DISCUSSION ON CHARACTERISATION* IN SOUTH AFRICAN PRIVATE INTERNATIONAL LAW*

*by Justin Leach***

1 Introduction

To inform those unfamiliar to the subject, private international law is simply that branch of a country's domestic law, which regulates the relationship between private individuals when foreign legal rules are in some way concerned. This branch generally has three sub-branches: Jurisdiction (choice of court), choice of law and recognition of foreign judgments.[1] The discipline of characterisation forms part of the choice of law sub-branch and is explained further below.

This article discusses the problem of a 'gap' arising from the phenomenon of characterisation in South African private international law, by considering the current case law authorities on the matter as well as the criticisms (and suggested solutions) of legal academics. A general discussion of characterisation, with some alternative suggestions for dealing with the problem, is also mooted for consideration in a bid to air ideas. No short work could do justice to the problem visited here. This work seeks to show that the obsession with characterisation in the choice of law arena is perhaps ill founded and should perhaps be simplified in favour of a 'most natural results' approach.

Few problems have vexed me quite like the questions I have sought to answer hereunder, with each proposed solution came a myriad of additional problems and the solutions appear ever more convoluted. As I waded through the mire of academic opinion and liberally applied judicial discretion I began to wonder if the individuals seeking the solution to their problem were not lost in the debate, if the overly complex issue of characterisation was not simply a petulant child of the academic mind and should be done away with in favour of a simpler approach.

* Synonymous, in this context, with classification, though characterisation is the term used throughout this text.

** This paper was originally an assignment submitted in partial fulfilment of the elective course Private International Law 410 lectured by Professor TJ Scott and has been adapted for this publication. I wish to thank Professor Scott for his encouragement and endearing manner of teaching.

*** BA (UP), Final year LLB Student, University of Pretoria.

1 CF Forsyth *Private international law: The modern Roman-Dutch law including the jurisdiction of the High Courts* (2003) 4 - 5.

2 A brief description of characterisation

The problem of characterisation exists in the reality that different legal systems may view the same set of facts as resulting in a legal question or problem which is governed by different normative rule sets, for example: a contractual question under one legal system might well be a matrimonial property question under another system.[2] This in turn has sparked a debate over which legal system should take precedence, causing characterisation to become a confused and disputed concept.[3] In essence it would appear that this concerns the determination of the legal category into which a legal problem, arising from the specific facts in issue, may be applied. Thus, the object of the characterisation exercise is to determine the set of norms that govern this particular question. In the case of private international law this means that characterisation determines which 'conflicts rule' would apply to resolve the dispute.

Forsyth asserts that legal rules or norms are classified.[4] Booysen J accepted this in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd (Laconian case)*.[5] This approach to classification may however yield unsatisfactory results, such as the situation experienced in the *Laconian* case. In this case a number of rules were uncovered before the legal question was properly ascertained and in effect a solution was then chosen and justified accordingly.[6] In reinforcing his point that legal rules are characterised, Forsyth states that a litigant asserts that a legal rule is applicable whilst the other litigant rejects this, hence the rule must be characterised in order to determine which legal rule set applies to the matter.[7] The problem with this statement is that a factual situation gives rise to legal consequences which exhibit an inherent legal character. Hence, in a domestic legal setup,

2 Forsyth (n 2 above) 68 – 69.

3 Forsyth (n 2 above) 68 describes characterisation as the first step in dealing with a multilateral conflicts rule, ie ascertaining the category of the problem in question which may then be combined with a factual connecting factor to determine the applicable legal system. This in itself is not confusing; the problem comes arises when one is faced with the *lex causae* (73 - 74) approach to characterisation which uses the (as yet undetermined) applicable legal system to classify the legal problem in order to determine the applicable legal system, resulting the problem of circular logic. It must also be said in this regard that the problem cannot be escaped through recourse to characterisation purely according to the *lex fori* as this will yield unsatisfactory and unjust results; see in this regard the English case *Ogden v Ogden* 1908 P 46.

4 CF Forsyth 'Enforcement of arbitral awards, choice of law in contract, characterisation and a new attitude to private international law' (1987) 93 *South African Law Journal* 4; see para 4 below for discussion on the general approach to characterisation.

5 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) (*Laconian* case).

