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**BEYOND THE INELUCTABLE:**  
**AN EXAMINATION OF CHOICE OF LAW RULES**  
**IN PROPERTY**

(Volumes I and II)

VOL. II

**JANEEN MARGARET CARRUTHERS**

**Thesis submitted for the degree of Ph.D.**

**School of Law**  
**Faculty of Law and Financial Studies**  
**University of Glasgow**

**March 2002**

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## Chapter Nine

### The Contract/Conveyance Borderland

#### Immoveable Property

When dealing with a transfer of immoveable property, it is important to bear in mind the distinction which exists between an agreement to create or convey an interest in such property, and the actual conveyance of such an interest.<sup>1</sup> The distinction, which is long-standing,<sup>2</sup> was more recently relied upon in *Hamilton v. Wakefield*,<sup>3</sup> where Sheriff Jessop held that, “*Scots law does recognise the validity of an obligation to convey heritage made in a foreign country in accordance with the legal requirements of that foreign country.*”<sup>4</sup> The distinction was also observed in *British South Africa*

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<sup>1</sup> Savigny, F C, ‘*A Treatise on Private International Law*’ (1869), p269; and Falconbridge, J D, ‘*Essays on the Conflict of Laws*’ (1947), p523. Falconbridge suggests, at p528, that, “... *there may be sound reasons of social convenience or practical expediency for resorting to the lex rei sitae as to some legal relations with respect to land and to some other law as to others.*” Cf. Second Restatement (Reese, W L M, 1971), paragraph 189, comment (a); Robertson, A H, ‘*Characterization in the Conflict of Laws*’ (1940), p217/8; Schott & Rembar, ‘*Choice of Law for Land Transactions*’ (1938) 38 Col. L. Rev. 1049, at p1049; Goodrich, H F, ‘*Two States and Real Estate*’ (1941) 89 Uni. of Pen. L. Rev. 417, 419; and Colwyn Williams, D, ‘*Land Contracts in the Conflict of Laws – Lex Situs: Rule or Exception*’ (1959) 11 Hastings Law Jo. 159, 165. Weintraub referred to the dichotomy as “*another major crack in the situs monolith.*” (Weintraub, R J, ‘*An Inquiry into the Utility of ‘Situs’ as a Concept in Conflicts Analysis*’ (1966) 52 Cornell L.Q. 1, 35) Cf. Gardner, J C, ‘*The Decreasing Influence of the Lex Situs*’ (1934) 46 J.R. 244, 253.

<sup>2</sup> E.g. *Cunninghame v. Semple* (1706) VI M. 4462, at p4464: “*The Lords found the indentures, though not made according to the forms and laws of this kingdom, may be the title and foundation of a process for claiming a succession or heritage of real rights here.*”; and *Cood v. Cood* (1863) 55 Eng. Rep. 388, per Sir John Romilly, M.R., at p392: “... *the law of which country is it that governs the transactions and the actors in it? The right to land in Chili [sic] must, no doubt, be determined by the lex loci [presumably shorthand for the lex loci rei sitae], but a contract entered into between three English gentlemen, two of them domiciled and residing in England, and the third residing in Chili, but not having acquired a foreign domicile must, I think, be governed and construed by the rules of English law.*” Cf. Erskine, ‘*Institute*’ III.2.40.: “... *though obligations to convey, if they be perfected secundum legem domicilii, are binding here; yet conveyances themselves of subjects within Scotland are not always effectual, if they are not executed according to the solemnities of our law. In the conveyance of an immoveable subject, or of any right affecting heritage, the granter must follow the solemnities established by the law ... of the state in which the heritage lies, and from which it is impossible to remove it.*”

<sup>3</sup> 1993 S.L.T. (Sh.Ct.) 30.

<sup>4</sup> *Ibid.*, p33. Cf. *Crichton’s Trustee v. Crichton’s Trustee* (1706) VI M. 4489: “*Personal contracts, or even obligations to convey heritage in Scotland, which are executed abroad, and according to the forms there established, may be effectual; but the deed in question ... laid [the granter] under no*



*Co. v. De Beers Consolidated Mines Ltd.*,<sup>5</sup> but in that instance, Cozens-Hardy, M.R. alluded to the subordinate nature of the contractual *lex causae*, stating that, “*Contracts relating to immovables are governed by their proper law as contracts, so far as the lex situs of the immovables does not prevent their being carried into execution.*”<sup>6</sup>

According to Article 3 of the Rome Convention on the Law Applicable to Contractual Obligations, contracting parties may select the law which is to govern their contract, even where the subject matter of the contract is a right in immoveable property or a right to use immoveable property, but according to Article 4(3), insofar as the applicable law has not been chosen, “... *to the extent that the subject matter of the contract is a right in immoveable property or a right to use immoveable property it shall be presumed that the contract is most closely connected with the country where the immoveable property is situated.*”<sup>7</sup> Furthermore, it is submitted that Article 4(3) is

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*obligation ... unless it be good as an actual settlement of heritage, to the validity of which it is essential, that it be completed according to the rules of our own law.”; Robertson’s Creditors v. Mason’s Disponees (1706) VI M. 4491; Countess of Findlater and Seafield v. Earl of Seafield 1814 Faculty Decisions 553, at p555: “The doctrine regarding the necessity of strict Scots law formality relates only to the actual feudal transmission of heritable rights, not to deeds of contract binding parties in regard to these rights.”; Adams v. Clutterbuck (1883) 10 Q.B.D. 403; Mackintosh v. May (1895) 22 R. 345; and Gaillard v. Chekili [2001] I.L.Pr. 33. In Hamilton v. Wakefield, Sheriff Jessop held “In terms of that contract the seller was bound to grant a conveyance in proper Scots form and completed in accordance with the requirements of Scots law which would actually transfer the heritable subjects to the purchaser.” (ibid.) Cf. Falconbridge, ibid., at p528: “... it has sometimes been held and more frequently assumed that questions arising from contracts with respect to land ... may be governed by some other law [than the *lex rei sitae*].”*

<sup>5</sup> [1910] 2 Ch. 502.

<sup>6</sup> *Ibid.*, p514/5, citing Westlake, J, ‘Private International Law’ (2<sup>nd</sup> edition), paragraph 216. Consider Morris, J H C, ‘Cases and Materials on Private International Law’, 4<sup>th</sup> edition, at p351: “*Contracts relating to land are governed, not by the lex situs as such, but by their proper law, which is usually but not necessarily the lex situs.*”

<sup>7</sup> Cf. Second Restatement, paragraph 189: “*The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other law has a more significant relationship under the principles stated in paragraph 6 to the transaction and the parties, in which event the local law of the other state will be applied.*” (Reese, *ibid.*) E.g. where the *lex situs*, but not the *lex loci contractus*, imposes a contractual incapacity on one or both of the parties, it might be considered that the *lex loci contractus* has a more significant relationship to the transaction *etc.* and should, accordingly, be applied (particularly if the parties are domiciled in the *locus contractus*). Consider in this regard *Polson v. Stewart* (1897) 167 Mass. 211, *per* Holmes, J.: “... *the lex rei sitae cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it.*”



the least likely of all the Article 4 presumptions to be rebutted by Article 4(5) which applies where “... *it appears from the circumstances as a whole that the contract is more closely connected with another country.*”<sup>8</sup>

While the distinction between real and personal rights may be clear in theory, in practice it may be less so.<sup>9</sup> It is quite feasible that a party, obligated in terms of an enforceable contract, may nevertheless be encumbered by a legal disability under the *lex situs*, which prevents him or her from performing the obligation or carrying out the agreement. The contractual *lex causae* (where that does not coincide with the *lex situs*<sup>10</sup>) may subsequently make an order, or grant relief, which conflicts with the *lex situs*. In such a case, the general view would appear to be that the *lex situs* must prevail: “*Thus, irrespective of what the law governing the contract may provide, it is*

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<sup>8</sup> The authors of the Giuliano & Lagarde Report suggest, however, at p21, that the Article 4(3) presumption would probably be rebutted in the case of a contract between two Belgians, for rental of an Italian holiday home, with the result that their contract would be governed by Belgian law. (Giuliano, M and Lagarde, P, ‘Report on the Convention on the Law Applicable to Contractual Obligations’ [1980] OJ C282)

<sup>9</sup> E.g. Is the need for delivery a contractual or proprietary matter? Do repair and maintenance covenants incorporated in lease or security documentation run with the parties, or with the immoveable subjects? Consider Venturini, G C, ‘International Encyclopaedia of Comparative Law, Volume III, Chapter 20 - Property’ (1976), at p22: “While, for example, according to French, Belgian, Italian and Japanese law, title is acquired as a result of the contract itself, other legal systems require ... that immoveables must be registered in the appropriate register etc.” Cf. Gardner, *ibid.*, p253; unattributed note in (1963) 111 Uni. Pa. L. Rev. 482 (per Weintraub, *ibid.*): “... the fact that many land transactions can fit comfortably into either characterisation demonstrated the inadequacy of the contract-conveyance dichotomy as the sole choice-of-law rule.”; and Goodrich, *ibid.*, at p425: “Perhaps the distinction is valid, but it must be confessed that it is just a little hard to follow.” Falconbridge considered that the contract/conveyance distinction was imposed, “... without sufficient or indeed much consideration of the difficulties inherent in the alleged distinction between interests in land and contractual or personal rights with respect to land, or without much or sufficient consideration of the possible conflicts between rights of the parties existing under the *lex rei sitae* and the rights of the parties as declared by a court in an action in a country other than that of the *situs* of the land.” (*ibid.*, p528)

<sup>10</sup> E.g. Where Article 4(5) displaces the presumption in Article 4(3), or where the law selected according to Article 3 is not the *lex situs*. (Although consider comment (c) relative to paragraph 189 of the Second Restatement, viz.: “... it can often be assumed that the [transacting] parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the land is situated would be applied to determine many of the issues arising under the contract.”) Note also Goodrich’s remark that, “... civilization would not crumble if the [contract/conveyance] distinction disappeared and both the contractual and conveyancing sides of the transfer of land were referred to the law of the place where the land is.” (Goodrich, *ibid.*, p422) In light of the Article 4(3) presumption, this is, in many cases, already the position in practice.



for the *lex rei sitae* to grant or to deny acquisitive effect to the contract itself.”<sup>11</sup> For example, if X (of Polish domicile, but resident in Scotland), agrees to sell to Y (a Scots domiciliary), land in Poland, the parties may expressly stipulate that their contract is to be governed by Scots law. It is a rule, however, of the Polish *lex situs* that non-Polish nationals are forbidden to acquire sole title to land in Poland.<sup>12</sup> Accordingly, the contract, valid by its proper law, would be denied “*acquisitive effect*” by the *lex situs*. While Y may be able to sue X for breach of contract, he or she would have no rights *in rem* in respect of the land in question.

Questions of capacity to deal with land abroad arose in *Bank of Africa Limited v. Cohen*.<sup>13</sup> The case concerned an English woman’s ability to transfer land in Johannesburg to the Bank, as security for advances made by the Bank to her husband. The Court at first instance held that the question of capacity to enter into a contract concerning immoveable property in the Transvaal was governed by Transvaal law, according to which Mrs Cohen was *incapax*.<sup>14</sup> On appeal, Counsel for the appellant, made the point that Eve J.’s judgment “... loses sight of the distinction between the capacity to contract and the capacity to convey. It is the latter only which is governed by the *lex situs*.”<sup>15</sup> The distinction, however, was not drawn by the appellate court, Buckley, LJ. holding that, “A person’s capacity to make a contract with regard to an

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<sup>11</sup> Venturini, *ibid.*, p23.

<sup>12</sup> The Sunday Telegraph has carried reports of this Polish prohibition, which is adversely affecting German-Polish war exiles seeking to return to the properties in western Poland, from which they were ousted by the Red Army, in and around January 1945. (The Sunday Telegraph, 22 July 2001) Similarly, a contract with Scots applicable law, between A and B, to sell A’s Swiss chalet to B, is likely to fall foul of the rule of the Swiss canton *lex situs* to the effect that purchasers must be Swiss nationals.

<sup>13</sup> [1909] 2 Ch. 129.

<sup>14</sup> Eve, J. stated that, “... if the *lex situs* shews that the contracting party had not the capacity to contract, the whole contract is void, and nothing can be done in this country to enforce that contract against the contracting party ... I am bound to hold that the disability goes to the root of the contract, and that, consequently ... it is a contract which is a contract only in form, and in substance is one by which the person incapable of entering into it is not bound.” (*ibid.*, p 135)

<sup>15</sup> *Ibid.*, p138.

*immoveable is governed by the lex situs.*"<sup>16</sup> This decision has been strongly criticised,<sup>17</sup> suggesting that the distinction between capacity to *contract*, and capacity to *convey* should be more firmly drawn.<sup>18</sup>

### **Moveable Property**

In the same manner that the contract/conveyance distinction is important as regards immoveable property, so too the distinction impinges upon the conflicts treatment of moveable property: "*Attention must be paid to the distinction between questions of personal liability affecting the parties to a contract of moveable property and the matter of real right to the property itself.*"<sup>19</sup>

The distinction has been strictly observed in international harmonising initiatives. Article 8 of the Annex to the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods<sup>20</sup> expressly states that, "*The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not ... be concerned with ... the effect which the contract may have on the property in the goods sold ...*" Similarly, Article 4 of the 1980 United Nations Convention on Contracts for the International Sale of Goods states that, "*In particular ... [this Convention] is not concerned with: ... (b) the effect*

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<sup>16</sup> *Ibid.*, p143.

<sup>17</sup> E.g. Morris, *ibid.*, at p350: "*This decision is incomprehensible.*" In particular, interest analysis proponents have objected to the decision in *Cohen*. (E.g. Castel, J G, '*Notes and Materials on the Conflict of Laws*' (1960), at p574; and Weintraub, R J, '*An Inquiry into the Utility of 'Situs' as a Concept in Conflicts Analysis*' (1966) 52 Cornell Law Quarterly 1, 38)

<sup>18</sup> Cf. *Gaillard v. Chekili* [2001] I.L.Pr. 33.

<sup>19</sup> Anton, A E, '*Private International Law*' (1990), p613. Cf. Zaphiriou, G A, '*The Transfer of Chattels in Private International Law*' (1956), at p4: "*The distinction between a contract and a transfer, or ... between contractual and proprietary questions, which ... are regulated by entirely different conflict rules must be emphasised right at the beginning; because it is a lack of a clear distinction that is the main source of the existing confusion in this important topic of the conflict of laws.*"

<sup>20</sup> Ratified by the United Kingdom on 31 August 1967.



*which the contract may have on the property in the goods sold.*"<sup>21</sup> These provisions give the rather deceptive impression that formally to distinguish the rules which respectively govern matters of contract, and matters of property, is the end of the matter. That, however, is not so.

The contract/property distinction rests upon whether the action affects *ius in rem*, or only *ius in personam*.<sup>22</sup> Graveson has advised that, "*Where a contract not merely creates personal rights and obligations between the parties, but purports also to transfer, convey or assign property or any interest in property, it ceases to be governed exclusively by the rules of conflict of laws relating to contracts as such, and becomes subject to the far less certain body of law governing assignments.*"<sup>23</sup> Certain types of transfer have an existence which is independent of contract (*e.g. inter vivos* donations), whereas other types of transaction are rooted in contract<sup>24</sup> (*e.g. the grant of a mortgage over corporeal moveables, or a conditional sale agreement*).<sup>25</sup>

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<sup>21</sup> Goode has explained that, "*The proprietary effects of commercial dealings have been largely ignored ... a deliberate decision was taken to exclude from CISG [Convention on International Sale of Goods] the property aspects of sales law in view of the wide divergences in approach among legal systems and the perceived difficulty of finding solutions ... Where attempts were made to tackle some aspects of the law relating to property in moveables they usually foundered, sooner or later, because the goal was over-ambitious and the task too daunting.*" (Goode, R, '*The Protection of Interests in Moveables in Transnational Commercial Law*' (1998) Uniform Law Rev. 453, at p453)

<sup>22</sup> Graveson, R H, '*The Conflict of Laws – Private International Law*' (1974), p454.

<sup>23</sup> Graveson (1974), *ibid.*, p454. Cf. Carnahan, W, '*Tangible Property and the Conflict of Laws*' (1935) 2 Uni. of Chi. L. Rev. 345, at p345, citing *Cable Co v. McElhoe* 58 Ind. App. 637, 647 91915), *per* Caldwell, J.: "*Any contract may present itself for construction in either of two aspects, perhaps both. Thus it may involve the personal rights, duties and obligations of the parties to it, under its terms, or it may relate to the title to, or interest in, property transferred or reserved by it.*"

<sup>24</sup> Cf. Carter, P B (In Lalive, P A, '*International Sales of Works of Art*' (1988)), at p317: "*... although title may be acquired in other ways for example by way of gift (or indeed, in certain circumstances by way of theft), title is usually acquired pursuant to discharge of a contractual obligation.*"

<sup>25</sup> Consider comment (c) relative to paragraph 244 of the Second Restatement, which states that, "*A conveyance of interests in a chattel ... is likely to involve both property and contractual questions.*" Further, comment (d) relative to paragraph 251: "*The creation of a security interest in a chattel is likely to involve both property and contractual questions ... There is no clear line of distinction in these cases between property and contractual rights e.g. what interests in the chattel are transferred by reason of the security interests from one party to the other ...*"



The distinction is not purely academic since a transaction may be unenforceable as a contract, but nevertheless effective so as to transfer property (or, more commonly perhaps, *vice versa*).<sup>26</sup> Validity and enforceability of the underlying agreement, and effectiveness of the property transfer may not necessarily coincide. Whilst the personal aspects of such a transaction (as between the contracting parties) are referred to the contractual *lex causae*,<sup>27</sup> any questions of a proprietary nature are referred to the *lex situs*.<sup>28</sup> This distinction is not always clear in practice,<sup>29</sup> since the *lex situs*, in

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<sup>26</sup> Zaphiriou, *ibid.*, p8; and Weir, T, 'Taking for Granted – The Ramifications of Nemo Dat' (1996) 49 Current Legal Problems 325, at p344: "... modern practice is overwhelmingly based on the view that property may pass by traditio despite the invalidity of the causa." Cf. comment (a) to paragraph 191, Second Restatement. Consider also *Elder v. Kelly* [1919] 2 K.B. 179, in which it was held that the effect of a contravention of the Sunday Observance Act 1677 upon a contract of sale was to avoid it, in the sense that it could not be sued upon in a civil action, but it did not avoid the contract so far as to relieve the seller from liability to prosecution if the article sold thereunder, being an article of food, was adulterated. Bray, J., stated, at p181, that, "The effect of [the] illegality no doubt was to prevent either party from enforcing the contract. But it is untrue to say that the transaction had no operation at all." Similarly, at p182, Shearman, J., remarked that, "The seller of the milk could have been fined for selling it during prohibited hours, but that does not show that the property in the milk did not pass to the purchaser so that he might lawfully have drunk it." Similarly, in *Stocks v. Wilson* [1913] 2 K.B. 235, it was held that, notwithstanding the Infants Relief Act 1874, the delivery of goods to the defendant with intent to pass the property therein, operated to vest the property in him, and, accordingly, he was not liable for conversion of the goods. Per Lush, J., at p247: "I am satisfied that ... the property passed by the delivery, notwithstanding the fraud ..." Cf., with reference to contracts concerning immovable property, Second Restatement, paragraph 189, comment (a).

