CONFLICTING LIMITATION PERIODS: A COMPARISON BETWEEN HONG KONG AND MAINLAND CHINA

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I. INTRODUCTION

The topic of limitation periods is frequently discussed in private international law.[1] In common law, it is an important part of the substance-versus-procedure characterization issue.[2] Since countries normally only apply their own procedural law, a characterization of procedure means that the forum's limitation period will apply. Alternatively, a characterization of substance leads a court to apply a foreign limitation period. A court faced with two different limitation periods thus has to make a decision on this characterization. If the proceedings are brought at a time when the claim is time barred under the *lex causae*, but not the *lex fori*,[3] the characterization will be outcome determinative. When the shorter limitation period is applied, the litigation will be time barred and the proceedings will be dismissed. Thus, the uniqueness of limitation period characterization is that, while it is technically a choice of law matter, its impact is jurisdictional because a court no longer has jurisdiction on a matter that is time barred.

Despite the importance of limitation periods, as will be demonstrated below, traditional common law rules hardly provide a straightforward answer. In fact, from time to time, this characterization is said to be used by courts to avoid the applicability of an undesirable governing law of the cause of action. This earns the limitation period the

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1 For example, Huber discussed statutes of limitation in his seminal work. DE CONFLICTU LEGUM DIVERSARUM IN DIVERSIS IMPERIIS back in the 17th century. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 483 (1834), *translated in* ERNEST G. LORENZEN, *Huber's De Conflictu Legum*, *in* SELECTED ARTICLES ON THE CONFLICTS OF LAWS 136, 161 (1947).

2 *See* Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) 628 (Lord Wilberforce) (appeal taken from Eng.).

3 *Lex causae* is defined as "the law applicable to the issue in dispute," while *lex fori* is defined as "the law of the court in which the trial is taking place." *See* ADRIAN BRIGGS, THE CONFLICT OF LAWS 36 (3rd ed. 2013).

infamous designation as one of the "escape devices."[4] Some common law jurisdictions, such as England, have changed the common law rules through legislation and opted for a more certain standard: the foreign limitation period is typically applied.[5] Meanwhile, a minority of jurisdictions, such as Hong Kong, continue to stick to traditional common law rules.[6]

To untangle these different approaches, this article seeks to highlight the problem of applying the traditional common law rules through a comparison between the characterization rules of Hong Kong and of Mainland China (hereinafter "Mainland"). In addition, the comparison will have significant practical impact as the Mainland is Hong Kong's largest trading partner. Trade with the Mainland accounted for more than half of Hong Kong's total trade in 2019.[7] Commercial disputes involving the two jurisdictions often arise and plaintiffs can potentially take advantage of Hong Kong's longer limitation periods. The general Mainland limitation period was, until recently, two years.[8] It is four years in cases of contracts for international sales of goods and contracts for and technology imports and exports.[9] The Hong Kong limitation period is generally six years;[10] or twelve years if the contract is made by deed.[11] It is difficult to find conflicting limitation periods between two jurisdictions that are as different as Hong Kong and the Mainland, yet that still interact so frequently. The com-

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4 *See* KERMIT ROOSEVELT, CONFLICT OF LAWS 19–21 (2010). Other escape devices include *renvoi* and public policy.

5 Foreign Limitation Periods Act, (1984) c. 16, § 1(1) (Eng. & Wales).

6 *See infra* notes 29–43 and accompanying text regarding interpretation of Hong Kong's limitation period under the traditional approach.

7 *See* TRADE & INDUS. DEP'T, *Hong Kong's Principal Trading Partners in 2019* (July 10, 2020), https://www.tid.gov.hk/english/trade_relations/mainland/trade.html.

8 Minfa Zongze (民法总则) [General Provisions of the Civil Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017), art. 188 (China), http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-03/15/content_2018907.htm (amending the limitation period to three years); Minfadian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 188 (China), http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml (preserving the general rule of 3-year limitation period introduced by the General Provisions of the Civil Law).

9 Hetong Fa (合同法) [Contract Law] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), art. 129 (China), http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm.

10 Limitation Ordinance, (2020) Cap. 347, § 4(1) (H.K.).

11 *Id.* § 4(3).

parison of these two jurisdictions will not only shed light on the conflict between Hong Kong and the Mainland, but also on how conflicting limitation periods should be assessed and resolved internationally.

Part II of this article introduces Hong Kong choice of law rules on limitation periods. This is followed by a comparison with its counterpart in the Mainland in Part III. Part IV highlights the various issues arising from the conflict between the different limitation periods of the two jurisdictions. In particular, the focus will be on the difficulties Hong Kong courts face in characterizing the Mainland limitation period provisions. Part V goes beyond choice of law to examine the impacts of the characterization of choice of law on the exercise of jurisdiction—*forum non conveniens*. Part VI concludes the article, suggesting that Hong Kong should adopt reforms via legislation in line with the Foreign Limitation Periods Act of 1984.

II. HONG KONG CHOICE OF LAW RULES ON LIMITATION PERIODS

How do Hong Kong courts applying Mainland law address a situation where a defendant argues for dismissal because the claim is time barred by Mainland law, even though it is not time barred under Hong Kong law?

As noted at the outset, unlike many jurisdictions, Hong Kong does not have legislation dealing with this issue. Under statutory provisions of other jurisdictions that have opted to change the common law regime, the foreign law limitation period will generally apply when foreign law applies.[12] Therefore, in Hong Kong, the issue must be resolved by the application of Hong Kong's common law rules on private international law. However, as will be discussed below, applying these rules to clashing limitation periods is no easy matter.

In limitation periods disputes, a Hong Kong judge's first step is to decide whether the limitation periods are to be categorized as substantive law or procedural law.[13] The traditional common law approach is to characterize the rule of law of the foreign country and the

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12 *See, e.g.*, Foreign Limitation Periods Act 1984, c. 16, § 1(1) (Eng. & Wales); Foreign Limitation Periods Act, (2013) Cap. 111A, § 3(1) (Sing.); Shewai Minshi Guanxi Falu Shiyong Fa (涉外民事关系法律适用法) [Law on the Application of Law for Foreign-related Civil Legal Relationships] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 7 (China), http://www.npc.gov.cn/zgrdw/huiyi/cwh/1117/2010-10/28/content_1602779.htm.

13 *See generally* George Panagopoulos, *Substance and Procedure in Private International Law*, 1 J. PRIV. INT'L L. 69 (2005).

rule of law of the forum, rather than the issue itself.[14] As such, in *In re Cohn*, when deciding whether German or English law governed the issue of survivorship, the English court chose to characterize each of the relevant statutes instead of characterizing the issue of survivorship.[15] The problem with characterizing rules of law is the possibility of odd results, including the application of both laws (which may conflict) or none of them. The former possibility would have come about, for example, if the court characterized the English law as procedural and the German law as substantive (called a "cumulation").[16] The latter would have been the case if the English law was characterized as substantive and the German law as procedural (called a "gap").[17]

These difficulties fortunately did not come about in *In re Cohn*, but their possibility is the reason why *In re Cohn* and its characterization of rules of law are criticized by commentators.[18] Alternatively, as Briggs[19] has suggested, "it is usually understood that issues, rather than rules of law, are characterized."[20] Thus, in the context of limitation periods, the court should simply characterize the issue of the limitation period as substantive or procedural. This reduces the variables from two (as in the characterization of two rules) to just one. As stated above, however, the characterization of rules of law remains the general practice of English courts. This distinction has not been addressed by Hong Kong courts.

If a rule of law characterization is applied to limitation periods, potential problems arise for the court. In a case where a Hong Kong court decides that both the Mainland and Hong Kong limitation period rules are procedural law, applying fundamental principles of private international law, a Hong Kong court would apply its own procedural

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14 *See* RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 47 (2012); LAWRENCE COLLINS ET AL., DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶¶ 2-009, -042 (2012); Christopher Forsyth, *Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws*, 114 L.Q. REV. 141, 147 (1998) ("It is submitted, that there is a very clear answer to the question of what is characterised: the object of characterisation is rules of law.").

15 In re Cohn [1945] Ch 5 (Eng.).

16 *See* GARNETT, *supra* note 14, at 47.

17 *Id.*

18 *See id.* at 46–47; ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 112-13 (2014).

19 Professor Adrian Briggs is Professor of Private International Law at the University of Oxford. *Adrian Briggs QC (Hon),* UNIV. OF OXFORD FACULTY OF L. BIOGRAPHIES, https://www.law.ox.ac.uk/people/adrian-briggs-qc-hon (last visited Oct. 10, 2021).

20 BRIGGS, *supra* note 18, at 111.

rules and not those of the foreign law,[21] so the Hong Kong limitation period applies. If Hong Kong and Mainland limitation rules are both considered matters of substantive law and Mainland law governs the contract, again there is no legal difficulty as the Mainland limitation period applies. Difficulties appear, however, when Hong Kong's limitation period is considered procedural law and the Mainland time-bar is deemed substantive law. In such a case, logically both limitation periods would apply—the problem of cumulation. Furthermore, if Hong Kong's limitation period is characterized as a matter of substantive law and the Mainland's period as procedural, and if Mainland substantive law applies to the matter, logically no limitation law applies—the problem of gap.[22] These difficulties are fully discussed in Part IV.

In deciding how to characterize each limitation period, the Hong Kong court will apply its own law. This is a well-established private international law principle. Thus, in deciding the issue of whether a particular part of the Kyrgyz Civil Procedure Law was a matter of substantive law or a rule of procedure, the Privy Council in *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd.* stated: "The question for the Manx court is whether, *from the viewpoint of Manx law*, the Kyrgyz rule relates to a matter of substance or of procedure. That the rule is contained in the Civil Procedure Code is relevant but not conclusive."[23] An illustration of this rule in the context of limitation periods is provided by *Black Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg AG,* where, despite the fact that German law regarded

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21 Black Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) 630 (Lord Wilberforce) (appeal taken from Eng.) ("the distinction made in English private international law between matters of substance and matters of procedure, and within that, the classification of limitation as a matter of procedure. Classification of limitation as procedural means that in proceedings in an English court, English law, as the lex fori, will apply its domestic law as to limitation and will not apply foreign limitation provisions even if the foreign law is the proper law").

22 The problem of a "gap" has been solved in South Africa, where its limitation legislation has been classified as substantive law by applying the limitation law with "the closest and most real connection with the [legal] dispute" and the foreign limitation period has been classified as procedural. *Society of Lloyd's v. Price*, *Society of Lloyd's v. Lee* 2006 (5) SA 393 (SCA) at para. 26 (S. Afr.). For further discussion, see GARNETT, *supra* note 14, at 265–66.

