Restitution in Private International Law

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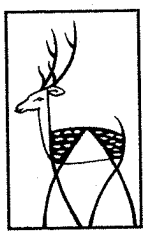

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categories of the *lex fori*.[24] The *lex fori* will characterise in accordance with its rules in a liberal manner, not insisting that all its technical requirements are complied with. This method of characterisation could be referred to as the "liberal" or "enlightened" *lex fori*. Therefore, under private international law, concepts such as "contract", "tort", "corporation" and "unjust enrichment" are to be given a liberal interpretation. For example, in *Re Bonacina*[25] the Court of Appeal characterised the matter before it as contractual even though the relevant foreign agreement was not supported by consideration.[26] Likewise, in *Batthyanay* v. *Walford*,[27] an action akin to waste, in relation to land situated in Austria and Hungary and subject to a *fidei commiss*, was characterised by the Court of Appeal as being in implied contract.[28] There was no indication that an Austrian court would have characterised it as such; something which at any rate would have been highly unlikely. Nor could it be confidently said that this foreign claim was on all fours with an English claim in implied contract. What is significant for present purposes, is that the Court of Appeal was not deterred by the fact that the particular foreign claim was not recognised under English law. It characterised it in accordance with what it considered to be the closest equivalent under the *lex fori*. Characterisation therefore is ultimately a question of substance and not of form. Although the selection of such issues or matters is determined by the *lex fori*, it is done so in a liberal manner.

2.2 The "Thing" to be Characterised?

It is submitted that there is also a third problem, which arises in relation to characterisation, possibly more fundamental than the two recognised by Cheshire and North. There is the inherent problem of determining the "thing" to be characterised. It is all very well to say that the *lex fori* is not to be applied strictly; however, a significant inquiry is isolating the thing to be characterised. This problem is particularly prevalent in relation to international restitutionary claims. It is not clear in fact whether it is the claim,[29] the rule,[30] the question,[31]

[24] *Macmillan Inc.* v. *Bishopsgate Investment Trust Plc (No.3)* [1996] 1 W.L.R. 387, 407, *per* Auld L.J. See also Cheshire and North, pp.38–9; Dicey and Morris, pp.38–43, 45–8, 1472; Kahn-Freund, pp.227–36.

[25] [1912] 2 Ch. 394.

[26] The same approach will presumably be adopted in relation to torts under s.9(2) of the Private International Law (Miscellaneous Provisions) Act 1995.

[27] (1887) 36 Ch.D. 269.

[28] There are strong arguments for doubting the correctness of the Court of Appeal's characterisation in *Batthyanay* v. *Walford*: see below ch. 7.3.3.

[29] Which can also be equated with the "cause of action": Cheshire and North, p.36; J. Bird, "Choice of Law" in F.Rose (ed.), *Restitution and the Conflict of Laws* (Oxford, 1995), p.75. In *Sayers* v. *International Drilling Co. NV* [1971] 1 W.L.R. 1176, 1181, Denning M.R. considered that one system of law must be applied to all the issues, including claim and defence.

[30] See *Re Cohn* [1945] Ch. 5, 7–8; *Re Maldonado* [1954] P. 223, 245, *per* Evershed M.R.

[31] *Ogden* v. *Ogden* [1908] P. 46, 57, 65, 74; *Beaudoin* v. *Trudel* [1937] 1 D.L.R. 216, 222, *per* Macdonnell J.A. (Ont.C.A.) ; *Re Maldonado* [1954] P. 223, 239, 244, *per* Evershed M.R. See also