<sup>27</sup> Consider Venturini, *ibid.*, at p9: "... the *lex rei sitae* does not extend to the determination of the transaction which underlies [the moveables'] acquisition and to the contractual effects arising therefrom." Cf. McCormack, G, 'Reservation of Title' (1995), p234. Consider too the position in America: paragraph 191 of the Second Restatement states that, "The validity of a contract for sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel, unless, with respect to the particular issue, some other law has a more significant relationship under the principles stated in paragraph 6 to the transaction and the parties, in which event the local law of the other state will be applied." Comment (f) advises that, "On occasion, a state which is not the place of delivery will ... be the state of most significant relationship ... e.g. when the contract contemplates a continued relationship between the parties which will be centred in a state other than that where delivery took place." (Cf. Chapter Eight, *supra* – 'The Transfer of Corporeal Moveable Property', and the role of the *lex loci expeditionis*.)

<sup>28</sup> Dicey & Morris, 'The Conflict of Laws', 13<sup>th</sup> edition, p1333, paragraph 33-109; Collier, J G, 'Conflict of Laws' (2001), p245; and Morse, C G J, 'Retention of Title in English Private International Law' (1993) J.B.L. 168, 170. *Contra* the position in America, according to comment (c) to paragraph 244 of the Second Restatement, which states that, "... the law selected [being the law which has the most significant relationship to the parties, the chattel and the conveyance] will be applied to determine such issues as what interests in the chattel are transferred by reason of the conveyance from one party to the other and whether one party has a right of action for breach of warranty against the other."

<sup>29</sup> Consider Baxter, I F G, 'Conflict of Law and Property' (1964) 10 McGill Law Jo. 1, at p7 *et seq*: "It may not be an adequate solution to say that the rules of contract shall apply when the problem is mainly concerned with the contractual aspects – for these aspects may be too interwoven. The creation of certain abstract property may be, in substance, only an agreement, or a declaration by a transferor – there being no physical property or indispensable instrument."



determining questions of a proprietary nature may first require to test the validity of the contract according to its proper law.<sup>30</sup> It is probable that, as regards moveable property, the distinction generates more true conflicts than are likely to occur in the context of dealings with immoveable property. The primary reason for this is that, unlike contracts concerning immoveable property (which may be subject to Article 4(3) of the Rome Convention),<sup>31</sup> there is no presumption that, in the absence of an express choice of contractual *lex causae* by the parties, a contract concerning moveable property will be governed by the *lex loci rei sitae*. The contractual *lex causae* in respect of moveable property will, it is submitted, less frequently coincide with the *lex situs* of such property, with the result that more than one potentially applicable law will vie for position.

Accordingly, the initial hurdle in any transaction concerning moveable property is characterisation of the constituent elements of the transaction.<sup>32</sup> In the face of a true conflict of laws, delimitation between contractual and proprietary matters is central to application of the correct conflict rule.<sup>33</sup> As Lalive has advised, “*characterization is*

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<sup>30</sup> Consider *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 Ll. Rep. 284, per Moore-Bick, J., at p293: “*Zahnrad v. Terex* [1986 S.L.T. 84] provides some support for the view that the *lex situs* itself may recognize the effect of a transaction and hence its proper law ...”

<sup>31</sup> As explained at note 8, *supra*, the presumption in Article 4(3) has buttressed the *situs* rule. This, it is submitted, conflicts with the rationale underlying the contract/conveyance dichotomy, the purpose of which was implicitly to curtail the *situs* rule.

<sup>32</sup> Consider Chesterman, M R, ‘Choice of Law Aspects of Liens and Similar Claims in International Sale of Goods’ (1973) 22 I.C.L.Q. 213, at p221: “... orthodoxy requires that ... one should first decide whether the relevant issue is ‘contractual’ or ‘proprietary’, then apply the proper law or the *lex situs* accordingly.”

<sup>33</sup> Cf. Baxter (1964), *ibid.*, at p7: “An inherent difficulty in this branch of private international law is the overlap between the law of contract and the law of property. Contract helps to create many proprietary rights. It may be difficult, if not impossible, to separate the contractual and property aspects ... The characterisation of such problems can be intrinsically difficult.” Cf. Cheatham, E E, ‘Cases and Materials on Conflict of Laws’ (1957), at p666: “What consideration should govern the classification of a right as contractual or proprietary? For instance, is the right to rescind the sale and recover the chattel a contractual or proprietary right?”; and Falconbridge, J D, ‘Essays on the Conflict of Laws’ (1947), who writes, at p385, of the “borderland between contract and conveyance.”

*nothing else than the selection of the proper law in disguise.*"<sup>34</sup> The question which arises, therefore, is, by which law should a particular matter (e.g. the need for delivery, the existence or extent of rights of stoppage in transit, the effect of error, or the passing of risk) be characterised as contractual, or proprietary:<sup>35</sup> the contractual *lex causae*, the *lex situs*, or the *lex fori*? The general rule of international private law is that the characterisation process should be performed by the forum, according to the *lex fori*,<sup>36</sup> though the characterisation of the nature of property by the *lex situs*, and the potential for a subsequent domestic re-characterisation within the *lex causae*, should be borne in mind.<sup>37</sup>

Consider, for example, the following scenario: A (a Utopian domiciliary) contracts to buy from B (also domiciled in Utopia), a quantity of jewellery, manufactured in, and situated, at the time of conclusion of the contract, in Eldorado. The parties choose to subject their contract to Utopian law, according to which risk passes at the time of conclusion of the contract. According to the law of Eldorado, risk passes on delivery.<sup>38</sup> Before the goods are delivered to A, they are stolen. Thus, if risk has passed, the loss will fall on A.<sup>39</sup> If, however, risk has not yet passed, B will bear the loss.<sup>40</sup> B, seeking to rely on the Utopian law of the contract, avers that the passing of risk is a *contractual* matter; according to the contractual *lex causae*, risk has passed.

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<sup>34</sup> Lalive, P A, 'The Transfer of Chattels in the Conflict of Laws' (1955), p142.

<sup>35</sup> As Venturini has advised, "[Some systems] tie the passing of risk to the passing of title (e.g. French, Italian, Belgian) while others regard it as an independent question (e.g. German, Swedish, Dutch law)." (Venturini, *ibid.*, p25) See also note 38, *infra*.

<sup>36</sup> Crawford, E B, 'International Private Law in Scotland' (1998), p43, paragraph 4.07.

<sup>37</sup> Crawford, *ibid.*, p308, paragraph 14.02.

<sup>38</sup> Cf. Section 20(1) of the Sale of Goods Act 1979: "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not."

<sup>39</sup> E.g. *Pignatoro v. Gilroy* [1919] 1 K.B. 459. If A should refuse to pay for the goods, he or she will be in breach of contract.

<sup>40</sup> Unless the contract has been frustrated, B will be required to perform his or her obligations thereunder.



A, on the other hand, avers that it is a *proprietary* matter, dependent upon the *lex situs*; in that event, B will bear the loss. Evidently, it is important to ascertain which law determines whether the passing of risk is to be characterised as a contractual or proprietary matter.

This issue does not appear to have been addressed by conflict scholars.<sup>41</sup> A similar problem of characterisation, however, has arisen in two other contexts, first, characterisation of parental consent to marriage as a matter of formal or essential validity, and secondly, characterisation of a state's claim to the property of a deceased person, as one *qua ultimus haeres*, or *qua* successor to *bona vacantia*.

As regards parental consent to marriage, Lord President Clyde, in the case of *Bliersbach v. McEwen*,<sup>42</sup> advised that, "*The solution of this problem depends in my opinion upon a consideration of the nature and quality of the impediment to marriage created by the requirement of parental consent.*"<sup>43</sup> The question, not explicitly posed, was, according to which law the "*nature and quality*" of the impediment was to be determined. It can be inferred, however, from his Lordship's reference to Canon law as incorporated into Scots law, that the court characterised the nature of the impediment according to the Scottish *lex fori*, rather than the Dutch *lex domicilii*.<sup>44</sup>

This appears also to have been the approach taken in *Sottomayor v. De Barros*

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<sup>41</sup> Zaphiriou stated that, "*The French writers take the view that according to the classification of the French lex fori the question of risk is closely connected with the transfer of ownership and must therefore be governed by the lex situs. But the view generally prevailing is that the question of risk is a contractual question and must be governed by the proper law of the contract.*" (Zaphiriou, *ibid.*, p98) This does not, however, answer the question as to which law should characterise the passing of risk as contractual or proprietary. At most, it alludes to the likelihood of a false conflict.

<sup>42</sup> 1959 S.L.T. 81.

<sup>43</sup> *Ibid.*, p86. The question was whether lack of parental consent constituted an *impedimentum impeditivum*, or an *impedimentum dirimens*.

<sup>44</sup> *Ibid.*, p86. Reference was made to Viscount Stair ('*Institutions*', 1.4.6.) and Lord Fraser ('*Husband and Wife*', I.55).

(No.1),<sup>45</sup> as approved in *Ogden v. Ogden*<sup>46</sup>: “In our opinion this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage.”<sup>47</sup>

As regards the characterisation of a state’s claim to the property of a deceased person, there is likewise authority that characterisation should be carried out according to the *lex fori* (e.g. *In re Barnett’s Trust*<sup>48</sup>). In contrast with this, however, in the case of *In the estate of Maldonado, deceased*,<sup>49</sup> characterisation was performed by the *lex causae*: “... by Spanish law the State of Spain is the heir of the deceased.”<sup>50</sup> Arguments in support of characterisation by the *lex causae* assert that, “Rules of a foreign legal system ought not to be torn from their native jurisprudence ... they should be considered in their proper context, which is the legal system from which they are derived.”<sup>51</sup>

The approach taken in the case of *In the Estate of Musurus, deceased*,<sup>52</sup> is less conclusive: Sir Boyd Merriman stated that, “I am quite satisfied now that it is

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<sup>45</sup> 2 P.D.81, 3 P.D. 1.

<sup>46</sup> [1908] P. 46, *per* Sir Gorell Barnes, at p75.

<sup>47</sup> 3 P.D. 1, *per* Cotton, L.J., at p7. (Emphasis added)

<sup>48</sup> [1902] 1 Ch. 847, *per* Kekewich, J., at p857: “[The Austrian Crown] ... *does not represent the deceased at all, except that by our law he is put in his place to defend actions by creditors or by persons claiming the estate against him.*” (Emphasis added) Cf. *Goold Stuart’s Trustees v. McPhail* 1947 S.L.T. 221, in which Lord Sorn interpreted ‘next of kin’ in accordance with the Scots *lex fori*, as opposed to the Australian *lex ultimi domicilii*.

<sup>49</sup> [1954] P. 223.

<sup>50</sup> *Ibid.*, *per* Morris, L.J., at p251, approving the decision of Barnard, J., at p231, viz.: “I have accepted the Spanish conception of heirship, for it would be wrong in my view to apply the English conception when dealing with Spanish law; and even to try to apply the nearest English equivalent to the Spanish conception of heirship would only lead to confusion.” Consider Crawford, *ibid.*, p359, at paragraph 17.15: “The case of Maldonado is renowned for the unaccustomed generosity of the forum (the Court of Appeal) in yielding to the foreign law of the domicile the power to classify the nature of its own claim.” Cf., in the context of the law of contract, *In re Bonacina, Le Brasseur v. Bonacina* [1912] 2 Ch. 394, *per* Kennedy L.J., at p403: “The effect of the ‘*privata scrittura*’ as a legal obligation must be determined by the law of Italy.” (Emphasis added)

<sup>51</sup> Hancock, M, ‘Torts in the Conflict of Laws’ (1942), p188.

<sup>52</sup> [1936] 2 All E.R. 1666.



*impossible to talk of that deposit ... as being anything in the nature of the succession of an heir*”,<sup>53</sup> but his Lordship did not advert to the law (Turkish, or English) according to which he had been satisfied.

Where the contractual *lex causae* and the *lex situs* reach different conclusions as to characterisation of, say, the passing of risk, or the need for delivery, it has been proposed that the “*choice of law rules governing assignments should prevail over those governing contracts, since assignment will normally be the dominant purpose of the transaction.*”<sup>54</sup> In any case, it has been suggested that “*the conflict between the law governing the contract and that governing the assignment of a right of action created by the contract is often more apparent than real.*”<sup>55</sup> This does not, however, resolve the characterisation problem; rather, it dictates *a priori* that the *situs* rule should prevail. There is no obvious reason for such an approach (at least as between the original parties to the transfer of the goods in question).

Where the purported transfer of property is void according to the *lex situs*, but valid according to the contractual *lex causae* (e.g. where according to the contractual *lex causae* property passed to the purchaser on conclusion of the contract, but according to the *lex situs*, delivery is deemed to be a prerequisite of the transfer of title, with the effect that no such title has passed), Graveson has advised that “*the court would probably treat it as an agreement to assign, provided the defect in the purported assignment related to some matter of form or capacity, not, for instance, to a matter*

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<sup>53</sup> *Ibid.*, p1667.

<sup>54</sup> Graveson, *ibid.*, p454. Cf. Falconbridge, *ibid.*, p451/2. At p385, Falconbridge writes that, “... *the contractual rights and duties of the parties under the proper law of the contract can be enforced only in so far as they are consistent with the recognition of the property rights existing or created under the lex rei sitae.*” Consider *F&K Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 All ER 145, per Pearson J., at p157.

*of legality, or breach of public policy. In treating a defective assignment in this way, the court would be applying a well-established principle of equity.”*<sup>56</sup>

Instead of automatically deferring to the *lex situs* rule (either to the substantive *lex situs*, or to the characterisation of a particular matter by that law), it is submitted that the characterisation process should be performed by the forum, according to the *lex fori*. As Lorenzen has advised, to act otherwise would result in the *lex fori* “... *no longer [being] master in its home.*”<sup>57</sup> What is recommended, however, is adoption of an ‘enlightened’ *lex fori* approach, according to which, “*The judge must characterize by the concepts of his own law, but must only apply those concepts after taking into consideration the part which a foreign rule of law plays in its own system.*”<sup>58</sup>

Although, for the purposes of international private law, classification of property as moveable or immoveable falls to the *lex situs*,<sup>59</sup> it is submitted that to classify a matter as pertaining to contract or to property, according to the *lex situs* (or indeed, to the contractual *lex causae*) would be to beg the question. To take recourse to the characterisation made by a foreign law, before the forum has even determined that such law is applicable, is illogical. Although Lorenzen has suggested that, “... [t]he first consequence resulting from the adoption of a law for the regulation of a certain

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<sup>55</sup> Graveson, *ibid.*, p455.

<sup>56</sup> Graveson, *ibid.*, p455.

<sup>57</sup> Lorenzen, E G, ‘*The Theory of Qualification and the Conflict of Laws*’ (1920) 20 Col. L. R. 247, 259.

<sup>58</sup> Robertson, A H, ‘*Characterization in the Conflict of Laws*’ (1940), p45. Falconbridge termed this approach the ‘*via media*’. Robertson expanded on this, advising that, “... *the judge must look to the context of a foreign rule of law, that is to say must take notice of the foreign characterisation, but is not bound to follow it, because the law of the forum is his principal guide.*” (*ibid.*, p45) Cf. section 9(2) of the Private International Law (Miscellaneous Provisions) Act 1995, where “*The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort or delict is a matter for the courts of the forum.*” (Emphasis added) Consider too *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 384, per Auld, LJ., at p407: “... *classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing 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 the other’s system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system.*”



*relationship is the necessity of adopting also the nature which it attributes to it*”,<sup>60</sup> in this instance, neither the *lex situs*, nor the contractual *lex causae*, has actually been adopted. Only once the *lex fori* has classified the matter as pertaining to property should the question be referred to the *lex situs*; if it transpires that the *lex situs* would, in fact, classify the matter as one pertaining to contract, there would be scope for a *renvoi* transmission. Indeed, on occasion, reference to the *lex situs* would be impossible. Consider, for example, a case where A agreed to buy from B goods deliverable in State X. If the goods were lost in transit, never actually arriving at the intended destination, characterisation of the ‘passing of risk’ rule as contractual or proprietary, could only be performed by the *lex fori*, the contractual *lex causae*, or the proper law of the transfer. In such a case, regardless of whether the contractual *lex causae* fell within Article 3 or 4 of the Rome Convention, it is likely that the contractual *lex causae* and the proper law of the transfer would coincide, giving rise to a false conflict.

Returning briefly to the case of the Utopian jeweller,<sup>61</sup> it is submitted that the issue of the passing of risk should be characterised by the [Utopian<sup>62</sup>] *lex fori*. It may classify the issue as contractual (placing the loss on A), or as proprietary (placing the loss on B).

## **Conclusion**

What then is the significance of the characterisation issue? For reasons already mentioned, it is submitted that the significance is greater as regards transfers of

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<sup>59</sup> See Chapter Three, *supra* – ‘The Distinction between Moveable and Immoveable Property’.

<sup>60</sup> Lorenzen, *ibid.*, p263 (referring to the writing of Despagnet).

<sup>61</sup> Note 38, *supra*.