23 AK Inv. CJSC v. Kyrgyz Mobil Tel Ltd. [2011] UKPC 7, [2012] 1 WLR 1804, ¶ 108 (appeal taken from Isle of Man) (emphasis added). In AK Inv. CJSC v. Kyrgyz Mobil Tel. Ltd., the court quoted with approval DICEY, MORRIS & COLLINS, THE CONFLICT OF LAWS para. 7-002 (14th ed. 2006) ("In deciding whether a foreign rule is procedural, the court examines the foreign law in order to determine whether the rule is of such a nature as to be procedural in the English sense."). AK Inv. CJSC v. Kyrgyz Mobil Tel. Ltd. ¶ 105.

limitation periods as substantive law, the law of England, the *lex fori*, classified the German rules as procedural.[24]

Accordingly, in deciding how to characterize the Mainland rules on limitation periods, a Hong Kong judge is likely to ignore the Mainland's own characterization of limitation periods. Thus, the fact that Article 7 of the Law on the Application of Laws for Foreign-Related Civil Legal Relationships ("LAL") clearly regards limitation periods as matters of substantive law[25] would not be regarded as relevant in Hong Kong courts.

One problem in applying Hong Kong's own characterization rule on limitation periods is that there is uncertainty as to exactly what these rules are. Does Hong Kong apply the traditional English common law approach to the substance/procedure distinction, or the "modern" approach adopted by the Australian High Court in *John Pfeiffer Pty Ltd v Rogerson*?[26]

A. The Traditional Approach

The traditional common law approach distinguishes between rights and the enforcement of those rights (i.e., remedies). The rule is summarized by Briggs:

> If the common law rules identify a foreign law as applicable, but that foreign law is written in terms which suggest, in whole or in part, that it is concerned with the remedies which may be ordered rather than with underlying rights, the foreign law will, to that extent, not apply in [Hong Kong].[27]

Similarly, in *Poyser v. Minors*, Lord Justice Lush defined procedure as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the rights . . . ."[28]

Applying this traditional approach to limitation periods, if the language of the relevant law merely prevents a party suing but does

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24 Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL) (appeal taken from Eng.).

25 Shewai Minshi Guanxi Falu Shiyong Fa (涉外民事关系法律适用法) [Law on the Application of Law for Foreign-related Civil Legal Relationships] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011) art. 7 (China), http://www.npc.gov.cn/zgrdw/huiyi/cwh/1117/2010-10/28/content_1602779.htm [hereinafter LAL] ("Limitation period is governed by the law that should be applicable to the foreign-related civil relation.").

26 *See John Pfeiffer Pty Ltd v Rogerson* [2000] 203 CLR 503, 543–44 (Austl.).

27 BRIGGS, *supra* note 18, at 145

28 Poyser v. Minors [1881] 7 QBD 329 (CA) 333 (Lush LJ) (appeal taken from Shrewsbury Assizes) (UK).

not "kill off" the right, the limitation period would be classified as procedural. In the case of Hong Kong's own limitation period rules, most are clearly applying this approach procedurally. The most prominent one is Limitation Ordinance (Cap. 347). Section 4(1) states that, "[t]he following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued . . . ."[29] This clearly means that after the limitation period expires in a claim for money owed under a contract, the creditor is unable to sue for this sum. However, the creditor still has the right to the sum owed, and if the debtor paid that sum, the creditor would have the right to keep it.

The English common law rules on this issue are well established going back almost two centuries. In *Huber v. Steiner*, the court concluded that a French limitation statute was procedural.[30] The English court construed the words "all actions prescribe themselves" as limiting the action only, not as destroying the debt.[31] Similarly, in *Harris v. Quine*,[32] an Isle of Man limitation periods statute was held to be a matter of procedural law, as the statute stated:

> [A]ctions of debt, grounded upon any trading, contract, or demand, without specialty, which shall be sued or brought in any of the temporal courts of this isle, shall be commenced and effectually prosecuted within the time and limitation hereinafter expressed, that is to say, within three years next after the cause of such action, plaint, or suit, and at no time afterwards.[33]

On the other hand, some Hong Kong limitation period rules clearly kill off the right and would be classified as substantive law. For example, section 5(2) of the Limitation Ordinance, which deals with successive conversions and extinction of title for an owner of converted goods, provides:

> Where any such cause of action has accrued to any person and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired and he has not

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29 Limitation Ordinance, (2020) Cap. 347, § 4(1) (H.K.).

30 Huber v. Steiner [1835] 132 Eng. Rep. 80 (C.P. UK).

31 *Id.* at 84 (Tindall, CJ) ("The article itself begins by stating, that 'all actions prescribe themselves,' not 'that the contract is proscribed or gone' . . . . [I]t is the action, not the debt, which is prescribed by the law.").

32 Harris v. Quine [1869] LR 4 QB 653 (Eng.).

33 *Id.* at 655 (quoting Manx statute of limitations).

> during that period recovered possession of the chattel, *the title of that person to the chattel shall be extinguished*.[34]

What is the status of these English authorities in Hong Kong? In *Peregrine Fixed Income Ltd. v. JP Morgan Chase Bank*, the defendant made an interlocutory application to stay proceedings in favor of New York.[35] One issue that arose was whether the fact that the contract was time barred under New York law, the governing law of the contract, but not under Hong Kong law was a factor that should be taken into account in deciding if Hong Kong was the *forum conveniens*.[36] One of the arguments considered was whether the traditional common law rules on procedure/substance applied in Hong Kong.[37] High Court Judge William Stone stated:

> 30. Initially Mr. Shieh [the Defendant's Counsel] sought to defuse that which the court made clear it regarded as a significant juridical disadvantage by arguing that a time bar in an alternative forum could only amount to a juridical disadvantage if such otherwise were not applicable in Hong Kong.
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> 31. This line of argument thus stimulated an invitation to the court by Mr. Shieh to depart from the recognised common law position that, in terms of Hong Kong conflict of laws characterisation, statutes of limitation are regarded as matters of procedure and are governed by the law of the forum, and to adopt the position — specifically achieved by statute in England and Australia — that defences of limitation are substantive defences and are governed by the proper law of the transaction.
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> 32. This court made it clear that it was *not* going to accept this argument, for the purpose of this interlocutory application at least; thus the proposition that PFIL [the plaintiff] would face the same time bar argument under New York law, irrespective of whether the action were to be tried in Hong Kong or in New York, and that as a consequence there would be no juridical disadvantage in staying proceedings to New York, was not an argument that was going to succeed.[38]

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34 *See* Limitation Ordinance, (2020) Cap. 347, § 5(2) (H.K.) (emphasis added).

35 Peregrine Fixed Income Ltd. v. JP Morgan Chase Bank [2005] 3 H.K.L.R.D. 1 (C.F.I.).

36 *Id.* at 7. *Forum Conveniens* is a term meaning the most appropriate court for the resolution of a particular dispute.

37 *Id.*

38 *Id.*

In another hearing relating to costs,[39] Judge William Stone further commented that he "was not interested in overturning a century or so of conflicts jurisprudence . . . upon an interlocutory application . . . ."[40]

As such, *Peregrine* does not constitute the strongest of precedents, as it was an interlocutory application and the judge considered this in determining at that stage of the litigation that it was not appropriate to consider detailed arguments on whether limitation periods were to be classified as procedural or substantive law. However, there remains at least the possibility that a future Hong Kong court will apply the traditional common law approach to the issue of conflicting limitation periods, as in private international law the Hong Kong courts have a tendency to apply the English common law approach.[41]

B. Modern Approach

The traditional approach to substance/procedure has been heavily criticized because of the "the intrusive effect of the forum law's modification of foreign substantive laws, contrary to the avowed objective of private international law to give effect to foreign law."[42] The attitude of the common law courts is well summarized by Ernest G. Lorenzen:

> English and American courts have been too prone to say in the past that a particular matter belonged to procedure, and that it was controlled therefore by the law of the forum. They have given to the term a very wide meaning, with the consequence, that many matters, which on principle and according to the established practice of other countries should be governed by some other law, are subjected to the law of the place where the suit happens to be brought . . . . The tendency of

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39 Peregrine Fixed Income Ltd. v. JP Morgan Chase Bank, HCCL 2/2004 (C.F.I. Mar. 15, 2005) (Legal Reference System) (H.K.).

40 *Id.* at 5.

41 *E.g.,* in Islamic Republic of Iran Shipping Lines v. Phiniqia International Shipping LLC, HCA 2368/2012 10–11 (C.F.I. July 21, 2014) (Legal Reference System) (H.K.), the Hong Kong court preferred the traditional common law rule that presence in a foreign country is required to establish competent jurisdiction and rejected the more modern Canadian approach that all that is required is a real and substantial connection with the claim. Application for leave to appeal against such decision was dismissed. Islamic Republic of Iran Shipping Lines v. Phiniqia International Shipping LLC, HCMP 2034/2014 (C.A. Sept. 24, 2014) (Legal Reference System) (H.K.).

42 REPORT OF THE LAW REFORM COMMITTEE OF SINGAPORE ON LIMITATION PERIODS IN PRIVATE INTERNATIONAL LAW ¶ 28(c) (2011).

> the common law has always been to be exclusive. It is no wonder, therefore, that when the English courts were first asked to enforce rights 'created' by a foreign system of law, the civil law, they should welcome any doctrines which would operate restrictively in the recognition and enforcement of such rights. They willingly accepted therefore the doctrine of the Dutch school which gave to the term 'procedure' a very extensive meaning. By subjecting to the law of the forum all matters belonging to procedure and giving that term the widest possible meaning, the field for the application of 'foreign law' became necessarily reduced.[43]

Logically, if in applying conflict of law rules the court has decided foreign law should apply, then as much as possible of that law should be applied. Applying the words of Chief Justice Sir Anthony Mason in *McKain v RW Miller & Co (SA) Pty Ltd*, the court stated, "the essence of what is procedural may be found in those rules which are directed to governing or regulating the mode or conduct of court proceedings."[44] This is in line with the practical test favored by Cook[45] as to what substantive law is: "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?"[46]

In particular, the application of the traditional approach of procedure/substance to limitation clauses has given rise to the following criticisms:[47]

1. It encourages forum shopping by allowing a plaintiff to litigate in a jurisdiction where his or her claim is not time barred.[48]

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43 Ernest G. Lorenzen, *The Statute of Frauds and the Conflict of Laws,* 32 YALE L.J. 311, 327 (1923).

44 *McKain v RW Miller & Co.* [1991] 174 CLR 1, 26-27 (Austl.).

