1

INTRODUCTION

A. THE NATURE OF THE SUBJECT

The title of this book suggests that it is concerned with the conflict of laws, but this should not be taken too seriously, for our subject has little to do with conflict, legal or otherwise. Once some very important preliminaries have been dealt with, in the chapters which follow, our fields of inquiry will be three in number. We will first examine the rules which determine whether an English court has jurisdiction to hear a claim where one or more of the parties, or some other aspect of the story, may be foreign to England or to English law: the conflict of jurisdictions.[1] Second, we will examine the effect of a foreign judgment in the English legal order: the conflict of judgments.[2] And third and finally, we will consider the rules and principles which tell an English court hearing a case with a foreign element whether to apply English law or a foreign law or a combination of laws to resolve the dispute: the conflict of laws.[3] But before we do, there is more to be said about the nature of this subject and the aim of this book.

1. THE SUBJECT AND THE WAY IT CHANGES

The common lawyer's label for this entire collection of material was 'the conflict of laws'. This is curious. In the third category just mentioned there may well be a conflict between the answers which would be given by the various potentially applicable systems of law, and a choice between them requiring to be made, but there is more to the subject than that. The traditional title plays down the significance of the law of jurisdiction and judgments. Some prefer to think of our subject as 'private international law', for it is concerned almost entirely with private law in cases and matters having

[1] See Ch 2 below.
[2] See Ch 3 below.
[3] See Chs 4–9 below.

international elements or points of contact. The only danger is that this title may suggest a relationship with public international law, which describes or regulates relations between states, and that would be misleading. For very little public international law infiltrates the subject. For example, when dealing with the confiscation or nationalization of private property by states, there may well be rules of public international law which specify whether the property of a foreign citizen may be seized, whether compensation should be paid, and so forth. But private international law has little concern with this: as long as the property was within the territory of the seizing state, title acquired by seizure will usually be effective in private international law, whatever public international law may say about the steps taken to acquire it. Nor is there a private international law of crime, an archetypal matter of public law: the international aspect of criminal law is dealt with by specific local legislation, or by extradition.

The nomenclature of 'conflict of laws' made sense when the subject confined its attention to the question of choice of law: whether a claim for damages for breach of contract was governed by English or French law; whether an alleged tort was governed by English or German law; whether the succession to an estate was governed by English or Spanish law; whether the validity of a marriage or effect of a divorce was governed by English or Italian law, and so on: such questions dominated the subject in the period of its calm and classical development, from the 19th to the middle of the 20th centuries. All this changed, in England at least, when the House of Lords opened a door which allowed, or even encouraged, much closer attention to whether English courts had and would exercise jurisdiction in a given case. At a stroke the law reports were filled with cases fighting the issue of jurisdiction, at the expense of trials which paid attention to choice of law. And though judges occasionally rail at being called upon to decide such questions, even aspersing the parties for having the audacity to 'litigate about where to litigate', they might do well to keep their breath to cool their porridge. Not only is the question where a trial takes place often of critical importance to its outcome, but also parties who have skirmished on the question of jurisdiction may well decide to settle, with considerable saving of resources.

This new concentration on the law of jurisdiction in England (and in that part of the common law world which takes its lead from English law) coincided with developments in Europe. The original Treaty of Rome, establishing the European Economic Community, called upon Contracting States to bring forward legislation to secure the free movement of judgments across the Community. The Contracting States implemented the instruction they had given themselves by enacting a scheme to lay down uniform rules of jurisdiction, it being expected that such foundations would be strong enough to ensure that full faith and credit be given to judgments from the courts of any contracting state. And so it proved. As the Community expanded, and then became a Union, this Convention, which then became a Regulation, on jurisdiction and judgments in civil and commercial matters, was updated and improved; and as it expanded its scope, the common law shrank back.

Not for nothing are the French said to observe that *ce n'est que le premier pas qui coûte*. The organs of the European Union looked at the new law on jurisdiction and judgments and saw that it was good. In no time at all they decided that if the law on civil jurisdiction and the enforcement of judgments could be directed towards uniformity, so could the rest of private international law. The result was an increasing number of legislative instruments aimed at bringing uniformity to choice of law rules as applied in courts all across Europe. These now cover the whole of the law of obligations, large parts of family law, parts of the law of property, including succession to property, cross-border insolvency and corporate activity, and a host of smaller and more specialist topics. Originally this was said to be necessary to bring about the completion of the internal market, but this justification is now less commonly heard. The harmonization of private international law across Europe is an end in itself, and England is well on the way to arriving at it. The question of whether it is a Good or a Bad Thing does not need to be answered, so it will not be addressed.

What does need to be addressed, however, is how to describe this hybrid corpus of private international law. For it would be a serious error to approach this European legislation in the same way as one might if it had been legislation made at Westminster. It is a mistake, because this legislation is not designed to amend

the common law rules of private international law; it is not designed to fit within the framework evolved by the common law. Just as an imperial spanner will not work with a metric bolt, the underlying techniques of the common law will not provide a basis for the proper understanding of this new European material. European legislation is made with the open and important aim of putting in place common, pan-European, rules for the matters which it governs. This requires that it be given, wherever possible, a common interpretation, and be applied to the same effect and in the same circumstances, across the Member States. It would be self-defeating to produce a single legislative text but which was subject to 20-odd different interpretations or modes of application. Where the European Union has legislated rules for choice of law, therefore, there is a threshold question whose importance is not always noticed: does the statutory rule apply within the framework of, or independently of, the common law structure for choice of law? For example, do the statutory rules for choice of law in contract and tort apply only to issues which the common law rules of characterization regard as issues of contract or tort, or does it apply despite, and without regard to, them? The answer is the latter. The European choice of law rules for contracts apply to whatever the European instrument defines as a contractual issue, and without regard to whether the common law rules for choice of law would have regarded the issue as a contractual one. If this is right, as it must be, the common law principles of characterization, which form the point of departure for the application of the common law principles of choice of law, are inapplicable to an issue covered by direct legislation of rules of pan-European choice of law. Not only the superstructure, but also the infrastructure, of the subject is now made in Brussels rather than in London or even in Oxford. The advice that the more things change the more they stay the same certainly does not apply in this subject at this point in its history.

Having said all that, the common law methodology of private international law is still a sensible starting point for the analysis of issues, and in many cases it will not mislead. But where it becomes entangled with European statutory rules for choice of law, it is necessary to ask whether a particular aspect of that common law methodology would, if applied insensitively, damage the

legislative aim of the particular provision. If the answer is that it would, the rule of the common law may be expected to yield to the contrary or contradictory statutory rule. In the end, this is the solution most faithful to the intention of Parliament as conveyed in the European Communities Act 1972; for the exercise of Parliamentary sovereignty is the end of every legal debate.

2. THIS BOOK AND ITS APPROACH

There are several ways in which a writer may try to render an account of this subject. One would be to consider the principles of private international law as a matter of legal theory: asking what the proper purpose of private international law is, and seeking to derive answers which accord with a broader philosophy of the nature and purpose of law, or as part of the economic or behavioural organization of society. This would tend to see the law as practised in courts as having illustrative, but not any obviously greater, value. The subject has never lacked theoreticians, of course, though it is fair to say that the place of theory in the world of English private international law has tended to be at the margins, for the common law was supremely pragmatic: the view that 'the lifeblood of the law is not logic but common sense'[4] was nowhere truer than in common law of private international law. Those who hope for a developed or delocalized theory of private international law should look away now.

Another would be to assert, and perhaps to acknowledge, that the pedagogic convenience which segregated private international law from the rest of the law now does more harm than good, and that to continue to treat the subject studied in this book in semi-isolation from the rest of the law is less a virtue, more a form of intellectual glaucoma. There is something in this. Whether it is the relationship with public international law, or human rights, or European law (and especially European law as it regulates its 'four freedoms',[5] the notion of European citizenship,

[4] Lord Reid, in *Haughton v Smith* [1975] AC 476, 500.

[5] This is not a reference to President Roosevelt's magisterial State of the Union address in January 1941, where they were identified as the freedom of speech, freedom of worship, freedom from want, and freedom from fear, but to the infinitely less inspiring free movement of goods, money, services, and people.

to say nothing of its seeping into company and competition laws at the domestic level, and elsewhere), it is wrong that private international lawyers sometimes pretend that all this is someone else's business. The French approach to the subject, for example, has always taken the law of nationality or citizenship as the starting point; the common lawyer, for whom citizenship has little importance and less interest, tended to view it as slightly odd; perhaps that ought to be reconsidered. And there is probably a book to be written on private international law as European law, but this is not it. As was said in the preface, the world is not Europe, and Europe is not the world.

A writer must make his or her own choice, and then leave it to the readers to make theirs. The approach taken here is to seek to work with the law as it applies in the English courts, and then to align the coverage of the book with what tends to be found in a university course in private international law. Statutes and judicial decisions therefore supply the framework and the detail of the law. Conclusions derived from this material are certainly open to evaluation and objection, but the concern here is to deal with the law which we have and which lawyers have to deal with, as distinct from the law which we might have had, or may one day have, or which might be encountered in a research institute or other parallel universe. No criticism is made of those writers who take a different point of view, of course; but they are doing a different job from the one taken in hand or enterprised here.

B. PRIVATE INTERNATIONAL LAW AS COMMON LAW

This section will outline the common law's conception of private international law, in order that reference may be made to it when a particular question arises which is not captured by the European legislation on private international law. For though the private international law of obligations (jurisdiction and choice of law) has been mostly removed to the domain of European private international law, the process is not yet complete, and some questions of choice of law in the close vicinity of the law of obligations are still left to the common law. The private international law of family relations and of property is still substantially within the domain

of common law private international law: either because there is no European legislation on the subject or because the United Kingdom has exercised its privilege to be not bound by certain acts of such legislation. Moreover, the techniques of the common law are not wholly alien to European private international law, which was built on the foundations of national laws, including English law; and above all, the common law of private international law is how the subject, as practised in the English courts, was made and refined. Its techniques provide a useful point of contrast with the new system of private international law which is being built up by the organs of the European Union; but an appreciation of them makes clear why they have little part to play within the domain private international law which is European law.

1. FOREIGN LAW IN ENGLISH COURTS

The principal characteristic of the conflict of laws is that it will sometimes lead to a judge being asked to apply foreign law to the dispute.[6] In the ordinary course, an English judge will apply English domestic law: common law, equity, and statute law. The judge will apply only English law, and may not apply a foreign law, to an issue unless four conditions are satisfied. First, the choice of law rules which make up English private international law must provide that a foreign law is in principle applicable to the issue in question; second, English legislation must not supervene to forbid the application of foreign law; third, the party who relies on foreign law must plead and establish its applicability; and fourth, the party relying on foreign law must adduce evidence which proves its content to the satisfaction of the court. Meeting these four conditions means that the judge will be enabled and obliged to apply a rule of foreign law.

