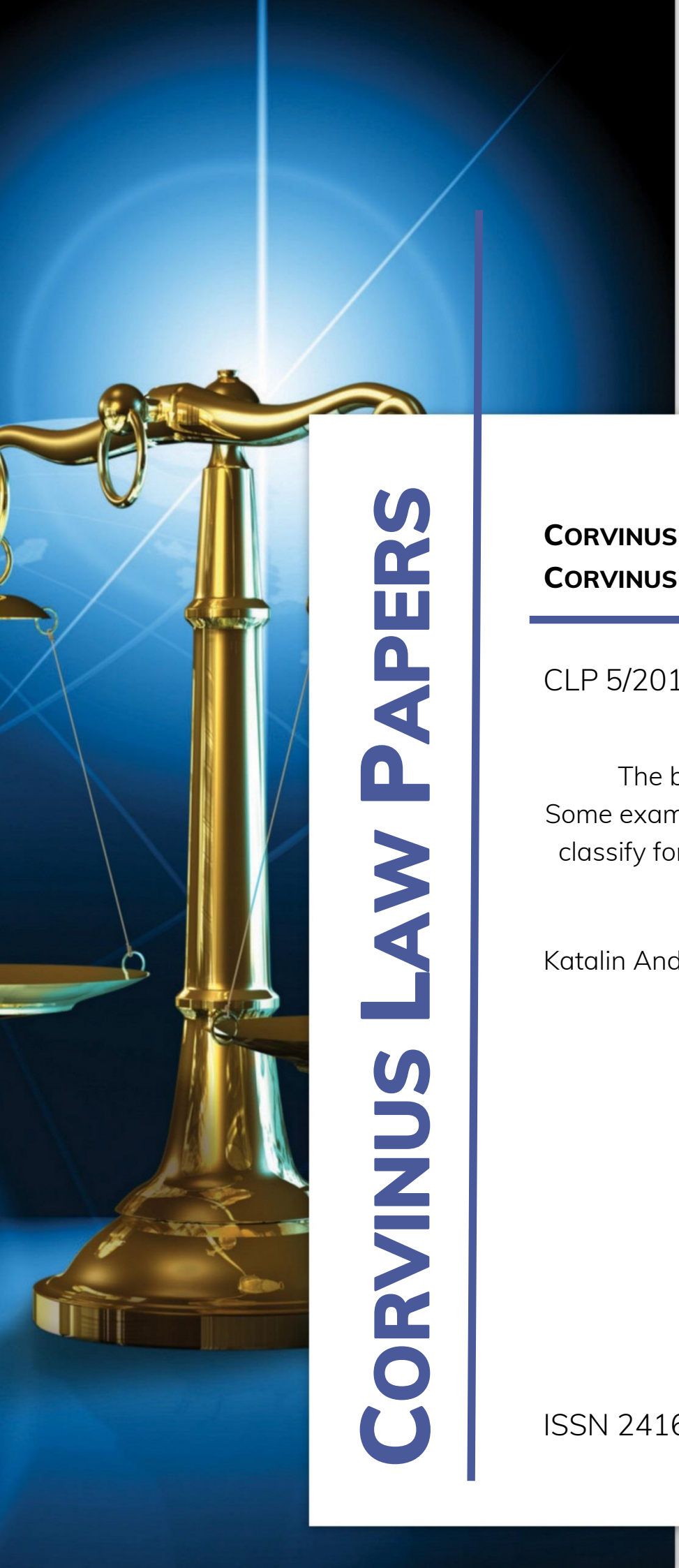

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Some examples of how English courts classify for private international law purposes

Katalin Andreides

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The basis of classification
Some examples of how English courts classify for private international law purposes

Dr. Katalin Andreides, LL.M.
attorney-at-law
e-mail: katalin@andreides.tv

Abstract: Classification or characterisation is a preliminary issue to deal with in order to find the correct choice of law rule and select the legal system that governs the matter before the court. It is about exploring what is the true basis of the claim and allocating the question at hand to the correct legal class or category. The choice of law rule will then work with an element considered decisive to establish a connection between the factual situation and a particular system of law. What this element is for the specific issue before the court, in general, is a question to be determined by the law of the forum. In order to make viable connection, legislators and courts consider policy reasons, natural justice requirements or the parties' expectations and commercial needs.

