foreign procedural rules, which tended to involve the exercise of an inherent jurisdiction and were not readily ascertainable on the basis of expert evidence. Booysen J was hence justified in falling back on his oath of judicial office, by which he was enjoined to apply South African law on a residual basis.

[71] On the question whether or not any of the foreign judgments in the present matter constituted a 'judgment debt' in terms of s 11*(a)*(ii) of the Prescription Act 68 of 1969, Mr *Seligson* submitted that it could not be so. It was the clear intention of the Legislature that a 'judgment debt' was restricted to a judgment of a South African court and did not include that of a foreign court. A foreign judgment constituted a cause of action for the institution of legal proceedings and was not executable in South Africa until it had been confirmed by a judgment of a South African court. It was based on an implied acknowledgment by the defendant of his indebtedness to the plaintiff in the amount of the judgment, which stood only as *prima facie* evidence of such indebtedness. It could be attacked only on certain limited grounds not available to an unsuccessful defendant in respect of a final judgment obtained in a South African court. 93(93)

[72] Mr *Seligson* rejected Mr *Thompon's* argument that the exclusion of a foreign judgment would render the term 'judgment debt' otiose. It was, he submitted, based on the assumption that the term could not apply to a South African judgment because the appropriate remedy was enforcement rather than the institution of further proceedings. This assumption was wrong in that it did not take account of the fact that it was possible to sue on a South African judgment. Thus the plaintiff who had failed to obtain satisfaction of a judgment debt by way of issuing a writ of execution, might institute sequestration or contempt-of-court proceedings. Indeed, s 11*(a)* of the Act gave him 30 years within which to continue his efforts to obtain satisfaction of a judgment debt through the execution process. In this regard, Mr *Seligson* submitted, a distinction should be made between a judgment debt and a judgment as such. A foreign judgment became a judgment debt only once a South African court had granted provisional sentence in favour of the defendant.

Thereafter, execution could be levied to recover such judgment debt. 94(94) For these reasons, Mr *Seligson* submitted that the plaintiff's claims (save that against F Ilse) had prescribed.

Consideration of the prescription issues

[73] When the authorities and arguments referred to above are considered, it is clear that there is no straightforward answer to the various issues raised by the parties. Both the applicable statutory provisions and the relevant jurisprudence in English and South African law must be carefully scrutinised with a view to determining the meaning and ambit of the provisions in question. Thereafter, the Court is required to classify, categorise or characterise such provisions in accordance with existing rules and principles. If the facts and circumstances of the particular case are such, however, that the existing rules and principles do not provide an obvious classification, category or characterisation, a different approach will have to be followed. The Court will then have to decide on a policy approach which will achieve a just, fair and reasonable result in the light of all such facts and

circumstances.

[74] On the face of it, the meaning of s 5 of the English Limitation Act of 1980 95(95) is unequivocal. An action based on (simple) contract is time-barred, in that it may not be instituted more than six years after conclusion of the contract, being the date on which the relevant cause of action came into existence. The same time-limit applies, in terms of s 24 of the Act, to an action based on a judgment. No action may be instituted on such judgment more than six years after it has become enforceable.

[75] I am quite satisfied that, in accordance with the weight of English authority, these time-bars or limitations must be characterised as procedural, in that the relevant remedy is blocked, but not extinguished. This is in contrast with the corresponding South African provisions set forth in ss 11*(a)*(ii) and 11*(d)*, read with s 10(1), of the Prescription Act 68 of 1969. A judgment debt is extinguished by prescription after the lapse of 30 years from the date on which it becomes enforceable, whereas all other debts are extinguished after the expiry of three years from the time the relevant cause of action arises. This is a matter of substantive law.

[76] It follows from these findings that this Court is, as was the Court in the *Price* matter, confronted with a unique situation. Whereas the relevant South African law of prescription, being the applicable domestic law (the *lex fori*), is substantive, the English limitation law, being the law where the underlying contract was concluded (the *lex causae*), is procedural. When the English rule, that all matters of procedure are

governed by the *lex fori*, 96(96) was devised, it was probably not envisaged that, in the *lex fori*, the limitation or prescription of actions might be a matter of substantive law and not of procedure. The compiler or compilers of the rule would probably have been aghast if they had been apprised of the fact that a judgment of the English Commercial Court would be extinguished, and not be simply time-barred, in terms of the *lex fori*. They could not be blamed for assuming that limitation provisions in the *lex fori* would also be procedural, as in English law, in which event the application of the *lex fori* would not be problematic. The question inevitably arises whether, if such a situation had indeed been envisaged, the rule would not have been qualified to read that the *lex fori* would be applicable to procedural matters, provided they are also procedural in such forum. If not, such matters should revert to the *lex causae*.

[77] Inasmuch as no such qualification was effected, it is for this Court to decide how it should fill the *lacuna*, void or 'gap' arising from the absence of any rule or principle governing the particular situation. Quite clearly, it cannot simply be left in limbo, as would eventuate if neither South African nor English law should apply and it should be held that the claim in question is not subject to any form of limitation or prescription. That would give rise to the absurd situation that the claim would remain perpetually enforceable, as appears to have been held in the notorious German decision adverted to previously. 97(97)

[78] In the *Kuhne & Nagel* case 98(98) O'Donovan J in my respectful view adopted an eminently practical approach in holding that statutes of limitation which extinguish a plaintiff's right altogether belong to substantive law, to which the *lex causae* applies. The

learned Judge was not required to deal with a situation such as the present, where prescription is a procedural matter in the *lex causae* and a substantive matter in the *lex fori*. His approach to the situation where both the *lex causae* and *lex fori* are substantive, however, would appear to favour the *lex causae* in the present case.

[79] The *Laconian* case 99(99) was an important step in the right direction but, in my respectful view, Booysen J missed a golden opportunity to develop the existing law in an innovative way. The learned Judge took cognisance of academic opinion favouring a *via media*, by virtue of which not only the *lex fori*, but also the *lex causae*, would be given consideration in characterising the relevant rules of law. Yet, rather than follow the *via media*, he held that there was no reason for him to depart from the general rule of South African international private law, namely that classification should be effected in terms of the *lex fori*. This prompted him to adopt an *ad hoc* or 'residual *lex fori*' approach, in terms of which he fell back on his judicial oath which enjoined him to apply South

African law in the absence of any rule determining the applicable legal system. This, in my respectful view, was a convenient rather than a sensible, reasonable or rational way to fill the gap or void caused by the absence of such rule.

