislation reflecting a distributive justice model.”

He finally sums up:

“It is noteworthy that among the major developments in US Conflict of Laws in 1997 was the abandonment by three US State Supreme Courts(those in Michigan, Rhode Island and West Virginia) of the traditional position that statutes of limitation are procedural. Six other States (Arkansas, Colorado, Montana, North Dakota, Oregon and Washington) have enacted the Uniform Conflict of Laws-Limitation Act. Eight other States have done so by other legislation or judicial decisions in recent years”.

In other words, 17 States had, by 1999, distanced themselves from treating limitation laws as procedural. The judgments of the State Supreme

Courts referred to by Prof. Tetley in the above passage are Sutherland vs. Kennington Truck Service Ltd: 562 N.W. 2d 466 (Mich, 1997); McKinney vs. Fairchild International Inc 487 S.E. 2d 913)(West Va); Cribb vs. Augustin 696 A 2d 285 (Rh I.1997). The last ‘eight other States’ referred to by him are Arizona, California, Florida, Idaho, Louisiana, Massachusetts, Nebraska and New Jersey. (quoting the article of S. Symeonides ‘Choice of Law in American Courts in 1997, 46 AmJ. Comp. L 234, at pp.272-273).

That brings us to the Uniform Conflict of Laws Limitation Act, 1982 evolved by the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Conflict of Laws-Limitation Act which has been enacted in several States in US. In their prefatory Note, they said:

“Traditionally, statutes of limitations have been characterized as ‘procedural’ laws, for conflict of laws purposes, so that the limitation periods prescribed by the forum states’ laws were applied. This result was reached despite its substantive effect of determining which party won the law-suit. Forum shopping by delay-prone plaintiffs, or by their attorneys, with suits filed in States with long limitation periods, inevitably occurred.

One consequence was that the Courts developed some rather inexact ‘exceptions’ to the ‘general rule’. These included one that treated as ‘substantive’ any limitation period that was “built into” the very statute, such as a Wrongful Death Act, that created the cause of action sued on; another called the ‘specificity test’ that treated a limitations statute as ‘substantive’ if it was directed specifically to the sort of claim sued on; and possibly others less commonly employed.

(See Grenmen, States of Limitations and the Conflict of Laws, Modern analysis. 1980 Ariz St LJ 1).

Another consequence was that about three-fourths of the States enacted so-called “borrowing statutes” which followed no regular pattern but required application of a limitation period other than the forum states’ if some stated aspect of the cause of action occurred in or was connected with another state. These borrowing statutes are often difficult to interpret and apply. They have been the source of considerable judicial confusion.....”

The Uniform Conflict of Laws Limitation Act, 1982 as drafted provided definitions in sec 1 while sec 2 dealt with ‘conflict of laws; limitation of periods’ and read as follows:

“Section 2: (a) Except as provided by sec 4, if a claim is substantively based:

- (1) upon the law of one other state, the limitation period of that state applies; or
- (2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflicts of laws of this State, applies.

(b) The limitation period of this State applies to all other claims.”

Section 3 dealt with other rules applicable to computation of Limitation Period and read as under:

“Section 3: If the statute of limitations of another state applies to the assertion of a claim in this State, the other States’ relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.”

Section 4 referred to ‘unfairness’ and reads as follows:

“Sec.4: If the Court determines that the limitation period of another State applicable under sections 2 and 3 is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of the State applies.”

Section 5 refers to ‘Existing and future claims’ and says:

“Sec.5: This Act applies to claims

- (1) accruing after the effective date of this Act; or
- (2) asserted in a civil action or proceeding more than one year after the effective date of this Act, but it does not revive a claim barred before the effective date of this Act.”

The Note further says that sec. 2 treats limitation period as substantive, to be governed by the limitations law of a State whose law governs other substantive issues inherent in the claim. This is true whether the limitation period of the substantively governing law is larger or shorter than that of the forum’s law. This is based on the judicial trend: Heavner v.

Uniroyal Inc: 63 NJ 130, 305 A.2d 412 (1973); Air Products & Chemicals Inc v. Fairbanks Morse Inc: 58 Wis 2d. 193, 206 NW (2d) 414 (1973) and Henry v. Richardson – Merrel Inc: 508, F 2d. 28 (3d Cir. 1975). In all these cases the forum State applied the other State substantive law even though the consequence would be to apply the other States' limitation period.