6 See further discussion below regarding the residual *lex fori* approach adopted by the court.

7 n 2 above, 71.

when a dispute arises over which rules apply the factual situation is scrutinised to glean the legal nature of the problem. It is crucial to note that the legal nature or character of the problem is not determined *ex post facto*; the enquiry is to determine what the already existent character of the problem is. Why is the reverse true in the private international law realm? The possible applicable rules are considered characterised and then chosen to suit the situation; in effect the rule chooses the situation rather than the situation choosing the rule, as is normal and logical. Regardless, courts favour the characterisation of legal rules, although this situation should perhaps be questioned and revisited with the same logic applied to ordinary domestic legal disputes.[8]

3 Characterisation and the gap

In the *Laconian* case[9] the court per Booysen J was called on to enforce an arbitration award that was granted in terms of and governed by English law. A large part of the judgment concerned the question of prescription. It was found that the applicable English prescription rule was procedural in nature, which in terms of South African conflicts rules requires that the *lex fori* be applied. On the other hand, the South African prescription rule was found to be substantive in nature, which in terms of South African conflicts rules requires the application of the *lex causae*.[10] Hence a gap was formed, in terms of the choice of law rules, neither legal system was applicable. Booysen J resolved this by asserting that characterisation is an interpretative process and thus procedural. This logic led him to the adoption of a residual *lex fori* approach.[11] The same approach was followed by the court *a quo* in *Society of Lloyd's v Price, Society of Lloyd's v Lee* (*Price* case).[12] Bennett and Kopke[13] offer a solid criticism in this regard in stating that:[14]

8 *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 5 SA 393 (SCA); see also *Society of Lloyds v Romahn* 2006 4 SA 23 (C).

9 n 5 above.

10 To elucidate the reason for this situation: once the *lex causae* has been determined then it is generally accepted court practice that only the applicable substantive rules of said *lex causae* may be applied, and that procedural rules are governed by the *lex fori*; various reasons for these rules exist, see in this regard: E Khan 'Conflict of laws' (1986) 12 *Annual survey of South African law* 537 - 538; Forsyth (n 2 above) 75.

11 n 5 above, 524. This situation should be avoided as the court does not properly evaluate which rules should be applied but rather in an almost irrational manner retreats into its comfort zone for convenience sake. This is discussed further by TW Bennett & K Kopke '*Society of Lloyd's v Price*: Characterisation and "gap" in the conflict of laws' (2009) 125 *The South African Law Journal* 65.

12 n 9 above.

13 Bennett & Kopke (n 12 above) 65.

14 As above.

> Allowing the forum to stipulate a category without paying any regard to other potentially applicable laws, however, may obviously distort the choice-of-law process, not to mention suggest judicial chauvinism and even encourage forum-shopping.

The supreme court of appeal in the *Price* case rejected the court *a quo*'s usage of the residual *lex fori* approach to resolve the 'gap' problem. The appeal court stated that an informed policy driven-approach should be adopted to ascertain which of the competing legal systems has 'the closest and the most real connection with the legal dispute before [the court] ...'.[15] This view appears to be correct, as the court seeks to ascertain the most natural legal system to deal with the legal problem. The court then considered numerous factors that may indicate such a 'close and real connection' and in this instance most of the factors considered arose out of the contract in issue. It is submitted that there is no reason why this same logic could not be applied to matters beyond the scope of contract law. Any number of facts in any situation may be indicative of a legal system, which should most naturally govern a particular issue. It would seem that the court in *Society of Lloyd's v Romahn*[16] (decided shortly before the *Price* case) also adopted the approach of seeking the 'proper law'.[17] In this decision the *via media*[18] approach was followed. The operation of which is as follows: the court must consider the question raised by the factual situation by considering the rules of the two potentially applicable legal systems in relation to the facts to determine whether, on the facts, a question is in fact raised by either legal system. Once this has been done, the court has a legal question and may then match this question to the question required by the potentially applicable conflict rule.[19]

The problem with this approach is that the court must still balance the contentions of the two legal systems. Thus, the *via media* approach does not provide an answer, but merely a guideline to the enquiry, the quality of which is dependent on how the court informs itself and evaluates the foreign legal question. This may lead to 'result shopping' as the court exercises a wide discretion on the basis of reasonableness and equity rather than the most correct/naturally applicable system. In other words: the court selects a result and sets about justifying the rule rather than the seeking the governing rule to determine the result.