[80] In his discussion of 'the proper law of the contract', 100(100) Booysen J appears to have accepted that the determination thereof should be made either in accordance with the express or imputed agreement of the parties, or by virtue of establishing the legal system most closely connected with the underlying transaction. Although he expressed a preference for the 'most real connection theory', he considered himself bound by the 'intention theory' advocated in the *Efroiken* case. 101(101)

[81] In the *Improvair* matter, 102(102) Grosskopf J found himself in a similar position. Despite referring with approval to the *Bonython* formula and to Van Rooyen's approach to the legal system most closely connected to the transaction in question, 103(103) the learned Judge likewise considered himself bound by the *Efroiken* case. He opined, however, that the most closely connected legal system would, in most cases, be that which the courts would presume to have been intended by the parties.

[82] I respectfully associate myself with the preference expressed by Booysen J, Grosskopf J and Van Rooyen for determining the *lex causae*, as the 'proper law of the contract', by establishing which legal system is most closely connected to the transaction in question. This is not only in line with the *Bonython* formula, which appears to have been unequivocally accepted in English law, but it is also logical, realistic and reasonable. It is indeed a contradiction in terms to speak of an 'assumed intention', as pointed out by Van Rooyen, in that an assumption is usually determined objectively whereas an intention occurs as a subjective expression of a person's will. The *Efroiken* judgment is, of course, binding on this Court, but I am of the respectful view that, if the Supreme Court of Appeal should consider this matter anew, it may well be persuaded to follow the *Bonython* approach.

[83] Support for a more enlightened and flexible approach in considering issues of this nature has come with eminent clarity from the innovative and creative judgment of Schutz J in the *Laurens* case. 104(104) Although he accepted that it was no simple matter, the

learned Judge had no hesitation in applying a 'connecting factor' after characterising the nature of the issue. Despite having little or no precedent to guide him, he fearlessly applied the *via media* as reflecting a universal point of view. This would enable him to take cognisance of the nature, scope and purpose of the foreign rule in its appropriate legal context and with regard to relevant policy considerations. It would, one may add, also

avoid artificial attempts to fit the issue into a 'pre-fabricated' or preconceived form or structure. In this way he would ensure that private international law, which was experiencing widespread development, would not stagnate or 'languish in a straightjacket'. For these reasons he followed the *via media* in considering both the *lex fori* and the *lex causae* before coming to a reasoned policy decision.

[84] I respectfully associate myself with Schutz J's approach. In a case like the present, it is essential to adopt a *via media* approach. This means that the Court must have regard to both the *lex fori* and the *lex causae* in considering whether the South African prescription regime or the English limitation regime should apply to the plaintiff's claims against three of the four defendants. It is clear that English law is the *lex causae*, in that it is the legal system with which the underlying transactions between the parties have their closest connection. It follows that the rule relegating matters of procedure to the *lex fori*, being South African law, must be critically examined and appraised before simply applying it to the facts of this case. In this regard, I accept that limitation in English law is procedural, in that it simply bars the enforcement of an action without extinguishing the debt it is seeking to enforce, while prescription in South African law is substantive because it extinguishes the debt on which the action is based. 105(105)

[85] In the present matter, the parties agreed that their rights and obligations would be governed by and construed in accordance with English law. 106(106) This means that they also agreed that the rule requiring procedural matters to be dealt with by the *lex fori* would apply. What they did not agree upon, in that they clearly could not have applied their minds to it, was that, in terms of South African prescription law, their respective claims would be extinguished by the effluxion of time. As mentioned previously, 107(107) the creators of the English rule were probably blissfully unaware of the fact that a debt, which was time-barred in English limitation law, would be extinguished should the *lex fori* be applied. It can scarcely be imputed to the parties that they intended such a result.

[86] This brings me to the question whether, in such circumstances, the rule might have been qualified to the extent that, if a matter of procedure in the *lex causae* should be a substantive matter in the *lex fori*, it would revert to the *lex causae*. In my view, justice, fairness, reasonableness and policy considerations dictate that this question be answered positively. There is, in my respectful view, no room in our law, or in private international law generally, for a convenient *ad hoc* solution such as that held in the *Price* and *Laconian* matters. 108(108) I am unable to accept that my judicial oath requires me to adopt a 'residual *lex fori*' approach when the relevant rules do not provide a ready solution to the issue I am required

to resolve. It is not, in my respectful view, consonant with legal logic or 'good sense'.

[87] From these considerations, it follows that I must respectfully differ from the approach by Booysen J in the *Laconian* matter and Mynhardt J in the *Price* case. In deciding on an *ad hoc* resolution of the issue, the learned Judges failed, in my respectful opinion, to give full consideration to the effect of the substantive nature of the South African prescription regime.

[88] I can likewise not agree with the basis on which Mynhardt J distinguished the *Laurens* case, namely that because there was no conflict between the opposing legal systems, the policy decision was 'easy to make'. This did not take account of the *via media* approach followed by Schutz J and the need to develop the 'residual *lex fori*' approach in order to make provision for circumstances such as those existing in the present case. More specifically, it did not take account of the important fact that the South African prescription regime is substantive, thereby causing the relevant debts to be extinguished rather than simply time-barred, as is the case in the English limitation regime. The *Abdul* case 109(109) does not, in my respectful view, support Mynhardt J's approach, simply because it did not deal with the effect of the substantive nature and character of the relevant South African prescription provisions.

[89] In view of these considerations, I must respectfully conclude that Mynhardt J was wrong, in the *Price* case, to hold that the claims in question had prescribed in accordance with South African law as *lex fori*. Inasmuch as the relevant South African provisions relating to prescription are substantive, South African law, as the *lex fori*, cannot be applicable in the present matter and the issue must accordingly be dealt with in terms of the relevant limitation provisions of English law, as the legal system most closely connected with the underlying cause of action and hence the *lex causae*. In the event, the plea of prescription raised by M Romahn, H Ilse and M Ilse in respect of the plaintiff's claims against them, must fail.