45 Cook is an American legal scholar specializing in the conflict of laws. *Guide to the Walter Wheeler Cook (1873-1943) Papers 1891/1944,* NW. UNIV. LIBR., http://uncap.lib.uchicago.edu/view.php?eadid=inu-ead-nua-archon-1062 (last visited Oct. 10, 2021).

46 WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 166 (1942).

47 U.K. LAW COMMISSION**,** REPORT NO. 1**14,** CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW**,** ¶ 3.2 (1982); REPORT OF THE LAW REFORM COMMITTEE OF SINGAPORE ON LIMITATION PERIODS IN PRIVATE INTERNATIONAL LAW 7–8 (2011); Brian R. Opeskin, *Choice of Law in Torts and Limitation Statutes*, 108 L.Q. REV. 398 (1992).

48 However, a plaintiff may have difficulty in persuading a Hong Kong court, where his/her claim is time barred in the Mainland, that Hong Kong is *forum conveniens*. *See infra* note 131 and accompanying text.

2. It defeats the main objective of limitation periods: legal certainty. A Mainland plaintiff who destroys all the documentary evidence concerning the dispute believing that no claim can now be brought against him in the Mainland may find that that he or she must then face trial in Hong Kong because of a longer limitation period.
3. The creation of an illusory distinction between a right and a remedy. "A right for which a legal remedy is barred is not much of a right."[49] A remedy is surely an inseparable part of a right.
4. The incongruity of the plaintiff establishing his or her claim based on one law and the defendant establishing his or her defense of limitation based on another law.

Under the modern approach, limitation periods are regarded as matters of substantive law. The leading case on this approach in the common law world is *John Pfeiffer Pty Ltd v Rogerson*,[50] which stated that, "matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure."[51] Referring to limitation periods, the court observed that "[s]ome statutes of limitation have traditionally been held to be procedural on the basis that they bar the remedy not the right; other limitation provisions have been held to be substantive. But all limitation provisions can affect whether a plaintiff recovers";[52] and "the application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure."[53]

Does this approach apply in Hong Kong? In *First Laser Ltd. v. Fujian Enterprises (Holdings) Co. Ltd.*,[54] in deciding the issue as to whether estoppel by convention was to be classified as a matter of procedure or substantive law, Lord Collins stated:

> The question whether a rule is a rule of procedure or a rule of substantive law depends on classification by the *lex fori*, here Hong Kong law. But it does not follow that because a

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49 ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 253 (1977); BRIGGS, *supra* note 18, at 145–46.

50 *John Pfeiffer Pty Ltd v Rogerson* [2000] 203 CLR 503 (Austl.).

51 *Id.* ¶ 99.

52 *Id.* ¶ 98.

53 *Id.* ¶ 100.

54 First Laser Ltd. v. Fujian Enterprises (Holdings) Co. Ltd., [2012] 15. H.K.C.F.A.R. 569 (C.F.A.).

> rule is classified as a rule of procedure for domestic purposes, it is also classified as a rule of procedure for the purposes of the conflict of laws . . . In the past there has been a tendency to classify rules as procedural for the purposes of the conflict of laws if those rules are classified as procedural in cases without an international element. But the more modern, and preferable approach is to say that matters which affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that are concerned with issues of substance, not with issues of procedure: *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543.[55]

Hong Kong courts have yet to decide if this statement by Lord Collins now represents the approach to be taken in Hong Kong in all cases involving the procedure/ substance distinction. Alternatively, it is surely possible for Hong Kong to introduce legislation similar to the Foreign Limitation Periods Act to avoid doubt and establish clear exceptions to the rule, such as that the foreign limitation period will not apply if it would cause undue hardship to one of the parties.[56]

III. MAINLAND CHOICE OF LAW RULES ON LIMITATION PERIODS

In this part, the Mainland choice of law rules on limitation periods will be explored. As Mainland cases do not adhere to *stare decisis*,[57] this section makes use of empirical methods to identify the practices of Mainland courts in applying Mainland choice of law rules.

Unlike traditional common law, where limitation periods are part of the overarching characterization question of substance and procedure, Mainland law has long provided for a bright-line choice of law rule on limitation periods. In 1988, the Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China

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55 *Id.* ¶ 91, 95.

56 *See, e.g.*, Foreign Limitation Periods Act 1984, c. 16, § 2 (Eng. & Wales). *See also* Jones v. Trollope Colls Cementation Overseas [1990] (CA) (appeal taken from EWHC (QB)) (UK) (foreign limitation period of only twelve months not applied where the plaintiff was hospitalized for seven months of this period and was led by the defendant to believe that her claim would be settled).

57 *See* ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 166–67 (2011) (stating that case law does not constitute a formal source of law in the Mainland, even though some judicial decisions, such as those from the Supreme People's Court ("SPC"), are binding on lower courts in practice).

(For Trial Implementation) ("1988 Interpretation") specified that limitation periods are governed by substantive law.[58] This rule has been preserved in Article 7 of the LAL, the law that sets out the current choice of law regime in China. In one simple line, the Article provides that limitation periods are governed by the law that should be applicable to the foreign-related civil relation. When this rule was originally proposed in 1988 and during the drafting of the LAL, Chinese scholars generally thought that it would align with the international practice of having the substantive law governing limitation periods.[59] This international practice includes the United Kingdom's Foreign Limitation Periods Act of 1984, chapter 16, which changed the traditional common law, but was not adopted in Hong Kong.[60] Another observation that distinguishes the Mainland choice of law rule from the Hong Kong rule is the characterization of limitation periods as an issue instead of a rule. This has avoided the complicated issues illuminated by *In re Cohn*, discussed above.[61] In short, the Mainland rule looks straightforward and easy to apply compared to its counterpart in Hong Kong.

A. Survey on Judicial Practice

Judicial practice in applying Article 7 of the LAL and Article 195 of the 1988 Interpretation by Mainland courts has been consistent. Throughout several legal databases,[62] the authors identified thirty-two cases where Chinese courts applied Article 7 of the LAL and Article 195 of the 1988 Interpretation. The following table shows that Chinese courts apply the limitation period of the substantive law on most occasions.

Table 1. Relationship between the substantive law and the law governing the issue of limitation

	Substantive Law was Applied to the Limitation Issue	***Non-Substantive Law was Applied to the Limitation Issue***	***Not Provided***	**Total**
1988 Interpretation Cases	6 (66.7%)	3[63] (33.3%)	0 (0.0%)	9 (100.0%)

58 Zuigao Renmin Fayuan Guanyu Guanche Zhixing <Zhonghua Renmin Gongheguo Minfa Tongze> Ruogan Wenti de Yijian (Shixing), Fa (Ban) Fa [1988] Liu Hao (最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见（试行），法（办）发[1988]6号) [the Opinions of the Supreme People's Court on Several Issues Concerning the Implementation of the <General Principles of the Civil Law of the People's Republic of China> (For Trial Implementation), Document Distributed by the Adjudication Comm. Sup. People's Ct. No. 6 [1988]] (promulgated by the Adjudication Comm. Sup. People's Ct., Apr. 2, 1988, effective Apr. 2, 1988), art. 195 (China), http://www.npc.gov.cn/zgrdw/huiyi/lfzt/swmsgxfl-syf/2010-08/18/content_1588353.htm ("The statute of limitations for foreign related civil juristic relations shall be determined according to the governing law for civil juristic relations determined by conflicting rules.").

59 *See* DU XINLI (杜新丽), GUOJI SIFA SHIWU ZHONG DE FALU WENTI (国际私法中的实务问题) [PRACTICAL ISSUES INVOLVED IN THE IMPLEMENTATION OF THE PRIVATE INTERNATIONAL LAW] 120 (2005); HUANG JIN (黄进) ET AL., ZHONGHUA RENMIN GONGHEGUO SHEWAI MINSHI GUANXI FALU SHIYONG FA JIANYI GAO JI SHUOMING (中华人民共和国涉外民事关系法律适用法建议稿及说明) [PROPOSED PROVISIONS AND EXPLANATIONS OF THE LAW ON THE APPLICATION OF LAW FOR FOREIGN-RELATED CIVIL LEGAL RELATIONSHIPS] 121 (2011); *see also* Huang Jin (黄进) et al., *Review of Judicial Practice in the Chinese Private International Law in 2007*, 11 CHINESE Y.B. OF PRIV. INT'L L. AND COMPAR. L. 433, 476 (2008); QI XIANGQUAN (齐湘泉), PRINCIPLES AND ESSENTIALS OF LAW OF LAW APPLICATION OF FOREIGN CIVIL RELATIONS (《涉外民事关系法律适用法》原理与精要) 3 (2011); WAN EXIANG (万鄂湘) et al., *Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa Tiaowen Lijie Yu Shiyong* (中华人民共和国涉外民事关系法律适用法条文理解与适用) [Explanations and Applications of the "Law on the Application of Law for Foreign-related Civil Legal Relationships"] 59-60 (2011).

60 *See, e.g.*, Foreign Limitation Periods Act 1984, c. 16, § 2 (Eng. & Wales). *See also* Jones [1990] (CA) (appeal taken from EWHC (QB)) (foreign limitation period of only twelve months not applied where the plaintiff was hospitalized for seven months of this period and was led by the defendant to believe that her claim would be settled).

61 *See* In re Cohn [1945] Ch 5 (Eng.).

62 These databases are pkulaw.cn, China Judgments Online, Westlaw China and Lexis China. The authors employed several search phrases (in Chinese), including art. 195 of the 1988 Interpretation, art. 7 of the LAL, and the full text of the two provisions, to collect potentially related cases and reviewed each case to identify relevant ones.

