CHAPTER 2

CHARACTERISATION AND THE INCIDENTAL QUESTION

1. CHARACTERISATION[1]

2–001 THE problem of characterisation, also known as classification,[2] was "discovered" independently and almost simultaneously by the German jurist Kahn[3] and the French jurist Bartin[4] at the end of the 19th century, and was introduced to American lawyers by Lorenzen in 1920[5] and to English lawyers by Beckett in 1934.[6]

2–002 **Nature of the problem.** Characterisation is a fundamental problem in all traditional systems of the conflict of laws, that is to say the systems applicable in England and other European countries. It results from the fact that the rules which have been evolved to deal with choice-of-law problems are expressed in terms of juridical concepts or categories and localising elements or connecting factors.[7] This structure may be illustrated by considering some typical

[1] Lorenzen, Chs 4 and 5; Beckett (1934) 15 B.Y.I.L. 46; Unger (1937) 19 Bell Yard 3; Robertson, *Characterisation in the Conflict of Laws* (1940); Falconbridge, Chs 3–5; Cook, Ch.8; Cormack (1941) 14 So. Calif.L.Rev. 221–243; Lederman (1951) 29 Can. Bar Rev. 3, 168; Rabel, Vol.I, pp.47–72; Bland (1957) 6 I.C.L.Q. 10; Inglis (1958) 74 L.Q.R. 493, 503–516; Ehrenzweig in Nadelmann, von Mehren and Hazard (eds.), *XXth Century Comparative and Conflicts Law* (1961), pp.395 *et seq.*; Turpin [1959] *Acta Juridica* 222; Kahn-Freund (1974) *Recueil des Cours*, III, pp.369–382; Dine [1983] Jur. Rev. 73; Forsyth (1998) 114 L.Q.R. 141; Lipstein, *International Encyclopaedia of Comparative Law*, Vol.III, Ch.5 (1999); Lipstein, in *Private International Law in the International Arena—Liber Amicorum Kurt Siehr* (Basedow *et al.* eds. 2000), pp.405–412. For the more extensive Continental literature, see Robertson, pp.xxv–xxix; Lorenzen, Ch.4; and particularly (in addition to citations elsewhere in this chapter) Neuner, *Der Sinn der Internationalprivatrechtlichen Norm* (1932); Meriggi, "Saggio Critico sulle Qualificazioni" (1932) 2 *Rivista Italiana di Diritto Internazionale Privato* 189, French translation in (1933) 28 *Revue de Droit International Privé* 201; Ago (1936) *Recueil des Cours*, IV, p.243; Niederer, *Die Frage der Qualifikation* (1940); Niederer, *Einführung in die allgemeinen Lehren des Internationalen Privatrechts* (2nd ed. 1956), pp.389–391; Wengler, *Festschrift für Martin Wolff* (1952), pp.337 *et seq.*; Rigaux, *La Théorie des Qualifications* (1956), Mistelis, *Charakteriserungen und Qualifikation in Internationalen Privatrecht* (1999).

[2] "Qualification" is the term used by Continental writers.

[3] (1891) 30 Jhering's *Jahrbücher* 1, reprinted in *Abhandlungen* I (1928) 1–123.

[4] (1897) Clunet 225, 466, 720; *cf.* Bartin, *Principes de Droit International Privé* (1930), Vol.I, pp.221–239; Bartin (1930) *Recueil des Cours*, I, p.565.

[5] (1920) 20 Col. L. Rev. 247; reprinted in Lorenzen, Ch.4.

[6] (1934) 15 B.Y.I.L. 46.

[7] For the meaning of "connecting factors," see above, paras 1–079 *et seq.*

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.

2–003 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.

2–004 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[8]—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).[9]

2–005 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."[10]

2–006 **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

[8] See *Ogden v Ogden* [1908] P. 46 (CA), discussed at para.17–020, below.

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

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

application may also be determined by reference or recourse to the common law of characterisation.

2–007 But where the choice of law rules which the court is directed to apply are those laid down by European Regulation or other European instrument, the question for the court is more usefully understood as one simply of statutory interpretation; and as will be seen at various points throughout this book, the principal canon of that statutory interpretation is that the legislative terms used in European instruments should have a meaning and a sphere of application which is uniform across the Member States. If, for example, an English court has to decide whether the matter before it is one of contractual or non-contractual obligation, in order to determine whether the choice of law rules are those of the Rome I[11] or Rome II[12] Regulation, or neither, the answer is not to be found by asking whether the common law rules of the conflict of laws would regard the issue as contractual, or tortious, or otherwise. The answer is instead to be arrived at by interpreting the statutory language of the Regulations, which is to be done in accordance with the guidance of the European Court of Justice and the principle that the Regulations should be interpreted in the same way, and to the same effect, in all Member States. Although it would be possible to describe the process of determining whether and how the Regulations apply as being a form of characterisation, that is, as a process of allocating the issue before the court to one or another of the potentially-applicable choice of law rules, it is one to be undertaken wholly without reference to the common law of characterisation. It is for this reason better understood as an entirely distinct, self-contained, exercise. It is therefore treated in appropriate detail in the chapters of this book which deal with the specific choice of law rules established by European Regulation. This chapter is therefore principally concerned with the doctrine of characterisation as it operates outside the context of legislative choice of law rules established by European Regulation or analogous instrument.

2–008 **Theories.** The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical.[13] The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result. They appear to have had almost no influence on the practice of the courts in England. For this reason, no attempt will be made to summarise them in detail, though the main features of the most important will be outlined.

