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# A Comparative Approach to the Conflict of Characterization in Private International Law

*Véronique Allarousse\**

## INTRODUCTION

The fundamental importance of characterization in private international law is derived from the postulate that characterization controls the solution of the conflict of laws. Private international law sets out "connecting categories" by deciding, for instance, that the status and capacity of persons is governed by their national laws, that contracts are governed by the law chosen by the agreeing parties and that property comes under the *lex rei sitae*. Consequently, when a court has to determine the law applicable to a factual situation, it must first place the specific action into its correct legal category before selecting the proper law.

The characterization process is not unique to private international law and is, in fact, inherent to all legal reasoning and judicial determinations. However, what is unique to private international law is the conflict of characterization, which arises when the legal orders involved do not offer similar classifications. Countries frequently differ on the question of what constitutes "immovable" and "movable" property, on the meaning of "capacity," "form," substance," "procedure," and in their definition of various other terms upon which the application of foreign laws depend.

The forum and the foreign country may have the same conflict rule and may interpret the connecting factor in the same way, but may disagree on the result because they characterize the question differently. For instance, there may be a conflict of characterization when the question of whether a will is revoked by marriage is regarded by the forum state as a question of matrimonial law and by the foreign system as a testamentary issue. The question is what law determines the meaning of the above terms in order to characterize the subject matter of the controversy at issue and allow a court to choose the substantive law applicable to that controversy. Until this is determined, it is impossible to apply the appropriate conflict rule.

It must be remembered that there is no absolute relationship between the domestic process of characterization and the international pro-

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cess of characterization. This proposition could be denied if the conflict rule was unilateral. Hence, if article 3(3) of the French Civil Code was literally construed ("the statutes concerning the status and capacity apply to French nationals, even when living abroad"),<sup>1</sup> one would think this provision is solely aimed at French institutions, exclusively translated by French concepts. But contemporary doctrine and case law regard the conflict rule as being essentially bilateral, *i.e.*, allowing for the application of the foreign domestic law as well as the law of the forum. An example is provided again by article 3(3) of the French Civil Code which is interpreted as follows: "the status and capacity of individuals is governed by their respective national laws."<sup>2</sup>

Such an interpretation of the conflict rule raises the issue of the influence, upon the formulation and implementation of the conflict rule, of the differences between the various domestic characterizations. Hence the existence of a "theory of characterization" is unique to private international law. The conflict of characterization presupposes the following postulates: first, the universal recognition of the bilateral nature of the conflict rule; second, the universal admission of the domestic nature of the conflict of laws; and third, the renunciation of the idea that there are concepts of private international law common to various legal systems as part of the Roman law heritage.

The problem of characterization must be distinguished from a similar problem which is the incidental or preliminary question,<sup>3</sup> where in a case involving private international law, there is not only one main question before the court, but also a number of subsidiary issues. After the law governing the primary legal question has been selected by applying the relevant conflict rule, a second choice-of-law rule may be required in order to answer subsidiary questions affecting the main issue.

Let us assume, for example, that from the appropriate conflict rule of country X the main question is governed by the law of country Y. Should the subsidiary questions also be governed by the conflict rule of country X appropriate to such questions, or should they be governed by the appropriate conflict rule of country Y? This issue will not be discussed here. I do not intend to deal with the question of what is being characterized.<sup>4</sup> Widely divergent views have been expressed on that topic. The factual situation, the legal question raised by the factual situa-

<sup>1</sup> C. CIV. art. 3(3). "Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étrangers." (French Civil Code) *Id.*

<sup>2</sup> *Id.* "L'état et la capacité des personnes sont régis par leur loi nationale." *Id.*

<sup>3</sup> Wengler, *Die Vorfrage im Kollisionsrecht*, 8 RABELS Z. 148 (1934). G. MELCHIOR, *DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS* 245 (1932).

<sup>4</sup> Wengler, *Réflexions sur la Technique Des Qualifications en Droit International privé*, 43 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 661 (1954)[hereinafter R.C.D.I.P.]; Ancel, *L'objet de la Qualification*, CLUNET 1980.227.

tion, the nature of the issue presented to the court for solution, a cause of action, a claim or defense, a legal relationship, a rule of law—all these have been suggested as being the subject matter of the characterization process or some part of it. Since this interesting issue does not directly relate to the conflict of characterization *stricto sensu*, it will be set aside for purposes of clarity and simplicity.

The conflict of characterization thus delimited will be dealt with in three parts:

- I. Choice of the Relevant Law for the Process of Characterization.
- II. Scope of Characterization by the *Lex Fori*
- III. Prospects of a Solution

#### I. CHOICE OF THE REVELANT LAW FOR THE PROCESS OF CHARACTERIZATION

Few problems have been discussed as extensively as the conflict of characterization and the subsequent determination of the law of characterization. This doctrinal cornucopia has no equivalent in case law where there is some form of uniformity in the solutions adopted by courts.<sup>5</sup>

##### A) Doctrinal Controversy

The conflict of characterization belongs to that set of problems to which one looks in vain for an ideal solution. That is probably the reason why three doctrinal streams oppose and fight each other: characterization by the *lex fori*, characterization by the *lex causae*, and characterization by reference to independent and universal concepts.

##### 1. Characterization by the *lex fori*

Of the various attempts to formulate a general theory for the solution of the conflict of characterization, Bartin's "theory of characterization" was the first to attract general attention.<sup>6</sup>

Bartin asserts that whenever the application of the domestic law of the forum or of another country depends upon the nature of a particular legal relationship, the law of the forum must decide what the nature of the relationship is. In a nutshell, a court, when dealing with the question of characterization, must always (subject to certain exceptions) decide the matter on the basis of the concepts of its own domestic law. Bartin would apply the forum law in the case where the legal relationship has no

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<sup>5</sup> Y. LOUSSOUARN & P. BOUREL, DROIT INTERNATIONAL PRIVÉ 244 (1987)[hereinafter LOUSSOUARN].

<sup>6</sup> Bartin, *De l'Impossibilité d'Arriver à la Suppression Définitive des Conflits de Lois*, 24 CLUNET 255, 255-68, 466-95, 720-60 (1897).

real connection with the forum state, and the foreign country (or countries) with which it is connected, qualifies it in a different manner.<sup>7</sup>

Similarly, in an article published in 1891, six years before Bartin's article, Kahn held *inter alia* that the law of the forum was itself competent to define the particular institution, relationship or legal concept, where there is a "latent conflict of laws," *i.e.* a conflict of characterization.<sup>8</sup>

#### a) Justifications

i. The characterization problem consists of interpreting a conflict rule and this interpretation can only be given by the legal order which has enunciated such a rule: *ejus est interpretari cujus est condere*.

For instance, when a French court determines the meaning of a French conflict rule to specify what must be understood by "form," so as to know whether the holograph form of a will is included in the category "form," the delimitation of the scope of such a category must be set forth by the French legal order, and more generally by the *lex fori* ("Dutch holograph will" case).<sup>9</sup> Otherwise, French law loses all control over the application of its own rule: the latter might be extended or restricted in a manner which has never been intended by those who framed it.

This argument has been justified by the existence of a sovereign necessity to limit the ambit of each law. The characterization process by the *lex fori* is an inescapable consequence of the domestic nature of the systems of conflict of laws. If we consider that the conflict rule has for our immediate purpose the delimitation of the legislative sovereignties and therefore the limitation of the sovereignty of the state which has enacted it, it is likely that the state concerned wants to know how important the limitation to which it consents is. This cannot be decided by another state.<sup>10</sup>

The above formulation is, however, insufficient since it amounts to saying that each legal order decides conflict rules on its own. The crux of the problem, rather, is to demonstrate that the choice of characterization is inseparable from the very meaning of the conflict rule.<sup>11</sup>

<sup>7</sup> Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 246 (1920).

<sup>8</sup> Kahn, *Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts*, JHERINGS JACHBUCHER 1891.1. He reached the same conclusion for "collisions in the point of contact" (problem of *renvoi*).

<sup>9</sup> See *infra* note 47.

<sup>10</sup> 3 J-P. NIBOYET, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS* 348 (1944). E. BARTIN, *PRINCIPES DE DROIT INTERNATIONAL PRIVÉ* 22 (1930).

<sup>11</sup> H. BATIFFOL & P. LAGARDE, *DROIT INTERNATIONAL PRIVÉ*, 341-42 (7th ed. 1981)[hereinafter BATIFFOL]; Maury, *Règles Générales Des Conflits De Lois*, 57 RECUEIL DES COURS 329, 468-69 n. 126 (1936).

ii. Since characterization is a necessary and preliminary condition to the settlement of the conflict of laws, it is impossible to refer to the *lex causae* to characterize the situation at issue if one ignores which foreign law is applicable. To assume the contrary would be a form of *petitio principii*. Hence in the holograph will case, to ask Dutch law if it is an issue of "form" or "capacity" presupposes that it is competent. But that is exactly what has to be demonstrated and the reason for characterization.<sup>12</sup>

This argument, commonly called the "vicious circle" argument, is the counter of the foregoing sovereignty argument. Instead of standing on the ground of "definition" (characterizing consists in interpreting a conflict rule), it shifts to the ground of "implementation," *i.e.*, a domestic court cannot materially address a substantive law as long as it has not chosen it, and therefore as long as it has not characterized the factual situation, the court addresses its own law for want of any other alternative.<sup>13</sup>

iii. The last justification deals with the concept of "unity" of the legal order. It can be subdivided into three sets of consideration.

First, to the extent that we consider private international law to be part of domestic law, to the extent that it belongs to the *lex fori* (*lato sensu*), it should be assumed that its concepts are similar to those of the domestic substantive law. The law of introduction to the German Civil Code,<sup>14</sup> the preliminary provisions of the Italian Civil Code,<sup>15</sup> and the relevant articles on the conflict of laws in the French Civil Code<sup>16</sup> must not be regarded as having a terminology distinct from the terminology of the Codes which comprise them. They are part of the same legal system.<sup>17</sup>

Second, when called upon to characterize, courts generally know of only one connecting factor, *i.e.*, jurisdiction, hence the characterization is by the *lex fori*.<sup>18</sup> Lastly, the process of characterization by the *lex causae* assumes that the conflict rule and the substantive rule can be drastically separated. This hardly ever happens in practice.

## b) Weaknesses

i. Characterization by the *lex fori* creates some form of legal isola-

<sup>12</sup> P. LEREBOURS-PIGEONNIÈRE, *DROIT INTERNATIONAL PRIVÉ* 461 (1970); LOUSSOUARN, *supra* note 5, at 246.

<sup>13</sup> BATIFFOL, *supra* note 11.