63 Nawagelekexi Hangyun Youxian Gongsi Su Zhongguo Yejin Jinchukou Shandong Gongsi (纳瓦嘎勒克西航运有限公司诉中国冶金进出口山东公司) [Navalgalaxy Shipping Ltd. v. China Metallurgical I/E Shandong Company], 2003 (3) Renmin Fayuan Anli Xuan (人民法院案例选) [People's Ct. Case Selection] 387 (Higher People's Ct. of Shandong Province Sept. 24, 2001) (China); Tongchuan Xinguang Luye Youxian Gongsi Su Zhongguo Yinhang (Xianggang) Youxian Gongxi (铜川鑫光铝业有限公司诉中国银行（香港）有限公司) [Tongchuan Xinguang Aluminum Co. Ltd. v. Bank of China (Hong Kong) Ltd.], (2004) Yue Gao Fa Min Si Zhong Zi No. 6 (Higher People's Ct. of Guangdong Province May 8, 2004) (China); Zhongguo Yinhang (Xianggang) Youxian Gongxi Su Zhuhai Shi Haida Gongmao Gongsi (中国银行(香港)有限公司诉珠海市海大工贸公司) [Bank of China (Hong Kong) Ltd. v. Zhauhai Municipality Haida Industry & Trade

LAL Cases	21 (91.3%)	1[64] (4.3%)	1[65] (4.3%)	23 (100.0%)
Total	27 (84.4%)	4 (12.5%)	1 (3.1%)	32 (100.0%)

It is worth noting that in all three 1988 Interpretation cases that have applied a law other than the substantive law to the issue of limitation periods, Mainland law (i.e., *lex fori*) was the substantive law; and, the only LAL case applying a non-substantive law to the limitation issue can be justified by its peculiar facts.[66]

In comparison to Hong Kong law, this means that Mainland courts do not characterize limitation periods as procedural at all, so Mainland courts do not usually characterize limitation periods as an escape device. In fact, limitation periods do not generally utilize other escape devices either. Among the usual escape devices, we could identify no case among the surveyed cases that struck out a limitation period specifically for public policy. There were also just two cases where a limitation period was rejected for a mandatory rule (i.e., replacing a limitation period by Mainland limitation period with the latter being a mandatory rule),[67] and just one case where a limitation period was rejected for failure to prove foreign law (i.e., failing to

Co. Ltd.] (2008) Zhu Zhong Fa Min Si Chu Zi No. 22 (Intermediate People's Ct. of Zhuhai Municipality, Guangdong Province Dec. 10, 2009) (China) (P v. D1 only).

64 Xinjiapo Zhangrong Haiyun Gufen Youxian Gongsi Su Diyi Chanwu Baoxian Gufen Youxian Gongsi (新加坡长荣海运股份有限公司诉第一产物保险股份有限公司) [Evergreen Marine (Singapore) Pte. Ltd. v. First Insurance Co., Ltd.] (2018) Zui Gao Fa Min Zai No. 196 (Supreme People's Ct. June 28, 2019) (China).

65 Foshan Shi Shunde Qu Dongjun Touzi Youxian Gogsi Su Zhongguo Yinhang Gufen Youxian Gongsi Foshan Gaoming Zhihang (佛山市顺德区东骏投资有限公司诉中国银行股份有限公司佛山高明支行) [Foshan Municipality Shunde District Dongjun Investment Co. Ltd. v. Bank of China Ltd., Foshan Gaoming Branch] (2013) Yue Gao Fa Min Si Zhong Zi No. 53 (Higher People's Ct. of Guangdong Province Oct. 11, 2013) (China).

66 *See infra* notes 99–101 and accompanying text.

67 *See infra* note 99 and accompanying text. *See also* Zhongguo Yinhang (Xianggang) Youxian Gongxi Su Zhuhai Shi Haida Gongmao Gongsi (中国银行(香港)有限公司诉珠海市海大工贸公司) [Bank of China (Hong Kong) Ltd. v. Zhauhai Municipality Haida Industry & Trade Co. Ltd.] (2008) Zhu Zhong Fa Min Si Chu Zi

provide foreign law on a limitation period as the sole basis for applying Mainland limitation period).[68]

It is easy to understand why escape devices are not exercised in limitation periods. Table 2 shows the substantive law applied by the courts in the thirty-two cases.

Table 2. The substantive law applied by the Chinese courts

	Mainland Law	***HK Law***	***UK Law***	***Indian Law***	***Singaporean Law***	***Mexican Law***	**Total**
1988 Interpretation Cases	8 (88.9%)	1 (11.1%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	9 (100.0%)
LAL Cases	15 (60.9%)	4 (21.7%)	1 (4.3%)	1 (4.3%)	1 (4.3%)	1 (4.3%)	23 (100.0%)
Total	23 (71.9%)	5 (15.6%)	1 (3.1%)	1 (3.1%)	1 (3.1%)	1 (3.1%)	32 (100.0%)

With more than seventy percent of the cases applying Mainland law, the courts generally applied the domestic limitation period. In other words, there is no potential conflict between substantive and procedural laws, as they are the same. Application of Mainland law clearly will not violate public policy or clash with a mandatory rule. Of course, there is no need to prove Mainland law as in the case of a foreign country's law. It is also noted that another 15.6% of the cases applied Hong Kong law. Even though Hong Kong is regarded as a

No. 22 (Intermediate People's Ct. of Zhuhai Municipality, Guangdong Province Dec. 10, 2009) (China) (P v. D1 only).

68 Note, however, that Meiya Baoxian Gongsi Shanghai Fengongsi Su Xianggang Donghang Chuanwu Youxian Gongsi (美亚保险公司上海分公司诉香港东航船务有限公司) [American International Group, Inc. (Shanghai Branch) v. TOHO Shipping Ltd.] (2003) Hu Hai Fa Shang Chu Zi No. 207 (Shanghai Maritime Ct. Sept. 23, 2004) (China) could be interpreted as such, though the judgment was not clear on this. *See infra* notes 97–98 and accompanying text.

separate jurisdiction for the purpose of choice of law under the Mainland rule,[69] Mainland courts have long shown friendliness to Hong Kong in private international law issues.[70] For example, Hong Kong judgments have a better chance to be recognized and enforced in the Mainland than those rendered by other jurisdictions.[71] It also helps that all statutes in Hong Kong are published in English and Chinese,[72] and many Mainland judges have received legal training in Hong Kong.[73] In short, putting aside cases governed by Mainland and Hong Kong laws, there were only four cases (12.5%) governed by foreign law.[74]

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69 *See* Zuigao Renmin Fayuan Guanyu Shiyong <Zhongua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa> Ruogan Wenti de Jieshi (Yi), Fashi [2012] Ershisi Hao (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释(一)，法释[2012]24号) (Interpretations of the Supreme People's Ct. on Several Issues Concerning the Application of the Law on the Application of Law for Foreign-related Civil Legal Relationships of the People's Republic of China, Judicial Interpretation No. 24 [2012]) (promulgated by the Adjudication Comm. Sup. People's Ct., Dec. 28, 2012, effective Jan. 7, 2013), art. 19 (China), http://www.court.gov.cn/shenpan-xiangqing-5273.html.

70 The reverse is the same: *e.g.,* Export-Import Bank of China v. Taifeng Textile Group Co. Ltd., HCMP 3012, 1684/2015 (C.F.I. Aug. 3, 2018) (Legal Reference System) (H.K.) (liberal and broad approach was adopted to interpret the jurisdiction clause rendering the relevant Mainland judgment enforceable in Hong Kong).

71 *See* King Fung Tsang, *Enforcement of Foreign Commercial Judgments in China*, 14 J. PRIV. INT'L L. 262, 275-76 (2018).

72 Official Languages Ordinance, (2017) Cap. 5, § 4(1) (H.K.) ("All Ordinances shall be enacted and published in both official languages."). *See also* XIANGGANG JIBEN FA [The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China] art. 9 (H.K.) ("In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.").

73 *See* Catherine Law, *Visit Enhances Collaboration Between CityU and National Judges College,* CITY UNIV. OF H.K. (Jan. 24, 2018), https://www.cityu.edu.hk/media/news/2018/01/24/visit-enhances-collaboration-between-cityu-and-national-judges-college (highlighting that the School of Law of the City of University of Hong Kong is offering various programs for current Chinese judges). *See generally* CTR. JUD. EDUC. & RSCH., *About Us*, CITY UNIV. OF H.K, https://www.cityu.edu.hk/cjer/en/about.html (last visited Sept. 8, 2021) (showing that the Centre for Judicial Education and Research was set up in 2013 to institutionalize those programs); GOV'T OF THE H.K. SPECIAL ADMIN., *Region, Projects and Cooperation with the Mainland*, DEP'T OF JUST., https://www.doj.gov.hk/en/mainland_and_macao/training_for_mainland.html (last visited Sept. 8, 2021) (indicating "Training Scheme in Common Law for Mainland Legal Officials" and "Short term attachment programme" are arranged by the Hong Kong Department of Justice for Mainland legal officials).

74 The overall application of a foreign limitation period may still appear to be relatively high given the conventional observation that Chinese courts have a homeward trend in applying Chinese law in foreign related cases. *See* ZHENG SOPHIA TANG ET AL., CONFLICT OF LAWS IN THE PEOPLE'S REPUBLIC OF CHINA 227–28

Additionally, it is difficult to utilize the aforementioned escape devices. For characterization, the clear language of Article 7 of the LAL does not lend itself to an interpretation of the limitation period as procedural.[75] While it is possible to utilize the public policy exception under Article 5 of the LAL,[76] that exception is usually limited to clear cut cases, such as foreign gambling law.[77] Theoretically, a much shorter foreign limitation period may deprive the plaintiff of a meaningful opportunity to initiate proceedings in court such that it denies him due process. In practice, however, the Chinese limitation period, which used to be two years generally (amended to three years in October 2017), is usually shorter than other jurisdictions.[78] Table 3 below compares the limitation period of China with those of other jurisdictions that were involved in the thirty-two surveyed cases:

Table 3. Limitation period of foreign jurisdictions involved in the surveyed cases (except Hong Kong)

Foreign Law	Contract	Tort
British Virgin Islands	6 years	6 years[79]
England and Wales	6 years	6 years[80]
India	3 years	1 year[81]
Indiana, USA	6/10 years	2 years[82]
Japan	5/10 years	3/20 years[83]
Macau, PRC	15 years	15 years[84]
Malta	5 years	2 years[85]

(2016). However, the sample size here is limited to conclude a contrary finding statistically.

75 LAL, *supra* note 26, art. 7.

76 LAL, *supra* note 26, art. 5.

77 *See*, *e.g.*, Zhang Jie Su Qiu Zhongming (张杰诉裘钟鸣) [Zhang Jie v. Qiu Zhongming] Zhe 06 Min Zhong No. 3126 (Intermediate People's Ct. of Shaoxing Municipality, Zhejiang Province Sept. 25, 2017) (China).

78 [General Provisions of the Civil Law of the People's Republic of China] (promulgated by the Fifth Sess. of the Twelfth Nat'l People's Republic of China on Mar. 15, 2017, effective date Oct. 1, 2017), http://www.npc.gov.cn/englishnpc/lawsoftheprc/202001/c983fc8d3782438fa775a9d67d6e82d8.shtml.