In sec. 3, the words 'governing conflict of laws' applies both to 'statutes' and 'rules of law'. This section treats all tolling and accrued provisions as substantive parts of the limitation law of any State whose law may be held applicable. They are part of that State's law as that State would apply it. The limitation period of another State, however, does not include its rules as to when an action is commenced. These rules are part of the procedural law of each forum State. The final clause in sec. 3 constitutes the standard means of avoiding renvoi problems.

Section 4 provides an 'escape clause' that will enable a Court, in extreme cases, to do openly what has sometimes been done by indirection, to avoid injustice in particular cases. It is not enough that the forum States' limitation period is different from that of the State whose substantive law is governing; the difference must be 'substantive', and the 'fair opportunity' provision constitutes a separate and additional requirement.

In the year 2004, a Study Committee headed by Prof. Robert Pushaw submitted a Memorandum on the 1982 Act which the National Conference Commissioners on Uniform State Laws (NCCUSL) withdrew in 1999.

The Memorandum refers to the fact that under the 1982 Act, the substantive law would be substantive law of the State whose law governs the underlying claim. But in 1988, the American Law Institute rejected the above approach by providing that the substantive law should be determined by the law of the State with the most significant relationship to the limitation issue, regardless of which State's substantive law controls and then sets forth very specific rules that presumptively favour applying the substantive laws of the forum State, unless the shorter limit of another State would make more sense.

Conclusion:

The principle that a forum country applies the procedural law of the forum country and the substantive law of the country of cause is well settled. So far as the law of limitation is concerned, the following is the result of the above discussion.

In civil law countries, the law of limitation is treated as 'substantive' in the sense that on the expiry of the period of limitation, not merely the judicial remedy is barred but the right itself gets extinguished. In common law countries (including India), the right remains but the judicial remedy gets barred. This continues to be the position in India even today, subject to the special provisions (like sec. 11 of the Indian Limitation Act, 1963) in respect of transnational problems, which were governed by special rules.

In the matter of transnational situations, if an action is instituted in a forum country which followed the common law system, then in respect of a

cause arising outside the common law country, the position previously was that the procedural law of the forum country applied, including the law of limitation of the forum country. The sole exception, as stated in the earliest case Huber v. Steiner: (1835) 2 Bing (NC) 202, by Tyndal CJ, was that if in the country where the cause occurred, the law was that the right itself stood extinguished, then the forum country would not grant relief even if the action was filed in the forum country within the period of limitation as prescribed by the law of limitation of the forum country.

As commerce increased and new notions of justice were developed, the principle that Courts should not allow 'forum shopping' became quite prominent and some common law Courts, as a matter of judicial decision, as in Canada and some Courts in USA, moved towards treating the law of the country of the cause as substantive law and applying the same in the forum country. If the period was shorter in the country of the cause, then the right would, as a matter of substantive law, stand extinguished, precluding the party from instituting the action in another country where the period of limitation was longer. Incidentally, when the case law moved in this direction, the period of limitation in the country of cause even if it was longer than that in the forum country, was necessarily applied.

One of the reasons for the Courts to change the law was to prevent 'forum shopping'. The second reason was to remove 'uncertainty'. The third was that there was no 'inconvenience' in applying the law of the other State. The fourth was that the principle of comity among countries had greater recognition today.

In States or countries in which the case law did not move in the direction as in Canada and some US States, as stated above, the legislature made laws specifically treating the law of limitation of the State or country of the cause as substantive law and thereby, the Courts in the forum country were compelled to apply the law of limitation of the country of cause. The English Act of 1984 and the various Acts in the States in Australia, the amendments to the New Zealand Act and the statutes of some of the States in US which followed the Uniform Conflict of Laws, Limitation Act, 1982, are examples.

In this background, we shall proceed to deal with the position in India in the next Chapter.