<sup>14</sup> Introductory Act of Aug. 18, 1896, arts. 1-218.

<sup>15</sup> C.c., chs. I & II (Italian Civil Code).

<sup>16</sup> See C. civ., art. 3 and accompanying footnotes (French Civil Code).

<sup>17</sup> Maury, *supra* note 11, at 491-91.

<sup>18</sup> Martin, *La Doctrine des Qualifications et ses Rapports avec le Caractère National des Règles du Conflit de Lois*, 31 R.D.C. 561, 593-94 (1930).

tionism.<sup>19</sup> The reproach is not directed at the characterization by the *lex fori* itself, but instead, at the extended scope of application formerly given to it. Indeed, the first reaction of some scholars was to turn systematically to the forum law for all kinds of definitions. This is a misconception (See Part II below).<sup>20</sup>

ii. Rabel has emphasized the following weaknesses:<sup>21</sup>

On the one hand, there is a considerable number of different or contradictory characterizations within the various domestic laws.<sup>22</sup> By interpreting the conflict rules in the same way as the corresponding substantive rules of the legal order involved, one multiplies the conflicts of characterization which are internationally insolvable.<sup>23</sup> On the other hand, the unification of the systems of conflict of laws becomes more difficult.

Lastly, characterization by the *lex fori* breaks down where there is no close analogy between the *lex fori* and a foreign institution or rule.<sup>24</sup> For example, there is no close analogy in English domestic law to the French system of community property and no close analogy in French domestic law to the English concept of "trusts."

iii. There are additional arguments against characterizing in accordance with the *lex fori*.

First, it may result in the forum refusing to apply a foreign law in cases where it would be applicable if its nature were properly enunciated, or in the forum applying a foreign law in cases where, according to that law, it is not applicable, with the result that the foreign law is distorted and that the law applied to the case is neither the forum law nor the foreign law.

Second, such a characterization process leads to arbitrary results even when there is a sufficiently close analogy between the foreign rule or institution and the corresponding rule or institution of the *lex fori*. For example, it clearly does not follow that because the requirement of parental consent to the marriage of minors has been characterized by English courts as relating to formalities of marriage and not to capacity to marry, that English courts must apply the same characterization to article 148 of the French Civil Code (which prohibits the marriage of minors without parental consent).<sup>25</sup>

<sup>19</sup> H. BATIFFOL, ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ n. 133 (1956).

<sup>20</sup> P. LEREBOURS-PIGEONNIÈRE, *supra* note 12, at 463.

<sup>21</sup> Rabel, *Le problème de la qualification*, R.C.D.I.P. 1933.10; see also Rabel, *Das Problem des Qualifikation*, RABELS Z. 241 (1931)[hereinafter RABELS Z.].

<sup>22</sup> See RABELS Z. *supra* note 21, at 242.

<sup>23</sup> *Id.* at 250.

<sup>24</sup> *Id.* at 252.

<sup>25</sup> Beckett, *The Question of Classification in Private International Law*, BRIT. Y.B. INT'L L. 55-56 (1934).

## 2. Characterization by the *lex causae*

The legal isolationism generated by the process of characterization according to the *lex fori* has given rise to a dissenting opinion in favor of characterization by the *lex causae*. Formulated initially in France by Despagnet, it has been refined by Pacchioni in Italy and Wolff in Germany.<sup>26</sup>

Despagnet advances the proposition that the law governing the legal relationship must control its characterization and that the relevant court must accept the characterization adopted by the foreign law in order to comply with the rules of private international law sanctioned by the forum law.

To Wolff, it would mean "falsifying" the content of the foreign law if it were characterized by the *lex fori* without regard to the foreign law's characterization. "[e]very legal rule takes its classification from the legal system to which it belongs."<sup>27</sup>

### a) Justifications

i. It is a flagrant contradiction to use the forum's characterization and to pretend at the same time that one is abiding by the foreign law.<sup>28</sup> If the foreign substantive law has made a certain question one of capacity, can it be said that if the question is converted into one of form by the law of the forum, the law which should govern the capacity of individuals has been complied with?

ii. The strongest argument flows from the situation where the forum ignores the foreign institution at issue. For example, if a French court is confronted with a trust existing under some Anglo-American law, the trust being unknown to French domestic law, the court must check how it is characterized within the foreign law.<sup>29</sup> Such an approach was indeed adopted by the Paris Court of Appeals in a case where it characterized an American trust according to the law of Pennsylvania,<sup>30</sup> following a similar decision of the German Reichsgericht.<sup>31</sup>

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<sup>26</sup> Despagnet, *Des Conflits de Lois Relatifs à la Qualification des Rapports Juridiques*, 25 CLUNET 253 (1898); G. PACCHIONI, ELEMENTI DI DIRITTO INTERNAZIONALE PRIVATO (1930); M. WOLFF, PRIVATE INTERNATIONAL LAW, 146-47 (2d ed. 1950).

<sup>27</sup> *Id.* at 154. (emphasis in original).

<sup>28</sup> *Id.* at 261-62.

<sup>29</sup> H. MEIERHOF, LA PORTÉE DES QUALIFICATIONS EN DROIT INTERNATIONAL PRIVÉ, 208 (1938).

<sup>30</sup> *Epoux Courtois v. Consorts de Ganay*, Paris, Jan. 10, 1970; R.C.D.I.P. *supra* note 4, at 1971.525; Dalloz 1972.122; Clunet 1973.207.

<sup>31</sup> R.G., Apr. 11, 1940, R.G.Z. 163,367.



b) Weaknesses

i. It is a circular argument to state that the foreign law governs the process of characterization before the process of characterization has led to the selection of the appropriate legal system.<sup>32</sup>

ii. The failure to observe the distinction between the true problem of characterization and the subsequent problem of interpretation of the foreign law has led to the erroneous conclusion that characterization is governed by the *lex causae*.<sup>33</sup>

iii. The leading idea of characterizing by the *lex causae* is to apply each substantive law with its own characterizations. Hence, if the French conflict rule decides that the personal status of Greek nationals is governed by Greek law, such a status has to be understood as Greek law understands it. This proposition is certainly appealing, but since Greek law places the religious wedding celebration in the category of personal status in contrast to the French conflict rule which characterizes it as a matter of form (law of the place of contracting),<sup>34</sup> the wish to respect both characterizations leads to declaring the marriage void because one of the two laws nullifies it. In practice, the Greek characterization is applied, even though it was formerly announced that both laws would be equally respected. Such a solution of pretending to reconcile the irreconcilable, apparently refuses to make a choice, but it does in fact make a choice barely in accordance with the requirements of life.

Characterization by the *lex causae*, therefore, is impossible in a bilateral system. What about in a unilateral system where the situation considered is governed by the legal order which includes it within its scope of application and defines that scope of application by reference to its own characterizations?<sup>35</sup> Even in that situation, primacy is indirectly given in case of conflict to the characterization by the *lex fori* since the latter's application excludes reference to any foreign law's characterization.

If there are two potentially applicable foreign laws, why should the forum adopt the characterization of one rather than the other? And vice versa, reference to a foreign law can lead to a negative conflict, which is particularly dangerous because of the absurdity of its result.

In a landmark case decided by the German Reichsgericht,<sup>36</sup> the debtor of a promissory note issued in Tennessee (U.S.A.), was sued by his creditor in Germany. The debtor opposed a time-barred provision to justify the non-payment of his debt. Both laws in conflict, German and

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<sup>32</sup> Maury, *supra* note 11, at n. 124.

<sup>33</sup> R. Ago, *Règles Générales des Conflits de Lois*, R.D.C. 342 (1936).

<sup>34</sup> See *infra* note 50.

<sup>35</sup> BATIFFOL, *supra* note 11, at 345-46.

<sup>36</sup> R.G., Jan. 4, 1882, 145 R.G.Z. 121/128-130.

Tennessee law, adopted different characterizations. German law regards the rules on limitation of action as substantive and considers the relevant substantive law to be the law of the place of issuance of the promissory note, *i.e.*, Tennessee law. But American law classifies such rules as procedural and procedure is governed by the *lex fori*. The Reichsgericht inferred from the divergence of characterizations that the action was not time-barred, although according to both German and American laws it certainly was.

What the court should have done is either to accept the *renvoi* to the German *lex fori* by American law, pursuant to the idea that the *renvoi* doctrine consists in consulting the relevant foreign law in its entirety, or to refuse to comply with this doctrine and decide that a German court must apply the American time-bound provisions even if those provisions are a matter of procedure in the United States, to the extent that their content corresponds to the German concept of prescription. The Reichsgericht adopted the second option in a later opinion.<sup>37</sup>

### 3. Characterization by reference to universal and independent concepts

Rabel and Beckett advocate solving the conflict by means of comparative legal studies and analytical jurisprudence. According to this theory, every rule of every legal system should be compared with the corresponding rules of other legal systems with the aim of establishing an exhaustive system of basic concepts of an "absolutely general character."<sup>38</sup>

Characterization is simply:

an interpretation or application of the rules of private international law in a concrete case and the conceptions of these rules must, therefore, be conceptions of an absolutely general character. [T]hese conceptions are borrowed from analytical jurisprudence, that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professedly universal application — not principles based on, or applicable to, the legal system of one country only.<sup>39</sup>

#### a) Justifications

i. Such an approach has the great advantage of removing the conflicts of characterization, assuming of course that universal concepts may be uniformly applied.

<sup>37</sup> R.G., July 6, 1934, R.G.Z. 145,121; R.C.D.I.P. 1935.447. See P. MAYER, *DROIT INTERNATIONAL PRIVÉ*, 143 (2d ed. 1983).

<sup>38</sup> RABELS Z., *supra* note 21, at 241; see also Beckett, *supra* note 25, at 58-60.

<sup>39</sup> *Id.* at 59.

ii. It would set aside the risk of misrepresenting and distorting foreign institutions unknown to the law of the forum. It would guarantee each domestic legal order the respect of its integrity, insofar as its categories conform to the universal structure of these general principles.<sup>40</sup>

b) Weaknesses

i. Rabel's theory is a remote ideal. Its practicability would impose upon the judge an impossible task of determining what is the universal standard, absent sufficient information on foreign legal systems.

