Dispute Resolution

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SOUTH AFRICA

Is there a *Price* to pay when entering an agreement subject to foreign law?

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Is there a *Price* to pay when entering an agreement subject to foreign law?

While legal proceedings may be instituted in South Africa pertaining to a dispute governed by foreign law, such proceedings may be practically cumbersome to prosecute in South African courts for various reasons, including:

- additional cost to litigants in obtaining advice from foreign legal practitioners on the application of the particular foreign law to the dispute being determined before a South African judge;
- additional cost to litigants for their South African legal practitioners to become *au fait* with that particular foreign law;
- the possible appointment of an assessor to aid the judge appointed to determine the matter in accordance with that particular foreign law; and
- the possible appointment of the matter to be case managed.

An example of foreign law being applicable to a matter being disposed of in a South African court is when parties enter into a written agreement to be determined in accordance with a foreign law. In light of the inclusion of a governing law provision, the question arises whether parties may invoke South African law to such a dispute (or whether they are limited to the foreign law as agreed).

In answering this question, the example of Singaporean law, specifically in relation to the defence of prescription, is useful. This example is used due to the difference in prescription periods between the South African Prescription Act 68 of 1969 of **three years** and the Singaporean Limitation Act, 1959 of **six years** (time-barring being the respective term in relation to prescription in Singapore).

In terms of South African private international law, the procedural rules of the *lex fori* apply while the substantive rules of the *lex causae* apply to claims governed by foreign laws. *Lex fori* being the law of the jurisdiction in which the legal proceedings have been launched (South Africa in this case), and *lex causae* being the law governing the substantive issues of the dispute (Singapore in this case).

Difference between substantive and procedural rules

In *Society of Lloyds v Price; Society of Lloyd's v Lee* [2006] (5) SA 393 (SCA) (Price), the Supreme Court of Appeal (SCA) dealt with the difference between substantive and procedural rules in relation prescription as follows:

> *"[T]hose which extinguish a right, on the one hand, and those which merely bar a remedy by imposing a procedural bar on the institution of an action to enforce the right or to take steps in execution pursuant to a judgment, on the other. Statutes of the former kind are regarded as substantive in nature, while statutes of the latter kind are regarded as procedural."*

As such, South African courts will apply the claim/defence of the *lex causae* where the *lex causae* considers the claim/defence to be substantive.

In *Price*, the following enquiry was applied by the SCA:

- Firstly, the characterisation of whether a claim/defence is substantive or procedural in accordance with the *lex fori* (South African law) is made: **In the case of prescription, the *lex fori* (South African Law) is substantive.**

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- Secondly, the characterisation of whether a claim/defence is substantive or procedural in accordance with the *lex causae* is made: **In the case of time-barring, the *lex causae* (Singaporean Law) is substantive.**

On application of this principle, a South African court will apply the limitation period of the *lex causae* where the *lex causae* considers the limitation to be substantive, in this case six years (in accordance with Singaporean Law).

A conflict arises, however, in instances where the *lex causae* considers the claim/defence to be procedural, then a "*gap*" may result in this application as neither the South African law nor the foreign law would apply.

On the occurrence of this "*gap*", the SCA in *Price* adopted a *via media* approach by exercising a discretion as to which law will be applicable:

> *"[T]he more flexible approach of applying the law of the legal system which, in the circumstances of the particular case, has the closest and most real connection to the question of extinction or enforceability is the more appropriate, although in practice the result in most cases is likely to be the same"*.

In this instance, the location of the parties, the currency of the transaction and the location of the cause of action would be viewed by the court in an effort "*to take cognisance of the nature, scope and purpose of the foreign rule in its appropriate legal context and with regard to the relevant policy considerations*". As such, the court has a discretion in relation to which law has application to the dispute taking into account the facts of the matter, and importantly, policy considerations.

In the result, the governing law provision in a written agreement confirming foreign law to be applicable to a dispute does not necessarily prevent a litigant from relying on South African law. The SCA echoed the overarching sentiments made in *Laurens NO v Von Höhne* [1993] (2) SA 104 (W) in that "*We may not dare to let our law stand still … private international law is a developing institution internationally and our own South African private international law cannot be allowed to languish in a straightjacket.*"

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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