79 Limitation Act 1961, Chapter 43, § 4(1) (Virgin Is.).

80 Limitation Act 1980, c. 58, §§ 2, 5 (Eng. & Wales).

81 The Limitation Act 1963, §§ 2, 3 (India).

82 IND. CODE §§ 34-11-2-4, -7, -11 (2020).

83 MINPL [CIV. C.] art. 166-7, 724-2 (Japan).

84 CÓDIGO CIVIL [Civil Code], art. 302 (Mac.).

85 Civil Code, (2020) Cap. 16, §§ 2153, 6 (Malta).

New South Wales, Australia	6 years	6 years[86]
Samoa	6 years	6 years[87]
Singapore	6 years	6 years[88]
Taiwan	15 years	2/10 years[89]
Turkey	2 years	2 years[90]
Vietnam	3 years	2 years[91]

Among the four cases that applied a different limitation period from the substantive law, there was one case relating to proof of foreign law, but the practice has been inconsistent, as illustrated by the following cases. In *Navalgalaxy Shipping Ltd. v. China Metallurgical I/E Shandong Co.*,[92] the Qingdao Maritime Court held that the plaintiff failed to provide English law regarding the contractual rights and obligations, but did provide the information regarding the English limitation period.[93] The court therefore applied Mainland law as to the contractual rights and obligations and English law as to the limitation period. This decision was affirmed on appeal,[94] and has been regarded as an application of *dépeçage*.[95] However, in *American International*

86 *Limitation Act 1969* (NSW) s 14 (Austl.).

87 Limitation Act 1975, § 6(1)(a) (Samoa).

88 Limitation Act 1996, Cap. 163, § 6(1)(a) (Sing.).

89 Minfa (民法) [Civil Code], (1998) §§ 125, 197 (Taiwan).

90 Turkish Code of Obligations, (2011) § 72 (Turk.) (*translated in* Erdem Büyüksagis, *Extracts from the New Turkish Code of Obligations*, 3 **J. EURO. TORT L.** 90, 96-97 (2012)).

91 CIVIL CODE (2015) §§ 429, 588 (Viet.).

92 Nawagelekexi Hangyun Youxian Gongsi Su Zhongguo Yejin Jinchukou Shandong Gongsi (纳瓦嘎勒克西航运有限公司诉中国冶金进出口山东公司) [Navalgalaxy Shipping Ltd. v. China Metallurgical I/E Shandong Company], (Qingdao Maritime Ct. Apr. 4, 2001) (China). This case has been summarized in Huang Jin (黄进) et al., *Review of Judicial Practice in the Chinese Private International Law in 2007*, 11 CHINESE Y.B. PRIV. INT'L L. & COMP. L. 433, 477 (2008).

93 *Id.*

94 Nawagelekexi Hangyun Youxian Gongsi Su Zhongguo Yejin Jinchukou Shandong Gongsi (纳瓦嘎勒克西航运有限公司诉中国冶金进出口山东公司) [Navalgalaxy Shipping Ltd. v. China Metallurgical I/E Shandong Company], 2003 (3) Renmin Fayuan Anli Xuan (人民法院案例选) [People's Ct. Case Selection] 387 (Higher People's Ct. of Shandong Province Sept. 24, 2001) (China).

95 Huang Jin (黄进) et al., *Review of Judicial Practice in the Chinese Private International Law in 2007*, 11 CHINESE Y.B. PRIV. INT'L L. & COMP. L. 433, 477 (2008). *Dépeçage* refers to "the process of dividing a case up into various issues governed by potentially different laws." *See* LEA BRILMAYER ET AL., CONFLICT OF LAWS, 121 (6th ed. 2011).

Group, Inc. (Shanghai Branch) v. TOHO Shipping Ltd.,[96] the Chinese court found the submission of a legal opinion by a single English lawyer unsatisfactory proof of English law. This allowed the Mainland court to avoid the designation of English law as the governing law by an express choice-of-law clause contained in the contract, as well as the nine-month limitation period specified in the contract.[97] It should be noted that the latter case predated the LAL and made no reference to the 1988 Interpretation; thus, it was not included in the survey above.[98]

Similar uncertainty regarding the applicability of *dépeçage* is also found in cases involving mandatory rules. In *Tongchuan Xinguang Aluminum Co. Ltd. v. Bank of China (Hong Kong) Ltd.*,[99] which focuses on a guarantee that violated Chinese foreign exchange control law, the court stated that the mandatory rule on foreign exchange control should only affect the relevant part of the foreign law that was in conflict, and thus should not affect other parts covered by foreign law, such as the limitation period under Article 195 of the 1988 Interpretation. In contrast, the Intermediate People's Court of Guangzhou Municipality, Guangdong Province in *Bank of China (Hong Kong) Ltd. v. Zengcheng Enterprises Group Ltd.*[100] displaced the Hong Kong law as

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96 Meiya Baoxian Gongsi Shanghai Fengongsi Su Xianggang Donghang Chuanwu Youxian Gongsi (美亚保险公司上海分公司诉香港东航船务有限公司) [American International Group, Inc. (Shanghai Branch) v. TOHO Shipping Ltd.] (2003) Hu Hai Fa Shang Chu Zi No. 207, (Shanghai Maritime Ct. Sept. 23, 2004) (China).

97 Parties may not agree to shorten the limitation period under Chinese law. *See* Minfadian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 197 (China), http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml.

98 Both cases predate the LAL.

99 Tongchuan Xinguang Luye Youxian Gongsi Su Zhongguo Yinhang (Xianggang) Youxian Gongxi (铜川鑫光铝业有限公司诉中国银行（香港）有限公司) [Tongchuan Xinguang Aluminum Co. Ltd. v. Bank of China (Hong Kong) Ltd.], (2004) Yue Gao Fa Min Si Zhong Zi No. 6 (Higher People's Ct. of Guangdong Province May 8, 2004) (China).

100 Zhongguo Yinhang (Xianggang) Youxian Gongsi Su Zengcheng Jingmao Qiye Jituan Gongsi (中国银行(香港)有限公司诉增城经贸企业集团公司) [Bank of China (Hong Kong) Ltd. v. Zengcheng Enterprises Group Ltd.], (2007) Sui Zhong Fa Min Si Chu Zi No. 17 (Intermediate People's Ct. of Guangzhou Municipality, Guangdong Province Dec. 4, 2007).

the governing law for violating the mandatory Chinese Exchange Control Law.[101] In doing so, the court also displaced the Hong Kong limitation period without further elaboration.

While it was suggested that *dépeçage* in the context of limitation period would be appropriate as it gave affect to party autonomy to the maximum extent,[102] it should be noted that *dépeçage* is not expressly provided in LAL, nor in the relevant Supreme People's Court ("SPC") interpretation. It does not help that the SPC did not clarify this issue in a recent case.

In *Evergreen Marine (Singapore) Pte. Ltd. v. First Insurance Co., Ltd.*, despite the Court deciding that the relevant liability in dispute was governed by Mexican law, it nonetheless found the Chinese limitation period to be applicable.[103] This decision may be justified by the unique circumstances of the case. The governing law of the shipping transaction was generally Mainland law.[104] However, according to Article 105 of the Maritime Law, if damage to the goods has occurred in a certain section of the transport, the laws governing that specific section of the multimodal transport shall be applicable to matters concerning the liability of the multimodal transport operator.[105] Mexican

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101 Daibiao Fa (担保法) [Guarantee Law] (promulgated by Standing Comm. of the Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995), art. 8 (China). Note that foreign exchange control law is a specified category of mandatory law under Zhuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa> Ruogan Wenti de Jieshi (Yi), Fashi [2012] Ershisi Hao (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释(一)，法释[2012]24号) [Interpretations of the Supreme People's Ct. on Several Issues Concerning the Application of the Law on the Application of Law for Foreign-related Civil Legal Relationships of the People's Republic of China, Judicial Interpretation No. 24 [2012]] (promulgated by the Adjudication Comm. Sup. People's Ct., Dec. 28, 2012, effective Jan. 7, 2013), art. 10(4) (China), http://www.court.gov.cn/shenpan-xiangqing-5273.html.

102 *Id.*

103 Xinjiapo Zhangrong Haiyun Gufen Youxian Gongsi Su Diyi Chanwu Baoxian Gufen Youxian Gongsi (新加坡长荣海运股份有限公司诉第一产物保险股份有限公司) [Evergreen Marine (Singapore) Pte. Ltd. v. First Insurance Co., Ltd.] (2018) Zui Gao Fa Min Zai No. 196 (Supreme People's Ct. June 28, 2019) (China).

104 This is because both parties agreed to apply Chinese law at trial.

105 This is an application of Zhuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falu Shiyong Fa> Ruogan Wenti de Jieshi (Yi), Fashi [2012] Ershisi Hao (最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释(一)，法释[2012]24号) [Interpretations of the Supreme People's Ct. on Several Issues Concerning the Application of the Law on the Application of Law for Foreign-related Civil Legal Relationships of the People's Republic of China, Judicial Interpretation No. 24 [2012]] (promulgated by the Adjudication Comm. Sup. People's Ct., Dec. 28, 2012, effective Jan. 7, 2013), art. 3 (China), http://www.court.gov.cn/shenpan-xiangqing-5273.html

law was thus only applicable to determine liability since the contract in question happened to be such a multimodal transport contract and the damage arose during transportation in Mexico. Interpreting Article 105, the SPC observed that the words there did not expressly cover limitation periods and the SPC did not think it should be extended to cover the same.[106] Thus, it could be argued that the relevant "substantive law," for the purpose of Article 7, refers to Mainland law instead of Mexican law. That said, the SPC could certainly have provided a clearer guidance if it discussed Article 7 and *dépeçage* in its judgment.

In the end, despite some uncertainties relating to *dépeçage*, it is safe to say that the Mainland choice of law rule usually applies the limitation period of the substantive law, particularly in cases where the court has made a reference to Article 7. It should be noted, however, that the consistency between substantive law and a limitation period does not mean that a Mainland court could not manipulate a limitation period. It can certainly do so by manipulating the substantive law like in *Bank of China (Hong Kong) Ltd. v. Zengcheng Enterprises Group Ltd.*, where the governing law of the contract was displaced for violating mandatory foreign exchange control laws. The general choice of law practice of the Mainland, however, is a topic beyond the scope of this article.

IV. INTERACTIONS WITH HONG KONG CHOICE OF LAW

With the expansive commercial transactions between Hong Kong and China, there are plenty of opportunities for interactions of the two regimes in the limitation periods and choice of law context.

A. How Will Hong Kong Courts Characterize Chinese Limitation Periods?

A review of the main provisions of Chinese limitation periods law shows major difficulties and the artificiality of the Hong Kong right and remedy approach.[107]

(providing that provisions in the Maritime Law of the People's Republic of China shall prevail if they are in conflict with those in the LAL).

