Characterization of an International Conflict in Private International Law: The Concept and the Complications

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Abstract: Characterization is allocation of a category to the questions raised by factual situation before the court so that its correct legal category and eventually the relevant rule or rules for the choice of law can be applied to it. It deals with the process of assigning a factual situation to a proper legal category. Different result can generate with different characterization making it vital and intricate. In those cases where a different result would be achieved depending on which of several possibly relevant laws is applied, characterization reveals the relevant rule for the choice of law. A judge cannot make any pronouncement for he would not know the rule or choice of law to be applied until he has not ascertained the true basis, that is, characterize the plaintiff’s claim. In majority of cases, it is obvious that the facts must be subsumed under a particular legal category that a particular conflict rule is available and the connecting factor indicated by that conflict is unambiguous. In fact, the categorization may be so obvious as to be automatic.

Various social scientists and jurists have propounded various theories of characterization making the process intricate. Yet recent judicial pronouncements are carving path wherein we can achieve uniformity in the process of characterization.

I. INTRODUCTION

The issue of characterization has been regarded as a fundamental problem to the conflict of law. It was discovered independently and almost simultaneously by the German jurist Kahn and the French jurist Bartin at the end of the 19th Century and was introduced to American Lawyers by Lorenzen in 1920 and to English lawyers by Beckett in 1934.

An ordinary case involves operative facts and issues which are connected with only that legislative jurisdiction in which the court sits and the court simply applies the law of the forum. Whereas a conflict of law case involves operative facts and issues some of which are connected with legislative jurisdiction other than that of the forum. In this type of case no one system of positive law regulates the entire situation. The court might either decide arbitrarily without reference to any system of law, or apply its own law exclusively, or refer the matter to the system of law with which the case seems to have the closest association. It is usual to think of this reference as being accomplished through application of a conflict rule, a rule of the forum by which the issue as defined is referred to a certain law by means of a connecting factor or place or element. Therefore, as mentioned by Robert A. Pascal in “Characterization as an Approach to the Conflict of Laws”, 2 La. L. Rev. (1940), capacity to marry may be referred to the law of the domicile; succession to an immovable may be referred to the law of its situs that is law of the land where the immovable property is situated.

The court which assumes jurisdiction over a case involving foreign element at the first instance has to determine whether the given situation gives rise to rights or imposes obligations or creates a legal relation or an institution or an interest in a thing. It may be pointed out that the same case might be decided differently in different states because of the conflict which might exist in the conflict rules of the states concerned. For instance, the conflict rules themselves might be patently different, as where capacity to marry is referred by one state to the party’s domiciliary law and by another state to his national law, or, the conflict rules may be apparently the same, but actually different because different meanings may be given to the connecting factor in each state, as where domicile is the connecting factor in each state, but one method of determining domicile does not correspond to the other or, the conflict rules may be apparently the same in each state, with the connecting factors the same in content, but the issue not defined in the same manner in each state, as where the necessity of parental consent is legally defined as a question of capacity in one state and as a question of forum in another.

In the Ogden v. Ogden ([1908] P. 46.) a minor Frenchman had married an English woman in England without previously obtaining the consent of his parents as required by French law. An English court considered the French requirement a matter of forum and applied the English conflict rule that form is governed by the law of the
place of celebration, which is England. The court found the French law to be inapplicable and upheld the validity of the marriage. Shortly before, a French court had to decide on the validity of the same marriage. Defining the necessity of parental consent as a question of capacity to marry, the French court applied the French conflict rule that such capacity is governed by the party’s national law, and declared the marriage null. Herein both England and France had the same conflicts rules that forum is determined by the law of place of celebration and capacity by the law of the party’s domicile, by a difference in the definition of the issue led to a difference in result. This problem of defining the issue and the connecting factor is called the problem of characterization.