<sup>62</sup> The dispute is likely to be heard in a Utopian forum.

moveable, as opposed to immoveable, property. Nevertheless, there will be equivalent cases where a true conflict of laws arises in relation to immoveable property.<sup>63</sup>

It is interesting to note Chesterman's observation that, "... *special claims* [rights of stoppage, lien *etc.*] *manifestly occupy a position on the borderline between contractual and proprietary so that any decision to the effect that a particular claim falls on one side of the line rather than the other is likely to be both difficult and controversial.*"<sup>64</sup> While characterisation of these rights as contractual or proprietary accords with strict conflicts methodology, one suspects that the characterisation arrived at may be rather arbitrary.<sup>65</sup> Adherence to traditional methodology may disguise the fact that the contract/conveyance distinction is, at times, rather strained. In the case of original-party disputes, it may be more honest (and less legalistic) to refer the issue to the *lex actus*, that is, to the law which is most closely connected to the particular issue in dispute.<sup>66</sup> This would offer scope for party autonomy (which

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<sup>63</sup> E.g. Where A (a Scots domiciliary) contracts to buy from B (also of Scots domicile), a converted farmhouse in Italy. If their contract is expressly governed by Scots law, or if Article 4(3) were displaced (as *per* note 8 *supra*), the contract would be construed in accordance with Scots law. If, following the conclusion of missives, but prior to the date of transfer of title (*i.e.* the date of entry, or the date of registration of title) the farmhouse were destroyed by fire, the question whether or not risk has passed would arise. Once again, the passing of risk must be characterised either as a matter of contract (to be determined by the Scottish law of the contract), or of property (to be determined by the Italian *lex situs*). This matter, it is submitted, should also be characterised according to an enlightened *lex fori*. (Of course, in determining what is the appropriate forum – which, in turn, means determining whether or not Article 16 of the Brussels Convention [or Article 22 of Council Regulation 44/2001] applies – a *circulus inextricabilis* arises, for the very question in issue is whether or not the proceedings "have as their object rights in rem in immoveable property.")

<sup>64</sup> Chesterman, *ibid.*, p221.

<sup>65</sup> Cf. the divergent characterisation techniques employed, and the substantive results reached, in the various cases of parental consent to marry, and succession to the estates of deceased persons. (Note 42 *et seq.*, *supra*)

<sup>66</sup> Bear in mind Chesterman's warning that, "... *the detailed rules as to characterisation in the conflict of laws should be the servants of this general aim, not masters in their own right.*" (*ibid.*, p223) Cf. Second Restatement, *ibid.*, introductory note to paragraph 244, viz.: "*The local law of the state of most significant relationship governs the property rights, as well as the contractual rights, of the parties to a single transaction involving a chattel, or a group of chattels, because this is the law that can most appropriately govern such controversies between the parties, and because in these situations there may be no clear line of distinction between property and contractual rights.*"



would be particularly appropriate in cases of goods in transit),<sup>67</sup> and in cases where the applicable law has not been expressly chosen by the parties (or demonstrated with reasonable certainty), it would permit the forum to refer the particular issue to what it considered to be the most appropriate law, without being unduly bound by what appears (in this context) to be a rather artificial and cumbersome characterisation process.

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<sup>67</sup> On a practical level, one would anticipate that in many international sale of goods transactions, for the sake of consistency and convenience, contracting parties would elect to regulate matters such as the passing of risk and the significance of delivery, according to the law which governs their *contractual* relationship. This, it is submitted, would be especially true in cases where the contracting parties enjoyed or contemplated an ongoing commercial relationship in respect of diverse (or diversely sited) commodities.

## Chapter Ten

### The Treatment of Cultural Property

#### ▪ THE PROBLEM

Interest in cultural property is ever increasing, witnessed by the creation of numerous museums and galleries, a growing number of exhibitions, a “*constantly increasing flow of visitors to collections, monuments and archaeological sites, and the intensification of cultural exchanges.*”<sup>1</sup> This escalating curiosity is accompanied by aggravated risk of theft and illicit trafficking. The art market, almost by definition, is an international market, and theft and illicit trafficking continue to be lucrative industries. Estimates of the value of cultural objects stolen each year within the UK vary quite dramatically, but the figure for insured losses lies somewhere between £50 million and £150 million *per annum*.<sup>2</sup>

It is intended in this chapter to outline some of the problems experienced by players in the international art market, using various examples which highlight the hazards, including the early nineteenth century exploits of Lord Elgin, the repatriation of the Lakota Ghost Dance Shirt, and certain property disputes which emanate from the Nazi era.

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<sup>1</sup> UNESCO Recommendation for the Protection of Moveable Cultural Property (28/11/78).

<sup>2</sup> Report of the Ministerial Advisory Panel on Illicit Trade (December 2000), paragraph 21.

### Lord Elgin's exploits – enlightenment or embezzlement?

A renowned example of alleged pillaging of cultural property is the acquisition, in 1802, by Thomas Bruce, seventh Earl of Elgin and eleventh of Kincardine,<sup>3</sup> of various fifth century BC marble sculptures from the Parthenon in Athens. So infamous is the Earl's procurement of the Marbles that the term 'elginism' has become "*synonymous with the uprooting of ancient monuments piece by piece ... and then exporting them under a guise of legality.*"<sup>4</sup>

Lord Elgin's purpose in removing the Marbles was essentially a commendable one - to educate and nurture the artists and artisans of his home country.<sup>5</sup> Indeed, he was motivated by a rather more laudable objective than was Napoleon Bonaparte, Elgin's adversary in the quest for the Marbles; Napoleon wished merely to accumulate "*a collection of original works of art of all periods from all over the known world to emphasize the power and grandeur of the imperial city of Paris.*"<sup>6</sup>

In removing the Marbles from the Acropolis, Lord Elgin did not, as is often forgotten, act entirely without official sanction; the antiquities were removed only after the issue of a 'firman', a formal grant of authority, from the Ottoman authorities in Constantinople to the Ottoman authorities in Athens. That said, Lord Elgin's agents did coax the Athenian authorities into exceeding the terms of the firman, to permit his removal of the sculptures from the Parthenon.<sup>7</sup> Nevertheless, Lord Elgin's

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<sup>3</sup> Lord Elgin was also Ambassador Extraordinary and Minister Plenipotentiary of His Britannic Majesty to the Sublime Porte of Selim III, Sultan of Turkey.

<sup>4</sup> Williams, S, '*The International and National Protection of Movable Cultural Property*' (1978), p9.

<sup>5</sup> Parliamentary Debates, House of Commons (1 Feb. 1816 – 6 March 1816), Volume 32, columns 577 and 578. At column 823, *per* the Chancellor of the Exchequer: "*Every person acquainted with that noble Lord must be aware that his object had been solely directed to the advancement of the arts.*"

<sup>6</sup> St Clair, W, '*Lord Elgin and the Marbles*' (1998), p129; and Parliamentary Debates, House of Commons (26 April. 1816 – 2 July 1816), Volume 34, column 1028, *per* Mr Bankes, MP.

<sup>7</sup> Merryman, J H, '*Thinking about the Elgin Marbles*' (1985) 83 Michigan Law Review 1880, 1889.



displacement of the Marbles bore a stamp of local assent.<sup>8</sup> Quite legitimately, therefore, in 1984, it was asserted during UK parliamentary proceedings that “*The collection secured by Lord Elgin, as a result of the transactions conducted with the recognised legitimate authorities of the time, was subsequently purchased from him and vested by an Act of Parliament in the trustees of the British Museum in perpetuity.*”<sup>9</sup> The UK has maintained this stance since 1816 when Lord Elgin was exonerated by the House of Commons Select Committee responsible for investigating his acquisition of the collection and subsequent sale of it to the British government for a sum of £35,000.<sup>10</sup>

At present, the Marbles remain in the custody of the British Museum, but only amid sustained pressure that they should be restored to Greece.<sup>11</sup> Regrettably, arguments in support of the British Museum’s retention of the collection (founded mainly on its skills of trusteeship and preservation) have been undermined by allegations that some of their conservation techniques have in fact caused more damage than good.<sup>12</sup>

Calls for repatriation of the Marbles are not a new phenomenon: since the foundation of the modern Greek state in 1833 the Greek authorities have expressed their disquiet about the UK’s retention of the collection. There has always existed a certain chagrin

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<sup>8</sup> Parliamentary Debates, House of Commons (26 April. 1816 – 2 July 1816), Volume 34, column 1028, *per* Mr Banks, MP; and Merryman, *ibid.*, p1900.

<sup>9</sup> Official Report Sixth Series, Parliamentary Debates, House of Commons (1983-84, April 9-27), Volume 58, 188w, *per* Mr Whitney, MP (10 April 1984).

<sup>10</sup> Williams, *ibid.*, pp25-26; and Parliamentary Debates, House of Commons (26 April. 1816 – 2 July 1816), Volume 34, column 1037, *per* Mr Crokes, MP. The motion supporting purchase of the Marbles was carried with a majority of 52 votes. (col. 1040)

<sup>11</sup> In March 2001, the Greek government voiced concern about British safekeeping of the sculptures, prompted by the theft by a light-fingered visitor of a marble hand from a 400BC Greek frieze in the British Museum. (The Daily Telegraph, 10<sup>th</sup> March 2001) The theft is thought to have taken place in November 2000 and although passing unnoticed for a few months by the museum authorities, the incident was pounced upon by the Greeks.

regarding Lord Elgin's conduct, verbalized over the years by various commentators and in various forms, including no less eloquent a form than the words of Lord Byron:

*"Tell not the deed to blushing Europe's ears;  
The ocean queen, the free Britannia, bears  
The last poor plunder from a bleeding land."*<sup>13</sup>

St Clair cites Lord Byron's rather more blunt feelings on the subject, viz.: *"I opposed – and ever will oppose – the robbery of the ruins from Athens to instruct the English in sculpture – but why did I do so? - the ruins are as poetical in Piccadilly as they were in the Parthenon - but the Parthenon and its rock are less so without them."*<sup>14</sup>

One does not doubt that Greece is the sentimental favourite.

A novel feature of the recent campaign for restitution has been the heavier reliance upon policy-based arguments. In the past, the case for and against return of the Marbles to Greece was an inter-governmental one, but now international opinion has been mobilized on all fronts, including American ex-presidents, HRH Prince of

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<sup>12</sup> The Herald, 6 May 1999. This is irrespective of the fact that had the Marbles remained *in situ*, they would, by now, have suffered decay at the hands of nature.

<sup>13</sup> *"Cold is the heart, fair Greece! That looks on thee,  
Nor feels as lovers o'er the dust they lov'd;  
Dull is the eye that will not weep to see  
Thy walls defac'd, thy mouldering shrines remov'd  
By British hands, which it had best behov'd  
To guard these relics ne'er to be restor'd  
Curst be the hour when from their isle they rov'd,  
And once again thy hapless bosom gor'd,  
And snatch'd thy shrinking Gods to northern climes abhorr'd!"*

Lord Byron (1788-1824), *'Childe Harold's Pilgrimage'* (1812) Canto II, stanza 15. Lord Byron travelled to Athens in 1809. (per [www.englishhistory.net/byron](http://www.englishhistory.net/byron)) See also Siehr, K, *'International Art Trade and the Law'* (1993) VI *Receuil des Cours* 9.

<sup>14</sup> St Clair, *ibid.*, p243.



Wales, even tourists to the Acropolis.<sup>15</sup> Now, more than ever, there is an acute awareness, not only of the benefit which the UK has derived from its custody of the Marbles, but also of the deprivation endured by their country of origin. It is the public perception of this deprivation that motivates the rather volatile and sporadic campaign for restitution of the Marbles, not any reasoned legal argument. This is characteristic of the treatment of what is called ‘cultural’ property; particularly where such property is concerned, we are in danger of allowing public sentiment to direct our handling of issues which more appropriately fall within the ambit of due legal process.

Only a few of the proponents for return of the Marbles appreciate that Lord Elgin’s taking does not give rise to “*any legal claim which can be presented in a court of law, ... any settlement of the claim, on a non-adjudicatory basis, cannot create a legal precedent.*”<sup>16</sup> The Earl took good title to the Marbles according to the law then applicable in Greece, and, in turn, he was able to transfer good title in England.<sup>17</sup>

Technically, the Marbles belong to the Trustees of the British Museum to whom they were transferred by Act of the United Kingdom Parliament, and repatriation would only be possible if de-accession legislation were passed.<sup>18</sup> Some claim that the fate of the Marbles is not merely an Anglo-Hellenic issue, but that it is one of global

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<sup>15</sup> E.g. ‘Clinton backs Elgin Marbles Claim’ <http://news.bbc.co.uk/1/english/world/europe> (20 November 1999). On 16 January 2002, a group of British celebrities and politicians launched the ‘Parthenon 2004’ Campaign, supporting repatriation of the Marbles. (<http://news.bbc.co.uk> – 15 January 2002)

<sup>16</sup> Evidence of the [USA] Institute for Law and Culture, Committee on the Parthenon, to the Department of Culture, Media and Sport Select Committee (pre-Seventh Report) (March 2000), paragraph 5.

<sup>17</sup> Satisfying the English (and Scottish) conflict rule concerning the transfer of moveable property. See *Camell v. Sewell* 1860 5 H&N 728; *Luther v. Sagor* [1921] 3 K.B. 532; and *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718.

<sup>18</sup> Official Report Sixth Series, Parliamentary Debates, House of Commons (1983-84, April 9-27), Volume 58, 188w, *per* Mr Whitney, MP (10 April 1984): “A Bill to amend the British Museums Act of

concern;<sup>19</sup> the fate of the Marbles, however, rests in the hands of Parliament, which currently, by a small margin, seems to support repatriation.<sup>20</sup>

### **The Lakota Ghost Dance Shirt**

On a local, as opposed to a national, stage, similar considerations arose concerning the case of the Lakota Ghost Dance Shirt. Whilst performing in Glasgow in late 1891, one George Crager, a member of the American Buffalo Bill's Wild West Company, sold and gifted various North American artefacts to the authorities of the City of Glasgow.<sup>21</sup> Included in the sale was a century-old shirt, apparently removed from the body of a deceased Sioux brave at the Massacre of the Wounded Knee. Since 1891, the shirt, together with various other artefacts, was held and exhibited at Glasgow's Kelvingrove Art Gallery and Museum. Swayed, however, by the entreaties of the Lakota tribe (and particularly by the testimony of seventy five year old Ms. Marcella LeBeau (otherwise known as Pretty Rainbow Woman), secretary of the Wounded Knee Survivors' Association, the City Council's Arts and Culture Committee agreed, at the end of 1998, to repatriate the shirt.<sup>22</sup> The shirt was eventually repatriated in August 1999. Not everyone, however, was convinced by the rationale for repatriation;<sup>23</sup> in particular, the then Lord Provost accused the Committee of

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*1963 to empower the trustees to return items to their countries of origin, should they so wish, was rejected in another place on 27 October 1983."*

<sup>19</sup> Evidence of the [USA] Institute for Law and Culture, Committee on the Parthenon, to the Department of Culture, Media and Sport Select Committee, paragraph 1.10. The Committee asserts that '*Since the European Renaissance, the Parthenon, including its marble sculptures, have become the international symbol for enlightened cultures and of democracy itself.*' Sections 3 and 5 of the British Museum Act 1963 prohibit the British Museum from alienating its holdings, save in strictly restricted circumstances.

<sup>20</sup> A recent parliamentary poll carried out by The Economist magazine indicated House of Commons support for return of the Marbles by a vote of 66 to 34, and in the Lords, 41 supporting, and 59 opposing repatriation. (The Economist, 18 March 2000, p120)

<sup>21</sup> Madra, S, '*Glasgow's Ghost Shirt*' (1999), p12.

<sup>22</sup> The Herald, 20 November 1998; and The Herald, 18 December 1998.

<sup>23</sup> Including, most notably, the City's Head of Museums. (The Herald, 3 June 1999) A motion for return of the shirt was carried by the City's Art and Culture Committee, by a majority of 13:2. (Madra, *ibid.*, p23)



‘emotional spasm’ which “*if repeated could deplete the cases within the city’s museums.*”<sup>24</sup>

This was an instance where, in terms of the *lex situs* rule, the City acquired a valid and marketable title to the artefacts, but where legal process was engulfed by a wave of public feeling. In certain cases, repatriation of the relevant property will constitute the proper course of action, but there lurks a legitimate fear of failure properly to distinguish between, on the one hand, the question of *bona fide* ownership and an owner’s *voluntary* decision to repatriate property and, on the other hand, a *legal* obligation, imposed by the relevant *lex situs*, requiring the ‘owner’ to make restitution.<sup>25</sup> This distinction will require to be more firmly drawn if our museums are confronted with a floodgates scenario (that is, having made one voluntary gesture of returning an artefact or exhibit, thereafter being urged to engage in an exercise of wholesale repatriation). Contrary to the opinion of Glasgow City Council, there is a reasonable possibility that this may, in fact, ensue;<sup>26</sup> as one journalist has remarked, “*Most of our great museums and galleries contain many objects which first left their original home when someone with power or wealth was in a position to take*

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<sup>24</sup> The Herald, 20 November 1998.

