

DICEY, MORRIS AND COLLINS  
ON  
THE CONFLICT OF LAWS

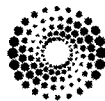
FIFTEENTH EDITION

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

WITH  
SPECIALIST EDITORS

VOLUME 1

SWEET & MAXWELL



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### *Characterisation and the Incidental Question*

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

The problem of characterisation consists in determining which juridical concept or category is appropriate in any given case. Assume, for example, that it is claimed that a marriage is void because the parties did not have the consent of their parents: should this be regarded as falling into the category “formal validity of a marriage” or should one take the view that it comes under “capacity to marry”? The answer could clearly determine the outcome of the case: this would be so if the law of the parties’ domicile required them to obtain the consent of their parents, while the law of the place where the marriage was celebrated did not. 2-003

It might seem possible to solve the above problem simply on the basis of normal legal reasoning—though the untutored assumption of most lawyers that parental consent relates to capacity is not in fact the solution adopted by the English courts<sup>8</sup>—but the next problem may seem more difficult. Assume that a testator domiciled in England makes a will disposing of land in Utopia (such will not being made in contemplation of marriage) and subsequently marries. He dies shortly afterwards. Is the will revoked by the marriage? Under the law of England it will be, but we will assume that this is not the case under the law of Utopia. In such a situation, the answer to the question whether the will is revoked could depend on whether the issue is characterised as one relating to succession or to matrimonial law (proprietary consequences of marriage).<sup>9</sup> 2-004

It will be seen from the above examples that the problem of characterisation arises whenever a system of conflict of laws is based on categories and connecting factors. In such a system, it is always necessary to determine which is the appropriate category in any given case. Since the English rules of the conflict of laws are based on categories and connecting factors, there is no way of avoiding the problem, though it may be ameliorated by selecting narrower and more specific categories. Thus the problem set out in the previous paragraph would disappear if there were a category “revocation of a will by subsequent marriage.”<sup>10</sup> 2-005

**Characterisation and the application of European Regulations.** The doctrine of characterisation examined in this chapter is, therefore, a doctrine which is an essential part of the mechanism by which a court chooses which law to apply in cases in which the framework for the decision, and the rules for choice of law, are those of the common law. In cases in which English statutes modify the choice of law rules of common law, the sphere of their 2-006

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<sup>8</sup> See *Ogden v Ogden* [1908] P. 46 (CA), discussed at para.17-020, below.

<sup>9</sup> It was in these terms that the Court of Appeal analysed the problem in the leading case on the subject, *Re Martin* [1900] P. 211. It concluded that it fell within the category “matrimonial law.”

<sup>10</sup> The problem of characterisation can be entirely avoided only by adopting a system of conflict of laws, such as the American doctrine of interest analysis, which does not use categories.

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

**Conclusions.** In essence, characterisation is a process of refining English conflict rules by expressing them with greater precision. If the relevant rule is, for example, “succession to movables is governed by the *lex domicilii* of the deceased,” characterisation involves deciding precisely which issues should be governed by the *lex domicilii*. The term “succession” is simply a useful way of referring to the bundle of issues that are regarded as appropriate for determination by the *lex domicilii*. To believe that a term such as “succession” has an objectively defined meaning which exists independently of the purpose for which it is used is mere conceptualism. It is, therefore, pointless to search for the “true” meaning of the term. Moreover, since the purpose of the exercise is to reformulate rules of English law, it is contrary to principle to look to foreign law for the answer. This seems to have been recognised by the English courts. For example, in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*, a recent English case in which the issue of characterisation received extended judicial discussion, Auld L.J. accepted that “the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence.”<sup>69</sup> 2-038

The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law.<sup>70</sup> In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation, a new conflict rule should be created. As Mance L.J. said in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*,<sup>71</sup> when dealing with the characterisation of issues: 2-039

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

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

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

<sup>71</sup> [2001] Q.B. 825 (CA), at [27]. See also *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] 2 W.L.R. 199 (characterisation of “capacity” of a corporation to be undertaken in a broad internationalist sense).