Keywords: law of conflicts, classification, choice of law, English law

Historically, for example, earlier English authorities referred to the owner's domicile as factor relevant in determining the law governing rights over movables.[1] It was stated that funds considered personal property of a British subject domiciled in England followed the person, and "it is not, in any respect, to be regulated by the situs, and if, in any instances, the situs has been adopted as the rule by which the property is to be governed, and the lex loci rei sitae resorted to, it has been improperly done."[2] But then the general view as to chattels changed and the courts chose the situs of the personal property relevant to create the link to reach the prevailing system of law – rather than the test of domicile or locus actus.[3] The law of the situs ought to prevail on practical grounds of business convenience. What domicile would be decisive if, for instance, the alleged owners were domiciled in different countries and claimed title in goods situated in any third country and where the laws in the countries of the respective domiciles differ? Further, and more importantly, the purchaser willing to obtain good title can only be required to satisfy requirements considered sufficient to pass a valid title by the law of the place where the chattel is at the moment of the purchase, but certainly cannot be expected to do more and further investigate past title according to that other system of law of the owner's domicile.[4]

As to classification, it is also a difficult and essential task to complete in order to decide which system of law applies to the matter. But what principles direct the courts to

[1] E.g. in Re Ewin (1860) 1Cr&J 151 at 156, or in Bruce v Bruce Bos.&Pul. 229
[2] Re Ewin (1860) 1Cr&J 151 at 156
[3] Winkworth v. Christie Manson and Woods Ltd [1980] Ch 496. See also in Cammel v. Sewell (1860) 5 H & N 728 at 744-5.: "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."
[4] Winkworth v. Christie Manson and Woods Ltd [1980] Ch 496.

ascertain the meaning of a particular legal expression or institution; and where the given expression or institution is placed within the legal system of the forum? Should the courts observe exclusively their own legal system, or classification is to be done according to some other foreign system of law which reveals as relevant in the issue before them, but which may conflict with the classification according to the internal law? Or are there essential common principles to apply that are accepted and understood universally?[5] To express a preliminary view on the matter, In Macmillan v Bishopsgate Investment Trust plc[6] Staughton LJ refers to a passage in the leading English law textbook on the conflict of laws[7]: "The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result." However, it follows, "fortunately" they "appear to have had almost no influence on the practice of the courts in England", and suggests to "seek common sense solutions based on practical considerations".[8]

In practice, English courts will apply the principles of their own legal system. However, by doing this they will consider the context and purposes of private international law and take into account, to some extent, foreign concepts, often without analogous internal categories. This means that, to be able to make any provision, the judge needs to understand and determine the content of the relevant foreign law. English judges assess, for example, whether the transaction satisfies the requirements for classification as a contract, meaning by this whether a legally enforceable agreement has been formed, irrespective of the requirements to be satisfied in accordance with the domestic doctrine of contract in a purely domestic case.

One good example of the English private international law classification can be observed in the De Nicols v. Curlier case.[9] A French couple married in France without making an express contract as to their proprietary rights. Their property, thus, became subject by French law to the system of community of goods. The couple then changed domicile and went to reside in England, where the husband died leaving a will which disregarded his widow's rights under French law. The widow took proceedings in England claiming that her husband could not dispose of the joint property in his will as if it were all his own absolutely, as she, his surviving spouse, became on his death entitled to one-half share of his then available assets under the French system of community. According to English private international law, in a case where the husband and wife have entered an ante-nuptial contract, this contract regulates the rights of the parties in movable property, not only in the matrimonial domicile, but also in any other domicile that may later be acquired.[10] In the absence of such contract, property rights are determined by the law of parties' matrimonial domicile.[11] At the heart of the problem was the question whether the

[5] Suggested solution by Beckett is to have recourse to principles of "general jurisprudence" outside the internal law of the judge, as there is no one set of principles to classify the lex forum and others for foreign laws. W.E. Beckett, The Question of Classification (Qualification) in Private International Laws, 15Brit. Y.B. Int'I L. 46 (1934) p. 59.

[6] Macmillan Inc v Bishopsgate Trust (No 3) [1996] 1 WLR 387

[7] Dicey & Morris, The Conflict of Laws, 12th ed. (1993) Vol.1, p. 35.

[8] Ibid., at p. 35

[9] Celestine de Nicols Appellant; v Curlier and Others Respondents [1900] A.C. 21.