<sup>25</sup> The distinction between the moral and the legal arguments was considered by Merryman, *ibid.*, p1896, and at p1903: “... *it occasionally happens that what is legal seems morally wrong, even to those making the legal decision.*” Merryman concludes, at p1910, that, “*The Greeks do not have a strong legal or moral case against Elgin.*”

<sup>26</sup> The opponents of repatriation of the Elgin Marbles list this factor as one reason for maintaining the *status quo*. There is some evidence in support of the notion: the curator of the South Seas Tauranga Vananga (formerly known as the Cook Islands) National Museum recently embarked upon a project to recover his nation’s heritage. Comprised within this project was a claim in respect of two seed and shell necklaces in the custody of a Montrose museum. According to Museum archives, the necklaces were donated to the Museum in 1922. Angus Councillors were required to vote upon the issue (presumably conscious of the fact that the repatriation project was supported by the British Executive Service Overseas). (The Herald, 3 March 1999) More recently, an Edinburgh church has succumbed to the pleas of the Ethiopian government, having agreed to return to Ethiopia a sacred wooden carving brought to Scotland by a soldier who purchased it at a military auction, following a siege in the North African country in 1868. The carving was gifted to the church by the soldier. (The Herald 6 December 2001) The suggestion has been made that at least forty British museums are preparing to repatriate their collections of Australian Aboriginal and native American art. (The Sunday Telegraph, 26 August 2001)



*advantage of another's temporary or permanent misfortune or greed ... No matter how and when acquired, the collections of the great museums of the world are being looked upon as though they constituted vast Fagin's kitchens of 'stolen' property."*<sup>27</sup>

### **The Nazi Cases – confiscation or constraint?**

Museums, it seems, may be prepared to open the floodgates as regards the repatriation of Holocaust looted art. Consider the following case: in 1932, a German Jew, a partner in a private bank in Düsseldorf, and keen collector of Old Master and Impressionist paintings, acquired a painting entitled, '*A View of Hampton Court Palace*', by the Dutch artist Jan Griffier the Elder (c.1645-1718). One year after acquiring the painting, its owner was dismissed from his employment, by the Nazis, and by 1937, he was presumed dead. In 1939, the deceased's wife despatched her personal belongings, including the painting, to Belgium, where she also was to seek refuge. Following the German occupation of Belgium in 1940, she sold her paintings, one by one, to finance the basic necessities of life; the Griffier, apparently, she sold to a gallery in Brussels for the price of 'an apple and an egg'. Sixteen years later, the painting, then described as '*A Castle in Northern France*' by Lucas Van Uden was sold at auction in Cologne to English art dealers. The German auctioneers could not (would not?) advise as to the post-war history of the painting, but they intimated that the previous owner was 'a serious private collector in South Germany'. In 1961, the Friends of the Tate Gallery purchased the painting (under its original description) and donated it to the Gallery. In accordance with the Tate's rotation policy, the painting

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<sup>27</sup> The Herald, 19 May 1997. The Times, 7 February 1997, reported upon the lingering resentment in India about the loss of priceless pieces taken home by the officers of the British Raj before independence in 1947. Resentment even extends to the *Koh-i-Noor* diamond, which was found on the banks of the Krishna River in 1656. After having been held by a succession of Afghans and Sikhs, the stone was passed to Queen Victoria in 1850, subsequently mounted in Queen Mary's crown in 1911,

has been on view for over 70% of the 40-year period following its acquisition. In 1999, a claim was lodged with the Tate by the son of the original Jewish owners, seeking not return of the painting, but compensation for its loss.<sup>28</sup>

At the International Military Tribunal held at Nuremberg in 1946, Alfred Rosenberg, Head of the Centre for National Socialist Ideological and Educational Research, remarked that “*Between October 1940 and July 1944 my organization accomplished the greatest art operation in history.*”<sup>29</sup> The organization of which Rosenberg spoke was the notorious *Einsatzstab Reichsleiter Rosenberg* (the ‘ERR’), the Nazi task force charged with ravaging art treasures from within Germany and the occupied territories. The ERR “... *crystallised into an organ for the seizure and pillage of cultural treasures for the Reich.*”<sup>30</sup> Never before had the world beheld a systematic, premeditated crusade of confiscation such as motivated the Nazi troops.<sup>31</sup> Not before, nor since, has such a prodigious art collection<sup>32</sup> been assembled with so few scruples. In view of this, it is probable that the Griffier claim will be one of a number of comparable claims likely to emerge over the next few years.<sup>33</sup>

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and finally, in 1937, was set in Queen Elizabeth, the Queen Mother’s crown, for the occasion of the coronation of George VI!

<sup>28</sup> Report of the Spoliation Advisory Panel in respect of a Painting now in the possession of the Tate Gallery (HC111), 18 January 2001 (‘S.A.P. Report’), paragraphs 8-16.

<sup>29</sup> Chamberlin, R, ‘*Loot! The Heritage of Plunder.*’ (1983), p149; De Jaeger, C, ‘*The Linz File – Hitler’s Plunder of Europe’s Art*’ (1981), p142; and Feliciano, H, ‘*The Lost Museum*’ (1997), p6.

<sup>30</sup> Williams, *ibid.*, p25/6.

<sup>31</sup> Williams, *ibid.*, at p28: “*The problem of looting and pillaging was not a question of actions by individual soldiers, which is common to all wars, but a ruthless campaign by a disciplined corps formed for that very purpose.*” Feliciano has pointed to the accuracy and detail of the inventories and art files prepared by the Reich. (*ibid.*, pp7 and 47) Cf. Petropoulos’ description of the Third Reich as a ‘kleptocracy’. (Petropoulos, J, ‘*The Faustian Bargain – The Art World in Nazi Germany*’ (2000), p5)

<sup>32</sup> Nicholas has pointed to the “... *highly trained art specialists*” within the Nazi ranks. (In Simpson, E, ed., ‘*The Spoils of War*’ (1997)) Treue remarked that, at the Nuremberg trial, Counsel for the prosecution doubted whether “... *any museum in the world, the Metropolitan in New York, the British Museum in London, the Louvre in Paris, or the Tretiakow Gallery in Moscow, could furnish such a list ... Never in the history of the world was so great a collection assembled with so little scruple.*” (Treue, W, ‘*Art Plunder*’ (1960), p249)

<sup>33</sup> Consider, in this regard, the claim currently being considered by Glasgow City Council’s Repatriation Working Group. The claim, which has been made by descendants of a German Jewish family, is in respect of ‘*Le Pate du Jambon*’, a painting attributed to Jean-Baptiste-Simeon Chardin,



Acutely calculating, the Nazis sought to clothe their *modus operandi* with an air of propriety. When acting within (what the Nazis deemed) their own territory, their confiscatory operation, even though discriminatory, was considered by traditional conflict of laws thinking to be valid.<sup>34</sup> When functioning extra-territorially, the ERR was apparently conscious of the potential limitations upon its arrogatory powers and, in certain circumstances at least, tried to forge an impression of regularity: a considerable number of items were not looted in the traditional sense, but were *purchased* (as, for example, was the Griffier): “*No matter that the transaction itself was made under pressure, or that sums paid were far less than would have been obtained in the open market, receipts existed, contracts had been signed.*”<sup>35</sup> When European social order was rapidly disintegrating into a general cultural and administrative malaise, it seems that even a semblance of commercial probity was enough to validate the essentially confiscatory exploits of the ERR. It was certainly enough to appease the wilfully restrained<sup>36</sup> enquiries of individuals then involved in the art trade (again evidenced by the Griffier case). In view of the degenerating social climate, and the common desire to remove person and property to a safe haven, the hasty sale of a valuable work of art, at a reduced price and particularly by a Jewish vendor, would not have been wholly exceptional or even questionable. Only with the

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and forming part of the City’s Burrell Collection. The painting is one of two hundred and thirty two works owned by the City Council and in respect of which provenance details cannot be completed for the period 1933-1945. The list of paintings was compiled in response to the National Museums Directors’ Conference Statement of Principles and Proposed Actions for Institutions (June 1998), concerning spoliation of works of art during the Holocaust and World War II period. (See further, [www.nationalmuseums.org.uk/spoliation.html](http://www.nationalmuseums.org.uk/spoliation.html)) The Chardin case is not unique; the Dulwich Picture Gallery in London has recently received a claim from the Czechoslovakian Baron Vladimir de Dubric in respect of its collection of one hundred and eighty Old Masters (including three works by Rembrandts, one by Canaletto and one by Rubens). Like the Chardin, the Dulwich claim results from dubious wartime provenance.

<sup>34</sup> *Frankfurter v. Exner* [1947] Ch. 629; and *Novello v. Hinrichson* [1951] Ch 1026.

<sup>35</sup> Chamberlin, *ibid.*, p179.

<sup>36</sup> De Jaeger, *ibid.*, p96.

harsh judgment of hindsight, do we censure the art dealers for indulging the ‘ask no questions’ culture that then prevailed.<sup>37</sup>

The obstacles inherent in trying to trace Nazi looted property are manifold.<sup>38</sup> As acquirers (in whatever manner) of Nazi treasures returned home from the War, they crossed borders, physical and legal, complicating further the question of ownership of the assets in question. The result was that many items of property, once confiscated by the State, or stolen by an opportunist mercenary, were circulated on the open market, and, in time, acquired by independent third parties acting in varying degrees of good faith.<sup>39</sup>

One example of this can be seen in the American case of *Goodman v. Searle*.<sup>40</sup> In July 1987, Daniel Searle, a US pharmaceuticals magnate, paid \$850,000 for ‘*Landscape with Smokestacks*’, a pastel by Edgar Degas. In 1996, the Goodman family raised an action against Searle in a New York forum, for damages and recovery of the painting, averring that it had, in fact, been stolen from their ancestors during the Second World War. The plaintiff’s complaint stated that the pre-War owner, Friedrich Gutmann, was beaten to death after he refused to sign a document transferring all of his possessions to the Third Reich. Shortly before a federal jury court in Chicago was due to hear the case in the spring of 1999, the parties reached a compromise agreement in terms of which Searle relinquished a one half share of his interest to the plaintiffs and donated

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<sup>37</sup> Consider Petropoulos’ reference to the ‘Faustian Bargain’ made between certain art ‘professionals’ and the Third Reich. (*ibid.*, p4)

<sup>38</sup> Consider the comment in The Economist magazine: “*Turning the collections of the world upside down so as to send works back to their place of origin would be little easier than matching souls to bodies on Judgment Day.*” (The Economist, 18 March 2000, p21)

<sup>39</sup> Consider the view of Pierre-Joseph Proudhon, viz.: “*La propriété c’est le vol.*” (‘*Qu’est-ce que la propriété*’) (1840)

<sup>40</sup> <http://www.courtvtv.com/library.misc/naziart.html>; and The Boston Globe, 25 February 1999 (Walter V. Robinson) (<http://www.boston.com/globe/nation/packages/paintings/081498.html>)



the remaining share to the Art Institute of Chicago (on whose Board, incidentally, he then sat). Unfortunately, from the perspective at least of the commentators, the settlement meant that several critical questions of proof, title, prescription, personal bar and good faith remained unanswered: *“Was this pastel the same work that was owned by the plaintiff’s family and sent to Paris during the war for safekeeping? Had it in fact been sent to Paris not for safekeeping, but for sale, as Mr. Searle suggested? Had the Guttman heirs waited too long to bring their suit, especially considering that the Degas in question had been publicly exhibited on several occasions since Mr. Searle purchased it in 1987? Should Mr. Searle – or the curators at The Art Institute of Chicago who researched the landscape’s provenance for Mr. Searle before he purchased the work have known or been able to know that there was an old claim on it or that there was a suspicious name in the provenance history?”*<sup>41</sup>

Similar issues have also arisen in an English forum: the conjoined cases of *City of Gotha v. Sotheby’s and Cobert Finance S.A.* and *Federal Republic of Germany v. Sotheby’s and Cobert Finance S.A.*,<sup>42</sup> which concerned a painting by the Dutch artist, Joachim Wtewael, offered the Queen’s Bench Division of the High Court an opportunity to consider these vexing matters. The facts of the case, whilst not entirely clear from the terms of the report, would appear to be as follows: at the end of World War II, the painting, ‘The Holy Family with Saints John and Elizabeth’ went missing from the Gallery of the Ducal Family of Saxe-Coburg-Gotha, in the city of Gotha, and was removed, in 1946 (it is presumed, by a member of the Russian forces) to Russia. Thereafter, it was smuggled from Moscow in the mid-1980s, emerging but briefly in West Berlin in 1987. In 1988, the painting appears to have been acquired by one Mina

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<sup>41</sup> Sharon Flescher, *International Foundation for Art Research Journal* (‘IFAR Journal’) Volume 1,

Breslav and was received by Sotheby's (on her behalf) in London, in November 1988. Cobert, a Panamanian corporation, purchased the work from Ms. Breslav in March 1989 and, three years later, in April 1992, the company marketed it for sale, once again, through Sotheby's. Sotheby's withdrew the painting when uncertainties emerged as to its post-war provenance. The City of Gotha, asserting a possessory interest, sought return of the painting whilst, in a consolidated action, the Federal Republic of Germany ('FRG') claimed ownership thereof. The critical issues were twofold: first, whether FRG could establish title to the painting and, secondly, if it could so establish title, whether the claim was time-barred in terms of the German law of limitation. Moses, J. held that the English court would recognize and enforce FRG's title to the painting, title having derived either expressly from an expropriatory law of 1945 or, alternatively, from a German act of dissolution of 1950 (but not, interestingly, stemming from the painting's 1987 sojourn in Germany). Curiously, despite recapitulating the *lex situs* rule, it would appear that the court did no more than consider the *lex situs* of the painting in 1945 (or possibly in 1950), but that it did not consider the *lex situs* at any later date, in particular, at the later date of the alleged transfer of ownership. Specifically, Moses, J. reflected that "*No-one has suggested that Soviet law is relevant to this issue of title.*"<sup>43</sup> This is somewhat perplexing given that the painting was admittedly removed to Russia in 1946 and that it remained in Moscow as late as the mid-1980s. But, whatever the rationale, Moses, J. also remarked that "*There was no argument before me as to the effect of Soviet law on proprietary rights whilst the painting was within Soviet territory.*"<sup>44</sup> Rather

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Number 3, Autumn 1998, p7.

<sup>42</sup> The Times Law Report (Q.B.D.) 8 October 1998.

<sup>43</sup> *City of Gotha v. Sotheby's and Cobert Finance S.A. and Federal Republic of Germany v. Sotheby's and Cobert Finance S.A.* (1998) Case transcript (Case No 1993 C3428; 1997 G185), p14. (1998) The Times, 8 October, C.A.

<sup>44</sup> *Ibid.*



incongruously, however, Moses, J. went on to state that “*Under Soviet law if the transfer of possession occurred without lawful consent of the owner, no subsequent possessor could acquire title.*”<sup>45</sup> With respect (and bearing in mind, of course, the relative ambiguity of the report), one is moved to ask on what basis the learned judge made this statement, in view of the fact that, by his own earlier admission, no evidence was led as to the content of Soviet law. (If the learned judge arrived at this conclusion through assimilation of Russian law and English law – in light of the fact that foreign law, in the absence of evidence to the contrary, is presumed to be the same as the *lex fori* – this is nowhere articulated in the report.) Moses, J. acknowledged that the painting was in the Soviet Union in 1950, but, when discussing the impact upon it of a German law passed at that time and purporting to affect property *extra-territorially* situated, he thereafter scrutinized the matter purely through the eyes of the German authorities, dismissing as immaterial the perspective of the Soviet *lex situs*.<sup>46</sup> It must, therefore, be concluded (insofar, at least, as may be gleaned from the report) that the approach of Moses, J. was not in full accord with the established *lex situs* principle, namely, that the relevant system to determine whether a party has acquired a valid title is that of the country in which the property is situated at the time of the particular transaction in question.<sup>47</sup>

The ‘Nazi cases’ are particularly delicate ones for courts to adjudicate upon since emotions understandably run high<sup>48</sup> and covert issues of policy inevitably (and

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, pp24 and 30.

<sup>47</sup> *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 WLR 387, 400 *per* Staughton LJ.

<sup>48</sup> Consider, for example, the exhibition in London in 1999, marking the centenary of the death of Johann Strauss. Robert Dachs, the curator of the Strauss exhibition, allegedly accused the Austrian government of having reserved certain items stolen by the Nazis from the Strauss family during the war years. Significantly, and illustrative of the enduring problem regarding the ‘private law’ consequences of confiscation *etc.*, Dachs, when interviewed on the subject of the Strauss memorabilia, is reputed to

perhaps quite legitimately) intervene. But before considering how these cases are now being resolved, it is necessary to examine another facet of the wider problem.

### The commercial link

What is the relationship between this mechanical rule of international private law and the treatment of cultural property? Complications arise because the demarcation of cultural property looting from private market transacting is neither clear nor absolute. Cultural property which is potentially protected by international convention might easily pass into private market channels and so become unavoidably infected with 'private law' consequences. Mr Crager of the Wild West Show could easily have disposed of his Lakota artefacts to a private individual rather than to the City Fathers, and as regards the Parthenon Marbles, it is known that certain items from the consignment transported from Greece were retained by the Elgin family and that "... *some pieces were later sold, including some ... to the Getty Museum in Malibu, California.*"<sup>49</sup> Contemporary looting stands at the crossroads between public law and private law. This is illustrated by the exploits of contemporary tomb raiders. In recent times, for example, the scale of robberies from ancient Buddhist temples and monuments has forced the Buddhist kingdom of Bhutan to consider introducing the

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have disclosed that seventy *per cent* of it had been purchased from the descendants of Nazi agents, still living in Austria. Dachs is quoted as having divulged that "*I had the feeling that they [the children of the Nazi agents] are disgusted with what happened, but they knew that they could never sell these items on the open market because people would wonder who they were and where they got them*" (The Sunday Telegraph, 9 May 1999) With cruel irony, one might reflect upon the strategy reputedly promulgated by Heinrich Himmler, namely, "*You have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back.*" (Israel Singer, Chairman of the World Jewish Congress) (FT Weekend, 6/7 March 1999)

<sup>49</sup> St Clair, '*Lord Elgin and the Marbles*' (1998), p260. Cf. Parliamentary Debates, House of Commons (26 April. 1816 – 2 July 1816), Volume 34, column 1027: arguing in favour of the Government's purchase of the collection, Mr Bankes, MP asserted that, "*By declining to purchase the Elgin marbles, the public must renounce all right in the thing, and leave my lord Elgin at liberty to deal with any other person who offers to purchase.*"



death penalty in an attempt to deter looters.<sup>50</sup> Treasures which have been cherished for generations are being stolen (sometimes to order) and sold to black market dealers in India and Nepal who supply the growing demand for Himalayan Buddhist artefacts in the Western art markets. The tiny Kingdom, until relatively recently hidden from the eyes of the world, now faces real concern about the drain of its cultural heritage onto the coffee tables and pedestals of western collectors.

## ▪ THE SOLUTIONS

In July 2000, a House of Commons Select Committee published a Report on *Cultural Property: Return and Illicit Trade*.<sup>51</sup> Shortly before publication of the Select Committee Report, the Government appointed an expert Advisory Panel on Illicit Trade.<sup>52</sup> Operating under the chairmanship of Professor Norman Palmer, Barrister and Professor of Commercial Law at University College, London, the Advisory Panel was appointed, first, to consider the nature and extent of the illicit international trade in art and antiquities, and the extent to which the United Kingdom is involved in this, and, secondly, to consider how most effectively the United Kingdom can play its part in preventing and prohibiting the illicit trade, and to advise the Government accordingly.<sup>53</sup>

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<sup>50</sup> The Sunday Herald, 7 January 2001. A different strategy has been adopted to frustrate the looting and destruction of Afghanistan's cultural heritage; a privately-funded (but UNESCO-backed) museum has been established in Switzerland, the aim of which is to purchase black-market antiquities and to exhibit them publically in an Afghan 'museum-in-exile'. (The Sunday Telegraph, 18 November 2001)

<sup>51</sup> Department of Culture, Media and Sport – Seventh Report (18<sup>th</sup> July 2000) (HC 371-I) (hereinafter 'Select Committee Report').

<sup>52</sup> The Advisory Panel was appointed on 24 May 2000.

<sup>53</sup> Report of the Ministerial Advisory Panel on Illicit Trade, Executive Summary.