106 Xinjiapo Zhangrong Haiyun Gufen Youxian Gongsi Su Diyi Chanwu Baoxian Gufen Youxian Gongsi (新加坡长荣海运股份有限公司诉第一产物保险股份有限公司) [Evergreen Marine (Singapore) Pte. Ltd. v. First Insurance Co., Ltd.] (2018) Zui Gao Fa Min Zai No. 196 (Supreme People's Ct. June 28, 2019) (China).

107 *See id.* Part II.

A number of Mainland statutes contain provisions relevant to limitation periods.[108] The major provisions are set out in the Civil Code[109] and its predecessors, General Principles of the Civil Law ("GPCL"),[110] and General Provisions of the Civil Law.[111] The provision that is likely most indicative of the right and remedy distinction is Article 188 of the Civil Code:

> The prescriptive period shall be calculated from the day when the obligee knows or should have known that his or her right has been infringed upon and who the obligor is, except as otherwise provided for by any law. The people's court *shall not offer protection* if 20 years have elapsed since the infringement. . . .[112]

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108 Minfadian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021) (China), http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml; Hetong Fa (合同法) [Contract Law] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) (China) [hereinafter Contract Law], http://www.gov.cn/banshi/2005-07/11/content_13695.htm; Chanpin Zhiliang Fa (2018 Xiuzheng) (产品质量法（2018修正）) [Product Quality Law (2018 Amendment)] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec. 29, 2018, effective Dec. 29, 2018) (China), http://www.npc.gov.cn/zgrdw/npc/xinwen/2019-01/07/content_2070255.htm; Huanjing Baohu Fa (2014 Xiuding) (环境保护法（2014修订）) [Environmental Protection Law (2014 Revision)] (promulgated by Standing Comm. of the Nat'l People's Cong., Apr. 24, 2014, effective Jan 1., 2015) (China), http://www.gov.cn/zhengce/2014-04/25/content_2666434.htm; Hai Shangfa (海商法) [Maritime Law] (promulgated by Standing Comm. of the Nat'l People's Cong., Nov. 7, 1992, effective July 1, 1993) (China), http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4575.htm; Baoxian Fa (2015 Xiaozheng) (保险法（2015修正）) [Insurance Law (2015 Amendment)] (promulgated by Standing Comm. of the Nat'l People's Cong., Apr. 24, 2015, effective Apr. 24, 2015) (China), http://www.npc.gov.cn/wxzl/gongbao/2015-07/06/content_1942828.htm.

109 Minfadian (民法典) [Civil Code] (promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021) (China), http://www.npc.gov.cn/npc/c30834/202006/75ba6483b8344591abd07917e1d25cc8.shtml [hereinafter Civil Code].

110 Minfa Tongze (民法通则) [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) (China), http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4470.htm. *See also* Minfa Tongze (2009 Xiuzheng) (民法通则（2009修正）) [General Principles of the Civil Law (2009 Amendment)] (promulgated by the Nat'l People's Cong., Aug. 27, 2009, effective Aug. 27, 2009) (China), http://www.npc.gov.cn/zgrdw/npc/lfzt/rlys/2014-10/28/content_1883354.htm [hereinafter GPCL].

111 Minfa Zongze (民法总则) [General Provisions of the Civil Law] (promulgated by the Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017) (China), http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-03/15/content_2018907.htm [hereinafter General Provisions].

112 Civil Code, *supra* note 111, art. 188 (emphasis added).

Because the provision calls for the court not to protect the plaintiff's right to initiate a lawsuit, instead of extinguishing the right itself, it suggests that the Mainland's limitation period should be regarded as a remedy. It will thus fall into the procedural rule category and will not be applicable in Hong Kong courts. Such wording is comparable to its counterpart under Hong Kong law. Identical wording has been used under Mainland law since 1986, when the GPCL was first promulgated.[113]

Similarly, Article 192 also indicates a procedural characterization:

> When the prescriptive period expires, the obligor may use it as a defence for non-performance of obligations. Where the obligor agrees to perform after the prescriptive period expires, the obligor may not defend on the ground that the prescriptive period has expired; and if the obligor has voluntarily performed, *no request for restitution may be made*.[114]

This provision states that, if sued, the obligor can raise the defense of the expiration of the limitation period, but the obligee's contractual rights are still preserved, and if the obligor agrees to honor his contractual obligations outside the limitation period, he is bound to do so.

In relation to the special limitation period for international sales of goods and technology contracts, Article 128 of the Contract Law states, "[t]he time limit for initiating legal proceedings or applying for arbitration regarding contracts of international sale of goods and contracts on technology import and export shall be four years . . . ."[115] Again there is nothing here to suggest the right is killed off.

However, another provision invites a contrary interpretation. Article 199 of the Civil Code provides that:

> Except as otherwise provided for by any law, the duration of rights such as the right of revocation and the right of rescission as granted by laws or agreed upon by the parties shall be calculated from the day when a right holder knows or should have known that such a right has arisen, and the provisions on the suspension, interruption, and extension of extinctive prescription shall not apply to the above duration. The right of revocation, right of rescission, and other *rights shall be extinguished* upon expiration of such duration.[116]

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113 *See* GPCL, *supra* note 112, art. 135; General Provisions, *supra* note 113, art. 188; Civil Code, *supra* note 111, art. 188.

114 Civil Code, *supra* note 111, art. 192 (emphasis added).

115 Contract Law, *supra* note 110, art. 128.

116 Civil Code, *supra* note 111, art. 199 (emphasis added).

In contrast to Article 188, at least in the context of revocation and rescission, Article 199 extinguishes a right upon the expiry of the limitation period.[117] Under the right and remedy approach, this will be regarded as a right and thus put the Chinese limitation period rule in the substantive category. As such, the Chinese limitation period potentially will be applied by the Hong Kong courts where the substantive law is Chinese.[118]

1. Reconciling the Conflicting Provisions

Will it be possible to reconcile these conflicting provisions? Theoretically, it is possible to do so by relegating the substantive characterization of Article 199 to revocation and rescission only and to characterize the Mainland limitation period generally as procedural. However, this interpretation would cause practical problems. Imagine a situation where a plaintiff claims both damages and rescission as alternative remedies. The damages claim would apply the Hong Kong limitation period since the general limitation period will not be governed by the Mainland limitation period rule, a procedural law. However, the rescission claim will be governed by the much shorter Mainland limitation period instead, assuming that Mainland law is the proper law of contract. With the application of two different limitation periods, this is again a form of *dépeçage*. However, unlike the *dépeçage* discussed above where different laws are applied to two issues, the contractual liability and limitation period, respectively,[119] this would apply two different limitation periods to the same issue. There is no justification for the same cause of action to have two different limitation periods. Why should rescission have a shorter limitation period than damages, except for a technicality of the choice of law rule? It is therefore unlikely for a Hong Kong court to apply *dépeçage* in this context.

If a Hong Kong court has to decide between the two categories when the Mainland limitation period is involved, which category will it choose in practice? Looking at the provisions as a whole, it is suggested that the procedural category is more appropriate. Article 188 is a more general provision than Article 199. This is further confirmed by Article 192 of the Civil Code and Article 128 of the Contract Law.

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117 *Id.*

118 This depends on the analysis of Re Cohn below. *See supra* notes 17–20; *infra* notes 121–25 and accompanying text.

119 *See supra* notes 102–06 and accompanying text.

As mentioned above, Article 188 and its predecessors have been key Mainland limitation period provisions since 1986, whereas Article 199 only came into existence in 2017. It is unlikely that the characterization of a country's limitation period should be changed only because of one recent addition relating to certain remedies adopting a different wording.

Apart from the confusion from the differing words, other considerations further complicate the characterization of the Mainland limitation period.

2. The Fallacies of In re Cohn

As discussed above, characterization of rules instead of issues could lead to the potential fallacies of *In re Cohn*.[120] If a Hong Kong court applies this approach using the traditional rights/remedies distinction regarding substance and procedure,[121] the process of deciding which law applies can become complex.

Diagram A. Four possible conclusions of Hong Kong courts regarding the substance-procedure characterization

Scenario	Hong Kong Law	Mainland Law
Scenario A1:	Procedural	Procedural
Scenario A2:	Procedural	Substantive
Scenario A3:	Substantive	Substantive
Scenario A4:	Substantive	Procedural

With two potential characterizations (substantive and procedural) in each of Hong Kong's and the Mainland's laws, there are four possible scenarios (assuming Mainland law is governing):
Scenario A1: where both the Hong Kong and Mainland limitation period rules are characterized as procedural.
Scenario A2: where the Hong Kong limitation period rule is characterized as procedural, while the Mainland limitation period is characterized as substantive.
Scenario A3: where both the Hong Kong and Mainland limitation period rules are characterized as substantive.
Scenario A4: where the Hong Kong limitation period rule is characterized as substantive, while the Mainland limitation period is characterized as procedural.

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120 *See supra* notes 17–20 and accompanying text.
121 *See supra* notes 29–43 and accompanying text.

Given that the Hong Kong limitation period rule will likely be characterized as procedural,[122] only Scenarios A1 and A2 are relevant, with the difference between the two lying in the Hong Kong court's characterization of the Mainland limitation period.

Scenario A1 will certainly lead to the application of the Hong Kong limitation period because Hong Kong courts can only apply Hong Kong procedural law.[123] However, Scenario A2 causes a major problem. Given the fact that Hong Kong's limitation period rules are procedural under the traditional rules, if the Mainland rules are regarded as substantive and thus *prima facie* applicable, how would a Hong Kong judge solve the problem of having to apply two conflicting limitation periods where the plaintiff is time barred under one but not the other? There is no direct precedent on this scenario. Dicey, however, suggested that "once a substantive period of limitation of the *lex causae* had expired, no action could be maintained even though a procedural period of limitation imposed by the *lex fori* ha[s] not yet expired: in such a case there was simply no right left to be enforced."[124] Accordingly, if the Mainland limitation provision is substantive law and the plaintiff is outside the Mainland limitation period, the claim in Hong Kong would likely be dismissed. Effectively, therefore, the court is applying the shorter limitation period under the substantive law.

Having said that, Dicey's position, while persuasive, remains untested in a case directly involving the very issue and a level of uncertainty lingers. Given that the main provision (Article 188) pointed to the procedural category, the Hong Kong courts could easily avoid the said uncertainty in Scenario A2 by characterizing Mainland limitation period as procedural and thus putting the case under Scenario A1. In other words, in choosing the two possible characterizations of the

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122 *See supra* notes 37–43 and accompanying text; *see also* GRAEME JOHNSTON & PAUL HARRIS, S.C., THE CONFLICT OF LAWS IN HONG KONG 30–31 (3d ed. 2017).