[10] The leading case on it: Radmacher (formerly Granatino) v. Granatino [2010] UKSC 42.

[11] In early cases from the nineteenth century the spouse's rights to movable property were automatically governed by the law of the husband's domicile at the time of the marriage. (See. e.g. in Welch v Tennent [1891] AC 639, 644.) It is only after 1974 that a wife has been capable of acquiring domicile independent of her husband (Domicile and Matrimonial Proceedings Act 1973, s 1.)

widow's rights to movable propriety under the French system of community of goods remained unaffected by the change of domicile, or the subsequent change dissolved the community giving the husband the power to dispose of the whole of all movable property by will.

To answer this question, it was first essential to understand what rights were acquired by marriage in France, what exactly the community of goods meant in the eye of French law. Could that meaning be understood as analogous to the concept the English notion of the parties' enforceable agreement? In this case the expert evidence accepted by the court was that according to the law of France, the parties' present and future property, without entering into a formal pre-nuptial contract, are governed by the system of the community of goods.[12] By the sole act of marriage, husband and wife were placed "in the same position in all respects" as if before their marriage they had in due form entered into a written contract and thereby adopted as special and express covenants all and every one of the provisions contained" in the provisions of the Code Civil.[13] So the expert evidence supported the conclusion that the effect of the marriage is precisely the same in all respect as if previously to their marriage the parties had executed a written contract in accordance with the system of community. It was clear that according to English internal law no contract has been made. Bud if the provisions of the French system of community embodied in a written contract by the parties expressing their intention to marry under that system could be accepted by an English court, then why in the absence of such an express contract a community of goods constituted by a marriage according to the French law would not equally be unobjectionable - if "there is nothing in the system itself repugnant to the law of England"?[14] It was therefore held that according to French law the couple was bound by an implied contract to adopt the system of community. The House of Lords thus accepted a wider foreign concept of contract in respect of the concept that is understood by English internal law, and classified the question as contractual applying French law, rather than testamentary applying English law to testamentary issues.

As to the effect of the change of domicile, it was said that it could not be fair and acceptable that binding obligations already existing, thought created by law instead of a written contract, could be affected by an act of one of the contracting parties over which the other party to the contract has no control at all. "It is not altogether satisfactory to hold that a change of domicile cannot affect an express contract embodying the of matrimonial domicile, but that a change of domicile does affect the application of that law if not embodied in an express contract."[15]

Other illustration of the more universal approach of classification is the English private international law distinction between movable and immovable property in international cases, which differs from the common law distinction between realty and personalty. When English internal law distinguishes between real and personal property, this distinction does not correspond to the concepts of movables and immovable accepted in other legal systems, though clearly also English law recognises the movable and immovable physical state of a property. The difference between realty and personalty is based on the rights that can be enforced against the land itself or, against the person for

[12] See. Art. 1536 to 1568 French Civil Code (1401 to 1496)
[13] Celestine de Nicols Appellant; v Curlier and Others Respondents [1900] A.C. 21.
[14] Ibid. p. 12
[15] Ibid p. 3-4

the value of the property by tort actions seeking damages. There are some difficulties here that may emerge as to the classification in private international law context.

First, the English concept of ”land” is much wider than the civil law concept of immovable. According to the Law of Property Act 1925 “land” means not only “corporeal” hereditaments – i.e. tangible property that can be inherited, for instance, mines, minerals or buildings -, but also “incorporeal hereditaments”, such as rent charges, easements and other rights and benefits considered interests in immovable property.[16] Further, under English law, objects affixed to land, chattels and personal property - such as the key of a house -, attached to a land or to an existing building are regarded as having an interest in land, although these items are physically movables. Where an item of the property which is subject of the dispute is classified as immovable, the rights over it will be determined by the law of the situs, which is not necessary the case where the rights in question concern an item that is considered movable. In the case of conflict of laws on the death of an owner, for example, who dies intestate domiciled abroad, his immovable devolve according to the lex situs, while his movables according to the lex domicilii.