2–009 Before doing this, however, we must consider a little more closely what a court does when confronted with a characterisation problem. What exactly is it that is characterised—an issue, a set of facts or a rule of law? Obviously, it can be any of these, depending on the way the court approaches the problem. For example, in one case members of the Court of Appeal referred to

[11] Regulation (EC) 593/2008 of the European Parliament and Council, examined in detail in Ch.32 below.

[12] Regulation (EC) 864/2007 of the European Parliament and Council, examined in detail in Chs 34–36 below.

[13] See n.1, above.

characterisation of "the issue",[14] "the question in this action",[15] "the relevant rule of law" and the "juridical concept or category".[16] In the example given above, the court could ask itself whether revocation of a will by subsequent marriage, as an abstract issue, is to be regarded as falling into the area of succession or matrimonial law; alternatively, it could consider how the facts of the case should be characterised. Both these approaches, it is suggested, amount to the same thing. But, as Auld L.J. observed in *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)*, the characterisation of the issue "requires a parallel exercise in classification of the relevant rule of law."[17] Once it is decided that the issue raised by the proceedings relates to matrimonial law rather than to succession, it logically follows that s.18 of the Wills Act 1837, the relevant provision of English law which deals with the revocation of a will by subsequent marriage, is characterised as a rule of matrimonial law.[18] Alternatively, the court could start by seeking to characterise s.18 of the Wills Act 1837. As will be shown below, this latter procedure can lead to difficulties which do not arise if the court characterises the issue.

2–010 The task which most of the writers have set themselves is that of determining which system of law should decide how legal rules and institutions should be characterised. Two main schools of thought have emerged: that favouring the *lex fori* and that favouring the *lex causae*. The various approaches were evaluated by Kahn-Freund, whose assessment was that characterisation in accordance with an "enlightened *lex fori*" was viable though sometimes difficult, that characterisation in accordance with the *lex causae* did not produce harmony, but risked "international dissonance as well as internal inconsistency", and that in some cases there was simply no obviously right answer to be found.[19]

2–011 The great majority of Continental writers follow Kahn and Bartin in thinking that, with certain exceptions,[20] the process of characterisation should be performed in accordance with the domestic law of the forum.[21] If the forum has to characterise a rule or institution of foreign law, it should inquire how the corresponding or most closely analogous rule or institution of its own law is characterised, and apply that characterisation to the foreign institution or rule. The principal argument put forward in favour of this view is that if the foreign law is allowed to determine in what situations it is to be applied, the law of the forum would lose all control over the application of its own

[14] *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1996] 1 W.L.R. 387, 391 (CA) *per* Staughton L.J.

[15] *ibid.*, at p.393, *per* Staughton L.J.

[16] *ibid.* pp.407 (Auld L.J.) and 417 (Aldous L.J.) respectively.

[17] [1996] 1 W.L.R. 387, 407.

[18] It ought also to follow that any foreign rule which addresses the same issue should be characterised in the same way. See para.2–040.

[19] Kahn-Freund, *General Problems of Private International Law* (1976), pp.223–241.

[20] One of Bartin's exceptions was the characterisation of interests in property as interests in movables or immovables, which he said must be determined by the *lex situs*: (1897) Clunet 250–253. That is still the prevailing view: see Mayer and Heuzé, *Droit international privé* (10th ed. 2010), para.156; Audit, *Droit international privé* (6th ed. 2010), paras 198 *et seq.*; Bourel and Muir Watt, *Droit international privé* (2007), para.391.

[21] Beckett (1934) 15 B.Y.I.L. 46, 49–57; Lorenzen, Ch.4, especially pp.91–93; Robertson, pp.25–38. This theory was adopted in the South African case of *Laconian Marine Enterprises Ltd v Agromar Lineas Ltd*, 1986 (3) S.A. 509, 517–524.

The court has jurisdiction, even though X habitually resides abroad and has no place of business in England.[142]

7. A's Spanish ship collides with an oil jetty in the River Thames because of the negligent navigation of the *Banco*, a British ship belonging to X. The oil catches fire and A is faced with claims amounting to several million pounds from those who suffered damage in the collision. A brings an Admiralty action *in rem* against the *Banco* and six sister ships owned by X. The court sets aside the service of the claim form on the six sister ships.[143]

8. A, the owner of cargo damaged while carried on a ship belonging to (or demise chartered by) X & Co, brings a claim *in rem* under the Senior Courts Act 1981. The claim form is served on the ship in an English port, but the ship is not arrested because contractual security is given by X & Co, a company domiciled in a State to which the Brussels I Regulation applies. X & Co challenges the jurisdiction of the court. On the facts of the case the court does not have jurisdiction under Arts 5–24 of the Brussels I Regulation. Since the ship was not arrested, the court has no jurisdiction to hear the action under the Brussels Arrest Convention.[144]

9. The circumstances are the same as in Illustration 8, but the ship is arrested. Although the court does not have jurisdiction under the Brussels I Regulation, it does have jurisdiction under the Brussels Arrest Convention.[145]

10. The circumstances are the same as in Illustration 8, but X & Co puts up security by means of a bail bond. The court has jurisdiction to determine the claim because, by giving bail, X & Co is deemed to have submitted to the court's jurisdiction.[146]

11. A ship owned by the United States is damaged in Rio de Janeiro harbour as a result of a collision with a ship owned by X & Co, a company domiciled in Italy (a State to which the Brussels I Regulation applies). The United States Government brings proceedings *in rem* in England to obtain damages, serving the claim form in an English port on the ship owned by X & Co. The ship could have been arrested, but is not, since security is given. On the facts of the case, the English court does not have jurisdiction under the provisions of Arts 5–24 of the Brussels I Regulation; nevertheless, it has jurisdiction to hear the proceedings, since it has jurisdiction under Art.1(1)(b) of the Brussels Collision Convention of 1952.[147]