As regards the first point, we will consider in Chapter 4 and following the rules of choice of law which may mean that the court may be required to apply a foreign law: to the conclusion that the law which governs a contract is French, or that the law applicable to an alleged tort is German, and so forth. As regards the

[6] See, generally, Fentiman, *Foreign Law in English Courts* (Oxford University Press, 1998).

second point, however, the rules of choice of law may in certain circumstances be overridden by contradictory English legislation which directs the court not to apply a rule of foreign law. So, for example, a contract admittedly governed by French law may contain a provision limiting the liability of, or even exculpating, the defendant in circumstances where this would not be permitted were the contract governed by English law. In such a case, English legislation may stipulate that the rules of English law on exemption clauses are to be applied even though English law is not otherwise the governing law.[7] This being so, the judge will, to that extent, be precluded from applying foreign law.

As regards the third point, the party or parties seeking to rely on foreign law must plead its applicability. It follows that if neither party does so, the judge will apply English domestic law to the issues in dispute. The judge has neither power nor duty to apply foreign law *ex officio*. So in the example of personal injury or damage to property taking place overseas, a claimant may consider that the law of the place where he was injured affords him a cause of action, whereas English domestic law would not: it will be up to him to plead the applicability of foreign law to the claim. Again, a defendant may consider that the law of the place where the alleged tort happened furnishes her with a defence which would not be available as a matter of English law: it will be for her to plead the applicability of foreign law to the issue raised by way of defence. But neither party is obliged to do this, and a judge will therefore be left to apply English domestic law when the parties do not invoke foreign law. According to the English way of thinking, this is so even when an international convention, or a European Regulation, stipulates that an issue *shall* be governed by a particular law.[8] It is sometimes wondered if the relaxed approach developed by the common law is consistent with a legislative instruction from the European Union that the law indicated by a statutory choice of law rule 'shall be applied'. Not

[7] For example, Unfair Contract Terms Act 1977, s 27(2); cf Rome I Regulation (Reg 593/2008: [2008] OJ L177/6), Art 9.

[8] It certainly can be argued that the traditional English approach is part and parcel of the common law, and is in formal conflict with, and inapplicable in relation to, the particular conventions or Regulations, even where these refrain from applying to 'evidence and procedure', as they mostly do.

everyone will consider it correct to understand this as though it actually said 'shall not be applied unless one of the parties chooses to plead and succeeds in proving it'. Yet the point has not really been taken, presumably because it would have a dramatic effect on the way English courts—which try a substantial number of cases with foreign elements—adjudicate. If a change in practice is to take place, it will require a clear and precise direction from a legislator, to say nothing of an impact assessment to explain how it is justified. So far neither such thing has happened.[9]

As a matter of observable fact, contract and tort cases litigated in England will frequently be decided by application of English domestic law, even though choice of law rules might have indicated that a foreign law should be applied.[10] This may reflect the practical truth that the principles of the law of obligations are all very similar, meaning that there is often little point in proving foreign law; and it may also be driven by the practical problem, and expense, of actually proving foreign law, as will be seen below. It means that English courts take a pragmatic, rather than a dogmatic, view of their role: the parties are free to establish a common position on the inapplicability of foreign law, and once they have done that, it is not for a judge to think he knows better. Now this may be fair enough where a court is called on to adjudicate a matter in the law of obligations: the question whether a contract was valid or broken, or whether a defendant was the victim of negligence or *volens* to the risk, is a matter of interest to the two parties alone,[11] and if they agree to the application of English domestic law to their dispute, there is no third party with *locus standi* to object. But in cases where the court is called on to decide an issue which may have an effect *in rem*, such as whether B obtained good title to a car from S, or whether H and W were lawfully married, this relaxed approach to foreign law is less attractive, for a ruling on status may well affect non-parties, such as a subsequent purchaser or an intending spouse. In this context the

[9] See further, p 48 below.

[10] This comment is based on cases in which choice of law was or would have been governed by the common law, but there is no compelling reason to believe that the coming into effect of European choice of law rule has brought about any change.

[11] Or, at most, them and their insurers.

decision of the original parties to have their adjudication by reference only to English domestic law affects other interested persons who were not privy to the agreement. Yet English law has never taken the view that in questions of status the court is obliged to enquire into and insist on the application of foreign law contrary to the wishes of the litigants. Perhaps it should think again.

As regards the fourth point, the content and meaning of an applicable foreign law is a matter of fact, to be proved as such by the parties.[12] Every pleaded proposition of fact needs to be admitted or proved; and as foreign law is a question of fact, evidence will have to be given by experts, usually one for each side and evaluated by the judge. Expertise in foreign law is, however, easier to describe than to define. There is no register of individuals who are qualified, still less authorized, to give such evidence to an English court; there is no reliable way to evaluate the expert or his evidence; it may not be clear whether an expert's knowledge is practical and up to date, or whether his seeming uncertainty actually reflects the true state of the foreign law itself. An expert who has written books may have had little or no practical experience of how the law he has described would be applied in a court; the fact that a lawyer is in private practice or judicial office may nevertheless leave her wholly unsuitable to give evidence in an area of law of which she has no direct experience. An English court may be more impressed by the reported decisions of a foreign court than a local court would be; it may be less persuaded by the writings of scholars than a foreign court would be. Nor is it always clear that the content of a foreign law as derived from statute and code will be consistent in every respect with the outcome which would result from its application by a foreign judge; and anyway, is Ruritanian law the law as derived from the written sources of Ruritanian law, or the outcome which would be delivered by a Ruritanian judge called upon to apply it?

[12] It might be thought to follow that a decision on foreign law is not subject to reversal on appeal, unless the primary judge's conclusion was so unreasonable that no judge could properly have reached the conclusion he did. But foreign law is a fact of a rather peculiar kind, and appeals are more frequent, and the substitution of an appellate court's own conclusion more common, than its status as a question of fact might suggest.

These are not trivial points, for as English private international law has committed itself to this particular view, it is legitimate to question whether the approach is fit for its purpose. There are many cases in which the judge has had to pick his way through baffling and contradictory evidence of foreign law, with the result that one may applaud the effort yet still lack confidence in the outcome; and the financial cost to the parties can be quite disproportionate to the substance of the claim. But the notion that the judge may go off on a frolic of his own and conduct a personal inquiry into foreign law has no place in an English court. So also is a judge precluded from founding on his own personal recollection of a particular foreign law,[13] even if he was trained and qualified in that system, for the law may have changed, and memory is no less fallible for sporting a wig; and, in any event, for a judge to usurp the privilege of the parties would be to ignore the limits on judicial power: the principle that *curia novit jus*, that the court knows the law, begins and ends with English domestic law.

If the party seeking to rely on foreign law fails to satisfy the judge as to its content, it is sometimes said that the judge will apply the foreign law, but in the sense that foreign law is taken to be the same as English law when the contrary is not proved. This is not very edifying. In default of proof of the content of foreign law, an English judge still has to adjudicate; and although the traditional default position was that English law would be applied, *faute de mieux*, courts have been prepared to dismiss a claim or defence as unproven if foreign law pleaded as its support has not been established by evidence.[14]

It may be thought that the practical difficulties in the English system reveal so many shortcomings that the model of other systems, in which the judge investigates and applies foreign law as well as his own, is to be preferred. Alas, this proposition does not stand up to inspection. A national judge manifestly does not know foreign law; a report on it must be commissioned. Whether it will be possible for a court to locate a competent expert from

[13] Examples exist, but are best left unidentified.

[14] *Damberg v Damberg* (2001) 52 NSWLR 492; *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3107 (Comm), [2007] 1 All ER (Comm) 1160.

whom to obtain a report must be doubtful, at least where the law in question is specialized or exotic; and in complex cases in which the reporter will require close and detailed knowledge of the entire dispute, in order to be sure that he has seen all the issues which bear on the legal analysis, it is doubtful that a court-commissioned expert will be able to do this. Even if the report is signed off by an authoritative figure, the chances will be that it was researched and written up by someone very much more junior. So despite the claims sometimes heard, that the continental system of establishing and applying foreign law is superior to the English one, the truth is that the application of foreign law by a judge is fraught with difficulty of a general complexity which will not go away unless the trial is made to go away. This in turn may point to the real truth, that a court should have the power to decline to hear certain cases if persuaded that a court elsewhere would be better placed to give the parties the adjudication, together with the prospect of a meaningful appeal, which they deserve.

A final question asks, what, exactly, is the judge asked to do once the law is proved. The common law understanding is that a judge, called upon to apply French or Ruritanian domestic law, should apply it as a French or Ruritanian judge, trying the case, would interpret and apply it. In other words, 'French law' means 'French domestic law as a local judge would apply it'. If the judge would apply this rule to this particular contract, or would not apply that rule to that claim or claimant, then an English judge, in applying foreign law, should do likewise, for this is the truest sense in which foreign law is applied. This technique is particularly helpful when a court is called upon to apply foreign statute law. In deciding whether and how the statute applies, the relevant question is whether, and if so how, a judge trying the case in the foreign court would apply the particular statutory provision. If he would not apply it to the case in question, it is not materially part of the foreign law which an English judge may be invited to apply. So if an Australian judge would not apply a provision of the Competition and Consumer Act 2010 to conduct taking place outside Australia, an English court, if applying Australian law as *lex causae*, should not apply it either. If a New Zealand judge would interpret and apply the Accident Compensation Act 2001 as precluding a civil claim for damages

for personal injury, an English court, applying New Zealand law as *lex causae*, should hold that there is no civil liability under the law of New Zealand,[15] and should not be tempted to hold that whilst a New Zealand judge would be required to apply the Act, a non-New Zealand judge need not do so. The other side of the coin is that where a statute is intended by its legislator to be applied, but the *lex causae* is, according to the rules of private international law applied in an English court, the law of another country, it must be ignored by the English court. So, if an English borrower and a Victorian lender enter into a contract of loan governed by English law, Victorian legislation reducing interest rates will be irrelevant to an English court, even if intended by the Victorian legislator to apply to the contract,[16] and even though a Victorian judge would have been required to apply the Act if he had been trying the claim.[17] The simple point is that where a statute is part of the *lex causae*, it should[18] be applied by the English judge, along with all other substantive provisions of the *lex causae*, in the way the foreign judge would have applied it; and if it is not part of the *lex causae* it is to be ignored.

A significant point of principle arises if the foreign judge would not have applied his own domestic law at all, but would instead have used his choice of law rules to point him to a different substantive law which he would then have applied. Whether the parties are entitled to invite an English judge to go down that path depends on the impact of the doctrine of *renvoi*, which is examined below.