Chapter IV

Problems in Indian limitation law and recommendations for change

The subject of foreign law of limitation and its applicability is dealt with in the Limitation Act of 1963 in sec. 11. Before the present Act of 1963 was enacted, this matter was also contained in sec. 11 of the Limitation Act of 1908. The provision in the 1908 Act referred only to ‘foreign’ contracts while the one in the 1963 Act referred to Contracts entered into in a ‘foreign’ country or in the ‘State of Jammu and Kashmir’. Otherwise, in substance, there is no difference between both the Acts. In fact, the Third Report of the Law Commission (1956) on the basis of which the 1963 Act was enacted, states very briefly that sec. 11 does not call for any change.

As we are dealing with sec. 11 in detail, we shall extract it once again:

“Sec.11: Suits on contracts entered into outside the territories to which the Act extends:

- (1) Suits instituted in the territories to which this Act extends on contracts entered into in the State of Jammu and Kashmir or in a foreign country shall be subject to the rules of limitation contained in this Act.
- (2) No rule of limitation in force in the State of Jammu and Kashmir or in al foreign country shall be a defence to a suit

instituted in the said territories on a contract entered into in that State or in a foreign country unless –

- (a) the rule has extinguished the contract; and
- (b) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.”

It will be seen that sec. 11 requires the provisions of the Indian Limitation Act, 1963 to be applied in cases where a suit is filed in India in respect of a cause of action on a contract entered into in a foreign country or Jammu and Kashmir. The only exception contained in subsection (2) is that the foreign law will apply only if it has extinguished the contract and another condition is that the parties were domiciled in the foreign country during the period prescribed by the law of the foreign country.

In the commentary on the old Limitation Act of 1908 by U.N. Mitra of 1949 edited by Prof. S. Venkataraman, it is stated that the section 11 was based on the principles laid down in English cases. According to English law, remedies, as distinguished from rights, are to be pursued according to the law of the place where the action is instituted. (Darby and Bosanquet, 2nd Ed, pp.15, 58, 59) The reason for the rule is as stated in Huber v. Steiner (1835) 2 Bing (NC) 202 which has been referred to in Chapter I. That decision was cited with approval by the Privy Council in Ruckmaboye v. Lulloobhoy Mottichand (1835) 5 Moore’s Ind App. 234 (268) where it was stated as follows: “Courts of law being instituted by every nation for its own convenience, the nature of the remedies available therein and the time and modes of proceeding therein are regulated by the nation’s own views, of

what is just and proper and expedient and it is not obliged out of any comity to the countries to depart (in the matter of procedure) from its own opinions of what is just and proper and expedient". The principle contained in sec. 11 based on the previous state of English law in Commonwealth countries has, as stated in the previous chapters, undergone a revolutionary change bringing the law in common law countries on par with the law in civil law countries whereby limitation law of a foreign country is treated as substantive law and results in extinguishing the right itself and not merely the judicial remedy and such law has to be applied by the forum countries in preference to the law of limitation in the forum country which may, except for transnational cases, still remain procedural.

A crucial mistake in the drafting of subsection (2) of sec. 11 both in the 1908 Act and 1963 Act requires mention. The word 'extinguished the contract' in sec. 11(2)(a) as has been pointed by Stokes in his *Anglo-Indian Codes* (Vol 2, p.965) really means 'extinguished the right resulting from the contract'. Stokes has been quoted by Prof. S. Venkataraman editing the commentary of U.N. Mitra (7th Ed, 1949, p.131) and also by Rustomji in his commentary (7th Ed, 1992 edited by S.P. Sen Gupta, p.28 quoting Stokes at p.955, Vol.2).

So far as the exception with two clauses (a) and (b) stated in sec. 11 (2) under the 1908 and 1963 Acts is concerned, it is stated by Prof. Venkataraman that it was drawn from Story's *Conflict of Laws*, sec. 582 where the twin conditions now mentioned in sec. 11(2) were stated.

We have already referred in the previous Chapters to the changes in law in UK, Australia and other countries and nowhere we find the second condition laid down in sec. 11(2)(b) that, “and the parties were domiciled in that State or in the foreign country during the period prescribed by such rule”.