Moreover, it would require him in case of conflicting characterizations to examine the provisions of a large number of foreign laws quite unconnected with the facts of the case before him, in order to determine which of the disputed characterizations is best in accordance with analytical jurisprudence and comparative law.<sup>41</sup>

ii. This "international" view is too vague to be applicable. There are very few "general principles of universal application" and very little measure of agreement exists as to what these principles are in international law. It is nearly impossible to find such a lowest common denominator without subjectiveness and arbitrariness.

iii. The study of comparative law is capable of revealing differences between domestic laws, but hardly of resolving them. For example, comparative law may reveal that parental consent to marriage is sometimes regarded as affecting formalities and sometimes as affecting capacity to marry, or that statutes of limitation are sometimes treated as procedural and sometimes as substantive: but how can comparative law determine how these matters should be characterized in a particular case?<sup>42</sup>

iv. Comparative law is not developed enough to be used efficiently. It has to be updated on a permanent basis each time a foreign statute is modified.<sup>43</sup>

B) *Comparative study of domestic laws*

Generally, the process of characterization in accordance with the *lex fori* has been adopted by most courts around the world and the recognition of the inescapable conceptual nature of the forum law in that process is now deeply rooted. In the peoples' democracies, however, it is frequently denounced as a protection of imperialist interests anxious to

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<sup>40</sup> LOUSSOUARN, *supra* note 5, at 249.

<sup>41</sup> BATIFFOL, *supra* note 11, at 348-49.

<sup>42</sup> A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS*, 25 (7th ed. 1973).

<sup>43</sup> See P. MAYER, *supra* note 37, at 137-38.

avoid the application of the law of socialist states.<sup>44</sup> This point of view might change considerably considering the present political climate in Eastern Europe.<sup>45</sup>

### 1. France

French courts have not always characterized according to French law. For a long time, French courts have acted more on instinct than on a reasoned basis, exhibiting some real empiricism without pointing out explicitly the law of characterization. More recent decisions are less laconic and some of them set out the problem of the conflict of characterization, referring explicitly to the legal concepts of the forum.

This general overview of French case law begins with *Anton v. Bartholo*,<sup>46</sup> a nineteenth century decision about which successive writers have debated and which Martin has made a *cause célèbre*.

Under French private international law, succession to immovables on death is governed by the *lex rei sitae* and the rights of husband and wife to property arising out of the *régime des biens entre époux* is governed by the law of the matrimonial domicile. Two Maltese, after marrying in Malta and residing there for some time, came to live in Algeria where the husband acquired land. The issue in the case was to determine the rights of his widow with respect to this land. At this time, a surviving wife had, under French inheritance law, no rights of succession as heir over the property of her deceased husband, but if the *régime des biens* was governed by French domestic law, she could claim half the land as property acquired in common.

The *régime des biens* in this case was governed by Maltese law and Maltese law gave the widow (a) half of the common property and (b) a right of survivorship consisting in one-quarter (*quarte du conjoint pauvre*) of the assets left by the deceased. If this right could be classified as part of the *régime des biens*, then as this regime was governed by Maltese law it would apply to the land in Algeria. But if it was to be regarded as a right of succession, it did not apply because the rights of succession were governed by French law. Holding the question to be one of matrimonial property rather than one of succession, the court rendered judgment in favor of the widow and did not follow Martin's approach. It based its conclusion on the manner in which the *quarte du conjoint pauvre* was classified in the Maltese Code. When a conflict of this nature arises, it is apparent that if a court applies its own characteri-

<sup>44</sup> Szaszy, *L'Evolution des Principes Généraux du droit International Privé dans les Pays de Démocratie Populaire*, 52 R.C.D.I.P. 1, 233 (1963).

<sup>45</sup> The process of characterization by the *lex fori* is already adopted by the Hungarian statute of 1979, article 3.

<sup>46</sup> Dec. 24, 1889, Cour d'App., d'Alger, 18 CLUNET 1171 (1891).

zation, the ultimate decision on the merits will vary with the country in which the action is being brought. On this hypothesis, the widow would have failed in France but would have succeeded in Malta.

Another example is in the *Leeuwn v. Guilbut* case,<sup>47</sup> relating to the holograph will made in France by a Netherlander who by his national law (article 992 of the Dutch Civil Code, 1829) is forbidden, even in a foreign country, to make a will in any form except the "authentic form" prescribed by that law.<sup>48</sup> What is the effect of article 992 of the Dutch Code? The answer depends on whether the question is regarded as one of capacity, in which case Dutch law applies, or one of formalities, in which case the French rule governs.

The Tribunal Civil de la Seine applied Dutch law. However, the Dutch characterization was not really given predominance over the French characterization. The decision acknowledged that it was a question of formality, but instead of applying the rule *locus regit actum*, in this case French law, it considered that the form of the will depended on the testator's national law.

This ambiguity in the choice of the law of characterization was solved by the French Cour de Cassation in the well-known *Caraslanis* case.<sup>49</sup> In *Caraslanis*, an orthodox Greek married a French woman in France in the civil form, although Greek law imposed a religious celebration. Was the marriage valid or void? Once more, the answer depended on the characterization process. If the Court considered the requirement of a religious ceremony to be a matter of personal status, it was governed by the Greek national law and the marriage was void. If, on the contrary, the Court considered that requirement to be a question of form consequently governed by the *lex loci celebrationis*, French law (*lex fori*) applied and the marriage was valid.

The Cour de Cassation clearly stated that:

the question whether an element of the wedding ceremony belongs to the category of form or substance must be answered by French courts by reference to French legal concepts, according to which the religious or civil nature of the wedding ceremony is a question of form.<sup>50</sup>

Hence the marriage was valid.

Since the *Caraslanis* decision, the principle of characterization in

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<sup>47</sup> Feb. 19, 1927, Trib. Civ., Seine, 55 CLUNET 707 (1928).

<sup>48</sup> *Id.*

<sup>49</sup> *Caraslanis v. dame Caraslanis*, Civ, June 12, 1955, R.C.D.I.P. 1955.723; Dalloz 1956.73; J. 1955.682.

<sup>50</sup> . . . "La question de savoir si un élément de la célébration du mariage appartient à la catégorie des règles de forme ou à celle des règles de fond devait être tranchée par les juges français suivant les conceptions du droit français, selon lesquelles le caractère religieux ou laïc du mariage est une question de forme." *Id.*

accordance with the *lex fori* has been vigorously reasserted by the Tribunal de Grande Instance de la Seine in a successoral matter dealing with movables and immovables<sup>51</sup> and by the Court of Appeals of Paris in a decision relating to a trust.<sup>52</sup>

## 2. Germany

German courts from early on have exhibited a real interest in the theory of characterization. Some decisions constitute an important contribution to the question. Most of them are in favor of the characterization by the *lex fori*. One is particularly interesting.<sup>53</sup>

In that case, the Court of Berlin had to characterize an institution unknown to German law, article 1595 of the Belgian Civil Code which prohibits contracts between spouses. The question was whether the provision related to capacity or matrimonial property. Since both spouses were Belgian and since, according to the court, they had chosen the German matrimonial regime, the application of article 1595 depended on its legal characterization. If it referred to Belgian personal status, it could be applied to conventions concluded by Belgian nationals in Germany, whatever the matrimonial regime adopted. If it had something to do with matrimonial property, it was not applicable to Belgians having adopted the German matrimonial regime.

The Court of Berlin resorted to a two-fold characterization. On the one hand, German law, which governs matrimonial property in the present situation, ignores the Belgian prohibition. On the other hand, article 1595 is connected with the legal category of personal status, since the prohibition concerns all Belgian spouses whatever their matrimonial regime. The court decided that article 1595 was applicable to the present situation.

The Reichsgericht quashed the system of double characterization set up by the Court of Berlin and adopted a process of characterization very similar to Raape's:<sup>54</sup> connecting categories are determined by reference to the law of the forum, but if the foreign rule is unknown to German law, its meaning (*Sinn*) and importance (*Bedeutung*) must be assessed in view of the purpose and function of that rule within the foreign legal order.<sup>55</sup> In a second stage, the rule may be introduced in the German legal categories.

The Reichsgericht appears to have made up its mind in favor of the

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<sup>51</sup> Jan. 12, 1966, T.G.I. SEINE, 56 R.C.D.I.P. 120 (1967).

<sup>52</sup> Ancel, *supra* note 4, at 207.

<sup>53</sup> R.G., April 11, 1940, R.G.Z. 163, 367.

<sup>54</sup> L. RAAPE, *Internationales Privatrecht*, 6 STAUDINGERS KOMENTAR ZUM BÜRGERLICHEN GESETZBUCH UND DEM EINFÜHRUNGSGESETZ, 15 (1931).

<sup>55</sup> "...unter Würdigung ihres Zwecks und ihrer Wirkung vom Standpunkte des ausländischen Rechts aus." See *supra* note 52.

characterization by the *lex fori*. Unlike Raape, Wolff thinks that this decision is a good illustration of characterization by the *lex causae*. These two interpretations are not as irreconcilable as the rigidity of their formulae might make us believe.

More than twenty years later, the Bundesgerichtshof solved the issue by characterizing *lege fori*.<sup>56</sup> The case dealt with a Dutch man whose succession was governed by Dutch law according to German conflict rules and who had drafted his will in Germany in the form of a private act. This was legal by reference to German standards but not by reference to article 992 of the Dutch Civil Code.<sup>57</sup> The main issue was to know whether article 992 related to formalities (*locus regit actum*) or set out limitations to the freedom of drafting one's will (*lex causae*). The court referred to German law.

It is worth mentioning that the Bundesgerichtshof made an attempt to support its choice of characterization by considering comparative law, but nonetheless ignored the position taken by French, Italian and Dutch courts which would probably have opted for the characterization by the *lex causae* in the above case (limitation of the freedom of will).<sup>58</sup>

### 3. Great Britain

The conflict of characterization has been introduced to American lawyers by Lorenzen in 1920<sup>59</sup> and to British lawyers by Beckett in 1934.<sup>60</sup>

English law is rather rich in cases raising questions of characterization but poor in judicial discussions of the problem. Apart from the practice of determining domicile in accordance with the *lex fori* and of determining the nature of proprietary interests in things in accordance with the *lex situs*, English courts have not really adopted any consistent theory of characterization. Their decisions range from the two extremes.<sup>61</sup>

In *Ogden v. Ogden*,<sup>62</sup> a domiciled Frenchman, age nineteen, married a domiciled Englishwoman without first obtaining the consent of his only surviving parent as required by article 148 of the French Civil Code. This article amounts to an express prohibition against the marriage of a minor without parental consent. The husband was granted an annulment of the marriage by a French court on the ground of want of con-

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<sup>56</sup> BGH, Jan. 12, 1967, N.J.W 1967.1177.

<sup>57</sup> See *supra* note 47.

<sup>58</sup> Clunet 1971.609.

<sup>59</sup> See Lorenzen, *supra* note 7.

<sup>60</sup> Beckett, *supra* note 25.

<sup>61</sup> For a review of English case law, see Bland, *Classification Re-Classified*, 6 INT'L COMP. L.Q. 10 (1957).