In Re Martin, Loustalan v. Loustalan ([1900] P. 211.) the court observed two questions to be determined by it, first whether the factual situation falls naturally within this or that judicial category, secondly it may be a case where English law and the relevant foreign law hold diametrically opposed views on the correct classification. There may, in other words, be a conflict of classification, as, for instance, where the question whether a will is revoked by marriage may be regarded by the forum as a question of matrimonial law, but by the foreign legal system as a testamentary matter.

The above mentioned two difficulties are well illustrated in the Maltese Marriage case (Anton v. Bartolo, (1891) Clunet 1171) In this case a husband and wife, who were domiciled in Malta at the time of their marriage, acquired a French domicile. The husband bought land in France. After his death his widow brought an action in France claiming a usufruct in one quarter of this land. There was uniformity in the rules for the choice of law of both countries: succession to land was governed by the law of the situs, but matrimonial rights were dependent on the law of the domicile at the time of the marriage.

Therefore, the first essential was to decide whether the facts raised a question of succession to land or of matrimonial rights. At this point, however, a conflict of classification emerged. In the French view the facts raised a question of succession; in the Maltese view a question of matrimonial rights. When a conflict of this nature arises it is apparent that, if a court applied its own rule of classification, the ultimate decision on the merits will vary with the country in which the action is brought. However, French law classified the issue as one of succession whereas Maltese law saw it as matrimonial property. In the event the court applied Maltese law.

The problem of characterization or classification of the choice of law, as stated above, arises because often a particular relationship, situation or an institution is characterized in one way in one country and in a different way in another country. This tendency of the courts of different countries of characterizing the same factual situation, the same legal relationship or the same institution in diverse categories has often led to grotesque results. Thus, it is pertinent to determine the law according to which the court is going to characterize the factual situation so as to reach a socially desirable and just result because unless the court determines what is meant by capacity, formalities or immovable property, it would be almost impossible for the court to proceed with the case.

Theories of Characterization

i) Lex Fori Theory

The term ‘lex fori’ means laws of the country where the action is brought. This theory was propounded by Bartin, who not only brought the problem of characterization to the fore but also suggested rules which may help in solving such problem, which are as following:

a) A court dealing with the question of characterization must invariably (subject to a few exceptions) apply and decide the issue on the basis of internal law. When a court is called upon to characterize a rule of foreign law, an institution, a legal relationship or some factual situation of a foreign country, it must determine it on the basis of characterization made in its internal law, provided there exists a corresponding rule, institution, legal relationship in the internal law. In case no such corresponding rule, legal relationship or institution exists in the domestic law, it should be determined on the basis of the closest analogy available in its internal law.

b) Once the court has determined that the law applicable is of a particular country or place, then the court should apply that law as it is applied in that country or place, and it should also adopt any subsidiary characterization as might be suggested by the law of that country or place. (Paras Diwan)

According to him, when a judge is called upon to determine a particular issue, he, being trained in the laws of the forum, cannot but decide the issue on the basis of the rules of the forum; for him determination of the issue on the basis of some other law would mean grouping in darkness. Therefore, before the determination of the question as to which foreign law is applicable, the question of characterization has to be answered, by its very nature, in reference to the law of the forum.

However, there are two exceptions to the rule of characterization that is to be made on the basis of lex fori:

(1) Whether the property is movable or immovable is to be characterized on the basis of the lex situs, because this rule would best sub-serve the security of transactions affecting property. Nevertheless it does not mean that the law of situs is given sovereign authority.
(2) When a contract is entered into by correspondence the governing law would be determined by reference to that law which postpones its formation longest. The basis of this exception is also the same as of the first.

It is pertinent to note that a universal application of this theory would result in the application of neither the law of the forum nor of lex causae, but of the law which is of neither. According to Beckett, “a logical application of the theory would result in an English court, through classifying a French rule in a matter different from that in which it is classified in its country of origin, not merely refusing to apply French law when according to French ideas it should be applied, but also applying French law in cases where, according to French ideas, that law is not applicable at all. This is supportable on the basis of logic; otherwise it is so repugnant to commonsense that few courts have ever consistently applied it. Whenever courts have applied it, they have, to avoid the absurd position to which it leads, fallen back on the doctrine of renvoi. But the application of renvoi goes against the logical basis of the theory.