As rightly pointed by Sri V.R. Manohar and W.W. Chitale in their Commentary (6th Ed, 1991) at p.280 on the Limitation Act, 1963, this condition in sec. 11(2)(b) does not fit into the present times and requires to be deleted. The authors say:

“Moreover, the insistence on domicile of the parties (sec. 11(2)(b)) in the Foreign State as a necessary prerequisite to the availability of the defence based on foreign period of limitation, appears, in the present submission to be at odds with contemporary realities of our times which have witnessed an enormous expansion in the growth of international trade with advances in means of communication and transport. Further, the claim of domicile being used as a connecting factor for the ascertainment of the applicable (law) to a contract of a purely commercial nature has little merit to commend it. It is hoped that when the revision of the law is undertaken, this and the other aspects discussed earlier will receive due attention.”

We agree that for the reasons stated by the authors, sec. 11(2)(b) condition must be deleted.

The Full Bench decision of the Madras High Court in Muthukanni v. Andappa (AIR 1955 Mad 96) considered sec. 11 of the 1908 Act. No doubt it was also concerned with sec. 13 of that Act, which corresponds to sec. 15(5) of the 1963 Act. Sec. 13 of the old Act stated that “In computing the period of limitation for any suit, the time during which the defendant has been absent from the Provinces of India and from the territories beyond the Provinces of India under the administration of the Central Government, shall be excluded”. Rajamannar CJ, in the course of discussion of the law under sec. 11 referred to the general principle as follows:

“the general principle is also well-settled that in regard to such actions all matters of procedure are governed by the ‘lex fori’, the law of the country in which the action is brought. Statutes of limitation, unless affecting immovable property, in so far as they bar the remedy of a plaintiff, are always considered to be statutes relating to procedure. So, the statute of limitation in force in the country in which the action is brought, will be applicable and not the statute of limitation which might obtain in the place where the cause of action arose, or the contract was made. There is, however, one exception to this general rule, namely, where, by the proper law governing the transaction in respect of which an action is brought, the statute of limitation in force in the country in which the cause of action arose or the contract was made operates not only to bar the remedy but also to extinguish that right, the rules of limitation in the country in which the suit is brought have no application. (Halsbury’s Laws of England, Vol VI, p.355)”

Reference was also made to Huber v. Steiner (1835) 2 Bing NC 202 and to Ruckmaboye v. Lullabhoy Mottichand (1851-54) 5 Moore's Ind App 234. The Madras High Court also referred to sec. 11(2)(b).

The general principle was also stated by Bachawat J in Dickie & Co v. Municipal Board (AIR 1956 Cal 216 at 219) as follows:

“It is well settled that so much of the law as affects the remedy and the procedure only is governed by the law of the country in which the action is brought and not by foreign law. The Court will not apply a foreign law of limitation which affects the remedy only and is therefore a matter of mere procedure. The foreign law of limitation will be applied where it extinguishes the right or creates the title so that it ceases to be a matter of mere procedure.

Sec. 11 of the Act is a plain recognition of this principle.”

It will be seen that sec. 11 applies only to foreign contracts. But this principle must be extended to all obligations or substantive rights arising in a foreign country with reference to which suits are filed in India. Prof. Venkataraman says that Dr. Stokes in his Anglo-Indian Codes, Vol II page 950 suggested that sec. 11 should be expressly extended to all obligations. Where the remedy only is barred by a foreign law of limitation, a suit may be instituted in India provided it is not barred by the Indian law (Nalla Thambi v. Ponnuswami (1879) ILR 2 Mad 400; Harris v. Quine (1869) LR 4 QB 653. That will be the position even after the proposed change, namely, that the foreign law of limitation would apply in India in respect of the period.

There is one other aspect which we have to refer in the matter of applicability of foreign law of limitation. It will be seen that in the Australian, New Zealand and UK statutes, it is said that in the matter of exercising discretion while applying the foreign law of limitation, the law of that country would be applicable. For example, in the Indian Act of 1963, there are ss. 4 to 24 in some of which there is provision for Court passing orders in excluding certain periods – see for example sec. 14, where the period spent in filing the suit in a wrong Court has to be excluded if that Court was approached bona fide and in good faith. We also have provision where minors are given extended period of time. Sec. 12 deals with exclusion of time taken in obtaining certified copies of judgments etc.