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3. X is a company incorporated in Liechtenstein. The company was formed for the purpose of acquiring and developing land in Egypt. The whole of the company's business is carried on and managed in Egypt, and the only connection with England is that the non-executive directors are English and live in England. The company is not resident in England.

## 2. STATUS

30R-009 **RULE 174**—The existence or dissolution of a foreign corporation duly created or dissolved under the law of a foreign country is recognised in England.<sup>34</sup>

## COMMENT

30-010 **The principle in the Rule.** Whether an entity exists as a matter of law must, in principle, depend upon the law of the country under which it was formed.<sup>35</sup> That law will determine whether the entity has a separate legal existence.<sup>36</sup> The law of that country will determine the legal nature of the

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<sup>34</sup> *Bonanza Creek Gold Mining Co v R.* [1916] 1 A.C. 566 (PC); *Lazard Bros. v Midland Bank* [1933] A.C. 289; *National Bank of Greece and Athens SA v Metliss* [1958] A.C. 509; *Arab Monetary Fund v Hashim (No.3)* [1991] 2 A.C. 114; *Gulf Consolidated Company for Services and Industries EC v Credit Suisse First Boston Ltd* [1992] 2 Lloyd's Rep. 301; *Toprak Enerji Sanayi AS v Sale Tilney Technology Plc* [1994] 1 W.L.R. 840; *Presentaciones Musicales SA v Secunda* [1994] Ch. 271 (CA); *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] Q.B. 282; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Gilbert Rowe* [1997] 2 Lloyd's Rep. 218; *Oxnard Financing SA v Rahn* [1998] 1 W.L.R. 1465 (CA); *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287; *Phoenix Marine Inc. v China Ocean Shipping Co* [1999] 1 Lloyd's Rep. 682; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *JH Rayner (Mincing Lane) Ltd v Cafenorte SA Importadora* [1999] 2 All E.R. (Comm.) 577 (CA); *Eurosteel Ltd v Stinnes AG* [2000] 1 All E.R. (Comm.) 964; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550; *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm.); *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm.), [2005] 2 Lloyd's Rep. 129, affirmed in part and reversed in part, sub nom. *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237, [2006] 1 W.L.R. 2276 without reference to the point; *Laemthong International Lines Co Ltd v Artis (No.3)* [2005] EWHC 1595 (Comm.); *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.); Foreign Corporations Act 1991, s.1, below, paras 30-014 *et seq.* See also *Dubai Bank Ltd v Galadar' (No.4)*, *The Times*, February 23, 1990; *Dubai Bank Ltd v Galadari (No.5)*, *The Times*, June 26, 1990; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338; *Trustees of Our Lady of the Sacred Heart v Registrar-General* [2008] NTSC 13; *Re Liquidation of Founding Partners Global Fund Ltd* [2011] SC (Bda) 19 Com (Sup Ct Bermuda); Foreign Corporations (Application of Laws) Act 1989, ss.7, 8 (Australia); *Taiwan via Versand Ltd v Commodore Electronics Ltd* [1993] 2 H.K.C. 650 (Hong Kong Foreign Corporations Ordinance 1993, s.2(1), (3)).

<sup>35</sup> *Associated Shipping Services v Department of Private Affairs of HH Sheikh Zayed Bin Sultan Al-Nahayan*, *Financial Times*, July 31, 1991 (CA); *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 W.L.R. 1302 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Gilbert Rowe* [1997] 2 Lloyd's Rep. 218; *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338; *International Association of Science and Technology for Development v Hamza* (1995) 122 D.L.R. (4th) 92 (Alta CA).

<sup>36</sup> See authorities in preceding note.

entity so created, e.g. whether the entity is a corporation or partnership,<sup>37</sup> and, if the latter, the legal incidents which attach to it.<sup>38</sup>

It is well established that a corporation duly created in a foreign country is to be recognised as a corporation in England,<sup>39</sup> and accordingly foreign corporations can both sue<sup>40</sup> and be sued<sup>41</sup> in their corporate capacity in the courts. Whether a corporation has been dissolved must be determined by the law of its place of incorporation<sup>42</sup> for “the will of the sovereign authority which created it can also destroy it.”<sup>43</sup> If according to that law the corporation is in the process of being wound up, it can still sue and be sued in England,<sup>44</sup> but if this process has ended, and the corporation has been dissolved, the corporation has been held to be dead in the eyes of the English courts.<sup>45</sup> If the