In framing its recommendations, the Advisory Panel was invited to take into account the earlier recommendations of the Commons Select Committee. The Advisory Panel reported to the Government in December 2000.<sup>54</sup> On 6 March 2001, the Government responded to the initial Select Committee Report, and on 22 March 2001, the Select Committee published its Second Special Report.

Ironically, some of the key recommendations of the Advisory Panel are diametrically opposed to those published a mere six months earlier by the Select Committee. The Government response reveals that it prefers the recommendations of the Advisory Panel.<sup>55</sup>

Among the Advisory Panel's principal recommendations is one that the UK should accede to one of two international conventions, and it is to a consideration of these that we now turn.

### **The international arena – the 1970 UNESCO Convention**

International intervention in this area derives largely from the vigour of public international lawyers. There has been a developing landscape of cultural property regulation. The area has been dominated by two Conventions, the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* ('the 1970 Convention'), and the 1995

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<sup>54</sup> Hereinafter the 'Advisory Panel Report'.

<sup>55</sup> Which, incidentally, intimated its belief that its proposals are consonant with the European Convention on Human Rights and that the Minister may properly so certify in accordance with section 19 of the Human Rights Act 1998. (Advisory Panel Report, p8) Subject to the demands of public interest, every legal and natural person [but which person in the chain?] is entitled to the peaceful enjoyment of its possessions under Article 1 of the First Protocol of the ECHR. "*That right extends to the enjoyment of cultural objects as much as to the enjoyment of other property and includes the right to transact commercially as well as to hold privately. Recognition of the right may also require that*



*UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* ('the 1995 Convention'). Until 13 March 2001, notwithstanding strong pressure from various quarters, the United Kingdom refused to accede to either Convention; on that date, however, the Arts Minister, Alan Howarth, announced that the Government had, finally, agreed to sign the 1970 Convention, joining ninety-one other nations in the fight against illicit trade in cultural property.<sup>56</sup>

In principle this step is to be commended, since it gives a clear signal about the United Kingdom's stance against the illicit trade in cultural objects. The essence of the 1970 Convention is that, "*The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention ... shall be illicit.*"<sup>57</sup> State Parties undertake to recover and return to the State Party of origin cultural property which has been stolen from a museum or public monument or similar institution in another State Party, provided that the property features on that institution's inventory.<sup>58</sup>

Much of the language of the 1970 Convention is "*loose and confusing.*"<sup>59</sup> Although the Commons Select Committee Report applauded the sentiment of UNESCO, it expressed concern about the lack of clarity of the provisions.<sup>60</sup> The 1970 Convention only imposes duties upon States; recovery is dependent upon State intervention: the former possessor of stolen cultural property (*i.e.* the victim of the theft) is denied a direct personal right of action. Moreover, the range of illicit practices attacked is

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*public authorities provide proper legal machinery to vindicate legal rights over cultural objects in the event of unlawful deprivation.*" (Advisory Panel Report, Starting Propositions, paragraph 7)

<sup>56</sup> House of Commons Written Answers, 13 March 2001, Column: 569w.

<sup>57</sup> 1970 Convention, Article 3.

<sup>58</sup> *Ibid*, Article 7(b)(ii).

<sup>59</sup> Advisory Panel Report, paragraph 60.

relatively restricted<sup>61</sup> and the range of objects caught by the 1970 Convention's net is narrow; although the Convention contains a very broad definition of cultural property, property must be explicitly designated by a State as important for its archaeology, history, literature, art or science if it is to merit protection.<sup>62</sup> Even if the 1970 Convention were retroactive (which it is not<sup>63</sup>), this requirement alone would foil Mr Winkworth's claim.

### The international arena – the 1995 UNIDROIT Convention

In a specific attempt to deal with the private law aspects of illicit trade, and as a measure complementary to the work of UNESCO, UNIDROIT (the International Institute for the Unification of Private Law) produced a draft Convention on Stolen and Illegally Exported Cultural Objects which was adopted at the 1995 Rome Conference. The 1995 Convention, which has been ratified by only twelve countries, lays down a scheme which is largely dependent upon private action. It offers a mechanism whereby a private individual may seek to recover an object of stolen cultural property, without need for governmental intervention and without the requirement that the stolen object be state-designated.<sup>64</sup> Importantly, however, the 1995 Convention does not surmount the difficulty that a calculated use of the *lex situs* rule by professional traffickers<sup>65</sup> can extinguish any benefit bestowed by the Convention. In short, the 1995 Convention cannot prevent the sale and purchase of

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<sup>60</sup> Select Committee Report, paragraph 109.

<sup>61</sup> Advisory Panel Report, paragraph 60. For example, it does not cover the unlawful taking of formerly unrecorded objects from archaeological sites.

<sup>62</sup> 1970 Convention, Articles 1 and 4.

<sup>63</sup> Ministerial Advisory Panel Report, paragraph 55.

<sup>64</sup> Article 3 declares that '*The possessor of a cultural object which has been stolen [according to which law?] shall return it [to whom?].*'

<sup>65</sup> Consider Palmer, N, ed., '*The Recovery of Stolen Art: A Collection of Essays*' (1998), at p80: '*Investment in a movement of cultural objects is used for tax evasion, for laundering money (obtained from drugs, gun smuggling or prostitution) or evasion of foreign currency controls.*'



works of art, or exchange of cultural property if that is lawful in the eyes of the *lex situs*.<sup>66</sup>

The Commons Select Committee, which recommended that the UK accede to the 1995 Convention, explained that the Convention “*opens up the prospect of the rightful owners of cultural property stolen in the UK and then taken abroad seeking restitution in the foreign courts, a prospect which no domestic alternative can offer.*”<sup>67</sup> This statement wholly ignores the rules of international private law, the very purpose of which is to deal with a scenario such as this. In contrast with the Select Committee, the Advisory Panel has recommended that the United Kingdom refrain from signing the 1995 Convention, and, for the time being at least, the Government prefers the latter approach.<sup>68</sup> To gauge the 1995 Convention’s value, one might ask whether it would have assisted Mr Winkworth. The answer is ‘no’. Article 1 states that it applies only to claims of an “international character.” Ironically, the accumulation of factors which connect Mr Winkworth’s case with England would preclude such a characterisation.<sup>69</sup>

### **The international arena – the 1993 EU Directive**

Until the Government’s March 2001 announcement, the sole international measure applicable in the United Kingdom was an *EU Directive of 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State*.<sup>70</sup> The

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<sup>66</sup> Williams, *ibid.*, p3.

<sup>67</sup> Select Committee Report, paragraph 110.

<sup>68</sup> Advisory Panel Report, paragraph 49.

<sup>69</sup> Palmer, N, “*Unidroit and the EU Directive: Revisiting some early case law*” in “*Recovery of Stolen and Looted Works*”, Institute of Art and Law, December 1998, p2/3.

<sup>70</sup> Council Directive 93/7/EEC (15 March 1993), as amended by Council Directive 96/100/EC, and enacted in the United Kingdom by the Return of Cultural Objects Regulations 1994 (S.I. 1994/501), as amended by the Return of Cultural Objects (Amendment) Regulations 1997 (S.I. 1997/1719).

Directive only operates among member states of the European Union<sup>71</sup> and, like the 1970 Convention, it only confers a right of action upon member states, not upon private individuals.<sup>72</sup> Consequently, the Directive “*shall be without prejudice to any civil or criminal proceedings that may be brought, under the national laws of the Member States by the requesting Member State and/or the owner of the cultural object that has been stolen.*”<sup>73</sup>

The Directive obliges a State to which a request is submitted for return of an unlawfully removed cultural object, to comply with the request, provided that “*the object satisfies the requisite criteria and the prescribed procedures are followed.*”<sup>74</sup> For example, to fall within the protection of the Regulations, a cultural object must be a national treasure of artistic, historic or archaeological value, and in addition, either belong to one of the limited categories listed in the Directive (in some cases with a financial threshold), or feature on the inventory of a public collection or ecclesiastical institution.<sup>75</sup> Fundamentally, Professor Palmer has stated that “*the right of action conferred on the member state from which the object was unlawfully removed does not extinguish any title acquired by a good faith buyer under a post-theft sale of the object, when the object was located in a country which regards that sale as conferring a good title*”<sup>76</sup> (i.e. the Directive endorses the *lex situs* rule of international private law). Perhaps without surprise, the Ministerial Advisory Panel reported that the Directive appears to have had “*few, if any, concrete results*”.<sup>77</sup>

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<sup>71</sup> Advisory Panel Report, paragraph 32.

<sup>72</sup> Regulation 6(1).

<sup>73</sup> Article 15. See also H.L. Sixth Report, p23, and “*Statutory, Forensic and Ethical Initiatives*” in “*The Recovery of Stolen Art – A Collection of Essays*”, Palmer, N, ed. (1998), p20.

<sup>74</sup> Advisory Panel Report, paragraph 31.

<sup>75</sup> Biondi, A, ‘*The Merchant, the Thief and the Citizen: the Circulation of Works of Art Within the E.U.*’ (1997) C.M.L.R. 1173, 1184.

<sup>76</sup> Palmer (1998), *ibid*, p21.

<sup>77</sup> Advisory Panel Report, paragraph 32.



### **The international arena – the EU Directive and International Private Law**

The point to note is that the *lex situs* rule has *not* been deposed by the EU Directive. The Directive does *not* change national rules of moveable property, whether domestic provision, or conflict rule.<sup>78</sup> Indeed, it is expressly stated that “*Ownership of the cultural object after return shall be governed by that law of the requesting Member State.*”<sup>79</sup> In practice, therefore, rules of international private law must dominate any question concerning the cross-border transfer of cultural property. Any benefit conferred by the Directive may clearly be subjugated by a transfer of the particular object in a manner compatible with the *lex situs* of the object at the time of the transfer. For as long as bespoke provisions concerning the transfer of cultural property do not trump rights conferred on private individuals by the *lex situs*, wider rules regarding member states’ title to sue, rights of recovery *etc.*, are in a sense futile, insofar as they can be rendered redundant by operation of the *lex situs* rule (*e.g.* by sale of the stolen item of cultural property to a *bona fide* purchaser in Italy). This loophole stems not only from the dichotomy between systems which protect the good faith acquirer of stolen property, and those which adhere to the principle that a thief cannot transfer good title, but also from a clash between public and private law, and between public international law and international private law.<sup>80</sup> It is not the grand gesture of the international conventions which matters in the final analysis.

It seems that a conflict of laws issue – the question of which country’s law governs a given dispute – frustrates the global co-operation needed to restrain the illicit traffic in

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<sup>78</sup> Siehr, K, “*The Protection of Cultural Heritage and International Commerce*” 1997 (6) I.J.C.P. 304, 314.

<sup>79</sup> 1993 Directive, Article 12. It is not clear whether ‘law’ is to be construed narrowly, or ‘in the round’. (See Crawford, E B, ‘*International Private Law in Scotland*’ (1998), p58, paragraph 5.01)

cultural property.<sup>81</sup> Whilst international efforts have historically concentrated upon regulation of *cultural* property (including export and import control<sup>82</sup>), it becomes apparent that a more pressing matter and more immediate cause for concern is, in fact, the very substance of the general international private law property rule, that the *lex situs* determines all questions of proprietary right. The rule which presently pertains in international private law is one which, *prima facie*, permits easy evasion of cultural property measures, ironically through deliberate reliance upon the *lex situs* rule. How, if at all, can the accent and objectives of the international instruments be reconciled with the strict operation of the *situs* rule? Instead of focusing exclusively on the question of cultural property, it is submitted that there is merit in taking matters one step further back, to assess the efficacy of the *situs* rule itself.

### **The Nazi cases – the Spoliation Advisory Panel**

In February 2000, the Government announced the creation of a new panel, the Spoliation Advisory Panel, to help resolve claims in respect of cultural objects looted during the Nazi era (1933-1945) and now held in United Kingdom national collections, or other UK museums or galleries. The Panel will consider claims and advise the claimant and institution in possession of the object on what action might be taken. The Arts Minister, Alan Howarth (appealing to conscience, if not to conflict of laws reasoning), has explained that “*The purpose of this Panel will be to offer an alternative to costly legal proceedings and to help [parties] reach a satisfactory solution to claims that is both fair, just and as speedy as possible.*”<sup>83</sup>

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<sup>80</sup> Prott (In Palmer, *ibid.*), p205.

<sup>81</sup> Fox, C, “*The Unidroit Convention: an Answer to the World Problem of Illicit Trade in Cultural Property*” 1993 (9) Am. Jo. of Inter. Law & Policy 225, at p255.

<sup>82</sup> E.g. *Attorney-General of New Zealand v. Ortiz* [1983] 2 All E.R. 93; 3 All E.R. 432.



### The Spoliation Advisory Panel - a legal lacuna?

The Panel's task, as prescribed by its Terms of Reference,<sup>84</sup> includes a duty "*to evaluate on the balance of probabilities the validity of the claimant's original title to the picture and the validity of the institution's title thereto, subject to the important reservation that [the Panel's] conclusions on questions of law are not determinative of the parties' legal rights.*"<sup>85</sup> The impression is that this particular task is secondary to another of its prescribed tasks, namely, "*To give due weight to the moral strength of the claimant's case, and to consider whether any moral obligation rests on the institution.*"<sup>86</sup>

The Panel's Constitution stipulates that "*In exercising its functions, while the Panel will consider legal issues relating to title to the object, it will not be the function of the Panel to determine legal rights, for example as to title.*"<sup>87</sup> The Panel's proceedings are intended to be an alternative to litigation, not a process of litigation, and it is therefore considered quite legitimate to take into account non-legal obligations, such as the moral strength of the claimant's case.<sup>88</sup> Any recommendation made by the Panel is not intended to be legally binding either on the claimant, the institution or the Secretary of State.<sup>89</sup> One must ask whether this is honest or useful.

This leaves the legalities of ownership in limbo. It appears that even if the institution in question has acquired a valid and marketable title to a certain painting in terms of

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<sup>83</sup> Department of Culture, Media and Sport Press Release (35\2000), 17 February 2000.

<sup>84</sup> Spoliation Advisory Panel, Constitution and Terms of Reference, paragraphs 7(d) and (f).

<sup>85</sup> Report of the Spoliation Advisory Panel, 18 January 2001, paragraph 6(2).

<sup>86</sup> *Ibid*, paragraph 6(3). (Emphasis added)

<sup>87</sup> *Ibid*, paragraph 5(a). (Emphasis added)

<sup>88</sup> *Ibid*, paragraph 5(b).

<sup>89</sup> *Ibid*, paragraph 5(c).

the *lex situs* rule, due legal process (including the choice of law rule) has been shamed by its lack of sensitivity to and accommodation of moral considerations.

Given the remit and status of the Spoliation Panel, it is extremely unlikely that any of the national museums would refuse to honour or implement the Panel's recommendations. If, however, a private claimant should be dissatisfied with what he or she perceives to be an adverse recommendation, the option of litigation is still open to him or her.

Interestingly, the Panel's Terms of Reference establish that "*The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.*"<sup>90</sup> Since both parties must support the reference, one might suppose that the 'owner' would not lightly spurn the Panel's recommendation. But, if the *lex situs* rule were to corroborate the 'owner's' title, then even although the Panel's recommendation might deny such a title, it is possible that the 'owner' might refuse to implement the Panel's recommendation. In such a case, the claimant's only resort would be to litigation. But, in that event, any court charged with making a conclusive determination of ownership would apply the rule of international private law, that is, the *situs* rule. Scope, once again, for the *lex situs* to trump the moral favourite.

### **'Cultural Property' and International Private Law**

At present, our rules of international private law make no distinction between the treatment of cultural property and any other type of property. As far as choice of law

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<sup>90</sup> Spoliation Advisory Panel, Terms of Reference, paragraph 3. (Emphasis added)



is concerned, items of cultural property effectively lose their privileged status as soon as they enter private law commercial channels. From a choice of law perspective, the legal issues regarding cultural property have been resolved simply by reference to the rules applying to all forms of moveable property.<sup>91</sup> *“Trading in objects of art is only one kind of trading in movables. The national systems of conflict of laws have developed general rules applicable to all kinds of trade.”*<sup>92</sup> If it were otherwise, the overriding problem would be one of definition: how could a legal system draw a clear and serviceable distinction between cultural property/cultural objects/cultural heritage (however labelled) and any other type of property? Professor Jean Châtelain, adopting a pragmatic stance, has said that he *“still cannot see any compelling reason to construct a new, specific art law, if only because the first thing to do, logically, would be to define the work of art, which alone should be enough to make any conclusion in this field a distant dream.”*<sup>93</sup>

Nevertheless, there are those who call for a discrete set of conflict rules, applicable only to cultural property and tailored accordingly.<sup>94</sup> With respect, it is submitted that until such time as our general property rule has been reviewed, the foundations upon which a distinct choice of law rule, applicable only to cultural property, could be constructed, may well prove to be unstable. Cultural property is not so idiosyncratic an aspect of the law as to merit a unique, tailored treatment, wholly divorced from the rules applicable to other types of property (though there may, admittedly, be scope for

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<sup>91</sup> Carter, P, *“Transnational Trade in Works of Art: The Position in English Private International Law”* in *“International sales of works of art”* (In Lalive P, ed.) (1988), p322.

<sup>92</sup> Sandrock, O, *“Foreign Laws Regulating the Export of Cultural Property”* (In Lalive P, ed.), p457. There are no special rules for trading in specific objects, and it has been said that there cannot be special rules for any specific trade *“because otherwise the body of rules of conflict of laws would grow to an unoverseeable and unmanageable extent.”* (p462)

<sup>93</sup> Châtelain, J, *“Synthesis”* (In Lalive P, ed.), p654.

<sup>94</sup> E.g. Prott, L V, *“Problems of Private International Law for the Protection of the Cultural Heritage”* (1989) V (217) *Hague Receuil* 215, 306.

additional excavation provisions, export and import controls *etc.*). To investigate the rules relating to the transfer of cultural property before reviewing the rules generally applicable to the transfer of moveable property, is akin to placing the proverbial ‘cart’ before the ‘horse’. It is suggested that to characterise the treatment of cultural property as anything other than a sub-category of property law would be unproductive.<sup>95</sup> Only when the general conflict rules of property have been scrutinised and settled should we seek to refine them for use in particular areas, including, *inter alia*, cultural property.