[90] It follows that it is not necessary for me to deal with the effect of the English Foreign Limitation Periods Act of 1984 on the characterisation of English limitation law, or with the question whether the defendants had 'implicitly waived' the right to rely on South African prescription rules. If I should have felt constrained to deal with these matters, however, I would have strongly inclined to associating myself with Mynhardt J's outright rejection of the arguments raised in this regard by counsel for the defendants. There is simply no merit in them.

[91] It is, of course, likewise not necessary to deal with the question whether an English judgment should be regarded as a 'judgment debt' for purposes of s 11*(a)*(ii) of Act 68 of 1969. If I should be held to have erred, however, in holding that South African law is not applicable in the

present case, I would find myself in respectful disagreement with Mynhardt J's finding that a foreign judgment cannot be regarded as a 'judgment debt' for purposes of the said section.

[92] It is quite correct that a foreign judgment is not directly enforceable, although it constitutes a cause of action which will be enforced by our courts, provided it complies with the requirements set forth in the case of *Jones v Krok*. 110(110) It is likewise correct that a judgment may be regarded as having novated the original or underlying debt, thereby creating 'a new and independent cause of action', as held in the *Gani* and *MV* Ivory Tirupati cases. 111(111) It may be accepted, as argued by Mr *Seligson*, 112(112) that a foreign judgment is not executable in South Africa before being confirmed, in provisional-sentence proceedings, by a judgment of a South African court. That does not, however, make it less a judgment than any judgment emanating from this Court. The authorities relied on by Mr *Seligson* in this regard do not, in my view, support his contention that the concept of 'judgment debt' excludes a foreign debt. On the contrary, in the case of *Joosab v Tayob*, the position was stated with great clarity by Bristowe J in the following terms: 113(113)

> 'I do not think it is possible to draw any distinction between the judgment of a foreign court and the judgment of a domestic court. I think that the rule is that the judgment of any court constitutes a debt. It novates the original debt, and substitutes a new one, which may itself, at common law, be made the subject of a new action in another court.'

[93] The *Primavera* case 114(114) does not, I would respectfully suggest, support Mynhardt J's decision in this regard. In that matter, it was held 115(115) that an arbitrator's award acquired the status of a judgment debt only when it was made an order of court. Once that had happened, it could be enforced like any other judgment debt. On the strength of this principle, Mynhardt J held 116(116) that there was 'no difference in principle between an arbitrator's award and a foreign judgment'. This cannot, with respect, be correct. An arbitrator's award differs *toto caelo* from a judgment of a court, whether such judgment emanates from a South African or a foreign court.

[94] In the event, I am satisfied that the English judgments in the present matter are judgment debts for purposes of s 11*(a)*(ii) of Act 68 of 1969. The claims in question have hence not prescribed in terms of English or South African law.

The fraud issue

[95] As an alternative to prescription, the defendants raised the defence that enforcement of the English judgments by this Court would be

unconstitutional and contrary to public policy. This was because the English courts had failed to apply the principle underlying the right of an affected party to be heard in legal proceedings (*audi alteram partem*) by precluding them from raising the defence that the plaintiff had induced them, by fraudulent misrepresentation, to become underwriting names.

[96] In his argument on behalf of the defendants, Mr *Seligson* submitted that, by precluding the defendants from raising fraud as a defence against the claims of the plaintiff, the English courts had effectively allowed the plaintiff to contract out of its own fraudulent conduct. He accepted that this Court would not, in general, enter into the merits of the case adjudicated upon by the foreign court, but this would not prevent it from investigating whether or not the recognition and enforcement of the foreign judgment was contrary to public policy or unconstitutional. In this regard, he relied on s 34 of the Constitution, which

provides:

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal.'

He relied also on s 65(1) and (2), which read thus:

> '(1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'

[97] On the applicability of s 34, Mr *Seligson* referred to the *De Beer* case, 117(117) in which Yacoob J stated:

> 'It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case.'

This, Mr *Seligson* submitted, established the link between s 34 and the common-law right of *audi alteram partem*, which was the essence of a fair trial. Our courts would not enforce a foreign judgment obtained in contravention of the principles of natural justice, in particular, the right to be heard. By preventing the defendants from raising fraud as a defence, he suggested, the English courts had denied them this right and had hence acted in conflict with the principles of natural justice.

[98] Mr *Seligson* submitted further that, by holding the defendants to the provisions of clause 5.5 of the R&R scheme, 118(118) the English courts had accorded recognition to 'an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other'. 119(119) This would be regarded by a South African court 'as *contra bonos mores* and so offensive to the interests of society as to render it illegal and hence void'. 120(120)

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[99] In his argument on behalf of the plaintiff, Mr *Thompson* submitted that the Court should give effect to the intention of the parties as evinced in their agreement. A court would not hold any part thereof as contrary to public policy without taking into account socioeconomic considerations relating to freedom of contract and commerce. He referred, in this regard, to what Smalberger JA said in the *Sasfin* case: 121(121)

> 'In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.'

[100] When considering the requirements of public policy, Mr *Thompson* suggested, the Court should have regard to the balance of justice and convenience. In the context of the conflict of laws, the concept of public policy should be narrowly construed for purposes of our internal, domestic law. Only if the enforcement of a foreign judgment should be fundamentally contrary to the principles of our law would a South African court refuse to enforce it. 122(122) None of the issues raised by the defendants, he said, passed muster on this score.

[101] Mr *Thompson* submitted further that, although the defendants had been precluded

from raising fraud as a defence in terms of clause 5.5 of the R&R scheme, they were at liberty to bring a separate or independent counterclaim based on fraud or negligence. A so-called 'no set-off' clause was a standard provision in various kinds of contract, 123(123) its main object being to ensure cash flow for purposes of settling claims. Bingham MR explained this with eminent clarity in *Arbuthnott v Fagan and Others (No 2)*: 124(124)

> 'The duty of the name to pay sums required by the agent without prevarication or deduction or delay is stated clearly and unequivocally. That reflects the overriding need, acknowledged on all sides, to ensure that funds are available for the prompt settlement of the claims of those who have insured or reinsured at Lloyd's.'