<sup>62</sup> [1904-7] All E.R. 86.

sent. The wife subsequently remarried a domiciled Englishman in England. In the present action, the latter petitioned for a decree of nullity on the ground that, at the time of the ceremony, the respondent was still married to the Frenchman.

The factual situation raised the question of the validity of the French marriage. As a matter of fact, if the purpose of article 148 was to incapacitate the husband from matrimony unless he complied with its provisions, it affected the essential validity of any marriage he might contract and should be granted extra-territorial recognition. The Court of Appeals applied the English characterization according to which the requirement of French law that a person cannot marry without parental consent is a matter of form. The marriage was held valid since the ceremony had been performed in accordance with the requirements of English law, the law of the place of celebration.

*Ogden v. Ogden* is a much discussed decision, though on this point it has never been formally overruled. Some of its aspects are inconsistent with earlier and later decisions of the House of Lords. Even if the decision is correct, it merely amounts to the determination that a specific provision of the French Civil Code relates to formalities. Since foreign law is a question of fact to be proved on each occasion by expert witnesses, it does not follow that the decision would be the same on a future occasion with reference to this provision, still less with other provisions of foreign law.<sup>63</sup> What is most criticized in the *Ogden* case is not the characterization process, but the absurdity of the practical consequences of the decision. The most unfortunate feature of *Ogden v. Ogden* is its suggestion that every rule requiring parental consent to a marriage must be classified as formal.<sup>64</sup>

At the opposite extreme, an example of a foreign rule being construed in its context with the views of deciding whether it falls within the sphere of control of the foreign *lex causae* is afforded by *Re Maldonado's (deed)*,<sup>65</sup> where the Court of Appeals had to decide whether the Spanish Government's claim to the movables in England of a Spanish intestate who died without next of kin was a right of succession (in which case the Spanish Government was entitled to the movables) or a *jus regale* (in which case England was entitled to them).

The rule under which movables, failing relatives, pass to the state is classified as a rule of succession in Spain but as a confiscatory rule in England and the question was whether in an English action this foreign

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<sup>63</sup> See *Lazard Bros. v. Midland Bank* [1932] A.C. 289 (1932).

<sup>64</sup> See *Lodge v. Lodge*, 107 Sol J. 437 (1963); Section 4.8 of The Law Commission Working Paper provisionally recommends that legislative change would be inappropriate, and that any reform should be left to judicial development. 12 The Law Commission Working Paper 89 (1985).

<sup>65</sup> 1954 P. 223 (C.A.), 2 All. E.R. 300 (C.A. 1953). *Id.* at 230, [1953] 2 All E.R. at 305.



conception of the relationship between the state and the deceased was to prevail with regard to movables found in England. Could the law of the domicile dictate to the English court what meaning should be attributed to heirship?

The court in *Re Maldonado (deed)*, held that this question had to be decided in accordance with Spanish law:

In examining the Spanish law in order to ascertain whether or not the State is a true heir according to Spanish law, I have accepted [*dixit* Barnard, J.] the Spanish conception of heirship, for it would be wrong in my view to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion.<sup>66</sup>

Between these two extremes stands *In Re Cohn*,<sup>67</sup> one of the most interesting cases, where the court had to characterize a rule of English law and the corresponding rule of German law as to the presumption of survivorship.

In *In Re Cohn*, a mother and daughter both domiciled in Germany but residing in England were killed in an air raid on London under circumstances rendering it uncertain which of them survived the other. The daughter was entitled to movables under her mother's will only if she survived her mother. By the English conflict rule, succession to movables is governed by the law of the domicile, procedure is governed by the *lex fori*. By section 184 of the Law of Property Act 1925, the presumption was that the elder died first but by article 20 of the German Civil Code, the presumption was that deaths were simultaneous.

The court first decided that the English presumption was substantive and not procedural, and did not apply. It next decided that the German presumption was also substantive and not procedural and therefore did apply. The court reached this conclusion by examining the terms of article 20 within its context in the German Civil Code. If section 184 had been characterized as substantive and section 20 as procedural, then no presumption would have been applicable with the result that those interested in the daughter's estate would not have been entitled to the mother's movables because they would have been unable to prove that the daughter survived her mother. If, on the other hand, section 184 had been characterized as procedural and article 20 as substantive, the court would have been faced with conflicting presumptions and would have had to choose between them.

*In Re Cohn* demonstrates how the process of characterization can

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<sup>66</sup> *Id.* at 231, [1953] 2 All E.R. at 305.

<sup>67</sup> 1944 Ch. 5.

be kept as flexible as possible.<sup>68</sup> According to Dicey, this cannot be done if the court characterizes a foreign rule in accordance with its own concepts or if the court simply follows the foreign characterization without questioning the policy considerations which underlie its own conflict rule.<sup>69</sup>

#### 4. The United States

Section 7(a) of the First Conflicts Restatement provides that "in all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the forum according to its law."<sup>70</sup> The Second Restatement states that "the classification and interpretation of conflict of laws concepts and terms are determined in accordance with the law of the forum."<sup>71</sup>

A good example of characterization by the *lex fori* is provided by the Supreme Court of California in *Grant v. McAuliffe*,<sup>72</sup> where the court had to decide whether survival of causes of action was procedural or substantive for conflict of laws purposes. If it was a matter of substance, the law of the place of the tort had to be applied; if it related to procedure, it was governed by the domestic law of the forum.

The second of the two options was adopted by the court, which considered that survival was not an essential part of the cause of action itself but related to the procedures available for the enforcement of the legal claim for damages and that the question was basically one of the administration of decedents' estates, which is a purely local proceeding.

In general, there is hardly any discussion of the problem of the conflict of characterization among the decisions of American courts, especially when they use a multiple-aspect approach.<sup>73</sup>

Hence in *Clark v. Clark*,<sup>74</sup> the Supreme Court of New Hampshire refused to go through the process of characterization:

'Some jurisdictions, experiencing the same dissatisfaction with the mechanical place of wrong rule, have substituted a straight characterization approach. This approach would reach different results according to whether a torts case could be technically re-characterized as a contracts case, *Levy v. Daniels U-Drive Auto Renting Co.*, 108 Conn.

<sup>68</sup> *Id.* The problem was solved more realistically in the present situation than by the Court of Common Pleas, in *Leroux v. Brown* 12, 801 (1852).

<sup>69</sup> DICEY, *supra* note 42, at 32-33.

<sup>70</sup> *See infra* note 75.

<sup>71</sup> *Id.*

<sup>72</sup> 41 Cal.2d 859, 264 P.2d 944 (1953).

<sup>73</sup> A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE AND MULTINATIONAL PROBLEMS*, (temp. ed. 1989-90).

<sup>74</sup> 107 N.H. 351, 223 A.2d 205 (1966).

333; as a family law case, *Haumschild v. Continental Cas. Co.*, 7 Wis.2d 130; as one presenting a procedural question, *Home Ins. Co. v. Dick*, 281 U.S. 397, or under some other key-number section heading which would enable a court to vary its choice of law subjectively. This court prefers not to rely on such a technique because it overlooks policy considerations that should underlie choice of law adjudication.<sup>75</sup>

In his famous article, "The Theory of Qualifications and the Conflict of Laws,"<sup>76</sup> Lorenzen states that according to Anglo-American law, the characterization of legal transactions as well as the definitions of "domicile," "the law of the place of contracting," and of other "points of contact" are governed in general by the strictly internal law of the forum, the principal exception to the rule being that the character of property as movable or immovable is controlled by the law of the situs. He adds that this conclusion is the only one consistent with the Anglo-American theory of the conflict of laws and that it agrees in substance with the conclusion reached by Bartin and Kahn.

However, all decisions rendered by American courts are not as readily apparent. The problem of the conflict of characterization is indeed seldom presented. It is difficult to find a case which sets out the issue in terms similar to those used by the French Cour de Cassation in the *Caraslanis* case.

As a matter of conclusion, most courts around the world have adopted the characterization by the *lex fori* for reasons of convenience and uniformity. Some issues still remain undetermined. Hence, to what extent is it possible to adhere completely to the *lex fori* as the law of characterization? What about taking into account the legal categories of the *lex causae* within the characterization by the *lex fori*?

## II. SCOPE OF CHARACTERIZATION BY THE *LEX FORI*

The general principle of characterization in accordance with the *lex fori* does not remove completely the legal categories of the *lex causae*. This section is designed to put forward the possible limitations to the law of the forum within the characterization by the *lex fori*, as well as the exceptions to it.

### A) *Limitations Imposed Upon the Law of the Forum Within the Characterization by the Lex Fori*

Three different sets of issues need to be addressed. They relate to the examination of the role of the legal categories of the *lex causae*; the adaptation of the internal legal categories of the conflict of laws and the

<sup>75</sup> *Id.* at 353, 223 A.2d at 207. In *Gray v. Gray*, 87 N.H. 82, 174 A. 508 (1934), the same court had gone through the process of characterization.

<sup>76</sup> Lorenzen, *supra* note 7.

extension of these categories by reference to comparative law; and the theory of "adaptation" as presented by Raape, Lewald, Cansacchi and Ziccardi.

1. Role of the legal categories of the *lex causae*: Scholars diverge on the role to be assigned to the legal categories of the *lex causae*

a) Batiffol and his two-fold theory

Batiffol considers that there are two distinct stages in the process of characterization: a preparatory stage of analysis according to the foreign law (*phase d'analyse*) and a phase of judgment by the law of the forum (*phase de jugement*).<sup>77</sup> A similar position was reached in Germany by Lewald, Raape and Melchior,<sup>78</sup> and in Italy by Pallieri.<sup>79</sup>

The basic rationale is that in order to decide upon the application of an abstract concept to a practical situation, it is necessary to confront the definition of that abstract concept with the characteristics of the practical situation. Once the foreign institution has been analyzed within the context of the foreign law, the characterization of the law of the forum is then applied and the foreign characterization is excluded. In other words, if one goes back to the example of the *quarte du conjoint pauvre*, the court, after analyzing this concept according to Maltese law and extracting its essential features from its original background, must decide in accordance with the *lex fori* (in this example, French law) whether this institution must be integrated into the category of matrimonial property or the category of succession. The originality of the process relies on the fact that the court takes into account the content of the *lex causae* without applying the foreign characterization. This approach manages "to put the foreign legal material into the drawers of the domestic legal system,"<sup>80</sup> or to express it differently, "the foreign State characterizes its own rules, the State of the forum classifies them."<sup>81</sup>

The law of filiation has long offered and still offers examples of this reasoning. For instance, before the adoption of new statutes in Germany (August 19, 1969) and France (January 3, 1972), when German law gave recognition to the natural child's right to ask his natural father for the payment of certain sums of money (articles 1708 and 1717 of the German Civil Code), the French court before which these provisions were put forward had to check whether German law gave them the character of a

<sup>77</sup> BATIFFOL, *supra* note 11, at 343.