The theory sometimes fails even when an analogy between a foreign rule and internal rule is available and lead to absurd results. The theory leads to most undesirable results where there is no close analogy between the rules of foreign country and the rule of forum. In those cases where there is no similar or identical rule to the foreign rule calling for characterization, the theory entirely fails both on theoretical and practical grounds.

Therefore, Bartin’s theory not merely leads to the indulgences in mechanical jurisprudence but also to socially most undesirable results. It not merely distorts foreign rules and institution but breaks down completely where there is no analogy between the internal rule or institution and the foreign rule or institution. Hence, this theory has not been accepted by any country.

ii) Lex Causae Theory

Despagnet and Martin Wolff, in opposition to Bartin’s theory, propounded the theory of lex causae characterization. According to Wolff “every legal rule takes its classification from the legal system to which it belongs. French law classifies French legal rules, Italian law Italian rules, and an English court examining the applicability of French rules will have to take the French classification into consideration. Even though, English rule on conflict of law can either expressly or implicitly forbid the court to accept the foreign classification. Such exclusion may be based, for instance, on principles of justice of morality. But this will be a rare exception. To examine the applicability of foreign law without reference to its classification may lead to failure to look at foreign law completely.” (M. De Boer, Facultative Choice of Law: The Procedural Status of Choice of Law Rules and Foreign Law 274-275 (Polity Press Publication, 1st Edition, 1996).)

Despagnet further states that when a judge, drawing inspiration from law of the forum and the principles of private international law, decides that a foreign law should be applied to a particular judicial relationship, he must be understood as applying such law so far as it organizes and regulates such relationship. The first thing that attracts the legislator and the first thing determined by him is the nature or qualification of the relationship which he regulates. To disregard his decision in this respect will tantamount to non-application of the law to which the judicial relationship in question was, on principal, subject. If the national law has made a certain question one of capacity, it cannot be said that if the question is covered into one form by the law of the forum then law which should govern the capacity of the individual has been applied because the very principle has been violated.

Cheshire criticizes this theory on the fact that, if the law which is finally to regulate the matter (i.e. the lex causae) depends upon classification, then it is not appropriate to make classification according to a law which in itself requires classification. However, Wolff states that “peculiarity of the basis on which conflict rules are framed does not hold good as a criticism”. For instance, the effect of marriage on the property of spouses is governed by the law of their matrimonial domicile. If two persons are married to each other the court has to apply all those rules operative at their first matrimonial domicile which according to the law there prevailing regulate the effect of marriage on the property of spouses. This is true in so far as it goes, but still it does not refute the criticism that characterization on the basis of lex causae leads into a vicious circle, and that in many cases solely on the basis of this theory one cannot arrive at a socially just result. In such cases where two foreign laws are equally applicable, the theory fails to explain why one law should be preferred over the other. Lorenzen in Cases on the Conflict of Laws 113 (West Publishing Company, 4th Edition, 1953) rightly said “It (Despagnet’s theory) manifestly begs the entire question. The qualification of a legal transaction cannot, in the nature of things, be determined by the law governing the transaction itself, inasmuch as the problem of qualifications is limited to cases where the application of the foreign law depends upon determination of the preliminary question. Under these circumstances it is impossible to decide the preliminary question by the law governing the transaction itself.”

iii) Theory of Two-Fold Characterization

According to the Two-Fold theory of Characterization, the problem of characterization can be best solved by dividing the process of characterization into primary characterization and secondary characterization. The former is for the lex fori Characterization and latter for the lex causae Characterization.
The protagonist of this theory recognize two exceptions to the rule that primary characterization is to be governed by the lex fori, viz., (a) whether things or interest in things are movable or immovable is a question for the lex situs, and (b) where there are two potentially applicable foreign laws and their characterization is the same, then the forum should adopt their common characterization.