Hoffmann LJ added: 125(125)

> 'The purpose of clause 9 is clear and uncontroversial. It is designed to insulate the liability of the name to provide whatever funds are necessary for the underwriting business from the state of accounts between himself and the agent. Such insulation is necessary for the purposes of enabling the Lloyd's market to meet its liabilities. Otherwise the flow of funds needed to pay policyholders'

> claims may be clogged by disputes within Lloyd's between names and their agents, to the detriment of the market as a whole.'

[102] Mr *Thompson* submitted that, inasmuch as these *dicta* pre-dated the R&R scheme, they confirmed that clause 5.5 of such scheme was a usual, valid and essential provision for purposes of ensuring the proper operation and supervision of the insurance market. Without it, he suggested, the plaintiff could simply not function properly or effectively. 126(126) The clause was not intended to protect a wrongdoer and did not affect the right of a name to institute an action for damages in delict (tort), or for any other relevant relief, against such person.

[103] It should not be lost from sight, Mr *Thompson* stressed, that the defendants had, in their respective general undertakings, 127(127) agreed that English law would govern all disputes between them and the plaintiff. They could not now be heard to say that the various decisions of the English courts, in respect of the binding effect of clause 5.5 of the R&R scheme, were in conflict with South African public policy.

[104] Significantly, Mr *Thompson* pointed out, there were similar provisions in South African legislation, such as the limitation provisions of s 40(5) of the Value Added Tax Act 89 of 1991. In his judgment in the *Metcash Trading* case, 128(128) Kriegler J held that such provisions were not in conflict with s 34, read with s 36, of the Constitution. He pointed out that the principle of 'pay now, argue later' was 'accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by s 36'. On this basis, Mr *Thompson* submitted, the limitation of the rights of the defendants in terms of clause 5.5 of the R&R scheme was reasonable and justifiable, having regard to the useful and legitimate purpose which it served.

[105] Finally, Mr *Thompson* argued that the defendants had all availed themselves of the opportunity to pursue a counterclaim for fraud against the plaintiff. They had been unsuccessful parties to the *Jaffray* proceedings, in which the Court of Appeal held that, although there had been a misrepresentation, it had not been fraudulent. 129(129) It gave that decision, which was final and binding, on 26 July 2002, prior to the plaintiff's instituting

provisional-sentence proceedings against the defendants in the present matter.

[106] I have considered the arguments for the defendants carefully and have no hesitation in rejecting them outright. It is simply not correct to say that the defendants were deprived of the right to a fair hearing in the sense that they were precluded from raising the plaintiff's alleged

fraudulent misrepresentation before the English courts. Although they were not permitted, in terms of their respective agreements with the plaintiff, to raise it as a defence, they were given every opportunity to do so by way of a separately instituted counterclaim. When they subsequently availed themselves of such opportunity, they were unsuccessful.

[107] What the defendants really want now, it would appear, is a second bite at the cherry. On my reading of the relevant English judgments, in which the allegations of fraud have been considered exhaustively, there is little prospect that the defendants would successfully be able to raise this defence, or counterclaim, before our courts. In this regard, I accept, of course, that I am not permitted to enter the fray by having regard to the merits of the case which served before the English courts. I am, however, required to consider whether the recognition and enforcement of the English judgments may be contrary to public policy. In doing so, I fully realise that I am required to act fairly, independently and impartially, without fear, favour or prejudice.

[108] It is absurd to suggest, as the defendants have done, that, by holding the defendants to the terms of clause 5.5 of the R&R scheme, they have allowed the plaintiff to contract out of its own fraud. Even if the English courts had not held unequivocally that there was no question of fraud on the part of the plaintiff, clause 5.5 merely has the effect of requiring full payment, without set-off or deductions, of the full amount owing by the name in question. It did not prevent such name from bringing a separate action based on alleged fraud or fraudulent misrepresentation. There is hence nothing untoward, unjust, unfair or unreasonable in including such a provision in the plaintiff's agreements with names.

[109] It is indeed essential, in an enterprise such as that operated by the plaintiff, to incorporate a provision of this nature into its agreements with names. It is clearly necessary for purposes of business and commercial efficacy, in that it serves to make funds available for the effective functioning of the enterprise, as explained with eminent lucidity by Bingham MR and Hoffmann LJ in the passages quoted above from the *Arbuthnott* decision. It is, in my view, analogous to restrictions of a similar nature in certain kinds of legislation, such as that relating to the payment of income tax or value-added tax, as Kriegler J observed with his customary perspicuity in the *Metcash Trading* case. It is also in line with the need to protect freedom of contract in commercial activities, as set forth in the *Sasfin* case.

[110] It follows that I am quite satisfied that the recognition and enforcement of the judgments in the present matter cannot be regarded as *contra bonos mores*. Even less can it be held to be unconstitutional in terms of ss 34 and 165 or, for that matter, in terms of any other provision of the Constitution. There is no basis on which it can be said to be in conflict with the principles of natural justice, fairness or reasonableness. On the contrary, the English courts have, with respect, achieved an eminently rational and functional balance of

justice and convenience in

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considering the facts and circumstances underlying the issues they were required to resolve. There are, in my view, no policy considerations prompting this Court to refuse to recognise and enforce the judgments of such courts. The fraud issue must therefore be resolved in favour of the plaintiff and the public-policy defence on this score must fail.

The conclusive-evidence issue

[111] This issue likewise invokes public policy in regard to the 'conclusive proof' provision contained in clause 5.10 of the R&R scheme and relating to the calculation of the amounts allegedly owing by the defendants. 130(130) The defendants averred that the enforcement of a judgment, in which the amount (*quantum*) of the claim was calculated in terms of this provision, would be contrary to public policy. They indicated that they 'would have wished to dispute those calculations' on the basis that they had never understood how the amount of their indebtedness to Lloyd's under the reinsurance scheme had been calculated. They were aware of 'a considerable number of names' who had discovered errors in the plaintiff's calculations.

[112] In his argument on behalf of the defendants, Mr *Seligson* placed great reliance on the *Sasfin* case. 131(131) In that matter it was held that a provision, in terms of which the amount owing would be 'deemed to be determined and proved' by a certificate signed by a director of any of the creditors, was contrary to public policy. The effect of this provision was that the certificate purported to oust the Court's jurisdiction to enquire into the validity or accuracy of the certificate, other than on the ground of fraud. 132(132) In view hereof, Mr *Seligson* submitted that this Court should refuse to recognise and enforce the judgments of the English courts on two bases. Firstly, the 'conclusive proof' provision was contrary to public policy and, secondly, it deprived the defendants of their right to defend the plaintiff's claims against them in respect of the *quantum* thereof. This was contrary to the principles of natural justice. It was also in conflict with the provisions of s 34 of the Constitution, in terms of which the defendants were entitled to a fair trial in respect of the *quantum* of the claim.

