The Difference of Resolving a Conflict Problem as to the Statute of Limitation of Actions or Prescription — What Can Be Seen from the Analyses of Cases in Australia, South Africa and Germany (summary)

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The purpose of this article is to research the relation between the characterization/ qualification and *renvoi* through analyzing very important judgments in Australia, South Africa and Germany. The author analyzes 3 judgments given respectively by the courts of these 3 countries : Australian case is "Neilson v Overseas Projects Corporation of Victoria Ltd", South African case "Society of Lloyd's v Price & Lee", and German case "Tennessee-Wechsel-Fall". All of these judgments are concerned with the question of how to treat foreign statutes of limitation of actions or prescription rules in PIL, but these judgments treat them in a different way: in Neilson v Overseas Projects Corporation of Victoria Ltd., the High Court of Australia resolves this question with *renvoi*. The 2 other cases are common in that they use the method of characterization /qualification, but the Supreme Court of South Africa adopts the *via-media* approach of *Falconbridge*, and in the German case, *Reichsgericht* is said by *Kahn-Freund* to have applied what was in effect the *Despagnet-Wolff* approach to the question, that means characterization in accordance not with *lex fori* but with *lex causae*.

The author wondered why the solution of this problem could be treated at the different stage of IPL or in a different way. It would be easy to say that the difference of the individual factual situation in each case causes the difference of its solution. But is it the only reason? F.Kahn, as is still well-known in the world of PIL, pointed long ago that the difference of legal concepts in various countries makes it impossible to unify the solution of conflict problems, so that the result might be different in each country. However, not only the difference of legal concepts but also that of methodology of PIL would also become an obstacle for unifying the solution or international harmony of decisions. Such a difference would also be a latent obstacle for it.

Therefore, the author, when looking at 2 judgments given successively (in 2005 and 2006) in Australia and South Africa, tries to find out the relation of characterization/qualification and *renvoi*, and eventually to identify the difference in the methodology behind

it.

As a result of this research , the author concludes as follows;

1. The correlation can be found between the theories of *renvoi* and those of characterization/qualification. According to *Sauveplanne*, "the technique of *renvoi* is only conceivable in a bilateral system of PIL, and cannot be used when applying unilateral rules". The author agrees partly with him, but the author thinks that the view on *renvoi* depends not upon which method the system of PIL is based on, i.e. unilateralism or bilateralism, but on what one thinks is the object of characterization/qualification. When one constructs the system of PIL on the base that this object is rules of law, one would tend to deny *renvoi.* On the contrary, when one takes a view that its object is legal relation or factual situation, that is, when one follows the mechanism of *Savigny's* PIL, one would admit *renvoi. Sauveplanne's* statement is correct on that Savigny's PIL uses necessarily bilateralism, and the thought like Statuists tends to use unilateral method. However, considering that Statuiists had already used the method of bilateralism, it would be more correct that the view on *renvoi* should depend not on the method, but the object of characterization/qualification.

2. Whatever position on PIL scholars may take, many of them try to search the applicable sphere of each rule of law, so that those who think the object of PIL is legal relation or factual situation try to use not only *renvoi* but also the secondary characterization. If one uses the secondary characterization, one will encounter the gap of applicable law, like the decision of *Reichsgericht* in 1882. When we take into consideration the sphere of individual rule of substantive law, however, there are various ways to fill this gap, which provide more flexible solutions suited to various concrete situations than renvoi which can provide the solution of remission or transmission of the whole system of law. It would be very useful to take the applicable sphere of a rule of law into consideration at some stage of the process for determining an applicable law.

3. In Japan, very rigid *Savigny's* method has been already established. Moreover, the use of *renvo*i is limited to where the rule of Japanese PIL designates the national law of a party concerned (Act on General Rules for Application of Laws, art.41), so that the room to take the applicable sphere of a rule of law into consideration is very little. Therefore, the use of *ordre public* is often discussed related with foreign statutes of limitation of actions or prescription rules instead of using *renvoi.*