123 JOHNSTON & HARRIS, *supra* note 27, ¶ 2.008–2.009, p. 16.

124 LAWRENCE COLLINS ET AL., DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 7.056; *See also* the conclusions reached in Huber v. Steiner (1835) 132 Eng. Rep. 80 (C.P.) and Harris v. Quine (1869) LR 4 QB 653, 658 (LRQB) (Eng.), that if the foreign limitation periods had destroyed the right no claim could be brought in the English courts. Lush, J. in Harris v. Quine stated:

Had the Manx statute of limitations been analogous to our statute (3 & 4 Wm. 4. c.27) as to real property, and had extinguished the right after the limited time and not merely barred the remedy, there would have been good ground for defence in this court. But the Manx law is like our statute of limitations, and bars the remedy only; and all that was decided in the Manx court was, that the action could not be maintained there. *Id.* at 658.

Mainland limitation period, the fallacies give the court additional motivation to characterize it as procedural.

3. Forum Shopping

This procedural characterization will, nevertheless, incentivize forum shopping. Such characterization will thus be contrary to public policy. The relative incentives of forum shopping are shown in the diagrams below.

Diagram B. In the event that the Mainland limitation period is characterized as procedural by the Hong Kong courts

	Hong Kong Law as Governing Law	**Mainland Law as Governing Law**
Litigating in Hong Kong	B1. HK limitation period	B2. HK limitation period
Litigating in Mainland	B3. HK limitation period	B4. Mainland limitation period

Diagram C. In the event the Mainland limitation period is characterized as substantive by the Hong Kong courts

	Hong Kong Law as Governing Law	**Mainland Law as Governing Law**
Litigating in Hong Kong	C1. HK limitation period	C2. Mainland limitation period
Litigating in Mainland	C3. HK limitation period	C4. Mainland limitation period

Diagrams B and C combine the above discussions on the Hong Kong choice of law rule (as illustrated in Diagram A) and the Mainland choice of law rule under Article 7 of the LAL. As discussed above, Hong Kong courts could theoretically characterize the Chinese limitation period as either substantive or procedural, which will have two alternative consequences: first, application of the Hong Kong limitation period (if the Mainland limitation period is characterized as procedural, as in Scenario A1) or second, application of the Mainland limitation period (if the Mainland limitation period is characterized as substantive, as in Scenario A2). These two scenarios, which have been

shaded in Diagrams B and C, are represented by Scenarios B2 and C2, respectively.

Comparison of the two diagrams shows that there will be no incentives for parties to conduct forum shopping if Hong Kong law governs,[125] regardless of how the Mainland limitation period is characterized (i.e., comparing B1/B3 with C1/C3). The real incentive for forum shopping is only present where Mainland law governs (i.e., the last column of Diagrams B and C). The plaintiff will have an incentive to forum shop in Diagram B (i.e., choosing to file the lawsuit in Hong Kong), but the incentive will not be present in Diagram C where the Mainland limitation period is characterized as substantive. This is because both Hong Kong and Mainland courts will apply the same limitation period (i.e., C2 = C4). Accordingly, comparing the two possible characterizations of the Mainland limitation period, the procedural characterization will increase the risk of forum shopping. If a Hong Kong court were to take into account forum shopping, it would give the court an incentive to interpret the wording of the Mainland Civil Code as being substantive.

4. No Limitation Period Case in Hong Kong

Table 2 shows that the Mainland courts have applied the Hong Kong limitation period in five cases. In addition, two Mainland cases involved potential application of the Hong Kong limitation period, though the arguments failed in the end. However, to date, in no Hong Kong case has a defendant argued for the application of the Mainland limitation period. Since the Mainland limitation period is generally shorter than the Hong Kong limitation period,[126] defendants have an incentive to raise the issue in hopes of rendering the Hong Kong suits time barred. The most obvious explanation for this is that both parties assume that the limitation periods in both jurisdictions are procedural. This impression may be created by *Peregrine*,[127] the only Hong Kong case in which the characterization was discussed.

In addition, the wording of the Mainland limitation period provisions are unlikely to be regarded as substantive under the traditional approach. The defendants may therefore prefer to pick another battlefield to fight on, rather than attempt to make legal history in Hong

125 It is, however, possible for the two jurisdictions to identify different governing laws.

126 *See* Table 3.

127 Peregrine, *supra* note 37.

Kong by establishing that the modern approach of classifying procedure/substance applies to limitation periods. The situation, however, is different in Mainland litigation. With a bright-line rule, the outcome of the characterization argument is obvious, namely that the case is time barred under Mainland law but not under Hong Kong law.[128]

Before we turn to the proposal to address these problems, it is important to highlight the impact of this characterization on jurisdiction, particularly *forum non conveniens*.

V. LIMITATION PERIODS AND *FORUM NON CONVENIENS*

Even though the question of applicable limitation periods is, strictly speaking, a choice of law issue, it clearly has jurisdictional implications. If the claim is time barred, then even though the Hong Kong court may have technical jurisdiction, the claim cannot proceed. Therefore, when the claim is time barred under Mainland law, a claim in a Hong Kong court can only proceed if the limitation period in both jurisdictions is classified as procedural so that the only applicable limitation period is that of the *lex fori*.

Therefore, an important related question arises in the context of *forum non conveniens*: specifically, what is the impact on the defendant's Mainland rights of the Hong Kong court's decision to allow the dispute to proceed in Hong Kong? Should the Hong Kong court be sympathetic to the plaintiff in this situation and allow the claim to proceed?

In the second stage of such an argument, a plaintiff in Hong Kong frequently uses the argument of the *forum non conveniens* test that, even though the dispute may have a closer connection with a foreign jurisdiction, "substantial justice" would not be obtained by the plaintiff if proceedings went ahead there, as the plaintiff is time barred in that jurisdiction.[129]

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128 The core of this argument is not the characterization of the Hong Kong limitation period, but rather which substantive law to apply.

129 Hong Kong follows Lord Goff's classic *forum non conveniens* test stated in Spiliada Maritime Corp. v. Cansulex Ltd. [1986] UKHL 10, AC 460 (HL) (appeal taken from Eng.). *See also* The Owners of Cargo Lately Laden on Board the Ship or Vessel "Adhiguna Meranti" v. The Owners of the Ships or Vessels "Adhiguna Harapan" [1987] H.K.L.R. 904, 907 (C.A.) (Hunter JA) (H.K.) ("(I) Is it shown that Hong Kong is not only not the natural or appropriate forum for the trial, but that there is another available forum which is clearly or distinctly more appropriate than Hong Kong[?] . . . (II) If the answer to (I) is yes, will a trial at this other forum deprive the plaintiff of any "legitimate personal or juridical advantages[?]").

For this argument to work, however, the plaintiff would have to prove that he acted reasonably in allowing the claim in the foreign forum to become time barred. The relevant law is succinctly stated by Lord Goff in *Spiliada*:

> Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there.[130]

Applying these principles, if the plaintiff should have been aware that the Mainland was an appropriate forum and took no action to preserve the limitation period there, then his second-stage *forum non conveniens* argument in favor of Hong Kong will fail. Thus, in *Re Kappa Sea*,[131] the court decided that the plaintiff had acted unreasonably in failing to issue a protective writ in Myanmar within the applicable limitation period, given the fact that the dispute had a strong connection to Myanmar and very little connection to Hong Kong.[132]

> This is not a case where the factors connecting the action to Hong Kong were, rightly or wrongly, thought to be much stronger than Myanmar so that one might perhaps be excused

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130 Spiliada [1987] AC 460 (HL) 483E-4A (appeal taken from Eng.).

131 Re Kappa Sea, HCAJ 101/2015 (C.F.I. Aug. 25, 2017) (Legal Reference System) (H.K.), *aff'd*, CAMP 38/2017 (C.A. Feb. 12, 2018) (Legal Reference System) (H.K.)).

132 The only Hong Kong connection was the fact that both sides' solicitors were Hong Kong firms. *Id.* ¶ 34.

> from coming to the view that it is unnecessary to protect the limitation period in Myanmar. Nor is this a case where the factors connecting the action to Hong Kong and Myanmar are evenly balanced, and owing to the Plaintiffs' view on the comparative quality of justice in both jurisdictions, they have decided to sue in Hong Kong, instead of Myanmar. As this court pointed out earlier, the action has no or no relevant connections with Hong Kong at all.[133]

This decision can be distinguished from *Bright Shipping Ltd. v. Changhong Group (HK) Ltd*,[134] which involved a tanker collision that had occurred in international waters. As it was accepted that there was no natural forum for the dispute, it was decided that the plaintiff was not at fault in allowing the claim to become time barred in Shanghai.[135]

What if the plaintiff asserts that the reason why the action was time barred in the Mainland was his or her lack of confidence in the Mainland legal system? In line with the English courts,[136] the Hong Kong courts take the view that a mere assertion that a plaintiff would be deprived of a fair trial if the claim proceeded in the Mainland is not sufficient. The plaintiff would have to produce cogent evidence to justify this.

> It is nowadays unlikely that concerns as to the quality of justice to be had in mainland courts per se will persuade the Hong Kong court not to grant a stay in favour of the PRC. It is open to plaintiffs in Hong Kong to make allegations of a denial of justice, but these must be asserted candidly and supported by cogent and positive evidence, which is lacking in the present case.[137]

However even if there is no evidence of any unfairness, "[s]ometimes a person's experience in a certain jurisdiction was so harrowing that even if objectively speaking even handed justice could be obtained in that jurisdiction, the inaction by that plaintiff might not be regarded by

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133 *Id.* ¶ 59.

134 Bright Shipping Ltd. v. Changhong Group (HK) Ltd., HCAJ 3/2018 (C.F.I. Nov. 15, 2018) (Legal Reference System) (H.K.) (*upheld on appeal*, Bright Shipping Ltd. v. Changhong Group (HK) Ltd., FAMV 3/2020 (C.F.A. July 16, 2020) (Legal Reference System) (H.K.)).

135 *Id.* ¶ 57.

136 "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why *cogent evidence* is required." AK Investment CJSC v. Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, ¶ 97 (Lord Collins) (appeal taken from Isle of Man) (emphasis added).

137 Gain Park Holdings Ltd. v. Eversino Investments Ltd., HCA 1638/2013 ¶ 61 (C.F.I. Nov. 26, 2014) (Legal Reference System) (H.K.).

an objective bystander as unreasonable."[138] Thus, in *Duan Qi Gui v. Upper Like Investments Ltd.*,[139]

> [d]uring the relevant limitation period, which . . . expired in May 2001, the plaintiff was detained from July 1999 in respect of charges which resulted in the death sentence in March 2001, which was not overturned until 28 August 2002. There was also the confiscation of all her assets in March 2001 and perhaps more importantly, the prospect of these consequences when she was detained pending trial. In such circumstances, we do not believe the learned judge's view that her inaction was not unreasonable could be faulted.