<sup>78</sup> H. Lewald, *Règles Générales des Conflits de Lois - Contribution à la Technique du Droit International Privé*, 69 R.D.I. 1 (1939). See also MELCHIOR *supra* note 3. RAAPE, *supra* note 54.

<sup>79</sup> B. PALLIERI, *DIRITTO INTERNAZIONALE PRIVATO* 63 (2d. ed. 1940).

<sup>80</sup> MELCHIOR, *supra* note 3, at 122.

<sup>81</sup> RAAPE, *Les Rapports Juridiques entre Parents et Enfants*, 50 R.D.C. 401, 521 (1934). "L'Etat étranger caractérise ses règles, l'Etat du for les classe." *Id.*

claim for damages or for a pension based on descent. In the case where the court adopted the second approach, it mattered little that German law had characterized this institution — for the implementation of its conflict rule — in the category of torts or filiation. If within the French conception the payment of a pension based on the evidence of a link of descent could be related to the concept of filiation, the personal law had to be applied, whatever the German characterization.<sup>82</sup> This issue has not changed much with the new round of statutes.<sup>83</sup>

b) Falconbridge and the *via media* solution

The Canadian lawyer J. Falconbridge sought a viable solution between the two extremes of characterization, and proposed a two-stage process: the first stage, a task for the *lex fori*, is to define the scope of the legal category, the categories not being those of the domestic legal system but of its private international law; the second stage is to examine the relevant foreign rule in its own context to see whether it can be placed into the legal category in question.<sup>84</sup>

Falconbridge suggested that the forum should engage in a process of provisional or tentative characterization before finally selecting the proper law, and should consider the provisions of any potentially applicable proper laws in their context.

An illustration is provided by the author himself:

Let us suppose [. . .] that a court in X has to decide whether an alleged marriage, celebrated in Y between parties domiciled in Z is valid or not[,] [. . .] and there are at least two conflict rules which may be applicable, namely, (1) that the formal validity of the marriage is governed by the law of the place of celebration, and (2) that the intrinsic validity of the marriage (including the capacity of the parties to marry each other or marry at all) is governed by the law of the domicile of the parties.

It being premised that a decision in favour of the validity of the marriage must be based on the marriage being both formally and intrinsically valid, and that the marriage is not valid if it is void or voidable either by the law governing formal validity or by the law governing intrinsic validity, the [court should] be informed of the content of each of the two laws.<sup>85</sup>

The court should first examine the provisions of the *lex loci celebra-*

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<sup>82</sup> Rohmann v. Kellerhals, Civ. Mar. 26, 1935, R.C.D.I.P. 1935.768.

<sup>83</sup> BATTIFOL, *supra* note 11.

<sup>84</sup> FALCONBRIDGE, CONFLICT OF LAWS 59 (1954) [hereinafter CONFLICT OF LAWS]; J. Falconbridge, *Conflict Rule and Characterization of Question*, 30 CAN. B. REV. 103, 116 (1952)[hereinafter *Conflict Rule*].

<sup>85</sup> *Conflict Rule*, *supra* note 84, at 116.

*tionis* in its context to determine whether they relate to formalities and may therefore affect the formal validity of the marriage, disregarding provisions of that law which relate to capacity to marry. Next, the court should examine the provisions of the law of the parties' domicile in their context to determine whether they relate to capacity to marry, disregarding provisions of that law which relate to formalities.<sup>86</sup> Falconbridge further provides:

Having consulted each of the two laws, those of Y and Z, which are potentially applicable as regards two different aspects of the validity of the marriage, the court of X is now in a position to characterize the question[s] [. . .] involved in the factual situation.

It may decide that there is a question of formal validity under the law of Y (the *lex loci celebrationis*) within the meaning of the conflict rule of the law of the forum relating to formalities of celebration, and [then select the law of Y as the proper law]. Alternatively, the court of X may decide that there is a question of intrinsic validity under the law of Z (the *lex domicilii*) within the meaning of the conflict rule of the law of the forum relating to intrinsic validity, and proceed to the final selection of the law of Z as the proper law. Furthermore, the court of X may find that there are two different questions under the laws of Y and Z respectively.<sup>87</sup> The marriage should be pronounced valid only if it is valid as to form by the *lex loci celebrationis* and valid as to capacity by the law of the parties' domicile.<sup>88</sup>

The problem with Falconbridge's view is that it assumes the function of the court is to examine foreign law of its own motion. But in England again, the court only examines foreign law if it has been pleaded and proved by a party. Moreover, this theory is not always clear as to its practical consequences. In a later passage, Falconbridge adds that it does not mean that a court is bound by the foreign characterization, but means merely that the court must be informed as to the meaning of the provision in the foreign law, almost necessarily including its characterization in that law.<sup>89</sup> Therefore, if there is no compulsion about it, the guidance offered by Falconbridge's theory of characterization is less useful than the theory seems at first glance.<sup>90</sup>

### c) Primary and secondary characterizations

According to A. Robertson, the problem of the conflict of characterization can be solved by distinguishing between primary characterization, a matter for the *lex fori*, and secondary characterization, a matter

<sup>86</sup> *Id.* at 116.

<sup>87</sup> *Id.* at 117.

<sup>88</sup> *Id.* at 117.

<sup>89</sup> CONFLICT OF LAWS, *supra* note 84, at 81.

<sup>90</sup> DICEY, *supra* note 42, at 28-29.

for the *lex causae*.<sup>91</sup>

Primary characterization is "the allocation of the issue to its correct legal category" or "the subsumption of facts under categories of law," so that "each state is competent to perform this process of subsumption in any way it sees fit, *i.e.*, the determination of exactly what is contract, tort, and the like, may be decided for each state by itself."<sup>92</sup>

Secondary characterization consists of "the delimitation and application of the proper law," which "is made necessary by the fact that the judge has to determine exactly how much of the foreign law is to be applied to the case before him; clearly not the whole of it."<sup>93</sup>

Primary characterization precedes, and secondary characterization follows, the selection of the proper law. For reasons of practical convenience rather than logical necessity, primary characterization ought, with certain exceptions, to be governed by the *lex fori* (by which is meant its conflict rules and not its domestic rules). In addition, secondary characterization ought to be governed by the *lex causae* and the connecting factor should be interpreted in accordance with the *lex fori*.<sup>94</sup>

Robertson's approach is not far from Bartin's. Indeed, to the general principle of characterization on the basis of the domestic law of the forum, Bartin formulates a second qualifying principle, which restricts the application of the first principle. This second principle is that once the court of X has ascertained, by means of the application of the relevant rule of private international law, and by such characterization according to the general principle as is necessary, that the matter under consideration is governed by the law of country Y, then the court of country X should apply the law of Y as it is applied in Y, including such subsidiary characterizations as may be involved (characterization in "sub-orders").<sup>95</sup>

There is some similarity between the theory of primary and secondary characterization and the approach adopted by the Italian school. Anzilotti has the merit of having distinguished two stages in the process of characterization.<sup>96</sup> The first stage is aimed at choosing the *lex causae*. Furthermore, the purpose of the second stage is to determine, within the foreign law, the applicable substantive rules. Similarly, Ago considers the true problem of characterization to be a problem of interpreting a conflict rule for the purpose of individualizing the applicable law, as opposed to the subsequent problem of interpretation of the foreign law to

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<sup>91</sup> A. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS, 59-134 (1940); G. CHESHIRE, PRIVATE INTERNATIONAL LAW 30-45 (2d ed. 1938).

<sup>92</sup> A. ROBERTSON, *supra* note 91, at 66, 118.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 104-17, 130-34.

<sup>95</sup> Bartin, *supra* note 6, at 604.

<sup>96</sup> D. ANZILOTTI, CORSO DI LEZIONI DI DIRITTO INTERNAZIONALE 156-60 (1913).

which the rule refers.<sup>97</sup> The great majority of Italian scholars adhere to that distinction.<sup>98</sup>

Robertson's theory, which exerted considerable influence on the discussion of the problem by Anglo-American writers, has lost much of its strength and has even been abandoned by Cheshire, one of its principal exponents.<sup>99</sup> Dicey has enunciated five main objections against that theory:

i. The distinction between primary and secondary characterization is unreal, artificial and leads to arbitrary results. "The process of characterization should be as little mechanical as possible."<sup>100</sup>

ii. The writers who hold this view do not even agree on the crucial point of the theory, namely where the line is to be drawn between primary and secondary characterization. The consequence of this is that one writer analyzes a given situation in such a way as to make it a case of primary characterization, while another writer analyzes the same situation in such a way as to make it a case of secondary characterization.<sup>101</sup>

iii. The theory expanding the sphere of secondary characterization by the *lex causae* introduces all the difficulties inherent to the *renvoi* doctrine. For Falconbridge, characterization strictly in accordance with the *lex causae* is only justified in exceptional cases where the forum is willing to apply the *renvoi* doctrine.<sup>102</sup>

iv. How likely is the principle that secondary characterization is a matter for the *lex causae* to be adopted by a court? Dicey gives a hypothetical example and tries to predict what the reaction of an English court would be:

Suppose that a Greek national domiciled in Greece marries an Englishwoman in a London registry office. Suppose that Greek law refuses to recognize a marriage where either party is a Greek unless an Orthodox priest is present at the ceremony. If formalities of marriage and capacity to marry both involve questions of secondary characterization, it would be necessary to refer to Greek law to determine the essential validity of the marriage. If Greek law characterizes the Greek rule as a question of capacity and not as a question of formalities, an English court would be obliged to hold the marriage invalid, notwithstanding the English conflict rule that the formalities of marriage are governed by the *lex loci celebrationis*.<sup>103</sup>

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<sup>97</sup> Ago, *supra* note 33, at 342.

<sup>98</sup> P. FEDOZZI, CORSO DI DIRITTO INTERNAZIONALE (1930); A. CAVAGLIERI, CORSO DI DIRITTO INTERNAZIONALE (1934). Merigi, *Saggio Critico Sulle Qualificazioni*, RIV. ITAL. 189 (1932); Merigi, *Les Qualifications en Droit International Privé*, 22 R.C.D.I.P. 201 (1933).

<sup>99</sup> G. CHESHIRE, PRIVATE INTERNATIONAL LAW 68-70 (6th ed. 1949).

<sup>100</sup> A. DICEY, CONFLICT OF LAWS 68-70 (6th ed. 1949).