30-011

<sup>37</sup> *Von Hellfeld v Rechnitzer* [1914] 1 Ch. 748 (CA); *Dreyfus v CIR* (1929) 14 T.C. 560, 576-577 (CA); *The Saudi Prince* [1982] 2 Lloyd's Rep. 255; *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 A.C. 418, 509; *The Kommunar (No.2)*, above; *The Gilbert Rowe*, above; *Oxnard Financing SA v Rahn* [1998] 1 W.L.R. 1465 (CA); *Laemthong International Lines Co Ltd v Artis (No.3)* [2005] EWHC 1595 (Comm.) *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. *cf. Backman v Canada* [2001] S.C.R. 367 (Sup Ct Can) (whether a foreign partnership is recognised in Canada for the purposes of tax legislation depends on the requirements for the existence of a partnership in Canadian law).

<sup>38</sup> *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch.), [2011] B.C.C. 338. As to whether, if it is a partnership, the partners are to be sued alone, together or as a firm, see above, para.7-017; *Johnson Matthey & Wallace Ltd v Ahmed Alloush* (1985) 135 N.L.J. 1012; *The Gilbert Rowe*, above; *Oxnard Financing SA v Rahn*, above.

<sup>39</sup> *Henriques v Dutch West India Co* (1728) 2 Ld.Raym. 1532, 1535; *Lazard Bros v Midland Bank* [1933] A.C. 289, 297; *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep. 287.

<sup>40</sup> *Henriques v Dutch West India Co* (1728) 2 Ld.Raym. 1532.

<sup>41</sup> *Newby v Van Oppen* (1872) L.R. 7 Q.B. 293.

<sup>42</sup> As to identification of the law of the place of incorporation, see below, paras 30-014 *et seq.*

<sup>43</sup> *Lazard Bros v Midland Bank* [1933] A.C. 289, 297; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *The Kommunar (No.2)* [1997] 1 Lloyd's Rep. 8; *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550; *Dubai Aluminium Co Ltd v Al Alawi* [2002] EWHC 2051 (Comm.); *Re Eurodis Electron Plc* [2011] EWHC 1025 (Ch.); Foreign Corporations Act 1991, s.1, below, paras 30-015 *et seq.* See M. Mann (1955) 18 M.L.R. 8; Wortley (1933) 14 B.Y.I.L.1. It is possible that the courts would not recognise a dissolution effected in defiance of a rule of public international law; see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 883 (CA and HL), above, paras 5-054, 25-011 and see F.A. Mann, *Studies in International Law* (1973), p.366, for a discussion of the recognition of international delinquencies by municipal courts.

<sup>44</sup> *cf. Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] A.C. 112; *Banque Internationale de Commerce de Petrograd v Goukassow* [1925] A.C. 150; *Employers' Liability Assurance Corporation Ltd v Sedgwick Collins & Co Ltd* [1927] A.C. 95; *First Russian Insurance Co v London and Lancashire Insurance Co* [1928] Ch. 922. *Seemle*, whether an action must be brought or defended by the liquidator depends on the law of the place of incorporation: see *Bank of Ethiopia v National Bank of Egypt and Liguori* [1937] Ch. 513, 524; and Rule 179, below.

<sup>45</sup> *Russian and English Bank v Baring Bros* [1932] 1 Ch. 435; *Deutsche Bank v Banque des Marchands de Moscou* (1932) 158 L.T. 364 (CA); *Lazard Bros v Midland Bank* [1933] A.C. 289; *Burr v Anglo-French Banking Corp* (1933) 49 T.L.R. 405; *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All E.R. 1017 (CA); *Phoenix Marine Inc v China Ocean Shipping Co* [1999] 1 Lloyd's Rep. 682. See also *The Rio Assu* [1999] 1 Lloyd's Rep. 201; *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd* [2000] 2 Lloyd's Rep. 550. *cf. Home Mortgage Ltd v Robertson* [1988] 4 W.W.R. 260 (Sask).