### **The tale of two innocents**

The perennial struggle between an original owner of goods whose goods are stolen or confiscated from him or her, and the subsequent *bona fide* purchaser of those goods is well known to conflict scholars. An examination of the *situs* rule in the context of cultural property demonstrates some of the disadvantages of the rule. If mechanical compliance with the *lex situs* rule gives rise to what the forum perceives to be an injustice to the deprived ‘owner’, the logical question is whether a more flexible, temperate rule should be articulated as a substitute for the present rule which, as a (sometimes) reluctant final resort, sanctions its own evasion via the arbitrary and amorphous route of public policy (*i.e.* where application of the *situs* rule grossly offends the forum’s public policy - a high threshold - the *situs* rule can be disapplied). There will always in international private law be a genuine need for an ultimate policy safeguard, but that should not, it is submitted, be the first port of call from an entrenched, obdurate connecting factor such as the *lex situs*. The particular danger in this connection is that resort to the public policy escape route pre-empts consideration

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<sup>95</sup> *Contra* Prott (1989), *ibid.*, p314. In light of Prott’s view, some consideration will be given to the



of the *situs* rule, and that public policy becomes an emotional response to the supplications of a one-time dispossessed owner, fluctuating unpredictably according to the ‘sensitivities’ of the time.

Where the innocent purchaser is an individual acting in good faith (as opposed to a museum or public collection), it is less likely that the full weight of public clamour will come to fruition, for no reason perhaps other than the fact that there is less public awareness of the contents of a private as opposed to a public or national collection. But, there is little logic in applying (or endorsing) different benchmarks relating to the use of the public policy safety net, depending upon the nature and identity of the acquiring party. As far as cultural property is concerned, there will always exist a visible struggle between private demand to own culturally important items, and public outcry to preserve and repatriate such items.<sup>96</sup> Repatriation of goods on the basis of public outcry should not be conceded merely because the ‘owner’ happens to be a public as opposed to a private collector.

## ▪ **THE PROBLEM WITH THE SOLUTIONS**

### **The international conventions**

First and foremost, as already outlined, the international conventions present a problem of definition: of ‘cultural property/objects/heritage’, of ‘owner’ and ‘unlawful’ taking – according to what law? But there is a further problem, one of justification. Even assuming that we could define the key terms, it is submitted that

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possibility of bespoke cultural property rules in Chapter Fourteen, *infra* – ‘The *Lex Proprietatis*’.

there is little justification at this stage for a set of discrete rules of choice of law applicable only to cultural property. It is suggested that a more appropriate course of action is, first, to revisit the choice of law rules applicable to the transfer of property generally.

### **The Spoliation Advisory Panel**

Has the case for special treatment of cultural property displaced during the Second World War, and now in the hands of United Kingdom museums, been convincingly argued? It does appear that this is a special problem deserving of a special solution. But, it must be acknowledged that in the event of an 'owner's' rejection of the Panel's recommendation, there remains scope for the *situs* rule to frustrate the good intentions of politicians and the Panel.

### **The *lex situs* rule – the tensions**

The hurdles to be surmounted by a party claiming title to property (including, *inter alia*, issues of proof, prescription, personal bar and good faith) constitute complex issues, but ones which, nevertheless, are potentially capable of being relegated to a position of relative insignificance, at the behest of public vehemence (most conspicuously where title to items of cultural property is concerned). Where title to cultural property is concerned, the touchstone of the authoritative (yet frustratingly insensitive) *lex situs* rule is, on occasion, in danger of being deposed by public policy arguments.<sup>97</sup> Such displacement of the *situs* rule stems from good intentions, but often lacks the clarity, certainty and logic of the general rule. The hazard now baiting museums is the inclination (in an effort to appease public sentiment and the

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<sup>96</sup> IFAR Journal, Volume 1, Number 3, Autumn 1998, p17.



supplications of re-created nations and cultures) to refute their legal entitlement to property (entitlement validly conferred by application of the *lex situs* rule) and to repatriate (foreign) cultural objects within their custody. This way lies chaos, and doubtless also increased risk of physical damage to the objects concerned.

Whilst in some cases repatriation of goods is being urged and justified by a sometimes reasonable, sometimes manipulative public policy argument, in other cases the public policy ideal is being denied in order, say, that the reasonable expectations of an acquiring party may be shielded.<sup>98</sup> This constitutes an unpredictable, inconsistent use of public policy, disguising perhaps an irreconcilable strain amongst ideals of cultural autonomy, public ownership and private possession. It would appear that, in this context at least, our choice of law rules are presently languishing somewhere between the *Scylla* of a stringent *lex situs* rule and the *Charybdis* of an indeterminate, volatile resort to public policy. Preferable would be a rule which would permit the forum to consider the provenance of the property in question, and to apply a law which, as suggested by Counsel for Mr Winkworth is more closely connected with the property, and the circumstances of acquisition than may be an entirely fortuitous or contrived *lex situs*. In particular, we need a rule which, in the case of cultural property, less readily frustrates the purpose of the international conventions.

### **The practical solutions**

Historically, condonation of the lenient practices and protocols of the art market was responsible for nurturing underhand and unscrupulous trading. In the past, it seems that if goods should have arrived in London, then in spite of (or because of?) its

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<sup>97</sup> Nationally, in the case of the Elgin Marbles, and parochially, in the case of the Lakota Shirt.

reputation as an international art centre, certain of the auction houses and dealers would apparently have sanctioned a 'no questions asked' policy.<sup>99</sup> There have been allegations, in particular, that many of the antiquities offered for sale were offered without authentication or legitimate provenances, "*giving rise to the plausible assumption (which can sometimes be substantiated) that these are 'hot' pieces that have illegally left their country of origin in recent years.*"<sup>100</sup>

As recently as 1997, those involved in the art market, principally the leading auction houses, were publicly rebuked for engaging in less than honourable practices.<sup>101</sup> An inquiry was launched by the Department of Trade and Industry (primarily to investigate allegations of professional impropriety on the part of Sotheby's Auctioneers) and, simultaneously, leading figures in the international art world (possibly as a measure of self-defence) called for immediate scrutiny of the London market. Ashamedly, it emerged that parallel to the reputation for excellence of the London market stood its renown as an asylum for stolen property. At that time, Italian police, in particular, recognized the United Kingdom as a preferred destination for treasures clandestinely removed from Italy.<sup>102</sup> An officer in the Carabinieri anti-art-theft squad has remarked to the British press that "*Unfortunately, Britain is not only pre-eminent in the legal art market, it is universally recognised as the leading market for receipt of stolen art works.*"<sup>103</sup>

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<sup>98</sup> *E.g. Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496.

<sup>99</sup> See generally Lacey, R, '*Sotheby's - Bidding for Class*' (1998).

<sup>100</sup> The Times, 7 February 1997.

<sup>101</sup> Not only for dealing in 'stolen' property, but also for 'ringing' (whereby dealers negotiate a joint bid for an item at a figure less than its true worth, sell it on and share the profit) and 'chandelier bidding' (whereby the auctioneer pretends to take non-existent bids in order to create a false impression of interest). The latter two tactics are, to a certain extent, countenanced as being no more than "*routine deceptions of the auction process.*" (The Times, 7 February 1997)

<sup>102</sup> The Times, 7 February 1997.



Whilst concern as to the probity of the United Kingdom market remains tangible,<sup>104</sup> the changing professional mores of art dealers and museum authorities must be highlighted. As recently as twenty years ago, it was remarked that the disappearance of cultural property was exacerbated by “*clandestine archaeological or ethnographical expeditions, or by purchases by antique dealers assisted by a network of ‘local jobbers’.*”<sup>105</sup> Dealers, conscious of the market for their goods, have traditionally been willing to satisfy that demand, even if it meant that full descriptions of the artist and the chain of previous owners were not supplied.<sup>106</sup> The position now seems generally to have changed,<sup>107</sup> but this is due less to an inherent corporate “*evolving morality*” than to a fuller measure of integrity being urged by the guiding hand of public pressure.<sup>108</sup> There currently pertains a general consensus that “*prevention is better than cure*”<sup>109</sup> and this is nowhere better illustrated than in the surge of codes of ethics and statements of good practice which have recently been promulgated.<sup>110</sup> These are principally directed at the regulation of acquisition policies.

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<sup>103</sup> *Ibid.*

<sup>104</sup> E.g. A former chairman of Sotheby’s has recently been convicted of conspiring with a former chairman of Christie’s, to operate a price-fixing scheme. (The Herald, 6 December 2001) See also the report of a British art dealer convicted (in France) of purchasing looted art. (The Herald, 7 July 2001)

<sup>105</sup> Williams, *ibid.*, p2. (Foreword – Baxter, R, R)

<sup>106</sup> E.g. Treue, *ibid.*, at p181: “*There were alert and knowledgeable British dealers and agents in Italy and all over the continent, ready to fall on the harvest of fine works of art put at their disposal ... It did not occur to them to offer these pictures and sculptures, which they had as a rule picked up for next to nothing, to their former owners; on the contrary, they were delighted with their windfalls and added them with joy to the art treasure of their country. They were not art robbers in the literal sense, but they took what they were offered.*” Cf. Prott’s explanation that in certain countries, auctioneers, as agents for the vendors, do not, in general, require to assume responsibility for any defects in the title of the vendor. At the same time, by being able to conceal the identity of the vendor, they can frustrate legitimate inquiries on the part of *bona fide* purchasers. (*ibid.*, p275)

<sup>107</sup> The Times, 7 February 1997: “*Morality in these matter is evolving and perhaps one should not be too severe over past misdeeds.*” (p10)

<sup>108</sup> E.g. IFAR Journal, *ibid.*, at p20, cites, in particular, the U.S. Association of Art Museum Directors’ 1998 Statement of Principles regarding the World War II confiscations.

<sup>109</sup> Cf. Palmer, *ibid.*, at p12: “*The proliferation of prevention and retrieval methods has made a valuable contribution to the suppression of art theft.*”

<sup>110</sup> E.g. Code of Practice for the Control of International Trading in Works of Art (*per* Palmer, *ibid.*, p10); International Art Dealers’ Code of Practice 1984; The British Dealers Code of Practice 1986 (cited by the Chancery Division in *Kingdom of Spain v. Christie, Manson & Woods Ltd.* [1986] 1 W.L.R. 1120, 1124); International Council of Museums Code of Professional Ethics 1986; National

It has been suggested that art dealers should be accountable in respect of three specific matters, namely, “*guaranteeing authenticity, providing connoisseurship and warranting title.*”<sup>111</sup> The significance of these responsibilities has been neatly framed: “*an honest and reputable dealer is the first line of defense for a private buyer.*”<sup>112</sup> The motivation for statements of good practice has stemmed largely from a desire to see the art market restored to a position of respectability and trust. In the context of the Organizing Seminar for the Washington Conference on Holocaust-Era Assets (“the Washington Conference”),<sup>113</sup> U.S. Under-Secretary Stuart Eizenstat gave substance to this proposition by declaring that “*We want the international art market to be open, stable and free of uncertainty that it might be trading in works whose history is tainted by Nazi looting.*”<sup>114</sup>

The terms of reference of the Washington Conference, whilst re-stating the goal of a transparent market,<sup>115</sup> incorporate an encouragement, both to national museums (including government buildings) and to private art owners (including museums, auction houses, art dealers and other traders of art) to take “*a more active approach with respect to their art holdings ... both by conducting thorough research into the provenance of holdings and by searching for the rightful owners or heirs ... so that greater due diligence in researching the provenance of artwork is made standard*

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Museums Directors’ Conference Statement of Principles; and Museum and Galleries Commission Statement of Principles.

<sup>111</sup> IFAR Journal, *ibid.*, p3.

<sup>112</sup> *Ibid.*

<sup>113</sup> 30 June 1998, to explore further the matters raised at the London Conference on Nazi Gold, December 1997. (<http://www.ushmm.org/assets/eizen.htm>, p2)

<sup>114</sup> *Ibid.*, opening statement.

<sup>115</sup> Terms of Reference, released by the U.S. Department of State, 26 October 1998, p1. (<http://www.state.gov/www/regions/enr/>). The policy of openness was intended to include “*open archives, shared information, public engagement, Internet dissemination*”, as well as art loss registers.



*practice.*"<sup>116</sup> The effect of such a practice, Under-Secretary Eizenstat hoped, would be that "*From now on the sale, purchase, exchange and display of art from this period [the Nazi era] will be addressed with greater sensitivity and a higher standard of responsibility.*"<sup>117</sup> Although these remarks were made in the context of the Washington Conference, they can appropriately be extended so as to encompass the transfer of art and antiquities from all periods. Indeed, although certain principles have been agreed dealing specifically with the particular problems of Nazi looting (*e.g.* the principles agreed by the American Association of Art Museum Directors), there also exist other statements of practice, more general in their nature and inclusive of all types of art work (*e.g.* International Council of Museums Code of Professional Ethics), which establish specific rules governing "*the acquisition and de-accessioning of collections and personal responsibility towards the collections, the public and the profession.*"<sup>118</sup> In particular, there is increasing pressure upon museums and dealers not to acquire any object, title to which cannot be clearly and continuously documented.<sup>119</sup> Such pressure, however, regardless of how well-intentioned it may be, suffers one fatal defect, namely,<sup>120</sup> "... *the principles adopted at the Conference aren't legally binding on countries ... [they] represent a moral commitment among nations which all in the art world will have to take into account.*"<sup>121</sup> Irrespective of how laudable the aims and substance of the Conference and the various codes may be,

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<sup>116</sup> *Ibid.*, pp1/2.

<sup>117</sup> Laura Myers, The Associated Press, 3 December 1998. (<http://www.ihawaii.net/webnews/wed/dr/Aholocaust-conference>)

<sup>118</sup> ICOM Press Release 14 January 1999. (<http://www.cs.reading.ac.uk/icom/worldwar2.html>)

<sup>119</sup> *E.g.* ICOM Code of Professional Ethics, Clauses 3.1 and 3.2 (<http://www.icom.org/ethics/html>); in addition, individual museums apply their own acquisition safeguards such as checking with governmental agencies of the country of origin *etc.*

<sup>120</sup> This defect was stated in the particular context of the Washington Conference, but it is true, by analogy, of all professional statements of practice.

<sup>121</sup> Laura Myers, The Associated Press, 3 December 1998. (<http://www.ihawaii.net/webnews/wed/dr/Aholocaust-conference>)

they cannot deal comprehensively with the issue of ‘private law’ consequences;<sup>122</sup> as Palmer has indicated, “ ... *having (at most) purely contractual force [dealers’] codes can be enforced only by and against members of the relevant group or their disciplinary body. They give no direct right to third parties such as dispossessed owners.*”<sup>123</sup>

Of perhaps greater significance, is the fact that while ethical persons will instinctively abide by ethical practices, compliance with such practices is alien to persons of dubious scruples. Accordingly, whilst codes of ethics *etc.* are useful expressions of prudent practice, they are ineffectual as a prophylactic measure in the fight against international art theft and can be no substitute for more refined and sensitive conflict rules regulating the transfer of property. Disreputable persons will always connive at means by which to evade or defeat ethical conventions and it is essential, therefore, that the deepest root of the problem be eradicated, rather than merely that we participate in a process of grappling with the peripheral nuisance.

## Conclusion

While one ponders the niceties of the *lex situs* rule, and the politicians contemplate ratification or not of international instruments, the ownership disputes continue.

In Greece, all hope is pinned on repatriation of the Elgin Marbles in time for the 2004 Olympic Games in Athens. In a leap of faith the Greek Government has committed

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<sup>122</sup> “*The Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.*” (Laura Myers, The Associated Press, 3 December 1998 (<http://www.ihawaii.net/webnews/wed/dr/Aholocaust-conference>), p2)

<sup>123</sup> Palmer, *ibid.*, p22.



itself to construction of a new Acropolis Museum, intended to house the Parthenon Marbles.<sup>124</sup>

In Britain meanwhile, the Tate Gallery's legal title to the Griffier painting has been declared unassailable by the Spoliation Advisory Panel.<sup>125</sup> But the Panel has been persuaded that the claimant has a valid *moral* claim to the painting,<sup>126</sup> having regard to the spoliation which his family suffered, and that this should be reflected in an *ex gratia* payment of £125,000.<sup>127</sup> Declaring the Tate free of moral and legal turpitude, however, the Panel has recommended that payment should be borne by the taxpayer. The Tate has simply been called upon to display alongside the painting an account of its provenance during and since the Nazi era, with special reference to the interest of the claimant and his family.<sup>128</sup> In a press release the Arts Minister announced that the Government has agreed to pay the compensation, but under admission that "*the family, who wish to remain anonymous, have no legal title to the painting, and that there is no criticism whatsoever of the Tate Gallery.*"<sup>129</sup>

In this particular tale of two innocents, all's well that ends well for claimant and Gallery alike. The decision, however, does not sit comfortably either with the *lex situs* rule, or, one might surmise, with the taxpayer.<sup>130</sup> One might do well to bear in mind the advice of Alexander Solzhenitsyn:

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<sup>124</sup> Select Committee Report, paragraph 151. Reports indicate that construction of the Museum (the estimated cost of which is £40 million) is being partially funded by the E.U. (<http://news.bbc.co.uk> – 22 August 2001) Consider also reports in The Sunday Telegraph, 19 August 2001, and The Sunday Times, 20 January 2002.

<sup>125</sup> S.A.P. Report, paragraph 40.

<sup>126</sup> S.A.P. Report, paragraph 44.

<sup>127</sup> S.A.P. Report, paragraph 68(1).

<sup>128</sup> S.A.P. Report, paragraph 68(2).

<sup>129</sup> Department of Culture, Media and Sport Press Release (12/2001), 18 January 2001.