As Robertson in Characterization in the Conflict of Laws 118 (University of Toronto Press, 4th Edition, 1996) puts it, the secondary characterization is the delimitation and application of the proper law. According to Cheshire the difference between the primary characterization and the secondary characterization is that the former precedes and the latter follows. This theory maintains that secondary characterization is governed by the lex causae. However, the conflict of procedural rules is governed by the lex fori. At the secondary stage of characterization whether a matter is procedural or not, is to be governed by the lex causae, though, as in the case of primary characterization so here, it is not necessary that the domestic characterization should be followed, rather it should be the classification or private international law.

Cheshire further sub-divides the characterization at this stage into cases, that is, where there is only one lex causae and cases where there are more than one lex causae. In the former case characterization is governed by the lex causae. Further, “once it has been established that by the private international law of England a foreign legal system is the appropriate law to govern the whole of a particular transaction, it seems only rational to admit that the particular view which that law holds with regard to the character of its own domestic rules must also be applied.” However, in the latter case, where there are more than one lex causae, the characterization is governed by lex fori.

The major criticism of this theory, as stated by Dicey, is that it is unclear as to where the line between the primary and secondary characterization is to be drawn. For instance, Cheshire characterizes parental consent as a matter to be governed by the primary classification whereas Robertson maintains that it is to be governed by the secondary characterization, leading to ‘all difficulties inherent in the doctrine of renvoi’

Lorenzen while criticizing the application of this theory states that a transaction which is not valid either under the lex fori or the lex causae will be held valid. He explains that if the law of the forum has decided that a contract or tort is governed by the law of state X and no rule of the procedure of the forum is involved, such questions as to whether a writing required by the law of the state X effects the formation and validity of the contract or relates to evidence, whether by the law of X the running of the statute of limitation discharges a contract or merely bar the remedy for its breach, whether the failure to give notice to the wrong-doer required by the law of state X will discharge the cause of action or whether it is merely procedural requirement for the bringing of the suit, should be governed by the law of the state X. The consequences of this view are that if the law of forum says that the statute of limitation is substantive and the law governing the contract says it is procedural, the action will be maintainable, even though it is not brought within the period of limitation prescribed by either law.

iv) Comparative Law Theory

The Comparative Law theory of Characterization was propounded by Rabel and Beckett, with the view that characterization should be governed by the analytical jurisprudence on the basis of comparative study of laws. Starting on the assumption that “rules of private international law” are rules to enable the judges to decide questions as between different systems of international law either between his own internal law and a given foreign law or between two foreign systems of law,” and therefore these rules “if they are to perform the function for which they are designed, must be such, and must be applied in such a manner, as to render them suitable for appreciating the character of rules and institutions of all legal systems” and as the “classification is simply an interpretation or application of the rules of private international law in a concrete case and the conception of these rules must, therefore, be conception of an absolutely general character”. Thus, as per Jason A. Beckett as mentioned in “Classification in Conflict of Laws” 15 B.Y.B.I.L 59 (1934), “these conceptions are borrowed from analytical jurisprudence that general science of law based on the results of the study of comparative law which extracts from this essential general principles of professedly universal application, not principles based on, or applicable to the legal system of one country only.” Beckett thus asserts that characterization must be based on analytical jurisprudence.

For the purpose of characterization, Beckett has divided the cases into the following three classes: (i) cases not involving characterization of a rule or institution of internal law, (ii) cases involving characterization of rules or institutes of internal law, and (iii) cases involving characterization of rules or institutions of foreign internal law.