12. A, the owners of cargo carried in a ship owned by X & Co, a Polish shipping company, alleges that in the course of the voyage the cargo was contaminated. X & Co starts proceedings against A in the Netherlands for a declaration of non-liability. A issues English proceedings *in rem* under the Senior Courts Act 1981, the claim form is served and the ship is arrested. Although the court's jurisdiction is derived from the Brussels Arrest Convention, the court must decline jurisdiction under Art.27 of the Brussels I Regulation.[148]

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[142] *ibid.* s.21(4)(7).
[143] *The Banco* [1971] P. 137 (CA).
[144] *The Deichland* [1990] 1 Q.B. 361 (CA) (decided under the Brussels Convention).
[145] *ibid.*
[146] *The Prinsengracht* [1993] 1 Lloyd's Rep. 41.
[147] *The Po* [1991] 2 Lloyd's Rep. 206 (CA) (decided under the Brussels Convention).
[148] Case C–406/92 *The Tatry* [1994] E.C.R. I–5439; [1999] Q.B. 515. The case was decided on the basis of the Brussels Convention and before Poland became party to the Lugano Convention and subsequently joined the European Union (and became subject to the Brussels I Regulation). The result would still be the same.

CHAPTER 14

FOREIGN JUDGMENTS[1]

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[1] See Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (1984), Pt I; Read, *Recognition and Enforcement of Foreign Judgments* (1938); Piggott, *Foreign Judgments* (1908); Briggs & Rees, *Civil Jurisdiction and Judgments* (5th ed. 2009), Ch.7; Barnett, *Res Judicata, Estoppel and Foreign Judgments* (2001); Schlosser (2000) 284 *Receuil des Cours* 9, pp.31–53, 200–214; Restatement, Ch.5; Von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study* (2007); Briggs, *Agreements on Jurisdiction and Choice of Law* (2008), Ch.9; Restatement Third, *Foreign Relations Law*, 1987, ss.481–483; Scoles, Hay, Borchers and Symeonides, Ch.24. Proposals at the Hague Conference for a worldwide Convention on jurisdiction and the enforcement of judgments foundered, and the resulted only in a limited Convention on Choice of Court Agreements which will, even if brought into force in England, have very little impact upon the recognition of foreign judgments in England. Art.8 of the Convention will establish that a judgment given by a court designated by an exclusive choice of court agreement may be denied recognition and enforcement only on the limited grounds set out, principally in Art.9. However, Art.9(1) provides for non-recognition if "the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid": a rule in these terms has no direct counterpart in the common law on the recognition of judgments. On the Hague Conference process, see Spigelman (2009) 83 A.L.J. 386; Garnett (2009) 5 J. Priv. Int. L. 161. For a response to the failure of the process see American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006), on which, and on US law generally, see Silberman (2008) 19 King's L.J. 235. This Chapter deals with judgments of foreign municipal courts. International tribunals set up by treaty are variously described as courts and arbitral tribunals, but their judgments or awards do not fall within the scope of this chapter. See below, Rule 72 (International Centre for Settlement of Investment Disputes); and Schachter (1960) 54 A.J.I.L. 1, 12–14; Schreuer (1975) 24 I.C.L.Q. 153; Giardina (1979) *Recueil des Cours*, IV, p.233.

1. INTRODUCTORY

14R–001 **RULE 41—A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England but may**

(1) be enforceable by claim or counterclaim at common law or under statute, or

(2) be recognised as a defence to a claim or as conclusive of an issue in a claim.

COMMENT

14–002 **The distinction between enforcement and recognition.** A foreign judgment has no direct operation in England. It cannot be immediately enforced by execution. This follows from the circumstance that the operation of legal systems is, in general, territorially circumscribed. Nevertheless, a foreign judgment may be recognised or enforced in England. It is plain that, while a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises.[2]

14–003 Such questions may arise in various ways but may be grouped into three categories. In the first place, the person in whose favour such a judgment is pronounced may seek to have that judgment executed or otherwise carried out as against the person against whom it is given. The claimant is then seeking to *enforce* the judgment. The case is not different when the plaintiff in the original or foreign proceedings, being subsequently made a defendant in English proceedings in the same or a related matter, sets up the foreign judgment by way of counterclaim or other cross-proceedings of a positive sort. Not every type of judgment is capable of enforcement in this way. A judgment dismissing a claim or counterclaim is obviously not capable of enforcement, unless it orders the unsuccessful party to pay costs, as it frequently does; nor is a declaratory judgment, e.g. one declaring the status of a person or the title to a thing; nor is a decree of divorce. There may, however, be orders ancillary to a decree of divorce which, because they order the payment of money, are capable of enforcement. Examples are an order that the husband should pay maintenance to his wife, or vice versa, or that the unsuccessful party should pay the other's costs.