An additional difficulty may concern the importance in English law of different arrangements of proprietary interests for certain purposes under a trust. Equitable interest over property is a very peculiar feature of English property law, historically arising out of equity, a system based on conscience and fairness. One important maxim of equity is that “equity regards as done which ought to be done” and, therefore, under certain circumstances, a land directed to be sold and turned into money is already to be considered as money, even before the actual sale is realised.[17] Thus, the effect of the doctrine of “conversion”[18] is that when a land conveyed to trustees on trust for sale, under which the trustees have an obligation to sell the land and hold the proceeds of sale for the beneficiaries, the interest of those beneficiaries to the property will change from an interest in land in an interest in money that represents it – even where the property has not yet been in fact sold. All this becomes material when, for instance, the beneficiary dies without having made a will, leaving his interest in the proceeds of the sale of the land which is subject to a trust for sale but not yet sold. Such an interest will be regarded as interest converted into money – not an interest in land - and treated as personalty accordingly.

The problem of a land devised on trust for sale was clearly assessed in the case Berchtold v. Capron[19]. Count Nicholas Berchtold, a person of Hungarian nationality and domicile, was entitled to a beneficial interest in a land in Birmingham, and the proceeds of sale thereof, under the will of his father, Count Richard Berchtold. Nicholas died intestate, leaving him surviving his widow, his one child only, Count Antoine, and his only sister Countess Szokolyi. Count Antoine, equally of Hungarian nationality and domicile, some years later was killed without leaving him surviving any issue. He left a will, later declared invalid by the Hungarian Courts. He died intestate accordingly.

To whom the decedents’ Birmingham land belonged? The question was whether this freehold interest owned by Count Nicholas at his death, and the interest owned by Count

[16] Law of Property Act 1925, Section 205 (1) (ix)
[17] In Brechtold v Capron [1923] 1 Ch. 192 Fletcher v. Ashburner
[18] “Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted” See in Fletcher v. Ashburber (1779) 1 Bro CC 497 at 499;
[19] Brechtold v Capron [1923] 1 Ch. 192

Antoine at his death in respect of the same freehold, was to be regarded as interests in movable or instead immovable property, in order to decide which law governed intestate succession of these respective interests.

According to English choice of law rule, the devolution of immovable is governed by the lex situs, in case of movables by the law of the deceased's last domicile. If the Court follows English domestic classification rules – giving effect to the equitable principle of conversion -, and classifies these interests as movable property, the law applicable to its intestate succession is Hungarian law, according to which the whole of the Birmingham freehold devolves upon and belongs only to the Countess Szokolyi as Count Nicholas' only sister, subject to a usufruct in favour of the widow of Count Nicholas. (Count Antoine having died intestate without leaving him any surviving issue.) If, on the other hand, these interests are regarded as immovable, English law – the lex situs - will govern its devolution and these interests will devolve upon the only person entitled by English law to the deceased owner's personal estate: the widow of Count Nicholas on his intestacy, and the same person as the mother of Count Antoine on his respective intestacy.

As the land was subject of a trust for sale, in the eyes of equity the land was already money, and money, being movable, on the death of the owner would devolve according to the law of the deceased owner's domicile, in this case Hungarian law. It was however held, that the domestic doctrine of conversion was irrelevant to this case: The doctrine "comes into play" only for certain purposes, when in the eye of the law a land must be considered to be money.[20] It is the case, for instance, when the destination of the land is to be sold to hold the proceeds to the beneficiary. This benefit ought to be regarded as it would have been – money and not land – if the sale had been realised during the beneficiary's life. Thus the beneficiary's personalty will include the money eventually arising from the sale. This issue, however, is not relevant to the question whether the property is movable or immovable. Until the land is sold, of course, it is still immovable. A consideration from the angle of the domestic doctrine of conversion is an out of context consideration in this case. As Russel J. points out in the case: "The doctrine of conversion is that real estate is treated as personal estate, or personal estate is treated as real estate; not that immovables are turned into movables, or movables into immovables."[21], and cites the case In re Hoyles[22]: "…the fact that a mortgage is regarded as personal estate for certain purposes … has no bearing on the question whether such mortgage should be regarded as a movable or not in questions of international law."[23] It was therefore held that the rights subject to the dispute concerned an immovable and were to be governed by the law of the situs, i.e. the law of England.