[113] Mr *Seligson* found support for his submissions in this regard in the English Court of Appeal's decision in *Adams and Others v Cape Industries plc and Another*. 133(133) In this matter, a United States Federal District Court granted default judgment against the two defendant companies in favour of 205 plaintiffs. The judgment was for damages arising from personal injuries and consequential loss allegedly suffered by the plaintiffs as a result of their exposure to asbestos fibres. The defendant companies were registered in England and took no part in the proceedings. No

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hearing was held for purposes of assessing the damages and the Judge appears to have made an arbitrary award based on his opinion of what would represent an appropriate average award.

[114] When the plaintiffs sought to enforce the judgment in England, the defendants raised the defence that it would, under the circumstances, be contrary to natural justice to do so. In the Chancery Division, Scott J held that the failure by the United States court to assess the damages judicially offended against English principles of natural (or substantial) justice. Although the award of damages might have been made in accordance with the applicable procedural rules, it was arbitrary, not based on evidence and not related to 'the individual entitlements' of the plaintiffs. He hence dismissed the action on the basis that the relevant test was natural justice as perceived by the court in which the plaintiff was seeking enforcement of the foreign judgment. An appeal to the Court of Appeal was dismissed.

[115] Mr *Seligson* submitted that the approach of these English courts was 'instructive' for purposes of adjudicating the present matter, in that, as in that matter, the 'conclusive proof' objection was restricted to the quantification of the plaintiff's claim. That in itself was a good reason for refusing to enforce a foreign judgment.

[116] In his argument for the plaintiff, Mr *Thompson* pointed out, at the outset, that clause 5.10 of the R&R scheme had been considered by the English courts and held to be valid, in that its main purpose was to achieve cash flow. It hence precluded, as a defence to the plaintiff's claim against a name, the raising of disputes concerning the calculation of the *quantum* claimed. This was the gist of Tuckey J's judgment in the *Fraser* case when he refused to invalidate clause 5.10. 134(134)

[117] Mr *Thompson* conceded that, in terms of the *Sasfin* decision, conclusive-evidence clauses, which provide for a certificate of balance to constitute conclusive proof of indebtedness in favour of a creditor, would be *contra bonos mores*, in that they precluded rebutting evidence to prove a mistake. If the certificate did not, however, preclude rebutting evidence, it would not be in conflict with public policy.

[118] In the present matter, Mr *Thompson* submitted, the plaintiff indeed relied on the calculations of the MSU (Members' Services Unit) in determining the amount of the defendants' indebtedness. There was no evidence, however, to suggest that these calculations were wrong or that the plaintiff had invoked the conclusive-evidence clause against any of the defendants so as to preclude them from establishing that the calculations were wrong. The defendants simply failed to make out a case that there was any error in the calculation of any of their liabilities. They could hence not be heard to say that clause 5.10 was contrary to public policy. Their attempt to do so was nothing more than a red herring.

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[119] Mr *Thompson* emphasised that, in the present matter, the plaintiff was not seeking to enforce a conclusive-evidence clause. It was seeking to enforce judgments of an English court based on English law, to which the defendants had agreed to subject themselves. English law did not, in general, regard conclusive-evidence provisions as contrary to natural justice or public policy. On the contrary, the defendants were free to object to the calculation of the amount claimed, not only on the basis of fraud, as in South African law, but also on the basis of manifest error or irrationality, in the sense of unreasonableness or perversity. 135(135)

[120] Mr *Thompson* made it clear that the present matter raised very different policy issues

from those considered in the cases relied on by Mr *Seligson*. Such issues had to be considered with reference to the fact that the defendants had agreed to be bound by English law, which recognises conclusive-evidence clauses. It also had to take into account the fact that comity requires a South African court to recognise and enforce a foreign (English) judgment.

[121] I agree with Mr *Thompson* that the defendants, in raising the conclusive-proof point, have merely drawn a red herring across the track and have achieved nothing for their efforts. The arguments put forward by Mr *Seligson* are interesting and instructive, but have no bearing, I believe, on the facts of the case before this court. The defendants have come nowhere near making out a case that they have had even the slightest difficulty with the computation of the *quantum* in their respective cases, let alone that it was manifestly wrong, fraudulent or irrational. Simply to say that they have had difficulty in understanding how the amounts have been calculated raises no issue or dispute at all. That they 'would have wished to dispute those calculations', without indicating on what basis they would have liked to do so, is meaningless. This is compounded by the unsupported hearsay allegation that 'a considerable number of names' have discovered errors in the calculations. 136(136)

[122] To suggest that the mere insertion of clause 5.10 into the R&R scheme constituted a breach of public policy, regardless of whether its provisions were ever invoked against the defendants, must be rejected out of hand. By the same token, the defendants cannot be heard to say that they have not been given a fair trial or a fair hearing in terms of s 34 of the Constitution. If, at any stage during the course of the English litigation, they had had a problem relating to the calculation or computation of the amount or interest claimed, they would have had the opportunity to raise it on the basis of its being manifestly wrong, fraudulent or irrational. If they had effected undue payments, they would have had the right to reclaim them. Similarly, if moneys had been owing

to them, nothing would have prevented them from laying claim thereto in a separate action. They were not, however, entitled to apply set-off in respect thereof, for the simple reason that they had contractually bound themselves not to do so.

[123] The *Adams* case to which Mr *Seligson* referred does not, in my view, assist the defendants. The facts of that matter differ totally from those in the present matter, in that neither of the defendant companies had, in that case, been involved in the proceedings in the United States court. In addition, the English Court had difficulty with the ostensibly arbitrary way in which the damages had been assessed by the United States court. In the present matter the defendants have, at all relevant times, been fully involved in the proceedings and have never questioned the assessment of damages claimed against them. This last-ditch attempt to raise *quantum* as an issue, in particularly vague and oblique terms, must necessarily bring their good faith and sincerity into question. It smacks of a desperate attempt to stave off the inevitable by clutching at even the most unsubstantial of straws.