14–004 A judgment *in rem* determining the title to a foreign immovable is equally obviously incapable of enforcement in England. A foreign judgment *in rem* decreeing the sale of a ship or other chattel to meet the claim does not normally require enforcement in England, because this can usually be satisfied out of the proceeds of sale of the *res*, or out of the bail or other security which the owner gave to avoid the arrest of the *res*. But if the security given in the foreign court is insufficient, it has been held that an action *in rem* may be brought in England against the ship to enforce the foreign decree if it is necessary to complete the execution of the judgment, provided that the ship

[2] As Lord Rodger put it: "The logic of the law is that recognition is the necessary primary concern": *Clarke v Fennoscandia Ltd* [2007] UKHL 56, 2008 S.C. (HL) 122, [21].

remains the property of the judgment debtor at the time of arrest.[3] It has also been accepted that a foreign judgment which would not be entitled to be enforced in England as a judgment *in rem* may be given effect, and enforced, as a judgment *in personam* if it satisfies the distinct conditions for such enforcement, at least where to do so is consistent with the substance of the judgment.[4]

14–005 Secondly, the person in whose favour a judgment is given in a foreign country may seek on its basis merely to resist a claim here in the same or a connected matter. In this case the type of judgment involved is largely immaterial. For instance, A may sue X in England for a debt and X successfully defend the action by showing that the matter has already been litigated in a foreign court, which has found that the alleged debt does not exist and has in consequence given judgment for X.[5] In such a case the situation indeed is that a party to English proceedings is relying directly upon a foreign judgment, but he is doing so merely to establish a negative proposition and seeks that *recognition* alone be accorded to that judgment. There is no question of *enforcement*. Again, if a foreign judgment *in rem* decrees the sale of a ship or other chattel in favour of A, A may resist proceedings in England by the owner of the ship or chattel in reliance on the foreign judgment,[6] or he may bring a claim *in personam* for wrongful interference against one who denies his title. In neither case is he seeking to enforce the judgment; he is relying on the foreign judgment to prove his title, and the judgment is recognised *qua* an assignment of property rather than *qua* a judgment. For A is relying on the title created by the foreign judgment rather than on the judgment itself.[7]

14–006 Thirdly, the party against whom a judgment was given may seek to use that judgment, or the fact that he has satisfied that judgment, to resist a further claim by the party in whose favour the judgment was given. For example, a claimant may have brought proceedings in a foreign court but have obtained a judgment for less than he had sought. If he brings a second set of proceedings upon the same claim, the defendant may seek to rely on the foreign judgment in support of either of two answers to the claim. He may seek *recognition* of the judgment if it contained a discrete ruling in his favour dismissing part of the claim, just as in the previous example. But he may also rely upon the existence, or the satisfaction, of the judgment as a bar to further proceedings on the same claim,[8] or on a separate claim but which should have been advanced, if at all, in the proceedings in the foreign court.[9] This also involves *recognition* of a foreign judgment, but its effect is to treat the foreign judgment as a final adjudication of the issues which arose between the parties, and to preclude the bringing of further proceedings *ab initio*, as distinct from establishing that the findings in favour of the party relying on the foreign

[3] *The Despina GK* [1983] Q.B. 214; see also *The City of Mecca* (1879) 5 P.D. 28, reversed on other grounds (1881) 6 P.D. 106 (CA). See below, para.14–112.

[4] *Pattni v Ali* [2006] UKPC 51, [2007] 2 A.C. 85.

[5] *cf. Barber v Lamb* (1860) 8 C.B. (N.S.) 95.

[6] See *Castrique v Imrie* (1870) L.R. 4 H.L. 414.

[7] See below, para.14–110.

[8] *cf.* Civil Jurisdiction and Judgments Act 1982, s.34; *Republic of India v India Steamship Co Ltd* [1993] A.C. 410. See below, paras 14–041 *et seq.*

[9] *Henderson v Henderson* (1843) 3 Hare 100. See below, para.14–043.

CHAPTER 23

IMMOVABLES[1]

1. JURISDICTION OF THE ENGLISH COURT: LAND IN ENGLAND

23R–001 **RULE 130—(1) The court has jurisdiction to entertain a claim *in personam* in a civil or commercial matter falling within the scope of Council Regulation (EC) 44/2001 ("the Brussels I Regulation")[2] where the proceedings have as their object rights *in rem* in, or tenancies of, immovable property situate in England.[3]**

(2) Where the defendant is domiciled in a State to which the Brussels I Regulation applies ("a Member State"),[4] or a State party to the Lugano Convention[5] ("a Convention State"), or is domiciled in Scotland or Northern Ireland, the court has jurisdiction to entertain a claim *in personam* in a civil and commercial matter falling within the scope of the Brussels I Regulation or the Lugano Convention where the proceedings relate to a contract and are combined with a claim against the same defendant relating to rights *in rem* in immovable property situate in England.[6]

(3) Subject to the Brussels I Regulation and the Lugano Convention, the court may assume jurisdiction if the whole subject matter of the claim relates to property located within the jurisdiction.

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[1] Hay, *The Situs Rule in European and American Conflicts Law*, in Hay and Hoeflich (eds.), *Property Law and Legal Education* (1988), pp.109–132; Carruthers, *The Transfer of Property in the Conflict of Laws* (2005), Ch.2.

[2] On the scope of the Brussels I Regulation, see paras 11–029 *et seq.*, above.

[3] Brussels I Regulation, Art.22(1) (first sentence) and Civil Jurisdiction and Judgments Act 1982, Sch.4, Rule 11(a)(i).

[4] See also Agreement between the European Community and Denmark [2005] O.J. L299/62, which applies the provisions of the Brussels I Regulation to Denmark, subject to certain modifications. See para.11–013, above.

[5] The Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters: [2007] O.J. L339/1, on which see paras 11–018 *et seq.*, above.

[6] Brussels I Regulation, Art.6(4); Lugano Convention, Art.6(4); 1982 Act, Sch.4, Rule 5(d).

[7] CPR, r.6.36 and PD6B, para.3.1(11). Under CPR PD6B, para.3.1 there is no direct counterpart to RSC Ord.11, r.1(1)(h) (certain claims in relation to matters affecting land situate in England). See, however, CPR PD6B, para.3.1(14), which enables jurisdiction to be exercised in relation to a claim made in probate proceedings which includes a claim for the rectification of a will.