Another example of classification based not strictly on the internal concepts of English law can be observed in case Trafigura Beheer BVv Kookmin Bank Co,[24] where a statutory provision in relation to tort claims was interpreted by the Courts. It was held that the issues raised before the court were issues relating to tort, not issues relating to contract, within the Private International Law (Miscellaneous Provisions) Act 1995 s. 9(1). The words "for the purpose of private international law" indicated that the Parliament intended that the court should examine relevant issues to decide whether they would be

[20] Brechtold v Capron [1923] 1 Ch. 192
[21] Ibid.
[22] In re Hoyles [1911] 1 Ch.179, 178
[23] Brechtold v Capron [1923] 1 Ch. 192
[24] Trafigura Beheer BV v Kookmin Bank Co (Preliminary Issue) [2006] EWHC 1450.

characterised as relating to tort not only by relevance to English legal concepts and classifications, but by taking a broad internationalist view of legal concepts. It followed that the word "tort" in s. 9(1) and s. 9(2) was to be construed broadly, so as to embrace non-contractual civil wrongs that gave rise to a remedy.

It can generally be said that classification of civil wrongs for the purpose of private international law is by no means a straightforward process. The coherent European Union choice of law regime, however, provides guidance for English courts to resolve classification issues. Furthermore, English courts are bound to follow the principle of uniform and autonomous interpretation of EU law, meaning that national courts should not define concepts by reference to their national law, but instead give independent EU meaning to the terms used in EU legislation.[25] Good examples are the problems involved in ascertaining the applicable law for non-contractual obligations since 2009, when the traditional English choice of law rules for torts, restitution and equitable obligations have been largely replaced by Rome II Regulation.[26]

In English law there are many different torts including assault, negligence, nuisance, conversion or fraudulent misrepresentation, to which different rules apply to establish tortious liability, and which cannot be allocated to a single general rule. There may also be, however, interests protected by torts of foreign systems which might not be recognised as those deserving protection under English law. While, for example, civil law systems have substantive law of unfair competition, there is no tort of unfair competition under English law. There are, however, specific torts such as breach of confidence, malicious falsehood or defamation which might occur in a business context. In the ambit of European Union law, an autonomous definition was given for the purposes of Article 6 of Rome II Regulation, as even in continental civil law systems the concept of unfair competition varies in meaning in Member States.[27] Therefore, while defamation was left outside the scope of the Rome II[28], the English concept of defamation, where a company undermines the business reputation of a competitor, for the purpose of Article 6 is to be regarded as unfair competition and thus coming within the scope of the Regulation.

Generally, as final remarks, two considerations can be made. First, English courts have adopted a rather pragmatic approach as to the classification without following any consistent theory. Authors, however, have underlined the danger of not considering theoretical and analytical discussions which may lead to the lack of deep understanding of the problem and may render straightforward cases more difficult and complicated than they actually are.[29] This can easily be observed reading through the long passages of the relevant cases devoted to the problem.[30] Secondly, English courts clearly follow the lex

[25] In relation to, for example, Rome II Regulation it is confirmed by its Recitals which provide definition for certain terms. (Recital (11) (non-contractual obligations), Recital (30) (culpa in contrahendo). An example of the relevant cases is Case C-350/14 Florin Lazar, représenté légalement par Luigi Erculeo v Allianz SpA ECLI:EU:C:2015:802 at [21].

[26] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations.

[27] Explanatory memorandum p. 15

[28] Mainly for the recognition of certain constitutional concerns over violation of freedom of the press. (See in the Explanatory Memorandum p. 18.)

[29] A clear analysis of the problem and suggestion to adopt a more analytical approach can be read in the work of Christopher Forsyth: "Characterisation revisited: an essay in the theory and practice of the English conflict of laws" in Law Quarterly Review L.Q.R. 1998, 114 (Jan), 141-161.

[30] See e. g. in case Macmillan Inc v. Bishopsgate Investment Trust Plc (No.3) [1996] 1 W.L.R. 387.

fori and are "inevitably intimately linked to English law"[31] when faced with the issue of classification. They will not, however, perform this process mechanically, as in international cases judges very often deal with situations, rules or institutions unknown to the English legal system. As it can be read in the remark of the Court of Appeal about characterisation in Macmillan Inc. v. Bishopsgate Investment Trust Plc: "…characterisation or classification is governed by the lex fori" and its purpose "is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that the competing systems of law, which may have no counterpart in the other's systems. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system".[32]

[31] Christopher Forsyth: "Characterisation revisited: an essay in the theory and practice of the English conflict of laws" in Law Quarterly Review L.Q.R. 1998, 114 (Jan), 141-161.
[32] Macmillan Inc v. Bishopsgate Investment Trust Plc (No.3) [1996] 1 W.L.R. 387