15 *Price* (n 9 above) para 25.
16 n 9 above.
17 *Price* (n 9 above) para 82.
18 The approach posited by Falconbridge in his article 'Conflict rule and characterisation of question' (1952) 30 *Canadian Bar Review* 103. This article could, unfortunately, not be obtained at the time of drafting. It is, however, discussed at length in C Turpin's 'Characterisation and policy in the conflict of laws' (1959) *Acta Juridica* 222.
19 Turpin (n 19 above) 223.

The problem with the *Price* decision is that the court failed to provide a sufficient explanation of how it decided on the factors to be used in determining the legal question and thus the applicable legal system. The court effectively failed to give substance to its 'most closely connected' approach. This allowed the *via media* approach, which the court used in conjunction to upstage a potentially significant development.[20] The problem with the *via media* approach may be seen in *Laurens NO v Von Höhne*[21] where the court used *via media* as a justification for tainting the decidedly applicable *lex causae* with the principles of the *lex fori*, in effect creating a hybridised set of rules tailored to the specific situation under the guise of policy considerations.[22] The court itself, in support of the *via media* methodology states:[23]

> If no regard is had to foreign law, what is likely to ensue is that the nearest analogue of the *lex fori* is laid on a Procrustean bed and subjected to a process of chopping off or stretching.

In the same manner, however, policy considerations become nothing more than a theoretical Theseus[24] laying the *lex causae* on its own procrustean bed and shaping it to suit the *lex fori*. This showed the *via media* applied by our courts to be nothing more than Latin terminology for unbridled judicial discretion.

3.1 Inherent character

Once the most 'closely connected' or 'most natural' legal system (*Lex causae*) is determined using appropriate factual considerations, the next step is to find the specific foreign legal rule governing the situation. Seen from this perspective characterisation should not be a problem, as legal rules bear their own inherent character ascribed to them by their own legal system. Thus, it is proposed that the starting point in a choice of law situation is not characterisation but rather the mere averment that a foreign legal rule applies. By this it is meant that a rule's character is not some separate aspect required for the rule's existence, but instead is an inextricable part of the rule and can only be properly viewed and applied by taking cognisance of the context of its own legal system, the purpose[25] specifically for which it exists within the society it originally sought to govern.[26] In this way the question of law is dealt with in the most natural way, as if it were

20 C Schulze 'Conflict of laws: foreign judgments' (2006) 32 *Annual Survey of South African Law* 837 839.
21 *Laurens NO v Von Höhne* 1993 2 SA 104 (W) 117-119.
22 The cornerstone of the *via media* approach.
23 n 22 above, 118; referring to Forsyth (n 5 above).
24 Greek mythology: Theseus ended Procrustes' terror spree by killing him in his own manner, by laying him on his own steel bed and 'fitting' him to it.
25 *Price* (n 9 above) para 27-28.
26 Schulze (n 21 above) 839.

raised before a court of the land whose law is determined to apply to the matter. The court (a court of the *lex causae*) dealing with the matter should not be overly swayed by notions of achieving the most equitable result within its own context but should rather seek the result most like that which would naturally have ensued from the situation; the result which would have ensued had the matter been brought before the *normal* (foreign) court, which *normally* would have had jurisdiction. I respectfully submit that this is the result that the appeal court sought to achieve in dealing with the *Price* case, although the court differed in its reasoning.[27]

3.2 Prescription as a unique problem area

To allow prescription to vary depending on whether or not the prescription rule is substantive or procedural in terms of the *lex causae*[28] is artificial and may result in forum shopping[29] among other problems, a fact which was quite correctly noted by the court in the *Price* case. In a bold and commendable manner the court stated that the specific nature of the prescription in question was irrelevant as the law with the 'closest and most real' connection had been ascertained, and as such prescription as it was pronounced under that (proper) law should be applied.[30] Unfortunately in this same vein the court digressed into a discussion of the inconsistency of the *lex causae* in respect of prescription rules, seeing this as cause to disregard the distinction between substantive and procedural prescription; effectively leaving the question of prescription in the same precarious position it was for cases where the *lex causae* is found to treat prescription in a consistent manner. As Neels[31] suggests, perhaps it would be more appropriate to create a general exception to the rule that procedural rules are governed by the *lex fori*. Such an exception would with cunning simplicity state that issues of prescription are always dealt with in terms of the *lex causae*, thus resulting in the legal effect most naturally ensuing from the factual situation, since the resultant effect of prescription on the particular situation then has

27 *Price* (n 9 above) para 25-28

28 Hence in a mechanical fashion one applies the *lex fori* rules regarding prescription when the *lex causae* characterises the specific prescription question as procedural, as was the situation visited in the *Laconian case* (n 5 above); it should be noted that the reverse is not necessarily true.