<sup>130</sup> As regards the Chardin claim (note 33, *supra*), it is interesting to note the comments of Bailie John Lynch, chairperson of Glasgow City Council's Repatriation Working Group, namely, "*If a cash*

*“Do not pursue what is illusory – property and position: all that is gained at the expense of your nerves decade after decade and can be confiscated in one fell night.”*<sup>131</sup>

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*settlement was recommended ... there would have to be discussions with the Scottish Executive or the exchequer.”* (The Herald, 6 October 2001) More interesting, however, is the response of a spokesman for the Scottish Executive, viz.: *“We do not envisage any role for the executive at this stage.”* (The Herald, *ibid.*)

<sup>131</sup> [www.quotationspage.com/quotes.php3?author=Alexander+Solzhenitsyn](http://www.quotationspage.com/quotes.php3?author=Alexander+Solzhenitsyn)



## Chapter Eleven

### The Assignment of Incorporeal Moveable Property

Incorporeal moveable property rights comprise, “*certain kinds of immaterial or incorporeal abstractions, which exist only as rights or bodies of legal claims and rights and have no physical existence which can be actually possessed, and which, moreover, are deemed not like or connected with land and are accordingly moveable rather than heritable in succession.*”<sup>1</sup> Incorporeal moveable property may be divided into three categories of rights: first, those which are purely rights of action, having an existence which is wholly independent of corporeal property (*e.g.* debts, claims in contract, delict or succession); secondly, those which exist as a concomitant to (albeit distinct from) corporeal property (*e.g.* the copyright which attaches to a book, or the goodwill which attaches to business premises); and thirdly, those rights which are represented by documentation which may itself be negotiated or transferred (*e.g.* negotiable instruments, or the rights represented by a share certificate). Generally, the expression incorporeal moveable property may be said to refer to property which exists *ex lege*, having “... *only a legal, not a physical existence, and [which is] ... accordingly capable only of legal, not physical, movement.*”<sup>2</sup>

Within the category of incorporeal moveable property falls a wide miscellany of rights, ranging for example, from court decrees for payment or specific implement (which impose an obligation upon defenders and vest in pursuers a “*jus exigendi enforceable by diligence*”<sup>3</sup>), to claims of debt emanating from non-purification of

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<sup>1</sup> Walker, D M, ‘*Principles of Scottish Private Law*’ (1989), Volume III, p492.

<sup>2</sup> Graveson, R H, ‘*Private International Law*’ (1974), p469.

<sup>3</sup> Walker, *ibid.*, p494.

pecuniary obligations, and rights of action, or relief, which flow from breach of contractual, delictual or restitutionary obligations. Even within the general class of claims of debt, there exists a varied collection of rights, including personal bonds, debentures, rights in security and reversionary interests. Particular rights of incorporeal moveable property also arise in the contexts of succession (*e.g.* prior rights of a surviving spouse, legal rights of a spouse and issue, and the beneficial rights of a liferenter or absolute beneficiary), and commerce (*e.g.* partnership interests<sup>4</sup> and company share holdings<sup>5</sup>). Also in the commercial frame, bills of lading for goods, as well as constituting documentary evidence of cargo shipped or carried, are deemed to be representative of the goods themselves and can, accordingly, be transferred by means of endorsement and delivery.<sup>6</sup>

Negotiable instruments constitute a special class of incorporeal moveable property. Negotiability is the character attributed, *ex lege*, to certain classes of documents, evidencing “*indebtedness and conferring a right to obtain payment of money.*”<sup>7</sup> Within this class fall cheques, bank notes, dividend warrants, promissory notes, bankers’ drafts *etc.* It is the quality of negotiability which implies, first, that a particular document is transferable either by delivery alone, or by endorsement and delivery, without need for formal assignation and intimation, and secondly, that a transferee will acquire good title, notwithstanding any defect in the title of the

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<sup>4</sup> In Scots law, the assignee of a partnership interest is entitled to share in partnership profits, but by reason of *delectus personae*, he or she is not generally entitled to participate in the business of the partnership. (Section 31 of the Partnership Act 1890)

<sup>5</sup> Noting, however, that there will often be express restrictions upon the transfer of shares in English or Scottish incorporated private limited companies, according to the relevant Articles of Association. Consider section 8 of the Companies Act 1985, and S.I. 1985/805 (Companies (Table A to F) Regulations), including, in particular, Article 24 of Table ‘A’ Articles of Association.

<sup>6</sup> *Hayman v. McLintock* 1907 S.C. 936.

<sup>7</sup> Walker, *ibid.*, p498.



transferor.<sup>8</sup> It is not proposed to examine the particular choice of law rules concerning negotiable instruments.<sup>9</sup>

Another significant class of incorporeal moveable property is that of intellectual property, but similarly, a detailed treatment of the conflict rules concerning such rights is beyond the scope of this work.<sup>10</sup>

The diverse nature of incorporeal moveable property rights in Scots law is apparent. One might reasonably ask what is the common denominator among such rights. Professor Walker has suggested that the thread which runs through all such rights is the capacity to be “... *turned into money* ... [they are] *assignable inter vivos* ... [they] *transmit to executors on death and* [pass] *to the trustee in sequestration on the holder’s bankruptcy*.”<sup>11</sup> Accepting, therefore, that incorporeal moveable property rights may be created, acquired, disposed of and transmitted, it is necessary to consider the choice of law rules which are applicable to such transactions.

### **Choice of law and the assignation of incorporeal moveable property**

It was demonstrated in Chapter Eight<sup>12</sup> that, over time, various connecting factors have vied for application to disputes concerning the transfer of corporeal moveable property. Collier has remarked that, “*If the choice of law rule relating to title to tangible moveables is now tolerably clear, the same cannot be said of that concerning*

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<sup>8</sup> *Bechuanaland Exploration Co v. London Trading Bank* [1898] 2 Q.B. 658.

<sup>9</sup> For further details, see Crawford, E B, ‘*International Private Law in Scotland*’ (1998), p323, paragraph 14.28 *et seq.*, and Dicey & Morris ‘*The Conflict of Laws*’, p1431, paragraph 33R-314 *et seq.*

<sup>10</sup> For a full treatment of the subject, the reader is referred to Fawcett, J, & Torremans, P, ‘*Intellectual Property and Private International Law*’ (1998).

<sup>11</sup> Walker, *ibid.*, p493. Cf. Stair Memorial Encyclopaedia, Volume 18, paragraphs 11, 16 and 120.

<sup>12</sup> ‘The Transfer of Corporeal Moveable Property’.

*title to intangibles.*”<sup>13</sup> In 1952, Cheshire described the transfer of choses in possession as “... *perhaps the most intractable topic in English private international law*”,<sup>14</sup> but it is submitted that the complexity of the rules concerning chattels is, in fact, surpassed, by the rules which concern choses in action.<sup>15</sup>

Where rights of incorporeal moveable property are concerned, certain potentially applicable localising agents may not be immediately discernible (*e.g.* the *lex situs* or the *lex loci actus*), and may not be detectable until a more penetrating investigation into the particular circumstances of the case has been conducted. Nevertheless, patent and latent factors alike have been contenders for signifying the *lex causae* appropriate to determine the validity of assignments of incorporeal moveable property.

### **Assignability**

Before identifying the law which is appropriate to regulate the assignment of incorporeal moveable property, a question arises as to whether the right in question is, in fact, assignable. By which law should assignability be determined? This question arose in the case of *Grant's Trustees v. Ritchie's Executor*,<sup>16</sup> in answer to which Lord Young declared that, “*By our law a subject which has not vested, or a right which has not vested, is not transmissible; but ... by the law of the country [England] where this will was made the provision here in question ... was nevertheless from the death of the testator a transmissible interest. Now, I must take the law of this deed to be the*

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<sup>13</sup> Collier, J G, ‘*Conflict of Laws*’ (2001), p251. The same author expresses a degree of surprise at this result, insofar as, “... *in commercial matters, the law relating to intangibles in the conflict of laws seems much more important than that concerning tangibles.*” (*ibid.*, p251)

<sup>14</sup> Cheshire, G C, ‘*Private International Law*’ 4<sup>th</sup> edition (1952), p428. It is indicative of the convolutions in this area of law, and of the unusually slow pace of change, that Cheshire’s sentiment is reiterated at p938 of the current (13<sup>th</sup>) edition of ‘*Private International Law*’.

<sup>15</sup> Cf. Dicey & Morris, ‘*The Conflict of Laws*’, p977, at paragraph 24-047: “*The choice of law rules which govern the assignment or transfer of intangible property are not easy to state with certainty.*”

<sup>16</sup> (1886) 13 R. 646.



law that governs the rights given by it [i.e. English law].”<sup>17</sup> Assignability is determined according to the proper law of the right, that is, the proper law of the original transaction from which the right derived, or the law under which the right was created.<sup>18</sup>

Although this view was reiterated by Lord Robertson in *Pender v. Commercial Bank of Scotland Ltd.*,<sup>19</sup> his Lordship also outlined how the rule may be defeated by other considerations: “Although a *jus crediti* may be *sua natura* [i.e. according to the proper law of the right] assignable, yet, I think, the holder of it may be precluded by the law of her domicile from assigning it.”<sup>20</sup> It appears, therefore, that assignability according to the proper law of the right may nevertheless be frustrated by operation of the transferor’s *lex domicilii*. In other words, the rule as to assignability is subordinate to the rule regarding capacity to assign.<sup>21</sup> Conversely, if the proper law of the right should consider the right in question to be non-assignable, it is of no consequence that

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<sup>17</sup> *Ibid.*, p650. Cf. Maher, G, ‘*International Private Law: Cases and Statutes*’ (1985), at p210: “Matters relating to the validity of the debt ... are governed by the legal system under which the debt or property is created (sometimes called the proper law of the debt). The same system of law also governs the characteristics of the debt, including whether it is capable of being assigned by the creditor to a third party.”; Wolff, M, ‘*Private International Law*’ (1950), p546; Carnahan, C W, ‘*Conflict of Laws and Life Insurance Contracts*’ (1958), p430; and Graveson, *ibid.*, p476. Consider the rule in the U.S.A., embodied in paragraph 208 of the Second Restatement, viz.: “Whether, and under what conditions, a contractual right, which is not embodied in a document, can be effectively assigned is determined by the local law of the state which has the most significant relationship to the contract and the parties with respect to the issue of assignability.” Comment (a) to paragraph 208 cites, as examples of such ‘conditions’, the question whether consent to the assignment, by the obligor or a third party, is a prerequisite to effective assignment.

<sup>18</sup> Cf. Graveson, *ibid.*, p477; *Companhia Colombiana de Seguros v. Pacific Steam Navigation Co* [1965] 1 Q.B. 101, *per* Roskill, J., at p128; and *Trendtex Trading Corp v. Crédit Suisse* [1982] A.C. 679, in which the plaintiff’s appeal was dismissed on the basis that, “... any such assignment of the English cause of action as was purported to be made by the agreement for the purpose stated was, under English law, void ... It remains a fundamental principle of English law that one cannot assign a bare right to litigate.” (p679) A right may be unassignable on grounds of *delectus personae* (e.g. in Scots law, the right of an employee under a contract of employment, or the right of a tenant under a residential lease, or an agricultural lease of ordinary duration). (McAllister, A, ‘*Scottish Law of Leases*’ (1995) 2<sup>nd</sup> ed., p67)

<sup>19</sup> 1940 S.L.T. 306; Cf. *Campbell Connelly & Co Ltd. v. Noble* [1963] 1 W.L.R. 252; and *Libertas-Kommerz GmbH v. Johnson* 1977 S.C. 191.

<sup>20</sup> *Ibid.*, p308.

some other law, say, the *lex loci actus* or the *lex domicilii*, should consider it to be assignable.<sup>22</sup>

As regards voluntary assignments effected by contracts entered into after 1 April 1991, it should be noted that, by virtue of statutory provision echoing the common law rule, assignability is determined by the law governing the right to which the assignment relates (*i.e.* the proper law of the right).<sup>23</sup>

### **Ascertaining the *lex causae* – significant distinctions**

It is important to observe three distinctions, namely, (1) contractual and non-contractual assignments; (2) original-parties and remote-parties disputes; and (3) voluntary and involuntary assignments.

#### **(1) Ascertaining the *lex causae*: contractual and non-contractual assignments**

Incorporeal moveable property may be assigned by means of contract, or alternatively, by means of non-gratuitous unilateral obligation, or outright gift.<sup>24</sup> The contractual (or non-contractual) character of the incorporeal right itself should not,

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<sup>21</sup> Alternatively, personal (in)capacity to assign must be regarded as an essential component of assignability.

<sup>22</sup> There is no room in Scots or English law for the interest analysis approach sometimes employed in the U.S.A., and illustrated in comment (a) to paragraph 208 of the Second Restatement, *viz.*: H and W, both domiciled in X, entered into a Separation Agreement by which H assigned to W one-half of his future wages. H subsequently acquired a domicile of choice in Y and entered into a contract of employment there with Z. W seeks an order, in X, requiring H to pay to her one-half of his wages. Wages are assignable by X law, but not by Y law. To ascertain the appropriate *lex causae*, comment (a) suggests that the key question is: what is the *purpose* of the Y rule of non-assignability? If its purpose is to protect wives and children, then no significant interest of Y would be prejudiced were the assignment to be upheld by the application of X law. If, on the other hand, Y law were intended to protect husbands or employers, Y's interests would be impaired by the application of X law. Accordingly, to ascertain the *lex causae*, a U.S. forum must assess whether X's interest in W's welfare outweighs Y's interests in H's welfare and the protection of H's employer.

<sup>23</sup> Article 12(2) of Schedule 1 to the Contracts (Applicable Law) Act 1990.

<sup>24</sup> *Re Westerton* [1919] 2 Ch. 104



however, be confused with the contractual (or non-contractual) character of the assignation.<sup>25</sup>

### (a) Contractual assignations

The rules concerning the (voluntary) contractual assignation of a '*right against another person*', are contained in Article 12 of the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter 'the Convention').<sup>26</sup> Article 1 of the Convention narrates that it shall not apply, *inter alia*, to contractual obligations relating to wills and succession, rights in property arising out of a matrimonial relationship, or rights and duties arising out of a family relationship, including maintenance obligations in respect of illegitimate children,<sup>27</sup> or to certain contracts of insurance.<sup>28</sup> The general exclusions of Article 1, it is submitted, transcend the potentially inclusive drafting of Article 12(1).

Article 1(1) of the Convention provides that the Convention "... *shall apply to contractual obligations in any situation involving a choice between the laws of different countries.*" Where the subject matter of a dispute concerns the non-contractual assignation of a non-contractual obligation,<sup>29</sup> reference to the common law rules regarding the assignation of incorporeal moveable property is clearly necessary.<sup>30</sup> This is also the case where a dispute concerns the non-contractual

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<sup>25</sup> Subject to rules of assignability, a non-contractually created right, such as copyright, may be transferred contractually, and conversely, a contractually created right, such as a debt, may be assigned otherwise than by means of contract (*e.g.* by gift or succession).

<sup>26</sup> Incorporated into Scots and English law by the Contracts (Applicable Law) Act 1990, and applicable to contracts concluded on or after 1 April 1991.

<sup>27</sup> Rome Convention, Article 1(2)(b).

<sup>28</sup> Rome Convention, Article 1(3).

<sup>29</sup> *E.g.* The gift of the benefits arising under a right of copyright.

<sup>30</sup> See note 32 *et seq.*, *infra*.

assignation of a contractual obligation.<sup>31</sup> In contrast, Article 12 of the Convention is applicable where a dispute concerns the contractual assignation of a contractual obligation. A more difficult question is whether Article 12 applies to the contractual assignation of a non-contractual obligation, such as a claim for delictual damages. In such a case, an obligation exists on two levels, first, the delictual obligation between the original parties (*i.e.* the perpetrator of the delict, and the injured party), and secondly, the contractual obligation between the assignor (the injured party), and the assignee. Clearly, the Convention applies to the contractual obligation between the assignor and the assignee; this accords with Article 1(1), and corresponds to the wording of Article 12(1). It is submitted, however, that the submission of this scenario to Article 12(2) (which would seek, in effect, to regulate the non-contractual obligation between the assignee and the debtor, the perpetrator of the delict), would be at odds with the wording of Article 1, which restricts the ambit of the Convention's operation to '*contractual obligations*'. After conclusion of the contract between the injured party and the assignee, all that exists between the perpetrator of the delict and the assignee is a delictual, not a contractual obligation. In short, Article 12(2) may, on occasion, overstep the boundaries established by Article 1(1). It is acknowledged, however, that the prejudicial effect of this may be minimal, since Article 12(2) denotes, in any event, application of the law governing the right to which the assignment relates (*i.e.* the proper law of the delictual right), not the contractual *lex causae*.

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<sup>31</sup> *E.g.* The gift of a contractually created right, such as a debt.



## **(b) Non-contractual assignments**

Where assignments are non-contractual, reliance is still placed upon the common law rules, which generally are renowned for their unintelligibility.<sup>32</sup> As Graveson has observed,<sup>33</sup> some courts have favoured a contractual analysis of the problem,<sup>34</sup> while others, a proprietary analysis,<sup>35</sup> and others still, a middle path.<sup>36</sup> Confusion derives from the fact that, frequently, some or all of the putative connecting factors (*e.g.* the *lex domicilii*, the *lex loci actus* and the *lex situs*) coincide. By reason of the false conflicts thus arising, courts have often failed to state explicitly the particular capacity in which the *lex causae* is being applied.

Before considering the potentially applicable connecting factors, it is worth stating that these rules apply, not only to non-contractual assignments, but also to contractual assignments of obligations which fall within the Article 1 exclusions (and thereby, outwith the scope of the Convention).

The connecting factors deemed, at one time or another, to be pertinent to the transfer of corporeal moveable property have, in like manner, been applied to the transfer of incorporeal moveable property.

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<sup>32</sup> Consider the unattributed remark made at the beginning of the last century, that “*There are various views as to what law governs the voluntary assignment of a chose in action ... The cases on the subject are singularly inconclusive.*” (Note, ‘*The Law Governing the Recording of an Assignment of a Chose in Action*’ (1906/7) 20 Harv. L. Rev. 636, p637) Cf. Cheshire & North, 13<sup>th</sup> edition, *ibid.*, p963; and Fletcher, I F, ‘*Conflict of Laws and European Community Law*’ (1982), at p176, where the rules are described as comprising “*a highly unsatisfactory and retrograde jurisprudence.*”

<sup>33</sup> Graveson, *ibid.*, p475.

<sup>34</sup> *Lee v. Abdy* (1886) 17 Q.B.D. 309.

<sup>35</sup> *Re Queensland Mercantile & Agency Company* [1891] 1 Ch. 536.

<sup>36</sup> *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669.