The message from the above cases is therefore clear. If there is a possibility that the Mainland could be an appropriate forum,[140] a plaintiff should take measures to protect the limitation period there. If there is a failure to do so, the fact that the Mainland limitation period has expired will not benefit the plaintiff in considering whether Hong Kong was *forum conveniens* unless, as in *Duan Qi Gui*, something has happened in the Mainland that objectively gives the plaintiff an understandable loss of confidence in the administration of justice there.

What would happen if the defendant is prepared to give a time bar waiver, such that if the case is stayed in favor of the Mainland the defendant will not raise the limitation defense in the Mainland proceedings ? Clearly this waiver is only relevant if the defendant can establish that the waiver would be accepted by the foreign court. It is therefore up to the defendant's legal expert to satisfy the Hong Kong court that such a waiver would be accepted. In *The Owners of Cargo Lately Laden on Board the Ship or Vessel "Adhiguna Meranti" v. The Owners of the Ships or Vessels "Adhiguna Harapan*,"[141] the court refused to accept such evidence:

> It was agreed that Article 741 of the Commercial Code imposed a time limit of 1 year. The issue was whether this was mandatory or could effectively be waived by a party. [The

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138 Duan Qi Gui v. Upper Like Investments Ltd., CACV 320/2007 (C.A. June 17, 2008) (Legal Reference System) (H.K.).

139 *Id.* at 40.

140 In *Oracle Software Systems Co Ltd. (China) v. Citic 21 CN Technology Co Ltd. (China)*, HCA 105/2012 (Sept. 18, 2013) (Legal Reference System) (H.K.), it was decided that the Mainland was not an appropriate forum and therefore the plaintiff had not acted unreasonably in allowing the claim to be time barred there because any Mainland judgment could not be enforced in Hong Kong, where the defendant had its assets.

141 [1987] H.K.L.R. 904, 919G-H (C.A.). A similar view was taken in *Andhika Samyra*, [1989] 1 H.K.L.R. 198, 204D (C.F.I.).

> Plaintiff's expert's] view was that the court 'may not and is not obligated' to give effect to any agreement or waiver, citing a case where the court had taken the limitation point of its own motion. [The defendant's expert] was of the opinion that the court would uphold an agreement to waive the time bar, citing post-independence Dutch authority in support. On this evidence, it was uncertain whether the Indonesian court would uphold a unilateral waiver and not raise limitation of its own motion.[142]

This is contrasted with *The Owners of the Ship or Vessel "Lanka Athula" v. The Owners of Cargo Lately Laden on Board the Ship or Vessel "Lanka Muditha"*[143] and *Peregrine Fixed Income Ltd v. JP Morgan Chase Bank*,[144] where it was decided that the undertakings to waive time-bars would be accepted by the New York courts.

In relation to undertakings by defendants to waive time bar defenses in the Mainland in *Duan Qi Gui v. Upper Like Investments Ltd.*[145] and *Oracle (China) Software Systems Co. Ltd. v. Citic 21 CN (China) Technology Co. Ltd.*,[146] the Hong Kong courts rejected the view that a waiver would be effective in the Mainland courts; whereas in *New Link Consultants Ltd. v. Air China*[147] and *Zhou Yi Qin v. Pong Tak Sen,*[148] such an assurance was held to be effective. The facts of *New Link Consultants Ltd.*, however, predate the introduction of Mainland legislation (*see infra* Table 4), which now makes it clear that any waiver agreement or unilateral assurance will have no legal effect.[149] Also, *Zhou Yi Qin* simply applied the former case without taking the relevant law into account.

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142 *Id.* at 916.

143 [1991] 1 H.K.L.R. 741, 744G-7J (C.A.).

144 [2005] 3 H.K.L.R.D. 1, 7E-I (C.F.I.).

145 CACV 320/2007 ¶ 47-8 (C.A. June 17, 2008) (Legal Reference System) (H.K.).

146 HCA 105/2012 ¶ 43-5 (C.F.I. Sept. 18, 2013) (Legal Reference System) (H.K.).

147 [2005] 2 H.K.C. 260, 287C-G, 90F-I.

148 HCA 66/2011 ¶ 28-33 (C.F.I. Mar. 14, 2012) (Legal Reference System) (H.K.).

149 The rationale behind art. 197 is: (1) The statute of limitations aims to urge the relevant parties to exercise their rights in a proactive manner to promote the use of property and the normal economics of the society in general. Further, it facilitates discovery and assessment of the relevant evidence. These purposes will be frustrated if the parties could create variations. (2) It is likely that third parties do not know about the contractual parties' agreement on the extension of the statutory limitation period. This may cause uncertainties and potential detriments to the third parties. (3) Allowing the parties to agree to extend the limitation period is not beneficial to urging the obligors to exercise their rights against the obliges. (4) In case the parties'

Table 4. Legal instruments passed in the Mainland providing for the ineffectiveness of the parties' waivers of statutory limitations

Legal Instrument	Effective Date	Relevant Provision
Provisions of the Supreme People's Court on Several Issues Concerning the Application of Statute of Limitations During the Trial of Civil Cases (Judicial Interpretation No. 11 [2008]) （最高人民法院关于审理民事案件适用诉讼时效制度若干问题的规定 (法释[2008]11号)）	September 1, 2008	**Article 2** The people's court shall not support any agreement reached in violation of law between the parties on extending or shortening the statute of limitations or waiving any interest from the statute of limitations.
General Provisions of the Civil Law（民法总则）	Oct. 1, 2017	**Article 197** The period, calculation method, and causes of suspension or interruption of extinctive prescription shall be provided for by laws, and any agreement between the

agreements to shorten the limitation period are recognized, the relevant parties may not have sufficient time to exercise their rights. (5) Renouncement of benefits may well be one of the clauses on contract templates and parties with more bargaining power may well abuse it. WANG LIMING**,** ANNOTATIONS ON THE GENERAL PROVISIONS OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA 505 (2017); Jia Dongming (賈东明), <Zhonghua Renmin Gongheguo Minfa Zongze> Shijie Yu Shiyong (《中华人民共和国民法总则》释解与适用) [Annotations and Applications of the "General Provisions of the Civil Law of the People's Republic of China"] 508-09 (2017); WANG ZHU (王竹), <ZHONGHUA RENMIN GONGHEGUO MINFA ZONGZE> BIANZUAN DUIZHAOBIAO YU TIAOWEN SHIYI (《中华人民共和国民法总则》编纂对照表与条文释义) [Comparison Table and Annotations of the "General Provisions of the Civil Law of the People's Republic of China"] 357 (2017).

		parties in this respect shall be void. A party's prior renouncement of the benefit of prescription shall be void.
Civil Code（民法典）	Jan. 1, 2021	**Article 197** The period, calculation method, and causes of suspension or interruption of extinctive prescription shall be provided for by laws, and any agreement between the parties in this respect shall be void. A party's prior renouncement of the benefit of prescription shall be void.

While the fact that it is not possible to waive a Mainland time bar defense may be used to support the argument that the claim should be allowed to proceed in Hong Kong, the argument is weakened by the fact that a Hong Kong court will not automatically assume that this will justify the case proceeding in Hong Kong. As discussed above, if the Mainland is an appropriate forum, the defendant must still produce convincing reasons as to why he or she allowed the claim to become time barred there. This therefore diminishes, to some degree, the concern that to construe both limitation periods as procedural would encourage forum shopping in Hong Kong.

VI. PROPOSAL

As discussed in Part IV, there are various issues with the traditional common law rules. First, the literalist interpretation applied to the foreign limitation period statute in construing it as procedural is artificial and does not give effect to the legislative intention of the foreign country where it was clearly intended to have a substantive effect. Second, the traditional characterization of rules of law rather than issues could lead to the fallacies of *In re Cohn*. Although the cumulation case between Mainland and Hong Kong laws is likely to be resolved

in the application of Mainland law, per Dicey's suggestion, these uncertainties and confusions could be avoided if the traditional common law approach to rights and remedies is abolished. Third, we have also seen how a procedural characterization could incentivize forum shopping. This in fact highlights the importance of adopting a characterization rule that is in line with prevailing international practice—the characterization of time limits as substantive, particularly when the largest trading partner adopts such a rule.

To avoid forum shopping and provide much needed certainty as to whether a claim is time barred, Hong Kong should follow the approach of civil law jurisdictions and most common law countries[150] in enacting legislation on limitation periods. It should make clear that the limitation provisions of the law of the cause of action will be applied irrespective of whether the limitation rules are classified as procedural under the law of the cause of action's choice of law rules, subject to a public policy or undue hardship exception.

An alternative solution could also be found in the Hong Kong courts adoption of the modern approach, as suggested by Lord Collins in *First Laser*. However, in the interests of certainty, it is surely preferable to introduce legislation to quickly settle this important matter, rather than wait for case law to eventually reach the conclusion that the modern approach should apply. In addition, legislative reform can make the change prospective so as not to undermine any choice of court agreements made on the understanding that limitation periods were procedural. Finally, it seems preferable to have more precision than would exist at common law as to when not to apply the foreign limitation period. The public policy exception is seldom applied at common law. Therefore, legislation specifying the foreign limitation period would not apply if this would cause undue hardship to one of the parties would make the exception far more certain, as the Hong Kong courts could rely on the substantial body of precedents on the meaning of this expression that the English courts have created under the Foreign Limitation Periods Act. This will also have the effect of harmonizing the Hong Kong rule with its counterpart under Article 7 of the LAL and reduce the transaction costs in dispute resolution between the jurisdictions.

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150 In recent years, New Zealand and Singapore have introduced such legislation. *See* Limitation Act 2010, s 55 (N.Z.); Singapore (Foreign Limitation Periods Act, (2013) Cap. 111A, § 3(1) (Sing.). Other common law countries, such as Canada, have departed from the traditional common law rule by way of case law. *See* Tolofson v. Jensen, [1994] 3 S.C.R. 1022 (Can.); *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 203 CLR 503 (Austl.).

In the end, this comes down to common sense. As remarked by Lorenzen more than a century ago, the "more satisfactory" approach is to characterize limitation periods as substantive "because it leads internationally to greater uniformity."[151] The same observation is still sound today given our more globalized world. This is especially true given the fact that the Mainland and Hong Kong both belong to the same country.

151 Ernest G. Lorenzen, *The Statute of Limitations and the Conflict of Laws,* 28 YALE L.J. 492, 495–96 (1919).