2. COMMON LAW CHOICE OF LAW: TECHNIQUES

A judge may therefore be called upon to apply a foreign law in the determination of a dispute. But there is a framework for the

[15] *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 (CA); *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 (CA).

[16] cf *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society* [1938] AC 224 (PC) (where the borrower was a New Zealander).

[17] *Akai Pty Ltd v People's Insurance Co Ltd* (1997) 188 CLR 418.

[18] Unless there is some rule of English law which overrides and instructs the English judge to do differently.

analysis, and this framework keeps the exercise under reasonable and reviewable control. We will frequently observe that the basic structure of the common law conflict of laws is built from propositions which connect 'issues' to a particular law. So the common law says that the material validity of a contract is governed by its proper law; liability in tort is governed in part by the law of the place where the person was when injured; the effect of a disposition of movable property is governed by the law of the place where the thing was when transferred; the capacity of an individual to marry another is governed by the law of his or her domicile at the time of the marriage; the ranking of claims and distribution of assets in an insolvency is governed by the law of the court administering the insolvency; and so on.

The simplicity of these propositions is deceptive, for they contain three legal ideas, and suggest a fourth. The first is the concept of an 'issue': how do we know whether to frame our question in terms of the material validity of a contract as opposed to its formal validity, or just its validity? How do we know whether to ask the question in terms of the capacity of persons to marry as opposed to the validity of the marriage? The answer is that we *characterize* an issue, or issues, as arising for decision. The second is the concept of a law: how do we know whether the law we choose means the domestic law of the relevant country, or, if this is different, the national law which would be applied by the judge trying the case in the courts of that country? How do we know whether the law of the domicile means the domestic law of the country in which the person is domiciled or if this is different, the law which would be applied by a judge trying the case in the courts of that country? The answer[19] is that the law relating to *renvoi* tells us whether our rule of decision, our choice of law rule, points to a domestic law only or includes a reference to the private international law rules of that country. The third is this: suppose the facts are characterized as giving rise to two issues, each having a choice of law rule, and for each of which English law and the foreign law would prescribe different solutions. Do we approach them independently, and try to combine

[19] Unless the choice of rule is a statutory one, and the statute itself answers the question.

the answers at the end, or does one play a dominant role, applying its rules to the determination of the other issue? This raises the *incidental question*, to which a solution must be found. Fourth and last is the identification of the connection, the 'law of the …'. These are the *connecting factors*, and once the appropriate one has been found, the process of choice of law is over, and the proof of foreign law may begin. But these four components of the choice of law process, as the common law developed it, need a little elaboration. For though in several areas they have been displaced by statutory rules, they are the very foundation of the conflict of laws.

(a) Characterization: identification of issues to point to a law

If a choice of law rule is formulated by connecting issues to laws, the first step is to think about issues. This requires the facts to be accommodated within one, or perhaps more, legal categories for which a choice of law rule is given. The definition of these categories and the location of facts within them comprise the process of characterization.[20]

Both aspects of characterization are undertaken by reference to English law: the available categories are those created by English private international law; and the placing of the facts within one or more of them is done according to English private international law: for those who find analogies helpful, English law designs the pigeonholes, and an English sorter decides which facts belong in which pigeonhole. This exercise has to be undertaken by reference to English law, for at this stage we are far from having explained whether, still less which, foreign law is going to be relevant.

The definitional list of the available categories or characterizations is established in part by authority, and in part by principle.[21] As we look at different substantive areas of law we will identify them: the capacity to contract, the proprietary effect of a transfer,

[20] Dicey, Morris, and Collins, *The Conflict of Laws* (15th edn Sweet & Maxwell, 2012) Ch 2.

[21] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825.

the formal validity of marriage, the capacity of a corporation to do an act, and so on. Although the categories are established, there is no reason of principle why the law may not develop a new one, and sometimes reason why it should. So, for example, it has been proposed that the category of essential validity of marriage should be broken down into capacity to marry and the quintessential validity of marriage, for which separate choice of laws rules would be prescribed;[22] it has been proposed that the category of capacity to marry should be broken down into the capacity to contract a polygamous marriage and the remainder of capacity to marry.[23] And again, the choice of law rules for the transfer of intangible movables may yet be refined so that certain complex cases, such as arise in the system for indirect holding of financial instruments, are dealt with separately from other intangibles. The process of change in this context will be slow and measured: the certainty of the law would be lost if new categories were created willy-nilly; an alternative response might be to make exceptions in individual cases, rather than new categories for general application. For all that, it is clear that the creation of new characterization categories is not impossible, but is sometimes overdue. For example, there might have been a characterization category for equitable claims, for which the choice of law rule is the *lex fori*, the law of the court hearing the claim.[24] Quite apart from the point that this might not be a desirable choice of law rule, it is doubtful that 'equitable claims' represents a coherent characterization category in the first place. Similar doubts have been expressed whether the law needed a characterization category for 'receipt-based restitutionary claims'.[25] Though these ideas may be indispensable as a matter of domestic English law, it does not follow that there is any use for them in the conflict of laws.

As regards whether a particular issue raised for decision in a case should be fitted into one or another of these categories, the conventional explanation is that this is done by using English

[22] *Vervaeke v Smith* [1983] 1 AC 145.

[23] *Radwan v Radwan (No 2)* [1973] Fam 35.

[24] There is some support for this in Australian law.

[25] *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 (CA).

law as the point of departure, and treating an issue as one might treat its nearest English equivalent: the exercise is undertaken 'in a broad internationalist spirit in accordance with the principles of the conflict of laws of the forum'.[26] So, for example, whether a contract is unenforceable if not notarized will concern the formal validity of contracts, even though English law does not generally require contracts to be notarized; whether a promise is enforceable as a contract even though not given for consideration will raise a question of the material validity of a contract, even though English law would not see a gratuitous promise as a contract at all;[27] an action claiming damages for insult or for breach of confidence will be treated as tortious even though English domestic law knows no such tort of insult and regards the breach of confidence as an equitable wrong; and a polygamous marriage will be treated as a marriage, even though English domestic law does not allow for polygamy. Occasionally this will lead to a result which appears odd. After a marriage had been celebrated in England between a French man and an English woman it was alleged[28] that it was invalid because the parents of the man had not given their consent. One[29] analysis adopted by the court was that the need for third party consent raised a question of the formal validity of a marriage, which was governed by the law of the place (England) of celebration, under which law the lack of parental consent was immaterial. Some argue, by contrast, that the issue should have been treated as one of capacity to marry and as such governed by the domestic law of the person (French) alleged to lack marital capacity.[30] There is some force in the alternative view, especially if the court really did

[26] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 at [27].

[27] *Re Bonacina* [1912] 2 Ch 394. These examples are taken from the common law. For contracts made after 1991, however, European legislation, rather than the common law, would determine the choice of law, and the process by which it did so would not be one of characterization properly so called.

[28] *Ogden v Ogden* [1908] P 46 (CA).

[29] The other was that if the facts raised an issue of capacity, it was still governed by English law, under the principle in *Sottomayor v De Barros (No 2)* (1879) 5 PD 94.

[30] Although under the rule in *Sottomayor v De Barros (No 2)*, this would not in fact have been the outcome.

reason that as third party consent is a matter of formal validity in domestic English law it must be the same in the conflict of laws. Quite apart from the fact that the divisions of the two (domestic, private international) systems of law are not bound to be congruent, it is sensible that the allocation of an issue to a characterization category be done with some flexibility. Even so, it is hard to see why the capacity solution, which would mean the marriage was void, is intrinsically better than the formality alternative, which leads to its validity; and the truth may be that some cases are inescapably hard ones. More novel cases can be expected as domestic laws are refashioned and reshaped to meet changing social conditions. Within family law, laws which provide for marriage between persons of the same sex, and regimes which permit the registration of a civil partnership of persons of the same sex or otherwise, might have required the courts to decide whether such unions were to be characterized as marriage, or as contracts, or as *sui generis* and requiring an entirely new characterization category, in order to provide a framework for litigation about their validity and consequences.[31]

As for what represents the object of characterization, the 'thing' characterized, the usual understanding is that issues, rather than rules of law, are characterized.[32] The justification for this is that the very language of the subject is written in terms which connect categories of legal issue with a choice of law. It also has the immense practical advantage that a single law is identified to provide the solution to the single issue. If, by contrast, one were to adopt the approach of characterizing the individual rules of law found in the legal systems having potential connection to the dispute, aiming to apply whichever was formulated so as to apply in the given context, one could end up with two contradictory solutions or none at all. Take the case of marriage without parental consent, discussed above. Suppose it had been held that the English rule that parental consent was not

[31] But for the time being, Civil Partnership Act 2004, Sch 20, provides a statutory answer.

[32] However, as will be seen in Ch 4 below, the rule of private international law that an English court will not enforce a foreign penal or revenue law will require characterization of the particular law, and not of an issue.

required was a rule about the formal validity of marriage, and hence applicable when a marriage took place in England; and the French rule requiring parental consent was held to be a rule about capacity to marry, and hence applicable to the marriage of a French domiciliary. Both rules would have been 'characterized' as applicable; the result of their combined application is an impossible contradiction. Or, taking the opposite possibility in each case, each rule might have been characterized as being inapplicable. This does not seem sensible; the ends condemn the means. Accordingly, the judge is required to identify an issue and apply the rule found in the system of law which governs that issue, and to close his ears to objection. In the only case to have confronted the issue directly,[33] a mother and daughter, domiciled in Germany but taking refuge in England, perished in an air raid. The court had to decide who succeeded to the estate of the mother. When it is unknown which of two people died first, both English law and German law solve the problem by applying a presumption: English law presuming that the older died first, German law that they died simultaneously. The judge deduced that he had to decide an issue of inheritance or succession, which was governed by German law, rather than a question of evidence governed by English law. He therefore applied the German rule. But whether he was right or wrong about this, his technique of identifying *an* issue raised by the facts is the critical point to notice. Had he simply characterized the respective rules of German and English law, he might have found that both applied or neither applied: this would have been so self-defeating that, whatever may be said in its defence, the solution could not be right.[34]

A final question concerns exactly what happens after characterization has pointed the court to a particular law in which to find the answer. Suppose a marriage has taken place in France, without the parental consent required by the French domiciliary law of one of the parties. An English court will characterize the issue as one of formal validity, and look to French law for

[33] *Re Cohn* [1945] Ch 5.