[124] It must not be lost from sight that the defendants expressly agreed to the provisions of clause 5.10 and likewise agreed that any dispute arising therefrom would be dealt with in terms of English law. I am, of course, permitted to have regard to the merits of the English

case, only for purposes of establishing whether it would be contrary to public policy to enforce a judgment ordering payment of an amount calculated in terms of such clause. In doing so I am constrained to remark that the approach of the English courts to this clause is particularly persuasive, namely, that the purpose of clause 5.10, as in the case of clause 5.5, is to achieve cash flow. 137(137) This makes good commercial sense.

[125] In this regard I am of the respectful view that the time may be overdue for the reconsideration, or at least a qualification, of the *Sasfin* rule. It seems logical and rational that account should be taken of business and commercial efficacy in considering a 'conclusive proof' provision. It also appears to be just, fair and reasonable that the amount claimed should be subject to attack, not only on the ground of fraud, but also on the grounds of manifest error and irrationality, in the sense of unreasonableness or perversity, as is the case in English law.

[126] As for Mr *Thompson's* argument that comity (*comitas*) requires this Court to recognise and enforce foreign judgments, I do not believe that it is necessary, for present purposes, to deal in any depth with this well-known principle of private international law. Suffice it to say that, since early Roman times, it was expected of a country, which had been victorious in battle, to treat the inhabitants of the defeated country *comiter*, that is to say, with affability, benevolence, courtesy, generosity and kindness. This usually entailed that their sovereignty (*maiestas*) and dignity (*dignitas*) would be recognised and respected by the

conquerors. 138(138) The application of comity in this sense was not attributable to some or other legal obligation arising from international law, but was, rather, a moral obligation motivated by considerations of humanity (*humanitas*) and equity (*aequitas*). Not surprisingly, it appears to have been transferred, as a fundamental value, to Roman-Dutch private international law, as demonstrated by Paul Voet (1619 - 1667) in his work on the conflict of laws. 139(139)

[127] Comity has probably, to a large extent, been a key factor in the development of the rules and principles of private international law. There can hence be no objection to applying it to the recognition and enforcement of foreign judgments and orders, provided it is not in conflict with public policy. On the facts and in the circumstances of the present case, however, it is not necessary to fall back on comity in rejecting the contentions of the defendants. There is simply no merit in them at all. It follows that the conclusive-evidence issue must also be resolved in favour of the plaintiff. The public-policy defence on this basis must hence be dismissed.

Conclusion

[128] From the aforesaid considerations it follows that all the defences raised by the defendants must fail, and that provisional sentence should be granted against them. The parties have agreed on the dates from which interest is payable by the defendants.

Order

[129] In the event, I grant the following order:

1. In case No 5108/03, M L Romahn is ordered to pay the plaintiff:

   (a) the amount of \P277 513,79 (being the principal sum of \P277 013,79 plus costs in the agreed amount of \P500);

   (b) interest on the amount of \P277 513,79 at the rate of 8% per annum from 23 December 1999 to date of payment.

2. In case No 5105/03, H Ilse is ordered to pay the plaintiff:

   (a) the amount of \P272 501,67 (being the principal sum of \P272 001,67 plus costs in the agreed amount of \P500);

   (b) interest on the amount of \P272 501,67 at the rate of 8% per annum from 23 December 1999 to date of payment.

3. In case No 5107/03, M Ilse is ordered to pay the plaintiff:

   (a) the amount of \P489 336,27 (being the principal sum of \P435 747,73 plus interest up to 11 March 1998 in the agreed amount of \P53 588,54);

   (b) interest on the amount of \P435 747,73 at the rate of 8% per annum from 12 March 1998 to date of payment.

4. In case No 8588/04, F Ilse is ordered to pay the plaintiff:

   (a) the amount of \P820 016,82 (being the principal sum of \P521 370,72 plus interest up to 13 May 2004 in the agreed amount of \P292 646,10 plus assessed costs in the amount of \P6 000);

   (b) interest on the amount of \P527 370,72 (being the principal sum plus assessed costs) at the rate of 8% per annum from 14 May 2004 to date of payment.

5. The defendants, M Romahn, H Ilse, M Ilse and F Ilse are ordered, jointly and severally, to pay the costs of suit, including the costs of two counsel.

Plaintiff's Attorneys: Webber Wentzel Bowens. Defendants' Attorneys: Cliffe Dekker Inc.

Endnotes

1 (Popup - Popup)

2005 (3) SA 549 (T) (also cited as *Society of Lloyd's v Price; In re Society of Lloyd's v Lee* [2005] 2 All SA 302 (T)).

2 (Popup - Popup)

[1998] CLC 1630 (also in [1999] 3 Lloyd's LR 156 (CA)).

3 (Popup - Popup)

See para [4] above.

4 (Popup - Popup)

[1997] CLC 759 and [1997] CLC 1012.

5 (Popup - Popup)

See *Society of Lloyd's v Leighs and Others* [1997] CLC 1398.

6 (Popup - Popup)

[1998] CLC 127.

7 (Popup - Popup)

In *Society of Lloyd's v Fraser and Others* (n 2 above).

8 (Popup - Popup)

An unreported judgment given in the Commercial Court on 4 March 1998.

9 (Popup - Popup)

At typed p 5 of the judgment.

10 (Popup - Popup)

At typed p 6 of the judgment.

11 (Popup - Popup)

1996 folio No 2032k.

12 (Popup - Popup)

Jaffray and Others v Society of Lloyd's [2002] EWCA Civ 1101 para 587.

13 (Popup - Popup)

[2003] EWHC 873.

14 (Popup - Popup)

See *Everard and Others v The Society of Lloyd's* [2003] EWHC 1890 (Ch) para 19. An appeal against Cooke J's judgment failed on all counts. See *Laws and Others v The Society of Lloyd's* [2003] EWCA Civ 1887. See also *The Society of Lloyd's v Bowman and Others* [2003] EWCA Civ 1886, in which the appeal against the order granted by Laddie J in the *Everard* matter (*supra*) was allowed in part. For present purposes it is unnecessary to deal with it.