<sup>101</sup> *Id.* at 63-69.

<sup>102</sup> *Id.* at 69.

<sup>103</sup> *Id.*



It is difficult to see how such a theory can be adopted by a court.

v. The view that secondary characterization is a matter for the *lex causae* involves a curious paradox.

Suppose that a contract governed by the law of country X is sued on in country F after the relevant periods of limitation fixed by the domestic laws of X and F have both expired. If F characterizes its statute of limitations as substantive and X characterizes its statute of limitations as procedural, the consequence of the view under discussion is that the action will succeed although neither the statute of X nor the statute of F has been complied with. The substantive rules of F cannot apply to a contract governed by the law of X, and the procedural rules of X cannot apply in a court of F.<sup>104</sup>

Cheshire formerly was of the opinion that the *lex fori* controlled the characterization of the statute of X, so that there was a complete abandonment of the principle that secondary characterization was a matter for the *lex causae*.

Wolff also rejects what he calls the "middle course" embodied in Robertson's approach.<sup>105</sup> He gives the following example:

A married man dies having a widow and a child; his first matrimonial domicile was country X; his last domicile-country Y; the widow claims some part of the property in a court of country Z. Is this claim one under matrimonial property law, or one of succession? Suppose the law of the forum Z characterizes the facts as relating to matrimonial property, and the conflict rule of Z in respect of matrimonial property points to the law of the first matrimonial domicile, *i.e.*, of X. By this primary characterization the law of Y is excluded from application. This may lead to injustice. Suppose the law of X gives the widow no share at all in the matrimonial property, but the law of Y, if applied, would give her a right of succession. Then the primary characterization would bar her from claiming such a right (in the court of country Z).<sup>106</sup>

2. Adaptation of the domestic legal categories to the conflict of laws and extension of these categories by reference to comparative law

Conflict rules must be interpreted *sub specie orbis*—from a cosmopolitan or worldwide point of view—that is, in such a way as to render them susceptible to application of foreign rules of law which may be based on concepts that do not coincide exactly with the domestic or local concepts of the law of the forum.

In the Anglo-American conflict of laws, the distinction is made be-

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<sup>104</sup> *Id.* See also, *supra* note 36.

<sup>105</sup> WOLFF, *supra* note 26, at 155.

<sup>106</sup> *Id.*

tween movables and immovables, not (as a general rule) between realty and personality.<sup>107</sup> It is equally true that the line between substance and procedure, for instance, may well be drawn in one place for the purposes of domestic law and in another place for the purposes of the conflict of laws.

It has been argued that the strictly domestic law of the forum provides too narrow a basis for characterization in the conflict of laws.<sup>108</sup> Frankenstein calls characterization on such a basis the "bankruptcy of Private International Law."<sup>109</sup> It seems quite obvious that unless we are prepared to accept the insular view that any legal relationship unknown to the domestic law of the forum is to be denied all recognition in local courts, the categories or concepts used in the conflict of laws must be wider than those of the strictly internal law. Hence, in the Western conception, marriage is monogamous and cannot be dissolved by the mere will of the two spouses. What happens then in the case where a foreign polygamous marriage is invoked before a Western court? How is it possible to classify such a marriage in the category of personal status without widening the concept of marriage, and more generally without embracing "analogous legal relations of foreign type"?<sup>110</sup> In the English case *De Nicols v. Curlier*,<sup>111</sup> a husband and wife, both French by nationality and domicile, were married in France without making an express contract as to their proprietary rights. Their property both present and future thus became subject by French law to the system of *communauté des biens*. The husband died, domiciled in England, and left a will which disregarded his widow's rights under the French doctrine of community. The widow took proceedings in England to recover her community share. The rule of English private international law states that proprietary rights of a spouse to movables are governed primarily by any contract that the parties may have made before the marriage. Failing such a contract, the rights are determined by the law of the matrimonial domicile of the parties. Thus the issue was whether the right claimed by the widow was to be treated as contractual or testamentary, for only after that had been settled would it be possible to choose between French law governing the contract and English law governing testamentary issues.

In the eyes of English law, no contract had been made but the House of Lords held that according to French law a husband and wife are bound by an implied contract to adopt the system of community, despite the absence of an express agreement to that effect. Thus the

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<sup>107</sup> See *Re Berchtold*, 1 Ch. 192 (1923).

<sup>108</sup> See *In re Annesley*, Ch. 692 (1926).

<sup>109</sup> See generally, Maury *supra* note 11.

<sup>110</sup> Nussbaum, *Book Review*, 40 COLUM L. REV. 1461, 1470 (1940).

<sup>111</sup> 1900 App. 21 (1899).

court, through its readiness to recognize a foreign concept, widened the category of contracts as understood by English domestic law.

The French *Cour de Cassation* has also broadened the meaning of domestic legal concepts of civil law to improve the functioning of the conflict rule. For example, it has classified the mental alienation for incapacity as belonging to the category of personal status although it is considered to be a *vice du consentement* (defect in the consent) in French domestic law.<sup>112</sup>

In the United States, the First Restatement is silent on the question whether characterization should give terms and categories in conflict rules the same meaning as the one they have in the domestic law of the forum.<sup>113</sup> Section 7 was usually understood in that way.<sup>114</sup> The Second Restatement clearly recognizes the possibility that a term or concept may have a different meaning for conflictive purposes.<sup>115</sup>

When the same legal term or concept appears both in the local law of a state and in its choice-of-law rules, the meaning which has been given the term or concept in local law does not determine the meaning to be given the term or concept in choice of law. . .<sup>116</sup>

However, it does not seem appropriate to go as far as Rabel's theory which is too remote an ideal to supplant the traditional characterization by the *lex fori*. In addition, it does not seem that courts have trouble characterizing foreign institutions unknown to them. French courts have managed to characterize polygamy as a particular type of marriage.<sup>117</sup> Even in situations where it is difficult to draw the line, the best way to proceed is to deepen the generic term in order to find out whether or not it includes the situation at issue.

According to H. Batiffol and P. Lagarde, all legal systems around the world try to give solutions to problems which are in fact universal.<sup>118</sup> On the seven continents, men get married, own property, make transactions, and pass away. With this approach in mind, there is no foreign institution which cannot fit into some domestic categories, since these answer universal problems and are by the same token universal themselves.<sup>119</sup>

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<sup>112</sup> Reg., Dec. 26, 1934, 63 CLUNET 166 (1936).

<sup>113</sup> VON MEHREN, *supra* note 73, at 482-86.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> RESTATEMENT (Second) OF CONFLICT OF LAWS at comment c (1971).

<sup>117</sup> Dame Chemouni née Krieff v. son mari, Civ, Jan. 28, 1958, 47 R.C.D.I.P. 110 (1958).

<sup>118</sup> BATIFFOL, *supra* note 11, at 348-49.

<sup>119</sup> *Id.*

### B) *Exceptions to the Principle of Characterization by the Lex Fori*

The basic idea of characterizing in accordance with the *lex fori* suffers a few exceptions:

#### 1. Characterization of movables and immovables by the *lex rei sitae*

Bartin admits that with respect to determining whether something is movable or immovable, he would apply the law of the situs, not because such law has sovereign authority over the soil but because it subserves best the security of transactions affecting property.<sup>120</sup> In addition, he acknowledges that this does not really constitute a derogation to the general system of characterization by the *lex fori* insofar as it does not trigger the conflict rule (no interpretation of the conflict rule is involved).<sup>121</sup> In other words, whatever the characterization sustained—movable or immovable—the law always applicable is the *lex rei sitae* with respect to property rights.

Conversely, if the question of characterization arises in connection with the law of succession, matrimonial property or contracts, the answer should be determined by the conflict rule applicable to succession, matrimonial property or contracts. In these specific cases, the conflict rules themselves distinguish between movables and immovables. Characterization by the *lex fori* once again commands the determination of the substantive law.<sup>122</sup>

#### 2. Characterization in regard to treaties

When the problem of characterization arises within the framework of a diplomatic treaty, the traditional process of characterization by the *lex fori* cannot be used anymore. Otherwise, it would distort the balance of the agreement.

Sometimes, the silence of the treaty regarding characterization is unintentional, but the consequences of such a silence can be dramatic. Hence the Hague Conventions of June 12, 1902, relating to Conflicts of Laws with regard to the Effects of Marriage on the Rights and Duties of Spouses and with regard to their Estates,<sup>123</sup> and of July 17, 1905, relating to the Settlement of the Conflicts of Laws concerning Marriage<sup>124</sup> have been denounced by France and Belgium. They are inapplicable in these two countries. The expression "right to contract marriage"<sup>125</sup> was not

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<sup>120</sup> Bartin, *supra* note 6, at 250-53.

<sup>121</sup> *Id.*

<sup>122</sup> There is still some controversy on that point. See BATIFFOL, *supra* note 11, at 351.

<sup>123</sup> 31 Martens Nouveau Recueil (ser. 2) 706.

<sup>124</sup> 6 Martens (3d) at 480.

<sup>125</sup> *Droit de contracter mariage.*

defined in the body of the Convention. Germany was of the opinion that it included all the provisions of its domestic legislation, even those dealing with the marriage of servicemen and civil servants (article 1315 of the German Civil Code), whereas France and Belgium took the stand that it included only the capacity to get married as understood by private law.<sup>126</sup> For lack of compromise, they denounced the Convention.<sup>127</sup>

Conversely, there are cases where a treaty's silence is intentional. An example is provided by the three Hague Conventions relating to the International Sale of Goods (*en Matière de Vente à Caractère International d'Objets Mobiliers Corporels*).<sup>128</sup> These texts do not define the word "sale." Consequently, courts of the contracting states are in charge of deciding whether a transaction constitutes a sale and whether it is governed by the Conventions.<sup>129</sup> The *travaux préparatoires* (preliminary drafts) reveal that the drafters did not define such concept because they had in mind the meaning commonly accepted by the international community.<sup>130</sup> One may wonder whether such meaning exists. Assuming it does not, it leaves the contracting states with a great deal of flexibility.

Obviously, the easiest way is to incorporate the necessary characterizations within the text of the treaty. The conflict of characterization in the "Dutch holograph will" case would not be raised today between France and the Netherlands since article 5 of the Hague Convention of October 5, 1961, on the Conflicts of Laws relating to the Form of Testamentary Dispositions states:

For the purposes of the present Convention, any provision of law which limits the permitted forms of testamentary dispositions by reference to the age, nationality or other personal conditions of the testator, shall be deemed to pertain to matters of form (. . .).<sup>131</sup>

A slight difficulty still remains: the definitions given by these conventions very often refer to legal concepts which are not defined. Such a vicious circle allows the problem to endure.