[34] Though it is fair to say that if this would have been the outcome, there is no chance that the judge would have blundered into following such a course.

its answer. But an answer to what question? If the question is 'is this marriage formally valid as a matter of French law despite the absence of parental consent?' the answer may be a rather puzzled 'yes': puzzled because, in the opinion of the French expert, this is not the right question to be asking. If, by contrast, the question is framed as 'is this marriage valid as a matter of French law despite the lack of parental consent?' the reasoning may be more complex, but the answer will be 'no': the French expert will explain that this issue is seen by French law as one of capacity, governed by the national (French) law of the allegedly incapable party, and according to which the marriage is invalid. It will be seen that the outcome of the case may depend on the manner in which the question is formulated: put shortly, is the question formulated for the expert to answer, expressed in and bounded by the precise terms of the characterization which led there in the first place, or is characterization defunct and forgotten once it has served to make a connection to a law? The answer may well require an understanding of the principles of *renvoi*, and the suggested solution offered by the common law will be found at the end of the next section.

(b) Renvoi: the meaning of law

If an issue is to be governed by the law of a particular country, what do we mean by the word *law*? Does it mean the rules of domestic law, as these would apply to a wholly local case, or might it refer to law in a wider sense, including in particular the private international law rules of that legal system as a local judge might apply them? Is the issue resolved by applying the domestic law, or by permitting a reference on—a *renvoi*—from that law to another, if the private international law rules of the chosen law would have directed it? The common law's answer is that there is no short answer: sometimes it will be the former, othertimes the latter. Which is which is a matter of authority more than anything else; why this represents the approach of English private international law is more controversial.

Let us take an example. Suppose a woman has died without leaving a will, and the question arises concerning succession to her estate.[35] Suppose she died domiciled in Spain, but still a

[35] For the rules on intestate succession, see Ch 7 below.

British citizen. As a matter of English private international law, succession to her movable estate would be governed by Spanish law as the law of her domicile at death. Suppose also that according to Spanish domestic law, X would succeed to the estate, but that according to Spanish private international law, succession would be governed by the law of the nationality, which would be taken to be English; and as a matter of English domestic law, Y would succeed. What is the judge to do?

He may have three possibilities. He may interpret his choice of law rule as pointing him to Spanish domestic law, and hold in favour of X. Or he may interpret his choice of law rule as pointing to Spanish law as including its rules of private international law, follow the path by which this points to English law, interpret this as meaning English domestic law, and find for Y. Or he may interpret his choice of law rule as pointing to Spanish law, follow the path by which this points to English law, interpret this as meaning 'English law including its conflicts rules', which point back to Spain, ask what the Spanish judge would do when she was informed that English law would look back to Spanish law, and accept whatever answer she would then give. As a matter of common law authority, the English judge will not, initially at least, take the second of these three possibilities. Sometimes he will take the first, and interpret the 'law' as meaning the domestic rules of the chosen law. But on other occasions, which include issues of succession, he will take the third, and interpret the 'law' as meaning that system of domestic law which the foreign judge, notionally hearing the case in the court whose law has been chosen, would apply:[36] he will, so far as the evidence of the content of foreign law allows him to do so, impersonate the Spanish judge and decide as she would decide. Such an approach to choice of law may be called the 'foreign court theory' of *renvoi*, or 'total *renvoi*'. Is this not all very difficult? Should the judge not simply have applied Spanish domestic law and left it at that?

Judges and writers have suggested so, and legislators usually say so. Before weighing the authority and the arguments, it is well to be reminded that *renvoi* applies only in certain areas of

[36] *Re Annesley* [1926] Ch 692; *Re Ross* [1930] 1 Ch 377; *Re Askew* [1930] 2 Ch 259; *Re Duke of Wellington* [1947] Ch 506.

private international law; and that, as the proof of foreign law lies primarily in the hands of the parties, a court will have neither need nor opportunity to examine the principles of *renvoi* unless the parties choose to raise them. One criticism of *renvoi*, that it can make life difficult for the parties and for the judge, may therefore be overstated. Another, that choice of law rules were formulated without any thought for *renvoi* but as pointers to a domestic system of law, is simply a rejection of the principle without separate justification, for even if it were true, the common law was able to improve itself by refining its rules. Another, that *renvoi* subordinates English choice of law rules to those of a foreign system, is misconceived, for it is English law, and English law alone, which decides whether to follow a foreign court's pattern of reasoning. A fourth is that the English 'impersonation' approach works only if the notional judge who is being impersonated would not be found to be trying to do the very thing which the English judge would do, which just goes to show that the very idea is flawed.[37] But this creation of the febrile academic imagination has never arisen for decision.[38] Were it to do so, the rational answer is that if the foreign rules point back to English law, *renvoi* has shot its bolt, and English domestic law would apply.[39]

Some see the arguments in favour of *renvoi* as stronger. Rules of private international law are rules of a foreign legal system: if this foreign law is selected for application, it is odd that material parts of that law—the very parts which explain whether a local judge would actually apply that law to the case!—are sheared off and ignored. It may be possible to imagine the rules of private international law as separate and distinct, but this is a pedagogic

[37] It is said that it is hardly a recommendation that the English doctrine of *renvoi* works only if other states reject it. This is tosh: one may as well say that one should never hold a door open for another to pass through, for if the other person is equally polite neither will make any progress at all.

[38] But the worry of it prompted the dissent of McHugh J in *Neilson v Overseas Projects Corpn of Victoria* [2005] HCA 54, (2005) 233 CLR 331, who was frightened by a paper tiger.

[39] *Casdagli v Casdagli* [1918] P 89, Scrutton LJ. Other answers may be imagined, but there is no sense in looking for an answer which is impossible to work with. This though will be the case in which the second of the three options identified above may be selected: as a response to a problem caused by the third.

convenience which risks damaging the coherence and integrity of the law the English court has chosen to apply. If one is to apply foreign law, it seems right to apply all of it; and equally right to apply it in the same way, and to the same effect, so far as this is possible, as the foreign judge would: realism teaches, and common sense understands, that the law is what a judge will say it is, neither more nor less. Moreover, although in our example it may not matter very much whether X or Y succeeds to the movable estate, it would seem very strange that an English court could consider and declare that one person is entitled to foreign land when, as a matter of that foreign law, the register of title will not be amended to reflect that view. If it is ever open to an English court to make a judgment about title to foreign land, it should surely do so in conformity with what it understands to be the law which the local courts would themselves apply; and if this aligns English choice of law rules to those of another system, so much the better for that.

There may be another justification for the general operation of the principle of *renvoi*. When applied by an English court, it seeks to ensure that the case is decided as it would be if the action were brought in the courts which are probably the closest to the dispute. After all, there will be no incentive to forum shop to England if the English court will try to determine the case in the same as a judge of the court whose law is the chosen law. Viewed in this sense, *renvoi* is an antidote to forum shopping which works, when allowed to operate, by refining the rules for choice of law.[40]

Common law rules for choice of law evidently come in two patterns. In one, the choice of law rule is expressed as the choice of a domestic law to determine the issue. So at common law, the material validity of a contract was governed by the domestic law chosen and expressed by the parties or, in default of such expression, by that domestic law with which it was most closely connected: the rule was formulated as a choice of a domestic law, and *renvoi* was irrelevant to it. In other cases, the choice of law rule might be expressed indirectly, or formulaically, as a choice of 'that law which would be applied by a judge holding court at

[40] *Neilson v Overseas Projects Corpn of Victoria* [2005] HCA 54, (2005) 233 CLR 331.

the relevant place'. So a question of title to land is governed by the law which would be applied by a judge sitting at the place where the land is; succession to movable property is governed by that law which would be applied by a judge sitting in the country where the defendant died domiciled. That does not seem conceptually challenging.

One must admit, however, that *renvoi* is viewed in some quarters with a distaste which sometimes borders on mania. In European private international law[41] its exclusion is often legislated, but even in the common law it probably played no part in choice of law for contract or tort. It does, in principle and if pleaded and proved by the parties, apply to questions of title to immovable property; and though it ought to apply to questions of movable property, a string of first instance decisions is to contrary effect.[42] It applies to the validity and invalidity of marriage;[43] but not to divorce where the choice of law rule for granting and recognizing divorces is for the law of the forum.[44] In other words, when the court is being asked to give a judgment which will have its effect only on the litigants themselves, *renvoi* will not apply. But when it is asked to give a judgment on status, either the ownership of a thing or the marriageability of an individual, which will have a potential impact on third parties the court will, if invited to do so, be more likely to interpret the law in the *renvoi* sense where this will tend to increase the chance that the view reached by an English court will align with that which might be reached by a potentially-involved other law.

One may now return to the point left open at the end of the examination of characterization: how to formulate the question which is to be referred to and answered by the expert on foreign law. The answer should be along the following lines. In a legal context where the principle of *renvoi* has no application, there is no compelling need to reach the same answer as would be given by the foreign judge. The question may therefore be asked in

[41] Which is a very different thing; see below.

[42] From *Iran v Berend* [2007] EWHC 132 (QB), [2007] 2 All ER (Comm) 132 to *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Comm). For an approving comment the reader must look elsewhere.

[43] *Taczanowska v Taczanowski* [1957] P 301 (CA); *R v Brentwood Superintendent Registrar of Marriages, ex p Arias* [1968] 2 QB 956.

[44] See Ch 8 below.

terms of the English characterization: 'was the contract formally valid?' etc. But in a case where the principle of *renvoi* does apply, and where the broad aim is to reach the same conclusion as would be stated by a judge in the local court, it will impair the chances of success if the law is not interpreted in a *renvoi* sense: only by allowing the expert to use the characterization and choice of law rules of his own system will it be possible for him and for the court to produce an answer of the quality sought. So in the case of the absence of parental consent, the question put should be whether the absence of parental consent makes the marriage invalid, without regard to the way that the issue was earlier characterized by the English judge or would be characterized by the foreign judge. But if the case were one concerning, say, the material validity of a contract, the question should be whether the foreign law regards the contract as materially invalid, even if the foreign law would not have regarded the issue as one of material, as opposed to, say, formal validity.

(c) Interlocking issues and incidental questions

Characterization allows us to identify an issue and attach a law to it. But a set of facts may involve more issues than one, and choice of law may point these to separate laws. So, for example, a claim for damages for an alleged tort might have been defended by reference to a contractual promise not to sue; a claim for the delivery up of goods over which a seller has reserved his title may be met by a defence that they were sold to the defendant who bought them in good faith and thereby displaced the title of the claimant; the validity of a marriage may be impugned by the alleged ineffectiveness of a prior divorce. The problem arises wherever there is a conflict between the laws which English private international law chooses for the two issues. To take the first example, characterization would have applied the *lex delicti* to a claim in tort, but the *lex contractus* to the contractual promise; how it combined them can be left for later.[45] But what if the private international law of the *lex delicti* has its own view, which diverges from that of English private international law, of what the *lex contractus* is? If the intrinsic validity of the contractual defence depends on first

[45] See Ch 6 below.

identifying its *lex contractus*, is this done by the rules of English private international law or by the conflicts rules of the *lex delicti*? Again, the capacity of a person to marry will be affected by the recognition or otherwise of the earlier divorce: is the law which determines the validity of the divorce chosen by the conflicts rules of English law or by those of the law which governs the person's capacity to marry? Or is the capacity of the party to marry simply a consequence of the conflicts rules which determine the validity of the earlier divorce?