29 Example: a legal situation/claim may well have prescribed in terms of the *lex causae* but simply on the strength of the rule of prescription being procedural a party may approach a South African court because in terms of South African law the claim may still be possible; the reverse is also true as it would, clearly be artificial to disallow a claim which is valid and enforceable in terms of the *lex causae* but which is deemed not so merely because the dispute arises before a South African court.

30 n 9 above, para 28.

31 JL Neels 'Tweevoudige leemte: Bevryende verjaring en die internasionale privaatreg' (2007) 1 *Tydskrif vir die Suid-Afrikaanse Reg* 178, as cited and discussed in Bennett & Kopke (n 8 above) 69.

the legal effect it would have had if the scenario had come before a court of the *lex causae*. Effectively this negates the possibility of forum shopping on the basis of prescription. Further to this point it is apparent that prescription is the most common legal rule-type giving rise to a 'gap' through characterisation, therefore such an exception to the existing rule could well be founded to ensure consistent results without the need for *ad hoc* rules to be created. In this regard the approach suggested by Neels[32] also, and rightly so, does away with the illogic of separating prescription from the main issue based purely on the character of the specific prescription rule within the *lex causae*.[33]

4 Proposals for resolving the characterisation issue

The discussion below bears little authority in law and is intended as an area for consideration of ideas beyond the scope of clinical academic debate, where the existing approach to ascertaining the applicable legal system in conflicts cases may be questioned on a fundamental level.

4.1 Determining the applicable legal system without characterisation

The most apparent problem from the discussion above is how exactly the 'most naturally' applicable legal system is to be determined. If characterisation is to be avoided then the 'most naturally' applicable legal system must be found with sound reasoning and particularity, and dealt with question by question according to the determination. The fact that a matter appears before a court of the *lex fori* with the suggestion that a foreign legal rule applies shows that a factual situation with legal consequences arose under one legal system and that the situation has now, in some way, migrated to be decided by the court of another legal system. Such a situation may very quickly and permanently be relocated physically or figuratively, to operate under another legal system as in the case of *Frankel's Estate v The Master*.[34] In such an instance a simple conflicts rule such as 'the proprietary consequences of a marriage are determined by the law of

32 n 32 above, 69-70.

33 Khan (n 11 above) 542, also appears to support this view, albeit indirectly when he states that the *lex causae* of a claim should govern all aspects of the claim.

34 *Frankel's Estate v The Master* 1950 1 SA 220 (A); In which a man and women were married in Czechoslovakia in 1933, at the time of the marriage the husband was domiciled in Germany whilst the Wife was domiciled in Czechoslovakia. No antenuptial contract was concluded. Shortly after the marriage the coupled moved to South Africa where they intended to settle permanently; having so

the husbands domicile at the time of entering the marriage' as applied in South Africa will only generate artificial results because there is no longer a 'real' link to the legal system under which the factual situation originated. In *Frankel's* case the newlywed couple's near immediate and permanent move from Germany to South Africa meant that for all intents and purposes their marriage subsisted as a South African marriage. The only connection to Germany for the purposes of the marriage was that it was the husband's domicile[35] at its conclusion in 1933. Why should this fact govern the marriage in perpetuity? The husband was naturalised as a South African in 1938. It is therefore suggested that perhaps marriages and other legal relationships should also be capable of a form of 'naturalisation'. Essentially such a possibility would mean that the factual situation dictates the applicable legal system rather than the classification of the contended legal rule, thus classification becomes irrelevant to the determination of which legal system to apply as the facts and circumstances of the case present the naturally applicable system by way of indicative factors[36] much like those considered when ascertaining the proper law applicable to contracts. Classification is thus relegated to its usual position of providing context for interpretation.[37]

A further argument in support of this position would be to query whether or not a couple may alter the proprietary consequences of their marriage by agreement. If this is possible, it begs the question why this change could not be effected by tacit means, such as moving to another country to live as husband and wife indefinitely.[38]

4.1.1 Static and dynamic legal issues

At present from a private international law perspective, legal rules are seen as static, which has led to the obsession with

settled they remained, the husband was naturalised as a citizen of the British Empire in 1938. He subsequently died in 1948, the wife then sought a declaratory order stating that the marriage was in community of property on the basis that the proprietary consequences of a marriage be determined by the law of the place of the intended matrimonial home; the master opposed this invoking the accepted rule that the proprietary consequences of a marriage are determined by the law of the husbands domicile at the time of entering the marriage; the master's contention was upheld.