15 (Popup - Popup)

See *The Society of Lloyd's v Laws and Others* [2004] EWHC 71.

16 (Popup - Popup)

1995 (1) SA 677 (A) at 685B - E.

17 (Popup - Popup)

See *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566 (A) at 568I - 569A. At 568I, Joubert JA stated unequivocally: 'The extinction of a contractual right of action by prescription is accordingly a matter of substantive law and not a procedural matter.'

18 (Popup - Popup)

The Conflict of Laws 13 ed (2000) vol 1 at 157 - 81, para 7R-001 at 157.

19 (Popup - Popup)

Paragraph 7-042 at 173 - 4.

20 (Popup - Popup)

Reported in (1882) 7 *RGZ* 21.

21 (Popup - Popup)

1981 (3) SA 536 (W).

22 (Popup - Popup)

At 537H - 538A.

23 (Popup - Popup)

At 538B.

24 (Popup - Popup)

At 538D - 539A.

25 (Popup - Popup)

At 539C - D.

26 (Popup - Popup)

At 539E.

27 (Popup - Popup)

C F Forsyth 'Extinctive Prescription and the *Lex Fori*: A New Direction?' in *SALJ* 99 (1982) at 16 - 22.

28 (Popup - Popup)

Christopher Forsyth 'Enforcement of Arbitral Awards, Choice of Law in Contract, Characterisation and a New Attitude to Private International Law' in *SALJ* 104 (1987) 4-16 at 12 - 13.

29 (Popup - Popup)

See further T W Bennett 'Cumulation and Gap: Are they Systemic Defects in the Conflict of Laws?' in *SALJ* 105 (1988) at 444 - 56.

30 (Popup - Popup)

1986 (3) SA 509 (D).

31 (Popup - Popup)

At 517G - 518I.

32 (Popup - Popup)

See M M Loubser *Extinctive Prescription* (1996) at 213 on the extent to which a South African court should take account of a different approach in the foreign legal system when carrying out the process of characterisation. He suggests that, in such a case, the *lex fori* should not be 'rigidly applied' and that 'a more flexible approach' should be followed, with reference to the classification of the rule under the *lex causae* and to factors such as uniformity of decision, applicable interests and existing rights.

33 (Popup - Popup)

At 519I - 520A.

34 (Popup - Popup)

At 521A - B.

35 (Popup - Popup)

At 523H.

36 (Popup - Popup)

At 523I - 524C.

37 (Popup - Popup)

Paragraph [32] above.

38 (Popup - Popup)

At 524E - F.

39 (Popup - Popup)

At 524G - H.

40 (Popup - Popup)

A A Ehrenzweig *Private International Law* (1967) 1125.

41 (Popup - Popup)

At 524I - 525A.

42 (Popup - Popup)

At 525C - F.

43 (Popup - Popup)

At 525F.

44 (Popup - Popup)

At 525F - 527J.

45 (Popup - Popup)

Note 48 below.

46 (Popup - Popup)

At 528H.

47 (Popup - Popup)

See at 530I - 531F of the judgment.

48 (Popup - Popup)

1924 AD 171.

49 (Popup - Popup)

At 185 of the judgment.

50 (Popup - Popup)

1961 (4) SA 21 (W) at 31A - B.

51 (Popup - Popup)

1983 (2) SA 138 (C) at 145F - H. 'Establissements' should read 'Etablissements'.

52 (Popup - Popup)

1951 AC 201 at 219.

53 (Popup - Popup)

[1972] 1 All ER 451 (CA) at 457 - 8.

54 (Popup - Popup)

At 146D - H.

55 (Popup - Popup)

J C W van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) at 217 - 18.

56 (Popup - Popup)

At 146H - 147B.

57 (Popup - Popup)

1993 (2) SA 104 (W).

58 (Popup - Popup)

At 116A.

59 (Popup - Popup)

At 116E - F.

60 (Popup - Popup)

At 116H - 117A.

61 (Popup - Popup)

J D Falconbridge *Essays on the Conflict of Laws* 2 ed (1954).

62 (Popup - Popup)

Reference may be made in this regard to C C Turpin 'Characterisation and Policy in the Conflict of Laws' in *Acta Juridica* (1959) at 222 - 8. He suggests that policy considerations and the needs of the international community should be applied in developing the relevant rules of international private law. See also Kahn's discussion of the *via media* and the concepts of 'provisional' and 'final' characterisation in Corbett, Hofmeyer and Kahn *The Law of Succession in South Africa* 2 ed (2001) at 597 - 9 and 611 - 12.

63 (Popup - Popup)

At 117B - E.

64 (Popup - Popup)

At 118I - J.

65 (Popup - Popup)

At 119I - J.

66 (Popup - Popup)

At 120F - H.

67 (Popup - Popup)

At 121A.

68 (Popup - Popup)

At 121D - F.

69 (Popup - Popup)

1995 (1) SA 366 (N).

70 (Popup - Popup)

At 369B.

71 (Popup - Popup)

At 369G - H.

72 (Popup - Popup)

Note 1 above.

73 (Popup - Popup)

Paragraphs [31] - [33] at 559G - 560B.

74 (Popup - Popup)

Note 57 above.

75 (Popup - Popup)

In para [37] at 563D.

76 (Popup - Popup)

In para [38] at 563F.

77 (Popup - Popup)

In para [38] at 563G - H.

78 (Popup - Popup)

Note 30 above. On this approach, see para [42] above.

79 (Popup - Popup)

Note 69 above.

80 (Popup - Popup)

In para [38] at 564A - B.

81 (Popup - Popup)

In para [38] at 564C.

82 (Popup - Popup)

In para [39] at 564D - H.

83 (Popup - Popup)

In para [40] at 564I - 565E.

84 (Popup - Popup)

He relied in this regard on *Primavera Construction SA v Government, North-West Province, and Another* 2003 (3) SA 579 (B) at 604E.

85 (Popup - Popup)

Note 57 above.

86 (Popup - Popup)

Paragraph [4] above.

87 (Popup - Popup)

1984 (1) SA 462 (T) at 466C - H.

88 (Popup - Popup)

MV Ivory Tirupati: *MV* Ivory Tirupati *and Another v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) in paras [30] - [33] at 116D - 117A.