It may seem complicated, but the law reports suggest that it rarely arises for application and decision in practice. In the end, if statute has not imposed a solution of its own the considerations which underpin the doctrines of characterization and *renvoi* allow a sensible result to be reached. The prevailing view of the common law is to regard one of the issues, if possible, as the main one. The conflicts rules of the law chosen for that main question will then select the law which governs the incidental question, so that the overall result is generated by the law (including its conflicts rules) which governs the main question. This assumes that a question can be identified as the main one; in many cases this will be the question which arises or occurs later in time, because in the end this is the decision which counts the most. By this reasoning, the effectiveness of the ultimate sale of the goods is the main question, the incidental issue being that of the validity and effect of the reservation of title; the law governing the later sale will also supply the conflicts rule to identify the law governing the earlier reservation of title. Again, personal capacity to (re)marry is the main question, the validity and effect of the prior divorce being incidental to it;[46] the law governing capacity to marry will supply the conflicts rule to identify the law which governs the earlier divorce. In neither case does English private international law take a simple chronological approach, applying its choice of law rules to the issues individually and sequentially and then seeking to combine the results.

Title to property and personal status are two areas in which the principles of *renvoi* probably apply, and where the court will aim to replicate the result which would be reached by the foreign

[46] *Schwebel v Ungar* (1964) 48 DLR (2d) 644 (Ont CA), but only to the extent that statute has not provided otherwise.

judge if he were trying the case. Where the focus is on the final or main question, any prior or incidental questions should be dealt with as the judge in the final court would deal with them. But a different analysis may be called for in a case where the principles of *renvoi* play no part in the choice of law, and where the need to replicate the final judge's perspective is absent. So in the case of a contractual defence to a tort claim, the *lex delicti* would determine whether there was a claim in tort. If a contractual defence were pleaded, the first step would be to decide whether the conflicts rules of the *lex delicti* or of English law select the *lex contractus*. There being no need to decide the overall question as a judge of the *lex delicti* would, there would be no reason to prefer the conflicts rules of the *lex delicti* to those of English law. Accordingly, the law which governs the contract and assesses the intrinsic validity of the defence would be determined by applying English conflicts rules; whether it defeats the claimant would be a matter for the *lex delicti*; but the *lex delicti* will take the validity of the contract as given, rather than making that judgment for itself.

The incidental question therefore integrates into the common law methodology for choice of law. But it can be overridden by statute,[47] for Parliament may have enacted a law in such a way that it precludes the possibility of assessing, say, the validity of a divorce by anything other than English law. To that extent the solution given above will be displaced, and the validity of the divorce conclusively determined, in accordance with Parliamentary intention, by English law.[48]

(d) Connecting factors

The identifier at the end of the 'law of the [something/somewhere]' formula is traditionally known as a 'connecting factor', on the ground that these points of contact are what connect an individual, or an issue, to a system of the law which will, in principle, furnish the answer being looked for. They are almost all defined by English law, not foreign law: this is inevitable, for until the choice of law rules have identified a foreign law to apply to a dispute, there is no sensible basis for using any law

[47] For further consideration of statute law, see below.

[48] *Lawrence v Lawrence* [1985] Fam 106; Family Law Act 1986, s 50.

other than English for definitional purposes. For example, if as a matter of English law X is domiciled in France, this attribution of domicile is unaffected by the possibility that French law may not agree but would regard him as being domiciled in England instead.[49] If English law considers the law applicable to an obligation to be Swiss law, it is irrelevant that a Swiss court, applying rules of Swiss private international law, might have come to a different conclusion.

To be useful the connecting factor must identify a territory having *a* system of law, as opposed to a larger political unit which may have many systems of law or none. For example, an individual may be domiciled in England, but not in the United Kingdom: there is English law on his capacity to marry, but no 'United Kingdom law' on the point; and if a statute has been enacted to apply in England, Scotland, and Northern Ireland, and may in some sense be considered as the law of the United Kingdom, it will apply because it is part of English law, rather than for any other reason. An individual may be domiciled in Florida, but not in the United States, with the result that the law of Florida, as distinct from the law of the United States, will be applied; although where the relevant law of Florida is in fact a federal rule of the law of the United States, the federal rule will be applied as part of the law in the state of Florida. But by contrast, in true cases where a federal state has defined itself as a single legal unit for certain purposes, the connecting factor may point to that law. So a person may be regarded as domiciled in Australia for the purpose of capacity to marry, for Australia is constituted by its own legislation a single law district so far as concerns the law of marriage,[50] but in Queensland for the purpose of making a will, for the law of testamentary succession is a matter on which state law is sovereign, and state laws are several. An occasional form of expression for this special sense of a 'country' is a 'law district'.

[49] *Re Annesley* [1926] Ch 692. But if choice of law rules refer to French law in a *renvoi* sense, and as a matter of French law he is domiciled in England, this detail will form part of the overall decision, and will not be contradicted.

[50] And, according to *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36, (2000) 203 CLR 503, for all matters which fall within the federal jurisdiction.

Connecting factors fall into two broad categories: those which define a law in terms of a personal connection, and those which define the law in terms of a state of affairs. For ease of exposition they need to be examined separately.

Personal connecting factors: domicile, residence, and nationality

The personal connecting factors are domicile, habitual (or ordinary or usual) residence, (simple) residence, and nationality. As far as the common law is concerned, domicile is the most significant, and it is the law of the domicile which, to a greater or lesser extent, determines the status and capacities of an individual. It is therefore worth examination.

According to the common law of domicile, every person has a domicile and, subject to what appears below,[51] no person can have more than one domicile at any time. The domiciliary law—the *lex domicilii*—still has a significant role in family and in property law, but it may also define the capacity of persons, especially companies,[52] to make contracts; and it plays a part in the law of taxation. From this very general introduction two points may emerge: 'domicile' is used in a wide but diverse range of matters, and it may be that its meaning should take its colour from its context. It is also desirable that it represent a rational connection to a particular law. In these two respects the English law of domicile scores rather badly. On the first, although it has been suggested from time to time that domicile should adjust its definition to its context, the courts have demurred. So a case on UK tax liability, in which it was held that a person had not acquired an English domicile despite 40 years' residence,[53] will be authoritative on whether and how a person may acquire an English domicile for the purpose of his or her capacity to marry or make a will, as also will be a decision on whether an illegal immigrant

[51] The persistence of the domicile of origin constitutes a general half-exception to the rule; the jurisdictional domicile which forms the backbone of the Civil Jurisdiction and Judgments Act 1982, the Brussels I Regulation, and the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) is a completely separate concept, irrelevant to the common law of domicile.

[52] Where it means the law of the place of incorporation: see p 372 below.

[53] *IRC v Bullock* [1976] 1 WLR 1178 (CA).

or overstayer[54] has acquired a domicile in England. One imagines that the policies which underpin the individual decisions in these various legal contexts are not identical and may even be contradictory, but this fact, if it is a fact, is not reflected in the definition of domicile, for domicile has, as a matter of common law, one definition, not several definitions.

A telling difficulty, on which authority is surprisingly sparse, is how to determine the domicile of a person who, in some sense, belonged to a territory whose borders have moved or which has simply ceased to be. A woman formerly domiciled in Czechoslovakia would now face the impossibility of being domiciled in a non-country which is no longer a law district and has no law. At a guess, she will be held to have acquired a domicile of choice in the part in which she was resident on the date on which the country severed itself, but this will be more difficult to defend as a conclusion if she had not, on that date, made up her mind whether to remain, and hence to reside indefinitely, in the part-country. A person who was domiciled in Yugoslavia or the USSR, which disappeared by disintegration, is in much the same position; likewise one who was domiciled in East Germany, which country disappeared by voluntary absorption. It is probable that one can have a domicile in the *soi-disant* and illegal 'Turkish Republic of Northern Cyprus', but what of Palestine? In all these cases there are practical problems in defining domicile in terms which look backward to an earlier set of facts, but there is no easy solution to the problem created by the fact that political history does not respect the conflict of laws.[55]

Domicile, as a common law concept, is a single species, but with three *genera*. The *domicile of origin* is the domicile of one's father (or mother, for one who is born out of wedlock or after the death of the father) at the date of one's birth. It is the first domicile of a child, and it serves as the actual domicile until superseded by the acquisition of another domicile, either of choice or of dependency. But it is only ever suppressed, with the result that if a later-acquired domicile is lost, then unless at the same moment a new domicile is acquired, the domicile of origin reasserts itself as the person's actual domicile. The domicile of

[54] *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98.

[55] *Re O'Keefe* [1940] Ch 124.

origin can never be shaken off; and if it revives at a point late in a person's life it has the potential to connect him to a legal system which may be remote from the circumstances of his present life.[56] Some regard this potential for the domicile of origin to reassert itself as showing why it should be abolished by legislation, but the truth is less clear-cut. After all, if a refugee is driven to flee from the country in which she has had a domicile of choice, it may be more offensive to hold that this domicile persists than to revive the domicile of origin unless and until a new domicile of choice is established somewhere less awful.

A *domicile of choice* is acquired by becoming resident in a law district, intending to reside there indefinitely: both conditions must be satisfied in relation to the law district in which the domicile is to be established before acquisition is complete. The *intention* must be geographically specific, unconditional, and deliberate in order to meet the somewhat restrictive requirements of the law. So if a person emigrates to the United States with an intention to remain there, but has not yet settled on which state she will, permanently or indefinitely, reside in, she will not have established a domicile of choice in any American state;[57] if she intends to reside in Texas but has not yet taken up residence there she will not have established a domicile in Texas. The intention must be to reside indefinitely. So an intention to reside for a term of years, or until the occurrence of a certain specific event such as retirement or the death of a spouse, is not enough,[58] although if the condition upon which the residence would come to an end is vague and unspecific it may be disregarded.[59] This means that residence for many decades' length may still not establish a domicile of choice: a fact which certain overpaid foreign nationals living and working in London have shamelessly exploited and at which successive governments have shamefully connived.[60] In a number of weirdly bizarre cases, the courts have assessed a person's distasteful intentions as insufficient to establish an English domicile. It is admittedly plausible that a fugitive from justice,

[56] *Udny v Udny* (1869) LR 1 Sc & Div 441. See also *Re O'Keefe* [1940] Ch 124.
[57] *Bell v Kennedy* (1868) LR 1 Sc & Div 307 (England and Scotland).
[58] *IRC v Bullock* [1976] 1 WLR 1178 (CA) (unless wife died first).
[59] *Re Fuld's Estate (No 3)* [1968] P 675; *Re Furse* [1980] 3 All ER 838.
[60] *IRC v Bullock* [1976] 1 WLR 1178 (CA).

who intends to remain only until the passing of time has prescribed her offence, will not acquire a domicile of choice,[61] but this was extended to a German terrorist who fled to England but whose intention to remain was evidently unconditional, almost certainly because the court looked on her case with distaste.[62] A wastrel who came to England to sponge off his relatives was held to be too useless to have an intention to establish an English domicile;[63] and an American citizen who was advised on medical grounds to remain in Brighton, but who spent his waking hours devising lunatic schemes to bring about the destruction of the British maritime empire, was held not to have the requisite intention either, even though he knew perfectly well that he would remain in England for ever.[64] It is hard to interpret these cartoon cases as instances of conditional intention, but what they add to the requirements for the acquisition of a domicile of choice is difficult to pin down.