The characterization of the first class of cases, according to Beckett is governed by the lex fori. “The only exception which can be made is where it is clear that upon the application of any conception the courts of law of one of two foreign countries must be competent and the two foreign countries must be competent and the two foreign laws are in agreement in following a conception different from that of the lex fori, and in these circumstances a court might in effect, if not in form, adopt foreign conception by the application of a principle analogous to that of the renvoi. As regards to the second class, “in most cases the court will simply by applying the rule-statutory or

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common law – of its internal law, in order to determine its application, its ordinary principles of private international law which can in this connection only be interpreted in the light of general jurisprudence.” In respect of the third class, it is essential that the court should not merely ascertain the purport of this rule as a rule of internal law, but also that it should ascertain in what circumstances it is applied by the courts of the country of whose legal system it forms part. It is only when in possession of this information that a court is in a position to classify the foreign rules or institutions. On the basis of this information the court should classify it according to the conception of analytical jurisprudence.

This theory has been criticized on the ground that it is impracticable. Morris has stated that, “this view is superficially attractive, because judicial technique in conflict cases should be more cosmopolitan and less insular than in domestic cases.” The criticism of the theory may be summarized as follows:

i) The theory is vague and impracticable, as “there are very few principles of universal application, and very little measure agreement as to what they are.” Thus, it is more a theoretical than a practical basis of characterization.

ii) “Characterization on the basis of comparative law would seem to require a supernatural class of judges, deeply learned in comparative law, capable of dissociating problems before them from the law of the forum, and willing to adopt in conflict problems a technique which is entirely foreign to the technique applied by them to other problems.”

iii) The study of comparative law is capable of revealing differences between domestic laws, but of hardly of resolving them. There are minor differences in certain laws of many countries. Therefore, even the most learned ‘analyzing jurists’ cannot remove such differences of classification without thereby alerting the law, for such divergence of classifications is not jurisprudential in nature, it connotes a difference in the law.

**Procedure of Characterization**

i) **Characterization of Factual Situation**

The first stage of procedure of Characterization is characterization of Factual situation. Initially the court has to determine that it has jurisdiction to entertain the case, thereafter it has to decide, before it can select proper law applicable to the situation, whether the factual situation before it constitutes a contract, tort, succession to property, etc. The difficulty arises on account of the fact that different systems of law characterize the same factual situation, institution or legal relationship differently. Thus the main question, at this stage, that arises before the court is categorization of which system it should accept and on what basis it should accept one categorization and reject the other.

According to Ugner, it is sufficient if the case falls within the analytical framework of the legal system of the forum, which he has explained from two English decisions, Re Bonacina (L.R. (1912) 2 Ch. 394.) and Nachimson v. Nachimson (L.R. (1930) 217.). In the former case a contract unsupported by consideration was held enforceable, while in the latter a Russian marriage, not falling within the definition of English marriage as it was dissoluble at will, was given recognition (L.R. (1900) A.C. 21.). Robertson considers Ugner’s formulation rather too narrow, as those institutions which are not known to English law would not receive recognition. This has been explained by him by citing De Nicols v. Curlilier,( [1900] 1 A.C. 21) where a French institution unknown to English law was recognized and held enforceable by the House of Lords. Therefore according to Robertson, in so far as the characterization of foreign legal situation is determined by the lex fori, the term does not mean strictly the internal law of the forum, but a wider concept which needs to be worked out for the purpose of conflict of laws.

It is remarkable that even though there may be some difference in this proposition that characterization in the first stage should be on the basis of the lex fori, there is unanimity or near unanimity as to following exceptional cases where the characterization even at the first stage by the lex fori may be abandoned in favour of some other law. These exceptional situations are the follows:

a) Proprietary rights in respect of property and rights in property give rise to several situations which can lead to different characterization. It is now almost universally accepted that proprietary rights in a thing are characterized by reference to that lex situs. Falconbridge states that, “proprietary rights in things, as distinguished from rights relating to things, are, as a general rule, governed by the lex rei sitae, and that in many situations this general rule imposes itself imperatively as affording the only practical solution of questions of proprietary rights.”