Another possibility would be for the convention to refer either to the systems of private international law of the contracting states or to their domestic legal systems.

The first option is quite rare, because it contradicts the purpose sought by international conventions, namely to establish rules common to all contracting states. An example, however, is provided by the Hague

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<sup>126</sup> J-P. NIBOYET, *supra* note 10, at 380.

<sup>127</sup> *Id.*

<sup>128</sup> Francescakis, *Qualifications*, REPERTOIRE DELLOZ DE DROIT INTERNATIONAL 705 [hereinafter REP. DALL. DRT. INT.].

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> 510 U.N.T.S. 175, 179.

Convention of October 5, 1961, on the Conflict of Laws relating to the Form of Testamentary Dispositions.<sup>132</sup> Article 1(1) provides:

A testamentary disposition shall be valid as regards form if its form complies with the internal law:

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(c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

(d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death,<sup>133</sup>

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These two concepts do not always coincide since, in some countries, domicile can be established out of any residence. Accepting a possible divergence in the interpretation of "domicile," article 1(3) of the Convention decides that "the determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place."<sup>134</sup>

Situations where the treaty expressly refers to the domestic law of the contracting states are much more frequent. For instance, Article 12 of the Hague Convention of October 5, 1961, Concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Infants,<sup>135</sup> cumulatively applies the internal laws of the contracting states for the purpose of characterization:

For the purpose of the present Convention, "infant" shall mean any person who has that status, in accordance with both the domestic law of the State of his nationality and that of his habitual residence.<sup>136</sup>

### 3. Characterization after *renvoi*

If the theory of *renvoi* is accepted, the domestic courts should, in applying the relevant foreign conflict rule, accept in principle the characterizations of the corresponding foreign law. Consequently, the process of characterization by the *lex fori* cannot be used.<sup>137</sup>

## III. PROSPECTS OF A SOLUTION

Some jurists have commented on what appears to them as the blind-

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> 658 U.N.T.S. 143.

<sup>136</sup> *Id.* art. 12, at 151.

<sup>137</sup> See *Sommer v. Dame Mayer*, Civ., Dec. 8, 1953, 44 R.C.D.I.P. 133 (1955). See *T1 Bruxelles*, July 14, 1955, R.C.D.I.P. 1957.639.

ness of courts to the characterization problem, while others consent to excuse the judiciary because the nature of the process of characterization is so subtle, few if any reasoned decisions on that specific problem can be found.

J. Morse, in a leading article on the question, considers that the conventional theory of characterization is not substance but shadow, and that the so called characterization questions are in their essence not much different from choice-of-law questions generally.<sup>138</sup> The purpose of this section is to attempt to rectify the problems of the conflict of characterization and demonstrate that characterization is not as omnipresent as one might have thought.

#### A) *Rectification of the Problems*

The problems of the conflict of characterization may be rectified in each of the following situations.

##### 1. Choice between two legal effects which are incompatible

The conflict between two rules of substantive law which provide for legal consequences exclusive of each other raises a problem of connection. This should be solved by an appropriate conflict rule to which the theory of characterization only adds a motivation open to criticism. The French *Caraslanis* case<sup>139</sup> is a good example of this growing tendency to see conflicts of characterization where they do not exist. In the above case, the conflict-of-law issue concerned the designation of the relevant authority to celebrate a marriage. In countries where the ceremony has been secularized, the relevant authority is determined by the law of the place of celebration (*lex loci celebrationis*). The fact that the legal systems of denominational inspiration give exclusive competence to the authorities referred to by the personal law of the spouses-to-be is not caused by some disqualification of these formalities, but by a different conception of the matrimonial institution taken as a whole. Based on the faithful belonging to a religious community, the denominational legal systems take into account as a connecting factor the personality of laws and not their territoriality. Thus, they attempt to extend the scope of application of the personal law thanks to exclusively unilateral conflict rules establishing the formalities of the marriage, in whatever the country it is celebrated.<sup>140</sup>

Unlike the decision of the *Cour de Cassation*, the religious or civil nature of a wedding ceremony is neither a question of substance in Greek law nor a matter of form in French law. In both countries, there exists a

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<sup>138</sup> Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

<sup>139</sup> See *supra* note 49.

<sup>140</sup> See generally, F. RIGAUX, *DROIT INTERNATIONAL PRIVÉ* (2d ed. 1987).

link between substance and form which is expressed by the appropriate connecting solution: choice of the law of the celebration place for countries having secularized the wedding ceremony, choice of the personal law for denominational legal systems.<sup>141</sup>

This tendency to discover conflicts of characterization where they do not exist, in fact, is also illustrated by the *Leeuwn* case.<sup>142</sup> Since article 992 of the Dutch Civil Code takes nationality into consideration and not the place where a will was drafted, the French *Cour de Cassation* thought that the Netherlands prohibited making a will in any form but the "authentic" form, and imposed a rule of capacity instead of a rule of form.<sup>143</sup> The French characterization being different, a conflict of characterization was said to arise. It was solved by the *lex fori*. Actually, the Dutch themselves consider the question of the validity of a holographic will generally to be a question of formality governed by the law of the place where it was drafted. They have simply broadened the scope of application of their own rule by declaring the rule applicable to wills drafted abroad by Dutch nationals.<sup>144</sup>

## 2. Combination of legal effects originating from two systems of substantive law

A conflict of characterization may produce the appearance of a problem when no problem exists in reality, either because there is no such difference between the laws in competition (false conflict) or because the issue at stake is not to choose between these two laws but to define their respective scopes of application. This issue does not depend upon a given characterization, but on how their contents can be harmonized.

### a) No real difference between the laws in competition

Morse states, "where the connections are split between two [or more] foreign states, if it appears that they would both treat the case alike, the task of the local court is easy. The common foreign rule should govern."<sup>145</sup>

Dicey gives a few examples of similar situations, involving a forum. Here is one of them:

Suppose an action is brought in F (country of the forum) for breach of an oral contract to sell land in X (foreign country), which is governed

<sup>141</sup> *Id.* It is interesting to mention that a Greek statute of April 5, 1982, has modified the provisions of Greek private international law relating to marriage formalities.

<sup>142</sup> See *supra* note 47.

<sup>143</sup> See *supra* note 140.

<sup>144</sup> MAYER, *supra* note 37, at 135-36.

<sup>145</sup> Morse, *supra* note 138, at 1062.



by the law of X. Both F and X have a statute, modelled on the English Statute of Frauds, which requires contracts for the sale of an interest in land to be in writing. By the law of F, the statute is substantive; by the law of X, it is procedural. The result of applying both characterizations is that the action will succeed, although neither statute is complied with.<sup>146</sup>

For Dicey, this absurd result can be avoided if the court in F recognizes that no real difference exists between its own domestic law and that of X and accordingly applies its domestic law.<sup>147</sup> It seems especially suitable for adoption by English courts which require foreign law to be proved as a fact and which apply English law if such proof is not forthcoming.

### b) Theory of "adaptation"

All conceptual methods of characterization run the risk of creating two kinds of problems. Possibly, the concurrence of two legal systems entails either the application of both of them, or neither of them. The result in the first case is a cumulation of applicable rules, and in the second, a vacuum. In this respect, Wolff gives an interesting example:

A German couple — married without any matrimonial agreement — acquired Swedish nationality. According to German private international law, their matrimonial regime is governed by German law, which corresponds to their national law the day they got married. But the right of inheritance of the surviving spouse is determined in accordance with Swedish law, which is the national law of the pre-deceased at the time of his death.

When the spouses decide to change their nationality in the course of their marital life, the exact application of the German and Swedish legal systems, including their own characterizations, leads to the following distortion: a Swedish widow — who had the German nationality at the time of her marriage — has no rights neither by virtue of her matrimonial regime nor by the law of inheritance. On the opposite side, a German widow — who had the Swedish nationality at the time of her marriage — can accumulate her share in the matrimonial property with the German right of inheritance.<sup>148</sup>

The theory of "adaptation" is precisely aimed at correcting such an absurd result: in accordance with a method elaborated by Raape and Lewald,<sup>149</sup> and taken up in Italy by Cansacchi and Ziccardi:<sup>150</sup> when the

<sup>146</sup> DICEY, *supra* note 42, at 29.

<sup>147</sup> *Id.*

<sup>148</sup> Lewald, *supra* note 78, at 144. See Francescakis, *Conflits de lois*, (Principes Généraux), REP. DALL. DRT. INT. 1-6.

<sup>149</sup> Raape, *supra* note 81, at 496-98; see also Lewald, *supra* note 78.

<sup>150</sup> G. Cansacchi, *Le Choix et l'Adaptation de la Règle Etrangère dans le Conflit de Lois*, 83

dispersal of connecting elements leads to the cumulative application of two legal systems whose contents are not harmonized, the court must adapt them to each other so as to avoid the situation where a legal effect obtained by applying completely one of these two laws is ousted by the partial application of both of them. This reasoning applies to cases of vacuum too.

The above theory can be applied in the following way:

A domiciled Swiss couple living under a contractual system of separation of property ultimately becomes domiciled and naturalized in Sweden, where the husband dies intestate leaving a child. His personal property consists mainly of a large bank deposit with an English bank. His widow cannot claim the Swiss portion of a quarter, as Swiss inheritance law does not apply. Is she entitled to the Swedish moiety of the united property? It would seem that she is not, because this moiety is part of the Swedish system of matrimonial property, which system does not apply to the couple. Under Swedish inheritance law, on the other hand, she has no right. Thus she would apparently receive nothing. This unsatisfactory result will be corrected by a reasonable construction of Swedish internal law. A Swedish widow has no right of inheritance because the law assumes that she is provided for by her moiety of the united matrimonial property. But when this safeguard fails because Swedish matrimonial law does not apply, it seems reasonable to suppose that Swedish law will give her as "hereditary" portion all she would have received as matrimonial property if Swedish matrimonial law had been applicable. In other words, Swedish law in classifying the moiety rule as part of matrimonial law includes a subsidiary characterization of that rule as an inheritance rule when through the non-applicability of Swedish matrimonial law the widow would have no share in her husband's property.<sup>151</sup>

In the *Ghattas* case,<sup>152</sup> the French *Cour de Cassation* had to face a problem of adaptation.