What constitutes *residence* is hard to say: and the definition of 'present as a resident' hardly advances matters very much. The view that residence in England originating in unlawful entry was incapable of sustaining an English domicile of choice has now been abandoned.[65] A person may remain resident in a country while overseas, but it is unclear whether he becomes a resident upon the instant of his arrival, or only some time after.[66] In principle one can be resident in two countries at once, but to avoid the inadmissible result of this leading to there being two domiciles of choice, it is probable that the residence requirement identifies the principal residence if there is more than one contender.[67]

A domicile of choice can be lost by being abandoned, which means ceasing to reside and ceasing to intend to reside indefinitely—both elements must be terminated—or lost by the acquisition of a new domicile of choice on the basis of the rules

[61] *Re Martin* [1900] P 211.

[62] *Puttick v AG* [1980] Fam 1.

[63] *Ramsay v Liverpool Royal Infirmary* [1930] AC 588.

[64] *Winans v AG* [1904] AC 287.

[65] *Mark v Mark* [2005] UKHL 42, [2006] 1 AC 98.

[66] In the case of habitual residence, this will not suffice: *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562.

[67] *Plummer v IRC* [1988] 1 WLR 292.

set out above. But if the abandonment is not contemporaneous with the acquisition of a new domicile of choice, the domicile of origin will reassert itself to prevent any domiciliary hiatus.[68]

A child's *domicile of dependency* is that, from time to time, of the parent upon whom, until the age of 16 or lawful marriage under this age, the child is dependent.[69] In principle, therefore, a child may suppress its domicile of origin with a domicile of dependency as soon as the cord is cut. When the age of independence is reached, it is debatable whether the domicile of dependency is lost by operation of law, so that the domicile of origin, if different, revives unless a domicile of choice be immediately acquired, or whether the domicile had as dependent continues as an imposed domicile of choice. Statute suggests that the latter is possible,[70] but principle suggests that it is not, and that the domicile of dependence ceases and is defunct on the attaining of majority.[71] The domicile of dependency of married women was abolished in 1974.[72]

It will have become apparent that the common law of domicile, with its peculiar rules and weirder authorities, has the potential to produce a capricious answer in a given case, and all the more so in Europe as political boundaries come and go.[73] But all proposals for reform[74] have been spurned, and the cause is now lost. One particular consequence of this inability to rationalize the common law of domicile was that it was manifestly unsuitable to identify a court in which a person should be liable to be sued in civil or commercial proceedings. For this reason the term 'domicile' in the Civil Jurisdiction and Judgments Act 1982 and the Civil Jurisdiction and Judgments Order 2001[75] is statutorily defined to make it separate and distinct from its common law homonym; it is examined in Chapter 2.

[68] *Udny v Udny* (1869) LR 1 Sc & Div 441.

[69] Domicile and Matrimonial Proceedings Act 1973, s 3.

[70] ibid, s 1.

[71] See Wade (1983) 32 ICLQ 1.

[72] Domicile and Matrimonial Proceedings Act 1973, s 1.

[73] cf *Re O'Keefe* [1940] Ch 124.

[74] Most recently in Law Commission Report No 168, *The Law of Domicile* (1987).

[75] SI 2001/3929.

Residence as a connecting factor, both in its own right and in the variants of *habitual*, *usual*, and *ordinary residence*, is more usually found in laws which derive from international conventions; but its use will increase each time the cause of reform of the law of domicile is defeated. At one time it would indicate a person's usual residence, but with few of the technical complications of the common law of domicile. But its use in areas liable to generate high emotional stress—child abduction being the most notable[76]—has increasingly meant that courts have to be increasingly precise about its meaning. It is probable that it indicates only one place, although regular absences will not, by themselves, deprive a residence of its habitual or usual character.[77] It is not greatly affected by a party's intention, though where it is contended that a new habitual residence has been acquired, there will need to be evidence of a settled intention to remain there on a long-term basis.[78] By contrast, (simple) *residence* may exist in more than one place. Residence and the concept of presence play a significant part in the rules of the common law dealing with jurisdiction and the recognition of judgments, although the relationship between residence and presence in these contexts can sometimes be obscure. Because its relevance is so closely related to these jurisdictional questions, it is examined in Chapter 2.

Nationality, as a connecting factor, plays little part in the English conflict of laws, by contrast with civilian jurisdictions where the *lex patriae* is still a common personal connecting factor. The reasons for its non-use in English private international law are pragmatic, but are also susceptible to English over-statement. First, a person's status as a national of a particular country is determined by the law of the proposed state: no rule of English law can determine whether someone is or is not a national of Russia, for example. Nationality is therefore immune to the judicial refinement which can be brought to bear on other connecting factors. Though it plays a significant part in the law of the

[76] See Ch 8 below.

[77] *R v London Borough of Barnet, ex p Shah* [1983] 2 AC 309. But one does not become habitually resident in a single day: *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562; *Nessa v Chief Immigration Officer* [1998] 2 All ER 728.

[78] *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562; *Re S (A Minor) (Abduction: European Convention)* [1998] AC 750.

European Union, it may be supposed that the Member States are content for this purpose to accept each other's ascription of nationality; it does not follow that it would be a useful tool outside that context. Second, a person may retain a nationality long after losing all practical connection to the state in question, retaining it, perhaps, for emotional or other idiosyncratic reasons, or even forgetfully: in such a case it may not be the most appropriate law to serve as the person's personal law. Third, dual nationality, or nationality in a federal or complex state, such as the United States or the United Kingdom, or statelessness, would cause real difficulty for any person for whom nationality was a personal connecting factor. Yet it seems reasonable to suppose that those many jurisdictions which employ nationality as a personal connecting factor manage to deal with these practical objections, and it may be wrong to see these instances as so significant that the basic rule must be rejected: tails should not generally be allowed to wag dogs. It is also true that a person who wishes to determine his nationality can usually just look inside his passport. By contrast, the person who needs to ascertain her habitual residence, to say nothing of her common law domicile, may be faced with the kind of question most usually encountered in university examinations. Pragmatism is, perhaps, not all one way.

Causal connecting factors

Terms which describe a connection between a fact or an event and a law are also defined by reference to English law; where the meaning is not obvious it will be explained in the particular area of the law where it is utilized. Some of those which will be encountered are mentioned here. Even though latinate expression is considered by some to add to the obscurity of the law, the definitional concepts of the conflict of laws are still rendered, across Europe and the world, in classical forms. Up to this point in this chapter the attempt has been made to express connecting factors in an English language paraphrase, but it is undeniable, except by those with tin ears, that these lack the elegance and the economy of the traditional usages. From this point on, therefore, these connecting factors will generally be referred to in the form in which they appear in the authorities and as they are used

internationally in the discourse of the conflict of laws. In addition to the *lex domicilii*, the law of the domicile, and the *lex patriae*, the law of the nationality, they include: the *lex fori*, the law of the court in which the trial is taking place; the *lex contractus*, the law which governs a contract, whether determined under the rules of the common law (for contracts made before 2 April 1991, the 'proper law') or the Rome Convention (for contracts made after 1 April 1991, the 'governing law') or Rome I Regulation (for contracts made after 17 December 2009, the 'applicable law'); the *lex loci contractus*, the law of the place where the contract was made; the *lex delicti*, the law which governs liability in tort, whether determined under the rules of the common law, statute, or Rome II Regulation; the *lex loci delicti commissi*, the law of the place where the tort was committed; the *lex situs*, the law of the place where land, or other thing, is; the *lex loci actus*, the law of the place where a transaction was carried out; the *lex loci celebrationis*, the law of the place of celebration of marriage; the *lex incorporationis*, the law of the place of incorporation; the *lex protectionis*, the law which grants legal protection to an intellectual property right; the *lex concursus*, the law of the court which is administering an insolvent estate; the *lex successionis*, the law which governs the succession to a deceased estate; and the *lex causae*, which is used to refer generically to the law applicable to the issue in dispute.

(e) Statutes and the expectations of comity

By contrast with its reasonably sophisticated framework for dealing with the application of foreign law, the common law conflict of laws is not at its best when handling English statutes. Although a court will only apply a foreign statutory rule if the foreign law is the *lex causae*, the reverse is not true. An English court may apply an English statute even though the rules for choice of law otherwise point to the application of a foreign law. All depends on the true construction of the statute, on whether Parliament has directed the judges to apply it without regard to or despite foreign components in the overall dispute.[79] Some, such as the Human Rights Act 1998, can be seen to override

[79] For example, Unfair Contract Terms Act 1977, s 27.

all contrary rules for choice of foreign law and jurisdiction, but it is rarely as clear as that. It is sometimes said that there is a presumption that laws are made to be territorially limited, for this is what international comity would expect. But even if that is so, it is only a point of departure; and it will depend on the law, and the precise way in which the 'territory' or 'territorial' is defined: is it by reference to the person, or the property, or the transaction, or something else? When Parliament legislates without making any clear statement of the international reach or 'legislative grasp' of its laws, the courts have to do the best they can; and there are no easy answers.[80]

This leads to a broader question, whether 'comity' has any discernible role in private international law. Some writers take the view that its lack of clear definition renders it unusable or useless. But other writers, and courts,[81] make reference to comity rather more often than this would suggest. If comity is understood as a rather woolly principle of judicial self-restraint, it would not be useful. However, the principle may be formulated as one which asserts positively that the exercise of jurisdiction and legislative power is territorial and that exercises of sovereign power within the sovereign's own territory are entitled to be respected, but which also accepts passively that parties may assume obligations which either may ask a court to enforce against the other without regard to such territoriality. On that basis it is capable of explaining the law on jurisdiction and foreign judgments, the interpretation and application of statutes, and certain elements of choice of law. It has been observed by leading civilian commentators that comity plays a characteristic role in the common

[80] On Employment Rights Act 1996, s 94, for example, see *Serco Ltd v Lawson* [2006] UKHL 3, [2006] ICR 250; *Ravat v Halliburton Manufacturing Services Ltd* [2012] UKSC 1, [2012] ICR 389. On Senior Courts Act 1981, s 36 (service of writ of subpoena), see *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43, [2010] 1 AC 90. On Insolvency Act 1986, s 423 (recovery of property transferred in fraud of creditors) see *Re Paramount Airways Ltd* [1993] Ch 223; and on orders to recover property derived from the commission of crimes, see *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2012] 3 WLR 379. It is impossible to see any clear picture in that.