We are not in favour of applying rules of the foreign law which correspond to ss. 4 to 24 of the Indian law. That would be compelling Indian Courts to identify various other provisions of the law of limitation or procedure in a number of countries. We, therefore, recommend that all that applies is the foreign period of limitation together with any declaration in that law that it is substantive or that the right does or does not get extinguished. The foreign period applies whether it is shorter or longer. But if a question corresponding to ss. 4 to 24 arises, the provisions of ss. 4 to 24 of the Indian Act apply.

As regards execution of foreign decrees, sec. 11 did not refer to the aspect expressly but Courts have held that the same principle which applies to suits should be applicable to execution proceedings, i.e. Indian procedural law, including Indian Limitation Act, will apply. In Dickie &

Co, above referred to, the Calcutta High Court said: “sec. 11 of the Limitation Act is, however, not exhaustive. Thus it was held in Nabibhati Vazirbhai v. Dayabhai Amulukh, AIR 1916 Bom p.200, a decree passed by the Native State of Baroda could not be executed in India because the application for execution was barred by the Indian Law of Limitation although it was clearly not barred by the law of limitation of Baroda State”.

To a like effect is the principle laid down in Srinivasa v. Narayana: AIR 1923 Mad 72 and Hukumchand Aswal v. Gyanendar (1887) ILR 6 Cal 570. It was laid down in these cases that the law of limitation for the execution of a decree transferred to an Indian Court for execution is that law which prevails in the latter Court.

But the legislature may expressly enact that a foreign rule of limitation shall be applicable to particular suits, although such rule has not extinguished the substantive right. For instance, see sec. 8 of Act XII of 1886, relating to the cession of Jhansi. (Prof. Venkataraman in U.N. Mitra’s Commentary, *ibid*, p.132)

So far as the execution of foreign decrees is concerned, there being no specific article in the Schedule to Limitation Act, 1963, there has been conflict of decisions. A Full Bench of the Madras High Court in Sheik Ali v. Sheik Mohammed: AIR 1967 Mad 45 (FB) took the view that Art. 182 applies only to execution of decrees passed by Courts in India and that hence the residuary Article 181 applies. It further held that under the third column, the starting point is the date on which the ‘right to apply accrues’ and it held that time commences from the date on which a certified copy of

the foreign decree is filed in the District Court in India. However, the Punjab and Haryana High Court in Lakhpur Rai Sharma v. Atma Singh: AIR 1971 Punjab & Haryana 476 held that Art. 182 which applies to execution of decree also applies to execution of foreign decrees.

Instead of leaving the matters indefinite, we are of the view that some provisions are required to be made. Firstly the 'foreign country' here must be a 'reciprocating country' under sec. 44A of the CPC. Only then is a foreign decree executable in India. Of course, sec. 44A of CPC does not apply to decrees passed in the State of Jammu and Kashmir. The decrees passed in that State can be executed in other parts of India as per sec. 43. Hitherto under the 1963 Act, limitation law being procedural, the Indian Act was applied in regard to execution of decrees of foreign courts, the only dispute was whether Art. 181 or 182 of the 1908 Act (now 137, 136 of the 1963 Act) would apply. Now that we are proposing under the new sec. 11 that the foreign period of limitation will apply to suits, this principle must also be reflected in the proposed amendments in respect of execution of foreign decrees. This is reflected in sec. 11A as proposed.

We have examined the question whether the period for execution of a domestic decree as prescribed in the foreign law should apply or whether the period for execution of a foreign decree as prescribed in the foreign law should apply. It is possible that in some countries, as in ours, there is no specific article dealing with execution of foreign decrees. In order to avoid uncertainty, we are of the view that the period for execution of a foreign decree in Indian Courts must be the period fixed in the foreign country for execution of its domestic decrees. Now that a certified copy thereof will be

filed in the Indian District Court under sec. 44A of the Code of Civil Procedure, 1908, the time for commencement, in our view, should be the date on which the certified copy of the foreign decree is filed here. As the proposed sec. 11A applies, principles stated in proposed sec. 11 apply. As sec. 11(2) as proposed uses the words ‘subject to the provision of this Act’, it is obvious that for purposes of proposed Art. 136A, ss. 4 to 24 of the Act shall also apply. The following provisions are proposed for the new sec. 11A.

