DICEY, MORRIS AND COLLINS
ON
THE CONFLICT OF LAWS

FIFTEENTH EDITION

UNDER THE GENERAL EDITORSHIP OF
LORD COLLINS OF MAPESBURY
P.C., LL.D., LL.M., F.B.A.

WITH
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Characterisation and the Incidental Question

rules of the English conflict of laws: “succession to immovables is governed by the law of the *situs*”; “the formal validity of a marriage is governed by the law of the place of celebration”; “capacity to marry is governed by the law of the parties’ domicile.” In these examples, succession to immovables, formal validity of marriage and capacity to marry are the categories, while *situs*, place of celebration and domicile are the connecting factors.

The problem of characterisation consists in determining which juridical concept or category is appropriate in any given case. Assume, for example, that it is claimed that a marriage is void because the parties did not have the consent of their parents: should this be regarded as falling into the category “formal validity of a marriage” or should one take the view that it comes under “capacity to marry”? The answer could clearly determine the outcome of the case: this would be so if the law of the parties’ domicile required them to obtain the consent of their parents, while the law of the place where the marriage was celebrated did not.

It might seem possible to solve the above problem simply on the basis of normal legal reasoning—though the untutored assumption of most lawyers that parental consent relates to capacity is not in fact the solution adopted by the English courts—but the next problem may seem more difficult. Assume that a testator domiciled in England makes a will disposing of land in Utopia (such will not being made in contemplation of marriage) and subsequently marries. He dies shortly afterwards. Is the will revoked by the marriage? Under the law of England it will be, but we will assume that this is not the case under the law of Utopia. In such a situation, the answer to the question whether the will is revoked could depend on whether the issue is characterised as one relating to succession or to matrimonial law (proprietary consequences of marriage).

It will be seen from the above examples that the problem of characterisation arises whenever a system of conflict of laws is based on categories and connecting factors. In such a system, it is always necessary to determine which is the appropriate category in any given case. Since the English rules of the conflict of laws are based on categories and connecting factors, there is no way of avoiding the problem, though it may be ameliorated by selecting narrower and more specific categories. Thus the problem set out in the previous paragraph would disappear if there were a category “revocation of a will by subsequent marriage.”

Characterisation and the application of European Regulations. The doctrine of characterisation examined in this chapter is, therefore, a doctrine which is an essential part of the mechanism by which a court chooses which law to apply in cases in which the framework for the decision, and the rules for choice of law, are those of the common law. In cases in which English statutes modify the choice of law rules of common law, the sphere of their

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8 See Ogden v Ogden [1908] P. 46 (CA), discussed at para.17-020, below.
9 It was in these terms that the Court of Appeal analysed the problem in the leading case on the subject, *Re Martin* [1900] P. 211. It concluded that it fell within the category “matrimonial law.”
10 The problem of characterisation can be entirely avoided only by adopting a system of conflict of laws, such as the American doctrine of interest analysis, which does not use categories.
Characterisation and the Incidental Question

rule which the court must apply. For if the answer is that it does, there is neither room nor need for a separate exercise in characterisation.

Conclusions. In essence, characterisation is a process of refining English conflict rules by expressing them with greater precision. If the relevant rule is, for example, "succession to movables is governed by the lex domicilii of the deceased," characterisation involves deciding precisely which issues should be governed by the lex domicilii. The term "succession" is simply a useful way of referring to the bundle of issues that are regarded as appropriate for determination by the lex domicilii. To believe that a term such as "succession" has an objectively defined meaning which exists independently of the purpose for which it is used is mere conceptualism. It is, therefore, pointless to search for the "true" meaning of the term. Moreover, since the purpose of the exercise is to reformulate rules of English law, it is contrary to principle to look to foreign law for the answer. This seems to have been recognised by the English courts. For example, in Macmillan Inc v Bishopsgate Investment Trust Plc (No.3), a recent English case in which the issue of characterisation received extended judicial discussion, Auld L.J. accepted that "the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the true issue or issues thrown up by the claim and the defence."  

The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law.  

In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created. As Mance L.J. said in Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC,  when dealing with the characterisation of issues:

"The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage [i.e. for characterisation] are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were conceived."

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69 [1996] 1 W.L.R. 387, 407 (CA). The decision was discussed and applied by the Court of Appeal in Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC [2001] Q.B. 825 (CA), and in Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2012] 2 W.L.R. 199 (characterisation of “capacity” of a corporation to be undertaken in a broad internationalist sense).

70 This approach borrows from interest analysis, but it is used to develop and refine the traditional English rules of the conflict of laws, not to replace them.

71 [2001] Q.B. 825 (CA), at [27]. See also Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579, [2012] 2 W.L.R. 199 (characterisation of “capacity” of a corporation to be undertaken in a broad internationalist sense).
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3. X is a company incorporated in Liechtenstein. The company was formed for the purpose of acquiring and developing land in Egypt. The whole of the company's business is carried on and managed in Egypt, and the only connection with England is that the non-executive directors are English and live in England. The company is not resident in England.

2. STATUS

**RULE 174**—The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.\(^{34}\)

**COMMENT**

30-010 The principle in the Rule. Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed.\(^{35}\) That law will determine whether the entity has a separate legal existence.\(^{36}\) The law of that country will determine the legal nature of the

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\(^{36}\) See authorities in preceding note.
Corporations and Corporate Insolvency

RULE 174

entity so created, e.g. whether the entity is a corporation or partnership, and, if the latter, the legal incidents which attach to it.

It is well established that a corporation duly created in a foreign country is to be recognised as a corporation in England, and accordingly foreign corporations can both sue and be sued in their corporate capacity in the courts. Whether a corporation has been dissolved must be determined by the law of its place of incorporation for "the will of the sovereign authority which created it can also destroy it." If according to that law the corporation is in the process of being wound up, it can still sue and be sued in England, but if this process has ended, and the corporation has been dissolved, the corporation has been held to be dead in the eyes of the English courts.


38 Re Kaupthing Capital Partners II Master LP Inc [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. As to whether, if it is a partnership, the partners are to be sued alone, together or as a firm, see above, para.5-017; Johnson Matthey & Wallace Ltd v Ahmed Al loush (1985) 135 N.L.J. 1012; The Gilbert Rowe, above; Oxnard Financing SA v Rahn, above.


40 Henriques v Dutch West India Co (1728) 2 Ld.Raym. 1532.

41 Newby v Van Oppen (1872) L.R. 7 Q.B. 293.

42 As to identification of the law of the place of incorporation, see below, para.5-014 et seq.