[81] For a recent example, see *Joujou v Masri* [2011] EWCA Civ 746, [2011] 2 CLC 566. It should be noted that US courts make much more frequent reference to the principle.

law of private international law, and there would be no reason for an English lawyer to deny it.[82]

A general principle of comity leads also to the specific conclusion that an English court may not be asked to rule on the validity of a foreign sovereign act carried out within its territory, whether the validity is said to be questionable by reference to the internal law of that state or referred to some precept of public international law. The acts of states as states, done within their territory, are not justiciable; they are beyond the purview of municipal courts, not only because there are no judicial or manageable standards by which to judge them, but also because the intervention of the courts at the instance of private parties may contradict the government in its conduct of the international relations of the United Kingdom.[83] Though from time to time an attempt is made to trim this wise principle of abstention, perhaps by taking instruction from resolutions of the competent organs of the United Nations,[84] the general principle is as sound as it is valuable. Of course, foreign legislation may be refused effect in England in an individual case on grounds of public policy, but such a conclusion does not rest on the invalidity of the foreign act or legislation, but on the ordinary rules of the conflict of laws.[85]

3. QUESTIONING THE COMMON LAW APPROACH

It is accurate to describe the traditional approach of the common law as 'jurisdiction-selecting': the choice of law process selects a legal system whose rule will be taken to govern the issue before the court; this legal system, more or less automatically, provides the answer. Little or no attention is paid to the question—which is not asked—whether this actually produces the 'right' answer, or the 'best' answer. Although it has proved remarkably durable in England and much of the common law world, and although

[82] See further, Briggs (2012) 354 *Hague Recueil* (Académie de Droit International; Martinus Nijhoff), p 69.

[83] *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 938.

[84] *Kuwait Airways Corpn v Iraq Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883.

[85] See further, p 208 below.

it appears to be found in most civilian systems as well, it is still open to criticism. Several points may be suggested. First, the creation of characterization categories is to some extent an artificial process, an attempt to impose order on a market of conflicting legal rules and tending, unless care is taken, to be rigid and blinkered.[86] Secondly, the idea that within each of these categories—material validity of contract, personal capacity to marry—there is a conceptual unity which justifies subjecting them all to the same choice of law is not always plausible: should the one law really determine the age at which a person may marry, whether a blood or other relative may be married, whether polygamy or same-sex union is permitted, and the effect of inability or refusal to consummate the marriage? Is this really a single, coherent, group of issues? Thirdly, and tellingly, little interest is shown in whether the rule of law actually chosen for application was developed or enacted with the intention that it be applied in the instant case. Fourthly, little or no attempt is made to compare and evaluate the results which would be produced by the rules of law from the various systems which might connect to the facts, still less to choose between them. For these among other reasons American jurists,[87] and some others drawing their inspiration from them, have proposed a variety of alternative approaches. These are varied in their content; have received some, but not substantial, judicial support; are perhaps most prominent in litigation about inter-state torts; and are more complex, and may be more subtle, than the more mechanical traditional approach. Take for example the case of an inter-state traffic accident, involving cars registered in, and drivers and passengers resident in, different states; and suppose that the laws of some, but not all, of these states restrict the type and extent of damages which can be recovered. It is not hard to see the mechanical application of a *lex delicti*, such as the law of the place where the tort occurred, as being too insensitive to the actual and personal facts of the case.[88]

[86] cf *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825.

[87] Especially Cavers, *The Choice of Law Process* (1965) and (1970) 131 Hague Recueil 143; Currie, *Selected Essays on the Conflict of Laws* (1963); American Law Institute, *Restatement Second of the Conflict of Laws* (1971).

[88] cf *Babcock v Jackson* 191 NE 2d 279 (1963).

A modest alternative, which is still jurisdiction-selecting, would be to apply the law having the closest and most real connection to the particular claim, and to assess this on a case-by-case basis; a variant would be to look to the law having the closest connection to the particular issue to be adjudicated, rather than to the tort as a whole. A more radical alternative, which may be thought of as 'rule-selecting', would enquire whether each of the various rules contained in the competing systems was intended by its legislator to apply to the case, or issue, currently before the court. If this analysis reveals that only one of the potentially-applicable rules was designed to apply to a case such as this, there will have been a false or illusory conflict of laws, and the one and only concerned law will be applied. But if it is discovered that more than one of these laws was intended to apply to the given facts, the court will have to resolve the conflict of laws, which it may do by applying its own domestic law if it is one of those which was designed to be applied, or by seeking to identify the 'better', or 'best' law. The scientific analysis of these alternatives to traditional choice of law is not susceptible to concise statement, but insofar as the approach involves construing conflicting statutes to discern what they really intend, it taps into an ancient and orthodox tradition. But it also works better in a system where the majority of actual rules from which the selection must be made are contained in codes or statutes. For the common law has no legislator and its purpose is, in this sense, unknown and unknowable. This may be contrasted with statute law, on which *travaux préparatoires* and constitutional theory may illuminate the actual or presumed legislative intention. This process is sometimes called 'governmental interest analysis', which is unfortunate: call it instead 'searching for the intentions of the legislature' and it seems much less alien. Whether it could ever have been made to work in England is open to debate;[89] and as English choice of law rules are increasingly contained in European legislation, there is relatively little scope for an English judge to follow whatever he may take to be the American way ahead.

If private international law is to continue to use connecting factors which select a law to be applied, a greater challenge may

[89] Kahn-Freund (1974) 143 Hague Recueil 147; Fawcett (1982) 31 ICLQ 189.

yet come from those new technologies which make a 'law of the place of …' rule seem inappropriate. The use of electronic systems of communication for publicity, trade, fraud, and defamation, has yet to be properly examined in the context of the conflict of laws. Opinions vary. On one side are those who consider that these new media mean that a rethinking of jurisdiction, foreign judgments, and choice of law cannot be avoided, and the sooner the better; on the other, those who feel that just as the conflict of laws came to terms with the telephone, telex, and fax, it will simply adapt its basic ideas to the facts of this new-fangled technology. It is too early to announce the death of the traditional conflict of laws; but there is always a risk that rules tailor-made for new technology invite their own obsolescence.

If the past is any guide to the future, specific choice of law rules which have reached the end of their shelf life may be superseded by more flexible ones. A couple of examples may illustrate the point. In the private international law of restitution, there was authority for the view that the obligation to make restitution would, in certain cases, be governed by the law of the place of the enrichment.[90] But when claims result from the electronic transfer—except that nothing is actually transferred as banks electronically adjust their records—of funds by banks, the place of enrichment may be so fortuitous or so artificial that it makes no sense as a choice of law rule. In the private international law of intangible property, dealings with negotiable instruments are traditionally governed by the law of the place where the document is. But widely-used, international electronic dealing or settlement systems, and the custodianship of securities, would risk being confounded by the rigid application of this antique rule of law to such novel methods of dealing. In such cases, new choice of law rules may be required if the most appropriate law to the issues raised by this new technology is to be applied; it is no answer to shrug and say that those who enter into the market risk the surprises which traditional conflict of laws may spring on them; and it would be optimistic to assume that sensible rules can be developed without the need for legislation.

[90] Though the issue is now generally governed by the Rome II Regulation, its Art 10(3) applies the law of the country in which the unjust enrichment took place, which rule raises questions of a similar kind.

Maybe similar thinking is required for general electronic commerce and communication. When contracts are made over the internet, it may be necessary to decide where a contract was made or was broken,[91] or whether a supplier directed his professional or commercial activities to the place of a consumer's domicile.[92] It is improbable that a technical analysis of the locations of the customer's computer and internet server, or of the server which hosts the supplier's website, the supplier's computer, and of the various ways in which this information is read or downloaded, etc, will yield a solution which is scientifically respectable, comprehensible for the people involved, and jurisprudentially rational. Where it is alleged that a reputation has been defamed by a statement displayed on a web page accessible by computer users from China to Peru, does it really make sense to ask where the tort or torts occurred, or where the damage occurred, or where was the event which gave rise to the damage?[93] For all these points of contact may be multiplied by the number of people who may have had access to the information. When it comes to jurisdiction[94] or the recognition of foreign judgments,[95] it may be necessary to ask whether the defendant was present (or carrying on business) in or at a particular place. The facts of modern business life may make this a surprisingly difficult question to answer. For the purposes of regulation of deposit-takers and investment businesses, it may be necessary to determine whether an individual carried on specified activities or business in the United Kingdom.[96] The conflict of laws must keep abreast of this brave new world.

In the absence of a more radical alternative, a tentative guess may be that the place where the individuals, or their day-to-day[97] office premises, are located will prove to be more significant than where the hardware is, and that both will be more significant than

[91] See CPR Practice Direction 6B, para 3.1(6).

[92] Council Regulation (EC) 44/2001, [2001] OJ L12/1, Art 15.

[93] ibid Art 5(3). cf *Gutnick v Dow Jones & Co Inc* [2002] HCA 56, (2002) 210 CLR 375.

[94] CPR r 6.9(2).

[95] *Adams v Cape Industries plc* [1990] Ch 433 (CA).

[96] For example, Financial Services and Markets Act 2000, s 418.

[97] As distinct from a letterbox address in a tax haven or money laundry, but which pretends to be a central office.

the notional places where links in the chain of communication may be found. After all, domestic law and the conflict of laws deal with communication and contracts made by telephone, and it appears to be assumed that the place of the telephone subscriber is decisive. It appears not to matter that the offeree left a message on an answering machine on the premises, or in a voicemail box maintained by a telephone company; or that either caller used a mobile phone. Rough-and-ready locations can be ascribed to the persons who communicate, and the legal analysis will proceed from there. For defamation, the eye of the reader is significant, rather than the place where or from which his computer receives the information in question.[98] For presence or the carrying on of business, it seems probable that this can indicate only where living, breathing, individuals do what they do, rather than a notional place where information is transferred. This is not to say coming to terms with conflicts issues presented by the new technology will be plain sailing, or that no legislation will be required. But calm creativity from commercial judges will usually bring about rational solutions.