The proposed sec. 11A will relate to the execution in India in the Courts to which the Act extends, of decrees passed in foreign countries which are ‘reciprocating countries’ as stated in the Explanation below sec. 44A of the Code of Civil Procedure, 1908. (Sec. 11A does not deal with execution of decrees passed by Court in Jammu and Kashmir, in the Courts in other parts of India for the law is settled by judicial decisions that sec. 43 CPC applies). In respect of such decrees passed in reciprocating foreign countries, which are sought to be executed in the Court to which the Act extends, in view of proposed sec. 11A, the principle of limitation stated in sec. 11 shall apply, namely, period of limitation and the principle of extinguishment of rights as may be stated in the law of limitation of the said foreign country. Further, the period of limitation of the foreign law that applies for execution in such Indian Courts as stated above, will be the period prescribed by the foreign law for execution of the decrees passed by its domestic Courts. The commencement of the period will be from the date of filing a certified copy of the decree of the foreign Court in the Indian Court as stated in sec. 44A of the Code of Civil Procedure, 1908. By virtue of sec. 11A attracting the principles of the proposed sec. 11, the provisions

of ss. 4 to 24 shall also apply to such applications for execution filed in India.

Prospective operation:

We further recommend that the provision of ss. 11 and 11A and Art. 136A shall apply only in relation to causes of action arising after the commencement of the proposed amendment Act. Hence, the new proposals will not apply to pending proceedings or even to causes of action which have already arisen before the commencement of the amending Act.

Summarising the recommendations, the position is as follows:

- (1) The provision in sec.11 of the 1963 Act is confined to contracts entered into in a foreign country but does not extend to other matters like torts etc. As pointed above, the proposed section must deal with the applicability of the foreign law of limitation as regards rights and obligations arising out of contracts entered into in the foreign country or in respect of any other kind of legal rights and obligations arising in the foreign country. The same will be the position in respect of such rights and obligations in respect of J & K.
- (2) The existing provision in the 1963 Act, namely, sec. 11 does not conform to the changes made in the statutes in other common law countries and, in view of the latest trends in other countries, the proposed sec. 11 must apply the law of limitation of the foreign country, treating it as substantive law. In that case whether the right gets extinguished there or whether the period under the

foreign law is larger or shorter than the corresponding period in India, the foreign period will apply. If the foreign law states that the right is extinguished after the period, Indian Courts will refuse relief.

- (3) The condition in sec. 11(2)(b) that the parties must have been domiciled in the foreign country during the relevant period, must be deleted.
- (4) So far as the provision of ss. 4 to 24 of the Indian Limitation are concerned, we are of the view that those sections must continue to apply to suits filed on the basis of obligations arising abroad and the only thing that applies from the foreign law is the period prescribed thereon or the declaration that the right is extinguished. In the matter of applicability of ss. 4 to 24 of the Indian Act, 1963, the Indian law will apply. Here, we have deviated from the UK Act of 1984 as well as the Australian enactments. The reason is that otherwise, Indian Courts will have to delve into the various other provisions of the foreign law relating to the manner in which discretion has to be exercised. Sec. 11 will apply to cause of action arising in the State of Jammu and Kashmir and in regard to which suits are filed in India, outside Jammu and Kashmir.
- (5) So far as execution of foreign decrees is concerned, there is no need to disturb the present state of case law that for execution of decrees passed in the State of Jammu & Kashmir in Courts in other parts of India, sec. 43 of CPC applies. In respect of decrees passed in foreign countries referred to in the Explanation to sec.

44A of the Code of Civil Procedure, 1908 (called reciprocating countries), the period for execution of such foreign decrees shall be the period as stated in the foreign law, for execution of the decrees passed in the Courts in that country, i.e. domestic decrees. That period will be applicable for execution of foreign decrees in the Courts in India to which the Indian Act of 1963 extends. The commencement of the period shall be the date on which a certified copy of the decree of the foreign Court in the reciprocating foreign country is filed in the District Court in India as stated in sec. 44A of the Code of Civil Procedure, 1908. The computation of the period shall be in accordance with the provisions of ss. 4 to 24.