(4) In this Rule, "domicile" means domicile as determined by Rule 30.

COMMENT

This Rule is not intended to be an exhaustive statement of the circumstances in which a court may take jurisdiction in cases concerning land in England; it merely sets out the rules that apply specifically in relation to immovable property. More general jurisdictional rules may also be applicable. 23–002

In a broad sense, the Rule is based on a general principle found in most legal systems that, where the action concerns immovable property, the courts of the country where the land is situated have exclusive jurisdiction. The Rule gives effect to the positive (jurisdiction-conferring) aspect of this principle; Rule 131 gives effect to its negative (jurisdiction-denying) aspect. There are various reasons for the principle. On the one hand, land still has a rather special position in most legal systems;[8] on the other hand, there are practical considerations: proceedings concerning land may involve inspections of the property (or of local records) and these can be carried out only by the courts of the *situs*; moreover, any judgment that may be given will normally be enforceable only with the co-operation of the courts of the *situs*. 23–003

In the past, the general principle underlying Rule 130 found expression, as far as English law was concerned, only in certain provisions for permission to serve out of the jurisdiction under RSC Order 11, r.1(1). Such provision still exists under CPR, r.6.36 and PD 6B, para.3.1, which allows service of process outside the jurisdiction (with permission) in cases involving property located in England, and forms clause (3) of Rule 130. It has, however, been largely superseded by Art.22(1) of the Brussels I Regulation, which is the basis of clause (1) of the Rule. 23–004

Relationship between clauses (1), (2) and (3). Clause (3) applies only where clauses (1) and (2) are not applicable. Clauses (1) and (2) apply only where the proceedings concern a civil or commercial matter within the scope of the Brussels I Regulation as defined in Art.1 or, in the case of clause (2), the identical provisions of Art.1 of the Lugano Convention. Article 1 expressly excludes certain matters, such as rights in property arising out of a matrimonial relationship, wills, succession and bankruptcy, and, where the action concerns any of these, clauses (1) and (2) will not apply. 23–005

The applicability of clause (1) does not depend on domicile, since Art.22(1) of the Brussels I Regulation (which forms the basis of clause (1)) expressly states that it applies "regardless of domicile." However, the position may be compromised to some extent by the Lugano Convention. Art.64(2) of the Lugano Convention, which deals with the relationship between the Brussels I Regulation and the Convention,[9] states that the Lugano Convention will be applied: 23–006

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[8] A modern justification for this is that important social questions may be involved, such as housing policy and tenants' rights, and the relevant legislation may be regarded as embodying public policy.

[9] Title VII of the Lugano Convention is headed "Relationship to Council Regulation (EC) No 44/2001 and Other Instruments."

"In matters of jurisdiction, where the defendant is domiciled in the territory of a State where this Convention but not an instrument referred to in paragraph 1 of this Article applies, or where Articles 22 or 23 of this Convention confer jurisdiction on the courts of such a State;"[10]

Paragraph 1 refers to the Brussels I Regulation (as well as to the Brussels Convention and the Agreement with Denmark).[11] Although Art.64(1) states that the Lugano Convention "shall not prejudice the application by the Member States of the European Community" of these instruments, paragraph 2 begins by stating that "However, this Convention shall in any event be applied" to matters specified therein

23–007 Read literally, this would appear to mean that the Lugano Convention, rather than the Brussels I Regulation, applies whenever either the defendant is domiciled in a State which is a party to the Lugano Convention but not bound by the Regulation[12] (hereinafter an "EFTA country"), or the land was situated in such a country. The better view, therefore, is that the jurisdictional provisions of the Lugano Convention other than Arts 22 and 23 apply whenever the defendant is domiciled in an EFTA country; and Arts 22 and 23 apply whenever the jurisdiction conferred by those Articles is given to the courts of such a State. Since the provisions of the Regulation and the Convention are in substance the same, this has no practical effect.

23–008 If this is correct, clause (3) comes into play only where the action concerns a matter outside the scope of the Brussels I Regulation (as defined in Art.1), or where the proceedings do not have as their object rights *in rem* in or tenancies of, immovable property. However, if the proceedings are within the scope of the Brussels I Regulation or the Lugano Convention, clause (3) will apply only if the defendant is not domiciled in a Member State or Convention State or in Scotland or Northern Ireland. This is because (where the proceedings are within the scope of the Brussels I Regulation or the Lugano Convention) the court may take jurisdiction over a defendant domiciled in a Member State or a Lugano Convention State or in Scotland or Northern Ireland only in the cases specified in the relevant provisions.[13] In such a situation, CPR, r.6.36 and PD 6B, para.3.1 cannot operate.

23–009 The main reason why it makes a difference whether a case comes within clause (1) or clause (3) of the Rule is that in the former case process may be served out of the jurisdiction without the permission of the court;[14] under clause (3), on the other hand, the permission of the court is required.[15] Another difference is that, as clause (1) is based on the Brussels I Regulation, the European Court has the last word in its interpretation;[16] this is not the case

[10] Art.64(2)(a).
[11] On which, see para.11–013, above.
[12] Denmark is bound by the Regulation: *ibid.*
[13] Brussels I Regulation, Art.3; Lugano Convention, Art.3; Sch.4, Rule 2 (defendant domiciled in Scotland or Northern Ireland).
[14] CPR, r.6.33.
[15] CPR, r.6.36 and CPR PD6B, para.3.1.
[16] On the jurisdiction of the European Court to give rulings on the interpretation of Art.22(1) of the Brussels I Regulation, see entry at paras 11–064 *et seq.*

with regard to clause (3), which is based on CPR, r.6.36 and PD 6B, para.3.1.[17]