35 The problem is not that it is the husband's domicile, the same issue would exist if it were the wife's domicile or the *lex loci celebrationis*, the problem here is that the rule is so final, causing a single moment in time to govern indefinitely.

36 Khan (n 11 above) 543.

37 Although the forum should apply its own normal interpretation rules taking cognisance of the foreign context because it would be unreasonable and infeasible to expect courts to import interpretation rules and general procedural rules; the exception for prescription as posited above should still stand.

38 Of course such tacit means would need to be significant; a legally acceptable threshold for acceptable tacit expression of the desire to alter the proprietary consequences of a marriage would need to be developed.

characterisation in order to ascertain rules to resolve disputes. The solution visited in 4.1 above proposes that some legal rules should be seen as dynamic, and dependent on the factual situation.[39] In essence this view holds that factual situations give rise to certain legal consequences (legal facts), some of which are dependent on the factual situation, whilst others exist independent of such factual situations. Those that are dependent legal consequences may change as the situation changes, including the possibility of having the applicable legal system change with the situation. Whilst on the other hand, those consequences that are static exist in terms of the legal system under which they arose and cannot be changed. For example there should be a fixed rule when dealing with the validity of a marriage. It is determined at the time of the conclusion of the marriage by the legal system under which the event occurs and the legal factual result cannot change once it has occurred.[40] The marriage is either valid or invalid as it is dependent on what happened factually at a specific point in time. Contrariwise, the proprietary consequences of a marriage exist in an ongoing factual situation which is factually not dependent on a particular moment in time except from the artificial and narrow perspective of unyielding conflicts rules. A husband and wife may organise their lives together as they see fit. Thus it makes little sense that the consequences of their decisions be governed by an arbitrary fact at an any point in time since in the meantime they will do what they like, regardless of the law.

The consequences of these organisational decisions are left to be determined by a court as and when a dispute arises based on the specific facts. A rule in this regard cannot be so flimsy as to change the legal system governing the proprietary consequences of a marriage every time the couple go on holiday. A simple threshold requirement would strengthen the rule and remedy any absurd results. Hence it should be possible for the legal system governing such consequences to change with the factual situation. This methodology is proposed as a starting point for an enquiry into the factual situation (giving rise to the legal question) in order to ascertain the applicable legal system without recourse to characterisation, with all its inherent problems.

4.2 Inherent character of rules

Lastly is bears mentioning that the character of a rule is a fact of the particular legal system. It is an automatic process inherent to each

39 Certainly not all legal rules should be seen in this light. However, there should be good reason why a rule should not change as situations change.

40 Except reconstituting the marriage with a new factual occurrence, but this would still be a different occurrence at a different time.

and every legal system. Characterisation may take place at different times. If the logic of the static, alternatively the dynamic legal facts is followed, then it must be seen that static legal facts are characterised when they come into being and must retain their character in terms of the *lex causae*. In the case of dynamic rules, they may be re-characterised in the event that the applicable legal system is altered. Thus the forum considering these rules should query whether the rules are required to be characterised at the time of the legal proceedings, in which case this must be done in terms of the *lex fori,* or if the characterisation already exists, according to the *lex causae*.

5 Concluding remarks

Ascertaining the applicable legal system in a choice of law is important. It is submitted that it should be based on a factual inquiry to determine the legal issues in order to find the most natural and most closely connected legal system to govern the specific situation before the court. Uniformity of decision-making may well be achieved by the forum seeking to be as much like a court of the *lex causae* as is reasonably possible, provided the applicable legal system is properly ascertained. Courts must use sound reasoning to ascertain the rules governing the situation and must then adhere to precedent. Characterisation cannot be used as an excuse for equity shopping, nor should it be used as an excuse to uphold the *lex fori* arbitrarily. The Supreme Court of Appeal's decision in the *Price* case would seem to be moving in the direction of a 'natural results' approach. However, the basis for determining the applicable legal system should be revisited due to the convoluted nature of characterisation.