b) The second exception relates to status. The question whether a person has got certain status is to be characterized on the basis of the lex domicili. However, a distinction is to be made between status and incidence of status and between status and capacity. While status is usually governed by the lex domicili, the same cannot be said about capacity. Whether a person possesses a particular capacity cannot be answered simply by reference to the law that governs status. Then, capacity in one transaction may differ
from another, for example, the question of capacity to marry is to be characterized as a matter of intrinsic validity of marriage, the capacity to succeed to property is to be characterized as a matter of succession, the capacity to make an ordinary commercial contract is to be characterized as a matter of intrinsic validity of the contract, and so on. In short, in every case the question of capacity has to be characterized in connection with the kind of transaction into which a given person enters or intends to enter.

c) The third exception arises in those cases where the characterization of the factual situation by the two foreign laws applicable to the situation is the same, then, the characterization at the first stage by reference to the lex fori may be abandoned.

In summary, it may be said that in the countries of common law, including India and in most countries of civil law system including the Soviet Union and most of the East European people’s democracies, the characterization at the first stage of the factual situation, legal relationship, institution, etc. is made by reference to the lex fori. In this regard there is some difference as to the meaning of the lex fori. Some take the view that the lex fori means here the internal law in the narrow sense, while others hold the view that it should mean internal law in the wider sense including the rules of private international law. But it is submitted that the latter view is preferable.

ii) Characterization of Connecting Factor

The second stage of Characterization involves an inquiry of the “connecting factor” or of “localizer”. Such inquiry precedes the inquiry as to the proper law applicable to the given situation or question. On the ascertainment of this, the factual situation, legal relationship or institution is connected to the law of the country which is to be applied.

For instance, when the court at the first stage comes to the conclusion that the factual situation or question at issue relates to succession, contract, tort, marriage, etc. then the court is directed by the choice of law rules of the forum to apply the lex domicilii, lex loci contractus or the lex loci delicti of some such law, these are called the connecting factors. Complications arise when laws of countries of the world differ as to the precise meaning of these terms, such as English law recognizes the doctrine of reverter in cases of domicile, while the American law does not.

There may be a latent conflict of conflict rules, and the difference in the characterization of the question may result in the use of different connecting factors and consequently the election of different proper laws as applied to the same factual situation. If, on the other hand, different connecting factors are specified in the corresponding conflict rules of two countries with respect to the same type of question, there may be a patent conflict of conflict rules applied to the same factual situation, notwithstanding that the question before the court is characterized in the same way in both countries. The third class of cases are those where conflict rules of two countries are in terms the same in that they both use normally the same connecting factor with respect to a question which is characterized in the same way in both countries, but nevertheless there may be a latent conflict of conflict rules, because the place element specified as the appropriate connecting factor in the conflict rule of one country may be characterized differently from the place element specified in the corresponding conflict rule of the other country.

The problem of characterization of the connecting factor is given a different dimension by those authors (such as Robertson) who, though accept the application of the lex fori, are yet inclined to accept the doctrine of renvoi. This means that they would accept the foreign characterization as far as it is indicated by the application of the doctrine of renvoi.

The difficulty involved in the characterization of the connecting factor may be illustrated by the following example: A Spanish domiciled person dies heirless leaving behind some movable property in England. According to Spanish law the state inherits the property of person who dies heirless. Under English law, succession to movables is governed by the lex domicilii of the deceased. There is almost unanimity in the laws of the countries of the world that the property of a person dying heirless goes to state. However, there is a difference of opinion in the laws of countries of the world as to whether state takes the property as an heir, this is the law in Italy, Germany, Spain and India or whether state takes it by forfeiture (such is the law in Turkey). An English court before which the question of succession whether it would accept the characterization of Spanish law, the predominant view is that the characterization of the lex fori governs the matter. However, in the last situation, In the Estate of Maldonado the English court took the view that the Spanish characterization will be recognized, as the law of domicile regulates all aspects of succession to movables.