- (6) It is also proposed that the period of limitation in the State of Jammu and Kashmir or a foreign country that is applicable in India will be for the purpose of the institution of suits in the Courts to which the 1963 Act extends and not for purposes of further proceedings arising therefrom. Likewise, the proposal for applying the foreign period for execution of foreign decrees in India is only for purposes of filing an application for execution in such Indian Courts and not for purpose of the further proceedings arising therefrom.
- (7) The proposed changes will be prospective in operation in the sense that they will apply only to causes of action arising after the date of commencement of the proposed legislation. That would mean that the proposed changes will not apply to pending proceedings or to causes of action that have not arisen. This is so far as suits

to be filed in the Courts in India to which the 1963 Act applies, which are based on foreign causes of action as provided in new sec. 11.

- (8) So far as the execution of decrees of Courts of a foreign country is concerned, execution application filed for that purpose in Indians courts under the 1963 Act, the proposed provisions in sections 11A and Art. 136A, shall not apply to applications for execution of foreign decrees, which were passed before the commencement of the proposed amending Act.

We recommend accordingly.

In order to concretize our recommendations in legislative form, a Draft Bill, namely, Limitation (Amendment) Bill, 2005, is appended as Annexure I to this Report.

We place on record the valuable assistance rendered by Dr. S. Muralidhar, Part-time Member of the Law Commission.

(Justice M. Jagannadha Rao)
Chairman

(Dr. K.N. Chaturvedi)
Member-Secretary

Dated: 7th June, 2005

The Limitation (Amendment) Bill, 2005

A

BILL

to amend the Limitation Act, 1963

BE it enacted by Parliament in the fifty-sixth Year of the Republic:-

Short Title and Commencement:

1. (1) This Act may be called the Limitation (Amendment) Act, 2005.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Substitution of new section 11 for section 11:

2. For section 11 of the Limitation Act, 1963 (Act 36 of 1963) (hereinafter called the Principal Act), the following section shall be substituted, namely:-

Suits on contracts entered into or legal rights and obligations arising outside the territories to which this Act extends:

“11(1) Suits instituted in the territories to which this Act extends, on the basis of:

(i) rights and obligations arising out of contracts entered in,
or

(ii) rights and obligations of any other kind arising in the State of Jammu and Kashmir or in a foreign country, shall be subject to the rules of limitation contained in subsection (2).

(2) Subject to the provisions of this Act, where the substantive law applicable in the State of Jammu & Kashmir or in a foreign country is to govern a suit before a Court to which this Act extends, the period of limitation and the principle of extinguishment of the right as provided in the law of limitation of the said State or country, shall apply for institution of such suits and shall be regarded as part of the substantive law of the said State or country.

Insertion of new section 11A:

3. After section 11 of the principal Act as substituted by section 2 of this Act, the following section shall be inserted, namely:-

Execution of decrees passed by Courts in reciprocating foreign countries:

“11A Where a decree is passed by a superior Court in any reciprocating territory as defined in the Explanation to sec 44A of the Code of Civil Procedure, 1908, and an application is filed for execution thereof in any Court to which this Act extends, then the rules of limitation referred to in sec. 11 shall apply for the filing of

such applications but the date of commencement of the period for execution of such decrees shall be the date specified in the Schedule.

Insertion of Art 136A in the Schedule:

4. In the Schedule to the principal Act, after Art 136, the following Article shall be inserted:

<p>“Art 136A</p> <p>certified</p> <p>the</p>	<p>Execution of a decree passed by the superior Court of a reciprocating territory as per Explanation below sec. 44A of the Code of Civil Procedure, 1908.</p>	<p>Period as applicable under the law of limitation in the reciprocating territory for execution of a decree passed in that territory.</p>	<p>Date on which a copy of the said decree is filed in the District Court in accordance with provisions of sec. 44A of the Code of Civil Procedure, 1908.”</p>
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Transitional Provision:

Provisions of the Amending Act to be prospective in operation:

5. (1) The provisions of the principal Act, as amended by sec. 2 of this Act, shall be prospective in operation and shall not apply to causes of action which have arisen in the State of Jammu & Kashmir or in a foreign country, before the commencement of this Act.
- (2) The provisions of the principal Act, as amended by sec. 3 and 4 of this Act shall be prospective in operation and shall not apply to the execution of decrees as stated in the said sections, where such decrees are passed in the said territories before the commencement of this Act.