Clause (1) of the Rule. This is based on the first sentence of Art.22(1) of **23–010** the Brussels I Regulation, which replaced Art.16(1)(a) of the Brussels Convention. The substance of the two provisions is identical.[18] It provides that in proceedings which have as their object right *in rem* in, or tenancies of, immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction. The expression "proceedings which have as their object[19] rights *in rem* in, or tenancies of, immovable property" does not fit with any previously existing concept of property law in England. Its origin owes more to French law, which has a well-established notion of "*actions réels immobiliers*," actions involving title to immovables (but not actions of a contractual nature which involve title to land).[20] Leases of immovables were specifically included in Art.16(1) of the Brussels Convention because in French law a lease is a personal and not a real right. But what are immovables, or what actions have as their object rights *in rem* in, or tenancies of, immovable property will not be a matter for national law, but must be determined by interpretation of a uniform concept.[21] The European Court has held that Art.16 of the Convention[22] must not be given a wider interpretation than is required by its objective.[23]

23–011 There are several questions with regard to the category of "proceedings which have as their object rights *in rem* in . . . immovable property." The

[17] This could cause difficulties of a procedural nature where it is unclear whether clause (1) applies, but there is no doubt that clause (3) applies if clause (1) does not. In such cases a claimant might seek and obtain permission *de bene esse*.
[18] The case law decided under Art.16(1)(a) of the Brussels Convention is equally relevant under the first sentence of Art.22(1) of the Brussels I Regulation.
[19] In Case C–144/10 *Berliner Verkehrsbetriebe (BVG), Anstalt des Offentlichen Rechts v JP Morgan Chase Bank NA* [2011] 1 W.L.R. 2087 the European Court considered the meaning of the phrase "proceedings having as their object . . . " in the context of Art.22(2) of the Brussels I Regulation. It re-affirmed that Art.22 must be given a restrictive construction (at [30]). It eschewed a technical analysis of the phrase "proceedings having as their object . . . ", noting the differences in the phraseology in different language versions of the Regulation and instead focused on the underlying and limited rationale of the rule. A reference by the Supreme Court in related English litigation was withdrawn following the European Court's judgment. See the earlier Court of Appeal proceedings: [2010] EWCA Civ 390, [2011] 1 All E.R. (Comm.) 775; and see also *Deppa Bank Plc v Provincia di Pisa* [2010] EWHC 1148 (Comm.), [2010] I.L.Pr. 51.
[20] *cf. Intpro Properties (UK) Ltd v Sauvel* [1983] Q.B. 1019 (CA) for the meaning of "real actions" in the context of the Vienna Convention on Diplomatic Relations.
[21] Case C–115/88 *Reichert v Dresdner Bank* [1990] E.C.R. I–27. Schlosser [1979] O.J. C59/168, expresses a different view.
[22] The same principle must apply to Art.22(1) of the Brussels I Regulation.
[23] Case 73/77 *Sanders v Van der Putte* [1977] E.C.R. 2383; Case 241/83 *Rösler v Rottwinkel* [1985] E.C.R. 99, [1986] Q.B. 33 (the actual ruling in this case was overturned by Art.16(1)(b) of the Brussels Convention; see now Art.22(1) (second sentence) of the Brussels I Regulation): see below paras 23–031 *et seq.*; Case C–115/88 *Reichert v Dresdner Bank* [1990] E.C.R. I–27; Case C–292/93 *Lieber v Göbel* [1994] E.C.R. I–2535; Case C–8/98 *Dansommer A/S v Götz* [2000] E.C.R I–393; Case C–73/04 *Klein v Rhodos Management Ltd* [2005] E.C.R. I-8667; Case C–343/04 *Land Oberösterreich v ČEZ a.s.* [2006] E.C.R. I-4557. See also Case C–372/07 *Hassett v South Eastern Health Board* [2008] E.C.R. I–7403, at [19] and [22]; *cf.* (on Art.22(2)) Case C–144/10 *Berliner Verkehrsbetriebe (BVG), Anstalt des Offentlichen Rechts v JP Morgan Chase Bank NA* [2011] 1 W.L.R. 2087. See further Mann (1985) 101 L.Q.R. 329.

instruments is similar, although there are some major differences which will be indicated where appropriate in this Chapter, which will deal with the general principles. The application of the Rome I Regulation to specific contracts is dealt with in Chapter 33.

32–003 **The common law and the Rome Convention.** The common law rules on choice of law in contract were, for the most part, superseded by the rules in the Rome Convention, and then by the Rome I Regulation. For a fuller account of the law prior to the 1990 Act (which will be relevant for contracts entered into on or before April 1, 1991 and for those jurisdictions, such as Australia and Canada, whose law developed along similar lines), the reader is referred to Chapter 32 of the 11th edition of this work.