iii) Characterization of Proper Law

In the third and the last stage of Characterization, the court is called upon for application of the law indicated by the connecting factor, as Robertson called it, “the delimitation and application of proper law”. Apparently, it would appear that once the first two stages have been passed, the application of proper law should follow almost automatically and there should be no difficulty or complication at the third stage. However, in reality it is not so, though in some cases it may happen that there is no difficulty. However, according to Falconbridge the difficulty arises because the thing which is characterized is not the factual situation; but the juridical question raised...
by the factual situation, including the various place element. It is true that once the court has chosen the connecting factor, the link joins the situation in question with some country, and this link also directs the selection of the law of some place as the proper law, and in the third stage of characterization the proper law should be applied to the issue before the court and decision should be rendered accordingly. Thus, the question arises as to the provisions of proper law which shall be applicable. For instance, an Indian court has to decide a case involving the distribution of personal property of a deceased person. Supposing it comes to the conclusion that the domicile of the deceased at the time of his death is the connecting factor, and then, characterizing it on the basis of the lex fori it comes to the conclusion that the deceased died domiciled in France. Or, supposing in adjudication in respect of a contract it comes to the conclusion that the lex loci contractus is the connecting factor and again it finds that the place of connection is France. The question that still remains is, as to the applicability of either French Internal Law or French Private International law. The complications arise, and question becomes vital when the French rules of conflict differ from the Indian rules, the lex fori. Here again it may involve the application of doctrine of renvoi.

Robertson who discusses the problem under the head “secondary characterization” holds the view that on principle the characterization of proper law should be on the basis of lex causae. It is because, once the proper law is indicated by the rules of the forum, the lex causae will determine the question. Cheshire also takes the same view. A brief reference to Dutch Will case and of Ogden v. Ogden will make the problem amply clear. In the former case a Hollander made a holographic will in France. The Dutch law prohibits Hollanders from making holographic will either at home or abroad. Assuming that the Dutch law considers it as one of formalities, Bartin is of the view that the case is once where no uniformity of decision could be arrived at. Cheshire considers it to be a problem of primary characterization and hence holds that the lex fori governs the matter. On the other hand, Robertson who considers it to be a matter of secondary characterization, says that if such a will disposing of movables is executed in England, the English court has to enquire as to what is the meaning of capacity under the French law and of formalities under the English law: the English private international law lays down that capacity is governed by the lex domicili and formalities by the lex actus.

Process of characterization includes lot of intricacies that can be simplified through application of theories but a well formulated solution is yet to be identified. It can be said that whether or not the question and the subsidiary questions that might arise after the foreign law has been chosen by the lex fori, should invariably be referred to the lex causae. The answer to the question would be simple if the characterization of the problem at this stage merely involves the application of foreign internal law—the answer would be that, the foreign law should govern. Thus, if the proper law to be applied is directed to be, such as, French law, then if the case is, for instance, of contract or of tort, all subsidiary questions, as for instance, whether the contract is to be regarded as a loan or deposit, or whether master is responsible for the tort of the servant, should be governed by the lex causae. However, complications arise due to difference in one factual situation from another and also interpretation of connecting factors may differ from country to country. It is pertinent to note that besides lex situs, which determines the characterization of property and there is hardly any consistent theory of characterization. In Macmillan Inc. v. Bishopsgate Investment Trust plc (No3) (1996) 1 W.L.R. 387, a case in which characterization was made by the lex fori, Auld LJ observed that, “however, classification of an issue and rule of law for this purpose the underlying principle of which is to strive for comity between different legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori or that of the competing system of law, which may have no counterpart in other system. Nor should the issue be defined too narrowly, so that it attracts a particular rule under the lex fori which may not be applicable under the other system.” Therefore, Characterization should not be restricted but must be determined based on the fact in issue.

II. REFERENCES