A Christian Lebanese had married a French woman in France without going through any religious ceremony, although Lebanese law imposes a religious celebration. In the eyes of French law, the marriage is valid and can be dissolved by divorce. In the eyes of Lebanese law, it is void. The combination of both systems leads to an indissoluble marriage: questioned upon the existence of the marriage, French law answers positively; with respect to a possible divorce, Lebanese law refuses to accept

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R.D.C. 79 (1953). P. ZICCARDI, IL VALORE DI DIRITTO STRANIERO NELL' ORDINAMENTO NAZIONALE 44 (1946). See P. RIGAUX, LA THÉORIE DES QUALIFICATIONS EN DROIT INTERNATIONAL PRIVÉ, 381 (1956).

<sup>151</sup> WOLFF, *supra* note 26, at 165-66.

<sup>152</sup> Civ., Feb. 25, 1947, 36 R.C.D.I.P. 446 (1947).

it.<sup>153</sup>

The *Cour de Cassation* applied French law on the ground that the latter necessarily had jurisdiction over the matter when the marriage was valid according to that law only.<sup>154</sup> These two foregoing examples illustrate the many-sided applications of the theory of "adaptation" and the precious help it brings to theory of characterization.

### 3. Conflict between the respective "causes" of the same legal effect

In this specific situation, the legal effect claimed by one of the parties is provided for by substantive laws in competition for "causes" that differ. It is probably the most irritating situation inasmuch as it reveals the procedural framework of the problem of characterization. The mistake of the theory of characterization has consisted of deducting from the legal nature of a judicial claim according to the domestic law consequences in the field of the conflict of laws.

For example, it is illogical to reach the conclusion that a promissory note cannot be time-barred when the law of the forum and the foreign substantive law both contain a statute of limitations.<sup>155</sup>

The best way to proceed is to search for a motivation proper to the conflict of laws. In the prescribed situation, it seems more appropriate to have the transaction submitted to the statute of limitation of the governing law which restrains application of the law of the forum. But the *lex fori* can be referred to if the relevant provision of the foreign law cannot be applied or if the imprescriptibility set out in the foreign law is considered to be incompatible with the administration of justice as it is organized in the legal system of the forum.

### 4. Result selective principle v. theory of characterization

In his above-mentioned article, *Characterization: Shadow or Substance*, Morse tries to demonstrate that the shadowy nature of characterization has operated not to control results but to veil the processes whereby they are reached.<sup>156</sup> His demonstration rests upon the fact that courts, "when weighing competing claims to legislative jurisdiction, commonly apply that law which advances a social or economic interest which they prefer."<sup>157</sup>

An illustration is drawn by the author from insurance law. In a conflicts case, where the domestic law of the place of performance of the

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<sup>153</sup> B. ANCEL & Y. LEQUETTE, *GRANDS ARRETS DE LA JURISPRUDENCE FRANÇAISE DE DROIT INTERNATIONAL PRIVÉ*, 204-05 (1987).

<sup>154</sup> *Id.*

<sup>155</sup> See *supra* note 36.

<sup>156</sup> See Morse, *supra* note 138, at 1029.

<sup>157</sup> See VON MEHREN, *supra* note 73, at 482-86.

insurance contract gives the insured a cause of action but the law of the place of making does not, the forum is prone to choose the law of the place of performance; the place of making is however held the dominant contact when its law favors the claimant. Thus, the desired result (benefit to the assured) dictates the law applied by the court.<sup>158</sup>

In *Grant v. McAuliffe*,<sup>159</sup> the Supreme Court of California characterized a survival statute both as procedural and as "one of the administration of decedents' estates" rather than substantive and of tort law. Similarly, in *Kilborg v. Northeast Airlines*,<sup>160</sup> after paying lip-service to the *lex loci delicti* rule, the New York Court of Appeals invoked the devices of characterization and public policy to justify the application of New York's unlimited recovery rule. To do so, the New York court characterized the measure of damages in wrongful death actions as "a procedural or remedial question."<sup>161</sup>

The *Grant* and *Kilborg* cases are not few in the choice-of-law process. There are many other cases in which courts have employed the characterization device in a result-selective manner (escape device).<sup>162</sup>

As Leflar expresses it,

[i]f more than one characterization is logically available for a set of facts, [. . .] the choice between the characterizations may turn on a judicial desire to achieve justice in the particular case, on a public policy preference for one rule of law over another, on a preference for the forum state's own rule of law, on the plaintiff's pleadings, or on something else other than pure logic.<sup>163</sup>

However, whether a court does or does not adopt a particular theory of characterization, it must in a case involving conflict of laws follow some process of reasoning for the purpose of deciding whether a given rule of law of a given legal system comes within some conflict rule of the law of the forum.<sup>164</sup> The result-selective principle cannot replace this preliminary step of characterization. Which is probably why one year after the *Kilborg* decision, the New York Court of Appeals retracted its "procedural" characterization for a damage ceiling.<sup>165</sup> *Davenport v. Webb* involved New York residents who died in an accident in Maryland. The plaintiffs filed a wrongful death action in New York. The issue the court addressed was whether the plaintiffs were entitled to prejudgment inter-

<sup>158</sup> See *Jones v. Metro. Life Ins. Co.*, 158 Misc. 466, 286 N.Y.S. 4 (N.Y. Sup. Ct. 1936).

<sup>159</sup> See *supra* note 72.

<sup>160</sup> 9 N.Y.2d 34, 39, 172 N.E.2d 526, 528, 211 N.Y.S.2d, 133, 136 (1961).

<sup>161</sup> *Id.* at 42, N.E.2d 529, N.Y.S.2d 137.

<sup>162</sup> See Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

<sup>163</sup> R. LEFLAR, L. MCDUGAL III & R. FELIX, *AMERICAN CONFLICTS LAWS* 262 (4th ed. 1986).

<sup>164</sup> *Conflict Rule*, *supra* note 84, at 282-83.

<sup>165</sup> *Davenport v. Webb*, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

est for the wrongful death.<sup>166</sup> A New York statute authorized the collection of prejudgment interest; Maryland did not. The court refused to characterize the measure of damages in a wrongful death action as procedural. It stated that *Kilberg* "must be held merely to express this State's strong policy with respect to *limitations* in wrongful death actions."<sup>167</sup> The court thus applied the law of Maryland and denied prejudgment interest because Maryland was the place of the wrong and its substantive law applied.<sup>168</sup>

*B) The "Conflict of Characterization," Barrier to the Development of a System of Private International Law, Common to all States*

To acknowledge that the court is empowered to interpret the connecting categories it uses, introduces in the universal conceptual system the same confusion as the characterization by the *lex fori*. The analysis put forward by Kahn and Bartin remains correct where they stress that a conflict rule, using traditional connecting categories like "personal status," "inheritance," "matrimonial regime," is essentially equivocal.

To introduce such concepts in an international convention necessarily entails some differences of appreciation among courts,<sup>169</sup> as long as there will not exist some supranational court which would control the judicial characterization of commonly used concepts.<sup>170</sup>

Uniformity cannot be achieved so long as separate sovereignties exist. Morse is of the opinion that "the price of uniformity is nonetheless too high if it means suppressing the diversity of the desires and judgments of individual communities and the correspondingly diverse policies which satisfy them."<sup>171</sup>

The accuracy of Kahn's and Bartin's analyses is nowadays verified by a shift in the policies of institutions such as the Hague Conference of Private International Law, the Institute of International Law, the International Law Association. Ambitious projects of conventions, thought about at the beginning of the century, have been replaced by more limited and reasonable efforts. Their main purpose is to elaborate conflict rules which concern institutions of private law defined by the convention itself or by reference to univocal concepts.

Another difficulty derives from the fact that there exist various languages which are spoken throughout the world, such as English, French,

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<sup>166</sup> *Id.* at 393, 183 N.E.2d at 903, 230 N.Y.S.2d at 18.

<sup>167</sup> *Id.* at 395, 183 N.E.2d at 904, 230 N.Y.S.2d. at 20 (emphasis in original).

<sup>168</sup> *Id.*

<sup>169</sup> See *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987).

<sup>170</sup> See RIGAUX, *supra* note 140, at 331.

<sup>171</sup> Morse, *supra* note 138, at 1056.

Spanish, Arabic and, to a lesser extent, German. This diversity of international languages is corroborated, from the legal point of view, by the use of terms and concepts with common roots but whose meanings have become different in the course of history. Furthermore, in areas where transnational transactions are dense and heavy (for example, transport, insurance, transfer of technology, banking), unification of the applicable law by the conclusion of international agreements goes together with the establishment of a transnational community of professional operators sharing some common practices, habits and even rules.

One can regret the shrinking of the material scope of application of the conflict rule itself: the latter henceforth is a mere *lex specialis* inserted into the general rules of private international law drafted by the national legislatures. As a result, international conventions are limited to casting selective interventions of unification among each domestic conflicts system.

Drafting of conventions using traditional categories of characterization can only succeed in small and well-structured international societies such as the European Economic Community which can delegate to the European Court of Justice the power to control the way domestic courts interpret conventional concepts.

### CONCLUSION

Some writers have asserted that the importance of the conflict of characterization has been exaggerated, that the problem of characterization is devoid of practical interest and does not deserve the elaborate discussion of which it has frequently been the object, that conflicts of characterization rarely occur, and that theories of characterization are of little or no value in the solution of conflict-of-law cases. It is true that conflicts of characterization have arisen in few cases and that the process of characterization is frequently simple or even obvious. It is submitted too that some of the criticism is based on a misapprehension of the purpose of characterization and a misunderstanding of the relationship between general theory and specific conflict cases.

Characterization is primarily a matter of method and analysis.

Specific consideration of the kind of question to which a potentially applicable rule of law relates ensures that adequate attention will be paid to foreign law and that adequate attention will be paid to the construction of conflict rules of the law of the forum in the light of comparison between domestic rules of the law of the forum and domestic rules of a foreign system of law. In this way conflict rules, even if expressed in terms derived from the system of domestic law of the forum, may be construed so as to be susceptible of application to differing concepts of foreign laws and may thus be fitted to fulfil the function of conflict rules. Even if conflicts of characterization do not occur fre-

quently, the proposed method may disclose the existence of more conflicts than some critics seem to admit, and in any event the utility of a correct theory of characterization is not limited to cases of conflicts of characterization.<sup>172</sup>

The theory of the conflict of characterization does not change much. What is outdated in Bartin's approach is the controversy between the positivist conception and the universalist conception of private international law. Today, the theory of characterization seems to be more mitigated, with a certain universal influence.

Very few writers disagree with the conceptual methods of characterization and assert that the conflict of characterization is a false problem. This assertion forgets that the problem of characterization has practical as well as scientific importance and for that reason deserves consideration.

Some knowledge of its nature is of assistance to courts in developing and refining their conflicts rules, and in avoiding some of the results which have been so much criticized in the past.

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<sup>172</sup> *Conflict Rule*, *supra* note 84, at 281-82.