32–004 *The common law.* The law prior to the 1990 Act had undergone a process of continuous development and refinement since the 18th century,[5] influenced at first by Huber and Story and subsequently Westlake, and then in the 20th century by Dicey, and latterly by Cheshire. Like other systems of the conflict of laws, the English rules of the conflict of laws had to respond to changes in the techniques of international trade. Increasingly, goods were bought and sold by purchasers and sellers who were in different countries, with the consequence that the place of contracting might be dependent on the fortuitous question of which party was the offeror and which was the offeree, and the place of performance would frequently be different from the place of contracting.[6] As a result, the following issues had to be addressed: (a) whether contracts should be governed by the law of the place of contracting or by a law selected by a more flexible rule, such as the law chosen or intended by the parties; (b) if contracts were to be governed by the law chosen by the parties, whether there were limits on the scope of that choice, and in particular whether the parties could choose a law which was intended to avoid the application of some other law, or whether they could choose a law unconnected with the contract; (c) if the parties did not choose a law, whether the governing law was the law of the place of contracting, or was to be identified

[5] The leading cases in the development were *Robinson v Bland* (1760) 2 Burr. 1077; *Allen v Kemble* (1848) 6 Moo. P.C. 314; *Lloyd v Guibert* (1865) L.R. 1 Q.B. 115; *PO & SS Co v Shand* (1865) 3 Moo. P.C. (N.S.) 272; *Chartered Mercantile Bank of India v Netherlands Co* (1883) 10 Q.B.D. 521 (CA); *Jacobs v Crédit Lyonnais* (1884) 12 Q.B.D. 589 (CA); *Re Missouri Steamship Co* (1889) 42 Ch.D. 321 (CA); *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 Q.B. 79 (CA); *Hamlyn v Talisker Distillery* [1894] A.C. 202; *The Industrie* [1894] P. 58 (CA); *Spurrier v La Cloche* [1902] A.C. 446 (PC); *NV Kwik Hoo Tong Handel Maatschappij v James Finlay & Co* [1927] A.C. 604; *R v International Trustee, etc.* [1937] A.C. 500; *Mount Albert Borough Council v Australasian, etc., Assurance Building Society Ltd* [1938] A.C. 224 (PC); *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277 (PC); *Kahler v Midland Bank Ltd* [1950] A.C. 24; *Bonython v Commonwealth of Australia* [1951] A.C. 201 (PC); *The Assunzione* [1954] P. 150 (CA); *Re Helbert Wagg & Co Ltd* [1956] Ch. 323; *Re United Railways of Havana, etc., Warehouses Ltd* [1960] Ch. 52 (CA), affirmed [1961] A.C. 1007; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] A.C. 583; *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] A.C. 572; *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 Q.B. 34 (CA); *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50.

[6] See Lando, para.12.

by reference to their actual intention, or to their presumed intention, or by reference to objective localising factors.

32–005 English courts had led the way in developing party autonomy as the basis of choice of law in contract. Early formulations referred to the law to which "the parties had a view"[7] or by which "the parties intended that the transaction should be governed or . . . to what general law it is just to presume that they have submitted themselves in the matter."[8] The general principle of party autonomy developed in the 19th century and the early part of the 20th century was that a contract was governed by the law to which the parties had submitted it, or to which they must be presumed to have submitted it. In the 20th century the test of the presumed intention came to be replaced in some countries (especially England, Germany and France) by a test based on objective connections of the transaction with a system of law. Under the influence of Beale, there was considerable resistance in the United States to party autonomy, but the prevailing view in the United States came to be (and is) that, in the absence of a choice of law by the parties, the applicable law is the law which has the most significant relationship to the transaction and the parties.[9]

32–006 Not all of the issues had been fully resolved in England. At common law the starting point was that every contract was governed at its outset by its "proper law", a term coined by Westlake. When the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was "bona fide and legal".[10] When there was no express selection of the governing law, an intention with regard to the law to govern the contract could be inferred from the terms and nature of the contract and from the general circumstances of the case.[11] When the intention of the parties to a contract with regard to the law governing it was not expressed and could not be inferred from the circumstances, the contract was governed by the system of law with which the transaction had its closest and most real connection.[12]

32–007 The objective test of "closest and most real connection" was adopted by the Privy Council in 1950 in *Bonython v Commonwealth of Australia*,[13] although

[7] *Robinson v Bland* (1760) 1 Bl.W. 257, 259.

[8] *Lloyd v Guibert* (1865) L.R. 1 Q.B. 115, 120–121.

[9] Restatement, s.188; Hay, Borchers and Symeonides, Ch.18.

[10] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] A.C. 277, 290 (PC). *cf. Re Helbert Wagg & Co Ltd* [1956] Ch. 323, 340; *The Hollandia* [1983] 1 A.C. 565, 576; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50, 61.

[11] For modern examples see *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] A.C. 583; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50; *The Stolt Marmaro* [1985] 2 Lloyd's Rep. 428 (CA); *The Komninos S* [1991] 1 Lloyd's Rep. 370 (CA).

[12] For examples see *Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] A.C. 572; *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 Q.B. 34 (CA); *Monterosso Shipping Ltd v International Transport Workers Federation* [1982] 1 C.R. 675 (CA); *X AG v A Bank* [1983] 2 All E.R. 464; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50.

[13] [1951] A.C. 201, 219 (PC).

it derived from Westlake (through Cheshire[14]) and its origins can be seen in earlier authorities. The same idea had previously been expressed by the test of objective presumed intention.[15] But the line between the search for the inferred intention and the search for the system of law with which the contract had its closest and most real connection was a fine one which was frequently blurred. In theory, in the absence of an express choice as the first test, the court had to consider as a second test whether there were any other indications of the parties' intention, and only if there was no such indication go on to consider the third stage, namely with what system of law the contract had its closest and most real connection.[16] But in practice the same result could be reached by the application of the second or third tests, and frequently the courts moved straight from the first stage to the third stage.[17] This was largely because the tests of inferred intention and close connection merged into each other,[18] and because before the objective close connection test became fully established the test of inferred intention was in truth an objective test designed not to elicit actual intention but to impute an intention which had not been formed. In the second test the surrounding circumstances were considered in order to ascertain the parties' actual intention, in the sense of what they would have said if asked at the time; at the third stage, the surrounding circumstances were considered to determine, objectively and irrespective of the parties' intention, with which system of law the transaction had its closest and most real connection, and that process involved the application of a rule of law, not a process of construction.[19]