89 (Popup - Popup)

Note 1 above.

90 (Popup - Popup)

This is in line with *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 835*j* - 836*a*, where Lord Brightman observed that, in most cases, the Limitation Act of 1980 'goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means'.

91 (Popup - Popup)

Note 57 above.

92 (Popup - Popup)

Note 30 above.

93 (Popup - Popup)

Mr *Seligson* relied, *inter alia*, on *dicta* appearing in *Joffe v Salmon* 1904 TS 317 at 319, *Joosab v Tayob* 1910 TPD 486 at 489; *National Milling Company Ltd v Mohamed* 1966 (3) SA 22 (R) at 23F; *Jones v Krok* (note 16 above) at 685B and 686A - B; and the *MV Ivory Tirupati* case (note 88 above) at 116D - 117B (in paras [30] - [34] of the judgment).

94 (Popup - Popup)

Mr *Seligson* referred in this regard to *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 626C, where Galgut AJA stated: 'A judgment debt is the amount or subject-matter of the award in the judgment. Execution can be levied to recover the judgment debt.'

95 (Popup - Popup)

Paragraph [28] above.

96 (Popup - Popup)

Rule 17 discussed by *Dicey and Morris* (note 18 above). See para [32] above.

97 (Popup - Popup)

Note 20 above. It features in the discussion of *Dicey and Morris* in para [32] above.

98 (Popup - Popup)

Note 21 above. It is discussed in paras [34] - [37] above.

99 (Popup - Popup)

Note 30 above. See the discussion in paras [39] - [45] above.

100 (Popup - Popup)

See para [44] above.

101 (Popup - Popup)

Note 48 and para [46] above. See also the *Guggenheim* case (note 50 and para [47]

above).

102 (Popup - Popup)

Note 51 and paras [48] - [50] above.

103 (Popup - Popup)

Note 55 and para [49] above ('die engste verbonde regstelsel').

104 (Popup - Popup)

Note 57 and paras [51] - [56] above.

105 (Popup - Popup)

See para [75] above.

106 (Popup - Popup)

Paragraph [4] above.

107 (Popup - Popup)

Paragraph [76] above.

108 (Popup - Popup)

Notes 1 and 30 above.

109 (Popup - Popup)

Note 69 and paras [57] - [58] above. See Mynhardt J's reference thereto in para [62] above.

110 (Popup - Popup)

Note 16 above. The case is discussed in paras [26] and [27] above.

111 (Popup - Popup)

Notes 87 and 88 above.

112 (Popup - Popup)

Paragraph [71] above.

113 (Popup - Popup)

Note 93 above, at 489 - 90. See also the *National Milling Company* case (note 93 above, at 23D - H).

114 (Popup - Popup)

Note 84 above.

115 (Popup - Popup)

At 604B - D of the judgment of Friedman JP.

116 (Popup - Popup)

At 566B - C of his judgment.

117 (Popup - Popup)

De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening) 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109) in para [11] at 439G - 440B (SA).

118 (Popup - Popup)

Paragraph [13] above.

119 (Popup - Popup)

Wells v South African Alumenite Company 1927 AD 69 at 72.

120 (Popup - Popup)

Reeves and Another v Marfield Insurance Brokers CC and Another 1996 (3) SA 766 (A) at 775D - E.

121 (Popup - Popup)

Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9E.

122 (Popup - Popup)

On the 'balance of justice and convenience', see *Sperling v Sperling* 1975 (3) SA 707 (A) at 722E, cited with approval in the *Laconian* matter (note 30 above, at 519H). See also E Kahn in *Annual Survey of South African Law* (1977) 564 at 570. He states there that the concept of public policy 'should be confined to the violation of some fundamental principle of justice or good morals, such as fraud by the successful party'. In the *Laurens* case (note 57 above, at 121B - C), Schutz J expressed approval of *Kahn's* approach where he suggests that a foreign rule should be rejected on the grounds of public policy 'only if it flies in the face of some deep-rooted conception of good morals'.

123 (Popup - Popup)

As stated in *Society of Lloyd's v Fraser and Others* (note 2 above) at 1649C.

124 (Popup - Popup)

[1994] 3 Re LR 168 (CA) at 171 (also in [1995] CLC 1396 at 1399).

125 (Popup - Popup)

At 173 (also in [1995] CLC 1396 at 1403).

126 (Popup - Popup)

See *Marchant & Eliot Underwriting Ltd v Higgins* [1996] 2 Lloyd's LR (CA) 31 at 39 (also in [1996] CLC 301 at 355F (*per* Leggatt LJ)): 'Without some form of "pay now sue later" obligation, Lloyd's could not function.'

127 (Popup - Popup)

Paragraph [4] above.

128 (Popup - Popup)

Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another 2001 (1) SA 1109 (CC) (2001 (1) BCLR 1) in paras [60] - [62] at 29D - 30D (SA).

129 (Popup - Popup)

See note 12 and para [21] above.

130 (Popup - Popup)

See para [13] above.

131 (Popup - Popup)

Note 121 above, at 14I - 15B.

132 (Popup - Popup)

See also *Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donelly v Barclays National Bank Ltd* 1995 (3) SA 1 (A) at 21A - D.

133 (Popup - Popup)

[1991] 1 All ER 929 (ChD and CA).

134 (Popup - Popup)

See para [17] above.

135 (Popup - Popup)

G Treitel *The Law of Contract* 11 ed (2003) at 446 - 7 states that contracts are contrary to public policy, and hence invalid, 'only so far as they purport to exclude the jurisdiction of the courts on a point of law'. If the exclusion relates to fact, it may still be challenged 'on the ground of unfairness, bad faith or perversity'.

136 (Popup - Popup)

See para [111] above.

137 (Popup - Popup)

As stated by Tuckey J in the *Fraser* case (see para [17] above).

138 (Popup - Popup)

See *Digest* 49.15.7.1.

139 (Popup - Popup)

Paulus Voet *De Statutis, Eorumque Concursu, Liber Singularis* (1661) 4.2.17; 4.3.17. See in general J M B Scholten *Comitas in het Internationaal Privaatrecht van de Hollandsche Juristenschool der Zeventiende Eeu* (1952) at 35 - 6 and 81 - 2, and *Van Rooyen* (note 55 above) at 15 - 16.