

CHOICE OF LAW FOR EQUITABLE DOCTRINES

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court should 'consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterized. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law'.¹⁵ This is consistent with the statement in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* that choice of law categories have no inherent value beyond their purpose in assisting the court to find the most appropriate law to determine the dispute before it,¹⁶ emphasizing the purposive approach in characterization.

- 3.10 The approach is consistent with the objective of finding a rule that is fair to apply to the parties, and that is also fit to apply by virtue of precedent to those parties in future litigation. It strives towards the objective of uniformity in requiring an international attitude in the characterization process. This goal is not achievable so long as different choice of law methodologies are used in different countries, but it is a goal worth pursuing if there are many other countries applying the same methodology. The approach meets the criticism that the characterization approach is mechanistic and fails to take adequate account of the social purposes of the law, while the retention of categories provides the ballast for certainty within the choice of law process. In overtly addressing the issue of the functions of the categories, it addresses a common criticism that the courts covertly manipulate characterization.¹⁷
- 3.11 Finally, reference should be made to the effect of international instruments on characterization. Where such instruments are concerned, the problem is technically one of statutory interpretation rather than characterization as such.¹⁸ For example, under the Rome Convention, 'contract' has an autonomous European meaning,¹⁹ and may be broader in some respects and possibly narrower in others than the English notion of contract. However, characterization is still important in respect of the approach to these instruments. The purpose of the relevant statutory provision is, like characterization, to deal with differences in domestic legal systems,²⁰ and

¹⁵ *Dicey and Morris* (12th edn, 1993) 44; see now *Dicey and Morris* para 2-035.

¹⁶ [2001] EWCA Civ 68, [2001] QB 825 at para 27.

¹⁷ eg, RC Cramton *et al*, *Conflict of Laws* (5th edn, 1993) 39ff (characterization as an 'escape device').

¹⁸ A Briggs (2003) 119 LQR 352.

¹⁹ Art 18. Efforts are in progress to convert the Convention into a Community instrument so that the ECJ can rule on questions of its interpretation when such questions are referred to it by national courts: 'Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization', available at: http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0654en01.pdf (last accessed: 6 January 2004).

²⁰ M Giuliano and P Lagarde, 'Report on the Convention on the Law Applicable to Contractual Obligations' [1980] OJ C282 (31 October 1980) (cited below as '*Giuliano-Lagarde Report*') 38.