32–008 At common law it was well established that the "proper law" of the contract determined its material or essential validity, its interpretation and effect, and its discharge. There was considerable judicial authority also for a rule (or exception to the basic rule that validity depended on the proper law) that a contract (whether lawful by its proper law or not) was, in general, invalid in so far as its performance was unlawful by the law of the country

[14] Cheshire, *Private International Law* (3rd ed. 1947), p.312; or Cheshire, *International Contracts* (1948), p.15. See also *South African Breweries Ltd v King* [1899] 2 Ch. 173, 182; *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1932) 43 C.L.R. 565, 585 and *McClelland v Trustees Executors and Agency Co Ltd* (1932) 55 C.L.R. 483, 489 ("most real connection"); *Boissevain v Weil* [1949] 1 K.B. 482, 490 ("most substantial connection"), affirmed [1950] A.C. 327.

[15] See, e.g. *Lloyd v Guibert* (1865) L.R. 1 Q.B. 115; *PO & SS Co v Shand* (1865) 3 Moo. P.C. (NS) 272; *Re Missouri Steamship Co* (1889) 42 Ch.D. 321; *R v International Trustee, etc.* [1937] A.C. 500; *Mount Albert Borough Council v Australasian, etc., Assurance Building Society Ltd* [1938] A.C. 224 (PC); *Kahler v Midland Bank* [1950] A.C. 24; *The Metamorphosis* [1953] 1 W.L.R. 543; *The Assunzione* [1954] P. 150 (CA).

[16] *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50, 61, *per* Lord Diplock; *Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd* [1970] A.C. 583, 611, *per* Viscount Dilhorne; *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 Q.B. 34, 46, *per* Megaw L.J.; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 C.L.R. 418, 440–442.

[17] In *Armadora Occidental SA v Horace Mann Insurance Co* [1977] 1 W.L.R. 520 Kerr J. decided the applicable law by reference to the second test, and was affirmed by the Court of Appeal on the basis of the third test: *ibid.* p.1098 (CA) and in *Amin Rasheed Shipping Corp v Kuwait Insurance Co*, above, Lord Wilberforce reached the same result by the third test as the other members of the House did by the second test.

[18] [1984] A.C. 50, 69, *per* Lord Wilberforce.

[19] *The Komninos S* [1991] 1 Lloyd's Rep. 370, 374 (CA), *per* Bingham L.J.

where the contract was to be performed (*lex loci solutionis*). The continued relevance of this proposition, based on *Ralli Bros v Compania Naviera Sota y Aznar*,[20] is considered below.[21] The formation of a contract (offer and acceptance, consideration, and reality of consent) was governed by the law which would have been the governing law had the contract been validly concluded, although not all of the authorities were clear and consistent. What law governed an individual's capacity to contract was not the subject of modern authority, and is considered below,[22] since the Rome I Regulation (like the Rome Convention) does not deal (except to a very limited extent) with capacity. A contract was formally valid if made either in accordance with the law of the place where it was made or in accordance with the governing law.

The Rome Convention.[23] The 1990 Act gave effect to the Rome Convention **32–009**
which was opened for signature in 1980, and was signed by the United Kingdom in 1981 and ratified by it in January 1991. The Report by Professors Giuliano and Lagarde,[24] which was published with the Convention, had a special status in the interpretation of the Rome Convention, as it will continue to have in relation to those provisions of the Rome I Regulation which are identical with, or similar to, those of the Rome Convention. The Rome Convention originated in a proposal in 1967 by the Benelux countries to the European Commission to collaborate, with experts from the then EEC Member States, in the unification and codification of the rules of the conflict of laws in the EEC, to be based on the draft Benelux convention on private international law.[25] This proposal was taken up by the Commission after the successful conclusion of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 (the Brussels Convention). A group of experts was established in 1969 and was expressly authorised by the Committee of Permanent Representatives of the Member States to continue its work on the harmonisation of the rules of private international law, including (among other topics) the law applicable to contractual and non-contractual obligations. In 1972 the group of experts completed a draft Convention on the law applicable to contractual and non-contractual obligations, which was published and received wide attention, particularly after the accession in 1973 to the European Communities of the United Kingdom, Ireland and Denmark. In part because of the uncertainty over the continued membership of the United Kingdom in the European Communities (which was resolved by the 1975 referendum), little progress

[20] [1920] 2 K.B. 287 (CA).

[21] Rule 224.

[22] See Rule 228.

[23] See generally North (ed.), *Contract Conflicts* (1982); Plender and Wilderspin, Ch.1; Kaye, *New Private International Law of Contract of the European Community* (1993); Fletcher, *Conflict of Laws and European Community Law* (1982), Ch.5; Lasok and Stone, *Conflict of Laws in the European Community* (1987), Ch.9; Lagarde (1981) 22 Va.J.Int.L. 91; Morse (1982) 2 Yb.Eur.L. 107; Jaffey (1984) 33 I.C.L.Q. 531; Williams (1986) 35 I.C.L.Q. 1; Rigaux, 1988 *Cah.dr.eur.* 306; North (1990) *Recueil des Cours*, I, 9, at pp.176–205; Lagarde, 1991 *Rev. Crit.* 187; Foyer, 1991 *Clunet* 601.

[24] [1980] O.J. C282/1, reprinted in Plender and Wilderspin, pp.859 *et seq.*

[25] See Nadelmann (1970) 18 Am. J. Comp. L. 405, with the text at p.420.