C. LEGISLATION ESTABLISHING PRIVATE INTERNATIONAL LAW AS EUROPEAN LAW

The system of private international law just described was developed to regulate the private international rules of the common law, making law from cases and the absence of cases, and from not much else. When it was required to accommodate statute law,[99] it generally did so by treating it as though they were no different from rules of non-statute law. English legislation would therefore be applied when, but only when, English law was identified by choice of law rules as being the *lex causae*; foreign law would be applied when that foreign law was the *lex causae*, and so on. Although a rare English statute might be applied in a case in which the *lex causae* was not otherwise English, this happened when and because the legislative instruction to the judge was

[98] *Gutnick v Dow Jones & Co Inc* [2002] HCA 56, (2002) 210 CLR 375.

[99] That is, rules of domestic law in statutory form. There was very little legislation of rules of choice of law.

understood to be so peremptory as to override the result which would have been derived from the ordinary process of choice of law.[100] There is no doubt that such a direct instruction from the legislator may have this effect on an English judge. But this effect could be attributed only to English legislation, and then only where the terms in which the legislation was drafted made it sufficiently clear that it really was a direct instruction to the judge, by-passing the rules for choice of law. In the great majority of cases, English legislation was simply fitted into the established common law pattern for choice of law.

But today, legislation is not only made in England, and instructions to judges do not come only from Westminster. Increasingly, rules of law, including rules of private international law, are established by the organs of the European Union. To be technical about it, these laws take effect in England under the authority of the European Communities Act 1972.[101] The law on jurisdiction and the recognition of foreign judgments is mostly governed by European, which means pan-European, legislation: this is true for civil and commercial matters,[102] and in some areas of family law[103] and insolvency,[104] but the legislative aim of the European Union is to exercise more widely yet its authority over the field of jurisdiction and judgments, but also civil procedure.[105] The rules for choice of law are also substantially European and legislative: choice of law for contractual[106] and non-contractual[107] obligations is

[100] The traditional terminology of private international law was therefore to refer to these as 'overriding' statutes. A more modern usage is to refer to them as 'mandatory' laws.

[101] Which gave a blank cheque to what is now the European Union to make legislation within the scope of the Treaty of Rome, as amended from time to time.

[102] Regulation (EC) 44/2001, [2001] OJ L12/1.

[103] Regulation (EC) 2201/2003, [2003] OJ L338/1; Regulation (EC) 4/2009, [2009] OJ L7/1.

[104] Regulation (EC) 1346/2000, [2000] OJ L160/1.

[105] Regulations also deal with the service of process (Regulation (EC) 1393/2007, [2008] OJ L331/21), the taking of evidence for use in proceedings (Regulation (EC) 1206/2001, [2001] OJ L174/1), and a growing number of small claims and consumer procedures not listed here.

[106] Regulation (EC) 593/2008, [2008] OJ L177/6.

[107] Regulation (EC) 864/2007, [2007] OJ L199/40.

now covered, as also are maintenance[108] and some other aspects of family law;[109] so also is insolvency.[110] To date, the United Kingdom has stood aside from European legislation governing the dissolution of marriage,[111] and that dealing with wills, succession, and the administration of estates,[112] but this did not prevent the legislation being made, and the United Kingdom may yet opt into it. It has also stood aside from proposed legislation to deal with the private international law of matrimonial property, but again, this will neither prevent the legislation being made nor preclude a later decision to opt into it. Still further, other European legislation which is not directly targeted at private international law may still impinge on issues of private international law. For example, the freedom of establishment guaranteed by the European Treaty is bound to have, and has had, a significant impact on the private international law of corporations. And quite apart from all that, the European Convention on Human Rights, made by the Council of Europe but legislated into English law by the Human Rights Act 1998, is also seeping into private international law.

Whatever else may be true, European legislation is not made to work within or amend the common law. It aims instead to override it and the national laws of all Member States, in order to produce uniform rules of private international law across the European Union. This will make it possible to know which courts will and will not have jurisdiction, and which country's law will be applied to the dispute, no matter where proceedings may be brought. It may be helpful to think of these legislative texts as being pasted onto the pages of an album, initially blank but which, when filled up, will stand as the Code of Private International Law for the European Union, and which is, in its present incomplete state, a part of that intended code of private international law.

This code, or these European materials, come with their own instructions for use. Let us take the choice of law rules for

[108] Regulation (EC) 4/2009, [2009] OJ L7/1.
[109] Regulation (EC) 2201/2003, [2003] OJ L338/1.
[110] Regulation (EC) 1346/2000, [2000] OJ L160/1.
[111] Regulation (EU) 1259/2010, [2010] OJ L343/10.
[112] Regulation (EU) 650/2012, [2012] OJ L201/107.

non-contractual obligations in civil or commercial matters arising from events giving rise to damage which occur after 11 January 2009. The choice of law rules of the Rome II Regulation apply if (i) the relationship in question is one of 'non-contractual obligation', (ii) the obligation is within the definition of 'civil or commercial matters', and (iii) events giving rise to damage occur after 11 January 2009. To decide (i) whether the relationship in question is a non-contractual obligation, and (ii) whether the matter is a civil or commercial one, the court is called upon to interpret Article 1 of the Regulation. To decide whether the events giving rise to damage occurred after 11 January 2009, the court is called upon to interpret Article 31 of the Regulation. The court does not 'characterize' the issue as being contractual, tortious, equitable, one of unjust enrichment, or otherwise, insofar as these are terms of art of the common law doctrine of characterization. For the doctrine of characterization is the key to the common law rules of private international law, but where the Regulation applies these rules of the common law are *res extincta*. True, the court may be faced with a problem if, for example, the events giving rise to damage appear to have occurred both before and after 11 January 2009, but it has to answer the question posed by Article 31 by focusing on the Article itself, on the recitals to the Regulation, and on more general principles of European private international law, such as legal certainty. It has to put out of its mind any recollection of how common lawyers might once have dealt with analogous problems, at least until it has concluded that Article 31 excludes the case from the domain of the Regulation, at which point the court assumes the power and responsibility of a common law court applying common law rules and techniques of private international law.

In short, this legislation makes up an entirely new system of private international law, conveniently called 'European Private International Law'. It comes with its own manual, which is written in European, not in English. Of course, the transitional phase is bound to be untidy, as transitional phases always are. If each system—common law, European—is designed to be complete, some turbulence can be expected if a case requires a court to work with materials from each system. But things can only get better.

1. PRINCIPLES OF LEGISLATIVE INTERPRETATION

The skills required by the private international lawyer working with this European legislative material form the counterpart to the common law principles of characterization, etc. What is required in the domain of European private international law are those techniques which will lead to a clear and accurate interpretation of the various legislative texts. The applicable canons of European statutory interpretation are general and particular. Consideration of those which are particular to specific pieces of legislation can be postponed to be dealt with in the context in which they arise: they are most developed in the field of jurisdiction and the recognition of judgments.

Prime among the general principles of interpretation is the requirement that terms of art in the legislation will bear a meaning which is autonomous, which is to say, independent of the national law of the court called upon to apply it. There would, as said before, be little point in enacting a single legislative text which meant different things in each of the 27 Member States: it would make no more sense for the Unfair Contract Terms Act 1977 to mean one thing in Yorkshire but another thing in Kent. Ideally these autonomous definitions of legislative terms will have been laid down by the European Court, on references for preliminary rulings made by national courts,[113] but where this has not yet happened, the national court must guide itself by considering how the European Court would have answered if it were to have been asked.

Second, the interpretation adopted should contribute to legal certainty: this principle has been identified with increasing clarity, and it manifests itself in various ways. It will tend to mean that where one piece of legislation has replaced another, the interpretation given to provisions which are common to both should be consistent, so that a litigant may know where he is able to sue or liable to be sued, or know what law will be applied if the case has to be taken to court, without the need for complicated analysis or expensive advice. In principle, legal certainty should

[113] Under Art 267 of the Treaty on the Functioning of the European Union.

also argue for consistency of interpretation across the legislation, though at this point the principle may yield to more contextual concerns, considered below.

Third, rules of general application are interpreted broadly; rules of specific application which derogate from these are interpreted as being no wider than is necessary to achieve the specific purpose for which they were made, for fear that the exception swallow up the rule. This does not always mean that a rule which may be regarded as *lex specialis* must be given the most restrictive interpretation imaginable, but the derogation from *lex generalis* should be no wider than the reason for the legislation requires.

Fourth, legislative rules which are made to protect a weaker party from exploitation may not be circumvented. This may be thought to be obvious, but the true position may be subtly complicated. For example, legislation which gives jurisdictional advantages to consumers in litigation against professionals may not have precisely the same scope as legislation which gives consumers preferential treatment in terms of choice of law. The legislative policies may be similar, but they may not be congruent.

Fifth, each piece of legislation, and (in principle, at least) each Article within that piece of legislation, has a natural scope which neither overlaps with others nor leaves unplanned gaps. So, in principle at least, a claim is either within the Brussels I Regulation for jurisdiction in civil and commercial matters, or it is within the scope of the Insolvency Regulation, but it cannot be within both, for the scope of each is defined to prevent their overlapping. A claim based on breach of an obligation should not fall within the scope of the Rome I (contractual obligations) and Rome II (non-contractual obligations) Regulations, even if at first sight it might appear that it naturally does, such as when a contractual duty of care is said to have been broken. In cases in which the legislator realized that this advice might be easier to formulate than to abide by, specific drafting may lead to the conclusion that where legislative provisions overlap, they point to the same eventual conclusion, with the result that there is no conflict of laws.

One might have expected to find a sixth: that when a Regulation directs a court to apply the law of a foreign country, the court should apply that law rather than falling back on the

common law principle that foreign law is a matter of provable (or improbable) fact. It is true that this would be far more fundamental a change than was ever brought about by making changes to the rules for choice of law themselves, and so far, English eyes have been averted from the challenge which this might present. But one day someone will decide that the scheme of European private international law is impaired when some, but not other, national courts decline to investigate foreign law for themselves, and as a result fail to apply it. When that day arrives, a really radical change in private international legal methodology will be forced upon the English courts.[114] It may get messy.

These principles help ensure that the legislation will provide legal stability for those established in the European Union, reduce the cost and unpredictability of litigation and, if this is thought to be material, perfect the internal market and bring closer union among the peoples of Europe. This will be achieved at a cost, which will be paid not only by those who need their answers well before the new legislative code is complete, but also by those versed in, and those who see virtue in, the common law principles of private international law. Still, for every one who would sigh and murmur *sic transit gloria Angliae*, there is another who will observe[115] that one cannot make an omelette without breaking eggs.

[114] For a proposal for legislation in the form of a Regulation, see Esplugues Mota (2011) 13 YBPIL 273.

[115] Whether this observation is properly attributed to Delia Smith, or to the Great Stalin, or otherwise, is a matter on which opinion remains divided.