*Lex causae – mobilia sequuntur personam*

During the period of its general prime,<sup>37</sup> application of the brocard '*mobilia sequuntur personam*' was extended to transfers of incorporeal moveable property.<sup>38</sup> Lord Kames and Joseph Story, writing on different sides of the Atlantic, both advocated application of the *mobilia* principle.<sup>39</sup> The theory, which attributes to the property a notional *situs* at the owner's domicile, is attractive insofar as its bias towards domicile acknowledges that property of this character lacks a physical *situs*.<sup>40</sup> The theory was applied in at least one Outer House decision,<sup>41</sup> and appears to have been one of the (several) bases of decision in *Republica de Guatemala v. Nunez*.<sup>42</sup> The facts in *Republica de Guatemala* were "peculiar and picturesque, but (so far as material to the point reported) not complicated ... C made in Guatemala a voluntary assignment in writing to N of a sum deposited by C in a London bank, both C and N being domiciled in Guatemala and N being a minor."<sup>43</sup> The assignment was valid according to English law, but invalid according to Guatemalan law. The proceedings were intended to determine the entitlement as between N and the Republic, to which C, while in prison, had subsequently assigned the deposited sum. The question was whether English law or Guatemalan law should determine the validity of the assignment to N. The Court of Appeal applied Guatemalan law, but for reasons which were not unanimously supported by the three members of the Court. Bankes, LJ. appears to have placed more emphasis upon the *lex domicilii* than did Scrutton, LJ., or Lawrence, LJ., who both referred, additionally, to the *lex loci actus*. Scrutton, LJ.

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<sup>37</sup> See Chapter Eight, *supra* – 'The Transfer of Corporeal Moveable Property'.

<sup>38</sup> Some authors have even suggested that the theory was, in fact, more suited to dealings with intangible property: "The theory had, perhaps, a stronger justification in the case of intangibles by reason of the absence or nebulous nature of the *situs* of incorporeal property." (Graveson, *ibid.*, p473)

<sup>39</sup> Kames, '*Principles of Equity*', III.8.4.; and Story, '*Commentaries on the Conflict of Laws*', paragraphs 362, 395-404.

<sup>40</sup> *New York Life Insurance Company v. Public Trustee* [1924] 2 Ch. 101, *per* Atkin LJ., at p119.

<sup>41</sup> *Forbes v. Official Receiver in Bankruptcy* 1924 S.L.T. 22.

<sup>42</sup> [1927] 1 K.B. 669.



explained that the court was “*Freed from the picturesque facts ... to determine the dry question of law*”,<sup>44</sup> but the case has been sorely criticized for failing to lay down a clear *ratio*: the author of a note published shortly after the decision described it as a “... *curious addition to the cases in which all the members of a strong court have arrived at the same result, but all for different reasons.*”;<sup>45</sup> Sykes concluded that, “[It] is difficult to extract anything very tangible from the welter of opinions.”;<sup>46</sup> and Collier has described the case as “*confused and indeterminate.*”<sup>47</sup>

In common with the eventual demise of the *mobilia* principle in transactions concerning corporeal moveable property, and largely for the same reasons, the principle is no longer considered appropriate to determine the validity of assignments of incorporeal moveable property. As one author has written, “*The fetish mobilia sequuntur personam long ago lost caste ...*”<sup>48</sup> Part of the reason for corrosion of the *mobilia* theory seems to have been the fact that the *lex domicilii* frequently coincided with the *lex loci actus*, or the *lex situs*. In *Lee v. Abdy*,<sup>49</sup> for example, Day, J. advised that, “[The parties] *are domiciled and are contracting in Cape Colony, and by the law of that colony, as it seems to me, the validity or invalidity of such contract [an assignment of a policy of life insurance] must be determined.*”<sup>50</sup> Similarly in the case

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<sup>43</sup> F P, ‘*Note – Republica de Guatemala v. Nunez*’ (1927) 43 L.Q.R. 296, at p296.

<sup>44</sup> *Ibid.*, p687.

<sup>45</sup> F P, *ibid.*, p296.

<sup>46</sup> Sykes, E I, ‘*Cases and Materials on Private International Law*’ (1962), p594.

<sup>47</sup> *Ibid.*, p255.

<sup>48</sup> Unattributed note, ‘*What Law Governs the Assignment of a Bank Account?*’ (1926-27) 40 Harv. L. Rev. 989, at p989.

<sup>49</sup> (1886) 17 Q.B.D. 309. This case concerns a contractual assignment, but the principle can be extended by analogy to non-contractual obligations.

<sup>50</sup> *Ibid.*, p312. In the later case of *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, Scrutton LJ. noted, at p689 that, “*Neither judge [in Lee v. Abdy - Day, J. or Wills, J.] draws a distinction between the lex domicilii or the lex loci actus,*” and further, “... *where, as here the two laws are the same it is not necessary to decide between them.*” Cf. Webb & Brown: “*It is by no means clear whether Day, J. really decided ... [Lee v. Abdy] on the basis of the lex loci actus of the assignment or on that of the domicile of the parties. The same ambiguity pervades Republica de Guatemala v. Nunez.*” (Webb, P R H, and Brown, D J L, ‘*Casebook on the Conflict of Laws*’ (1960), p376)

of *In re Anziani, Herbert v. Christopherson*,<sup>51</sup> the document in question was invalid because its validity was a matter for Italian law, the *lex domicilii* and the *lex actus*.<sup>52</sup>

### Lex causae – lex loci actus

The notion that incorporeal moveable property lacks a factual *situs* also prompted for a time application of the *lex loci actus* to govern the validity of an assignation of incorporeal moveable property.<sup>53</sup> The *lex loci actus* theory (which gives rise, of course, to the question: what is the *locus actus*?),<sup>54</sup> subjects the validity of a particular assignation to the law of the place where the assignation was made or effected.<sup>55</sup> So, for example, in *Scottish Provident Institution v. Cohen*,<sup>56</sup> Lord McLaren held that, “*It appears to me to be reasonably clear that the validity of the assignment must be determined by the law of the country within which the assignment was made.*”<sup>57</sup>

Whilst this theory may be of some value in determining the validity of an assignation as between the assignor and the assignee, it must be refuted that the *lex loci actus* is

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<sup>51</sup> [1930] 1 Ch. 407.

<sup>52</sup> *Ibid.*, per Maugham, J., at p422: “... the comity of nations, whatever that phrase may include, certainly does not require the Courts of this country to recognize as valid a voluntary assignment of a moveable [situated where?] entered into here by a domiciled Italian which by Italian law, for reasons of public policy, is regarded as null and void.”

<sup>53</sup> *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669.

<sup>54</sup> Cf. Aldous, J., in *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, at p424: “... applying the *lex loci actus* ... can raise doubt as to what is the relevant transaction to be considered and where it takes place. That is particularly so ... with the explosion of communication technology.”

<sup>55</sup> E.g. *Scottish Provident Institution v. Cohen* (1888) 16 R. 112, per Lord President Inglis, at p116: “The transaction took place in England and the constitution of the creditor’s rights must be determined according to the law of the country where the transaction took place – that is, the law of England.” The views of Lord McLaren, the judge at first instance, were held to be “very sound” (*ibid.*, p116), viz.: “We have nothing to consider under the law of Scotland ... except to see that a valid right of credit is created by the policy in the form recognized by our law ... The validity of that assignment will, in general, be determined by the *lex loci contractus* – that is, according to the law of the country in which the transference is made or the security given.” Cf. *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733, per Lord Stormonth-Darling, at p734: “The moment that the insured transferred his right of credit in a manner recognised as sufficient by the law of the country where the transaction took place, I think he became divested of his right, and incapable of transferring it to anybody else, or at least to anybody who had notice of the prior transfer.”

<sup>56</sup> (1888) 16 R. 112.



appropriate as regards the original debtor who is not, in fact, a party to the subsequent assignation. As Graveson has pointed out, “*The effect of governing his [i.e. the original debtor’s] rights under the assignment by the lex actus [in this context, meaning the lex loci actus] may well lead to the untenable position of increasing his obligations under the debt.*”<sup>58</sup>

As regards disputes concerning priority among competing assignations, the *lex loci actus* theory is deficient, for in the event that each assignation is valid by its corresponding *lex loci actus*, the theory provides no solution whatsoever. Admittedly, the *lex loci actus* may evince legitimate interest in the formal validity of an assignation,<sup>59</sup> but this does not justify wider application of the *lex loci actus*. At any rate, Staughton, LJ. has recently asserted that, “*At all events, for choses in action in general, the lex loci actus has been rejected.*”<sup>60</sup>

### *Lex causae – lex situs*

By extension of the rule applicable to corporeal moveable property, Westlake, Dicey and Falconbridge each considered that the *lex situs* (or more properly, the *lex loci rei sitae*) was apt to govern all disputes concerning incorporeal moveable property.<sup>61</sup> As has been demonstrated in Chapter Four, however, the *situs* of such property is a complex and artificial notion, and for reasons of definition, if none other, the *situs*

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<sup>57</sup> *Ibid.*, p116.

<sup>58</sup> Graveson, *ibid.*, p473.

<sup>59</sup> Anton, A E, ‘*Private International Law*’ (1967), p410; *Falconer v. Heirs of Beatie* (1627) Mor. 4501; *Sinclair v. Murray* (1636) Mor. 4501; and *Erskine v. Ramsay* (1664) Mor. 4502. (Note 104 *et seq.* *infra*)

<sup>60</sup> *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, 402.

<sup>61</sup> Westlake, J ‘*A Treatise on Private International Law*’, 5th edition, p207; Dicey & Morris, ‘*The Conflict of Laws*’ 1st edition (1896), Rule 141; and Falconbridge, J D, ‘*Essays on the Conflict of Laws*’ (1954), p274. Consider also *F&K Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, *per* Pearson, J., at p156: “*Evidently, there is a considerable weight of authority in favour of the*

rule is inconclusive. As has been noted, however, the *situs* rule is one of the most despotic choice of law rules.

In *Republica de Guatemala v. Nunez*,<sup>62</sup> Lawrence LJ., opined that, “*Wherever a local situation can properly be attributed to a debt it seems to me logically to follow that the same principle should be applied to its assignment as is applicable to the transfer of goods ... The principle that a transfer of goods made according to the lex situs is valid is ... well established.*”<sup>63</sup> His Lordship considered that, “*In the present case the debt is connected in so many ways with England that there is no difficulty in arriving at the conclusion that it has its situation or quasi-situation*<sup>64</sup> *in England*<sup>65</sup> ... *In the case of a debt so situated I am unable to appreciate why on principle an assignment valid according to the lex situs should be rendered ineffectual merely because it was made in Guatemala, where the parties to it were domiciled, and because it did not comply with the requirements of the law of Guatemala.*”<sup>66</sup> This is a surprising passage, since it is effectively a dissent from the majority decision that the validity of the assignment should be governed by the law of Guatemala, but oddly, his Lordship did not explicitly proclaim his dissent. On the contrary, he declared that, “*I have come to the conclusion that the gift to the defendant, who by his personal law and by the law of the place where it was made was disabled from accepting it, cannot properly be treated as valid in England, notwithstanding that the subject-matter of the gift was*

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*view that only the lex situs can alter the title to debts and choses in action, and the authorities cited to prove the contrary proposition do not seem to have that effect.”*

<sup>62</sup> [1927] 1 K.B. 669.

<sup>63</sup> *Ibid.*, p695.

<sup>64</sup> This is a significant reference to notional *situs*.

<sup>65</sup> For example, “*The contract with the bank was made in England – the nature and extent of the bank’s obligations under the contract fall to be determined by English law – the debt is payable in England where the bank is resident and domiciled and England is the place where the debt is properly recoverable.*” (*ibid.*, per Lawrence, LJ., at p697)

<sup>66</sup> *Ibid.*, p697.



*situate here.*"<sup>67</sup> This constitutes a veiled capitulation by the *lex situs* in favour of the accumulating *lex domicilii* and *lex loci actus*.

In the same manner that the *lex domicilii* often coincides with the *lex loci actus*, so too the *lex loci actus* often corresponds with the *lex situs*. As Scrutton, LJ., noted in *Republica de Guatemala v. Nunez*,<sup>68</sup> with reference to the case of *In re Queensland Mercantile and Agency Co.*,<sup>69</sup> "The law of the situs of the debt, the unpaid calls, and the law of the place of the transaction the effect of which was being considered, the arrestment, were the same, and it was therefore unnecessary to decide which would prevail in case of difference. North, J. [in *In re Queensland Mercantile and Agency Company*] treated the law of the place where the debt was situate as overriding the law of the domicil of the creditor. He did not deal with the *lex loci actus*, which was also the *lex loci rei sitae*. The Court of Appeal did not deal with the case in these terms at all but on the lines that the Scottish court was administering the *jus gentium* and the English court would not interfere."<sup>70</sup> Again, it is evident that the basis upon which the *lex causae* is applied might frequently be obscured by a variety of links between the parties and their circumstances, and that law.<sup>71</sup> Whilst such an accumulation of factors may confirm that the *lex causae* is apposite,<sup>72</sup> this does not assist in ascertaining the appropriate connecting factor, or in determining the *lex causae*, in cases which have more diverse legal ties.

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<sup>67</sup> *Ibid.*, p701.

<sup>68</sup> [1927] 1K.B. 669.

<sup>69</sup> [1891] 1 Ch. 536; affirmed [1892] 1 Ch. 238.

<sup>70</sup> *Ibid.*, p693.

<sup>71</sup> E.g. Warrington, J., in *Kelly v. Selwyn* [1905] 2 Ch. 117, at p121, noted that *In re Queensland Mercantile and Agency Company* [1892] 1 Ch. 219, "... merely decided that where there is a chose in action owing from persons residing in a particular country (in that case in Scotland) an assignment in that case by process of law of those choses in action, valid according to the law of Scotland, would be valid elsewhere. I do not think that case decided anything more."

The simple fact that a precise situation may notionally be ascribed to incorporeal moveable property, does not, *per se*, warrant the application of the *lex situs* to all questions concerning that property. The question of 'appropriateness', however, has often been overlooked. This was the case in *F&K Jabbour v. Custodian of Israeli Absentee Property*,<sup>73</sup> where Pearson, J., held that, "... if the action to recover a debt or chose in action is brought in the country where it is properly recoverable and therefore situated, and if there is a conflict between the *lex situs* and the proper law (the one having legislation which vests the debt or chose in action in A and the other having legislation which vests the debt or chose in action in B), the court trying the action will be bound to apply its own law which is the *lex situs*."<sup>74</sup> Hence, Pearson, J. admits that the *lex situs* need not necessarily be the proper law.

The arguments proffered in support of applying the *lex situs* to assignments of incorporeal moveable property, mirror, by simple (too simple) analogy, those arguments promulgated in support of applying the theory to transfers of corporeal moveable property.<sup>75</sup> However, the rationale which exists for applying the *lex situs* to corporeal moveable property, is distorted when the rule is extended to assignments of incorporeal moveable property.<sup>76</sup> Considerations such as ease of ascertainment,

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<sup>72</sup> *Sed contra*, *Winkworth v. Christie, Manson & Woods Ltd* [1980] 1 Ch. 496.

<sup>73</sup> [1954] 1 W.L.R. 139.

<sup>74</sup> *Ibid.*, p156.

<sup>75</sup> The attribution of a '*situs*' to incorporeal property is intended to facilitate the conflict of laws regulation of the assignment of such property. Accordingly, as Anton has noted, "... *there has been a tendency on the part of private international law lawyers to resolve questions relating to their [i.e. incorporeal objects'] assignment by rules similar to those governing the transfer of corporeal moveables, that is, according to the *lex situs* principle.*" (Anton (1967), *ibid.*, p408) Cf. Graveson, *ibid.*, p474; and Rogerson, P J, '*The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading*' [1990] 49 C.L.J. 441, 453.

<sup>76</sup> Cf. Note (1926), *ibid.*, p990: "*The frailty of the notion of situs in its application to a debt has been demonstrated repeatedly. If the concept be not limited to tangibles, its use merely implies a metaphoric description of a result attained on independent grounds.*"



uniformity, control, and commercial expediency do not apply with equal force to dealings with incorporeal moveable property.

These considerations led Morris to conclude that the *situs* test is inadequate.<sup>77</sup> This view was judicially endorsed by Staughton, LJ. in *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)*:<sup>78</sup> “In the case of a simple contract debt the *lex situs* is thus rejected, because it is uncertain. That was not always Dicey’s view.”<sup>79</sup> Furthermore, in the recent case of *Raiffeisen Zentralbank Österreich v. Five Star General Trading LLC*,<sup>80</sup> Mance, LJ. advised that, “... application of the *lex situs* cannot provide a satisfactory solution in all cases ... in cases of global assignments, for example, under factoring or discounting arrangements, it may well not be appropriate to adopt a rule which would make the validity of assignment depend upon consideration of the residence of each debtor and *lex situs* of each debt assigned<sup>81</sup> ...

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<sup>77</sup> Morris, J H C, ‘Cases and Materials on Private International Law’, 4<sup>th</sup> edition, at p370: “Westlake ... and Dicey ... thought that the *lex situs* of the debt is the test. This view has been overruled by the majority of the Court of Appeal (*Republica de Guatemala*) and by Maugham J. in *Re Anziani* ... at any rate so far as voluntary assignments are concerned. The objection to it is that though a debt may be regarded as situated in the place where it is properly recoverable ..., that is presumably where the debtor resides and may be sued, the debtor may reside in more places than one.” Cf. Rogerson (1990), *ibid.*, at p453, where the author asserts that “... application of the *lex situs* to intangible property is an implausible stratagem.”

<sup>78</sup> [1996] 1 W.L.R. 387.

<sup>79</sup> *Ibid.*, p401. His Lordship referred to a dictum of Cozens-Hardy, J. in *In re Maudslay* [1900] 1 Ch. 602, at p610, in which reference was made to rule 141 of the 1<sup>st</sup> edition of Dicey’s work (1896): “An assignment ... of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt) is valid.”

<sup>80</sup> [2001] 2 W.L.R. 1344; [2001] 3 All E.R. 257.

<sup>81</sup> Benjamin has explained that as regards immobilised securities, “The interest of the participant is characteristically unallocated ... Of course, where all interests are represented by an undivided Global, the interest of the participant is not only unallocated, but inherently unallocatable.” (Benjamin, J, ‘Determining the *Situs* of Interests in Immobilised Securities’ (1998) 47 I.C.L.Q. 877, 924/5) Benjamin had previously warned that, “... although [the] securities business is international and electronic, settled law does not yet reflect this.” (Benjamin, J, ‘The Law of Global Custody’ (1996), p49)

[Some scholars<sup>82</sup>] *favour the law of the assignor's residence as the applicable law in such cases.*"<sup>83</sup>

### *Lex causae – lex actus*

To formulate a mechanical choice of law rule – whether *lex domicilii*, *lex loci actus*, or *lex situs* – intended to govern every question which could potentially arise in connection with the assignation of incorporeal moveable property is clearly contentious. A more viable rule may be one which is more flexible and which permits account to be taken of each relevant factor.<sup>84</sup>

As was demonstrated in Chapter Eight, Professor Cheshire was an early exponent of the *lex actus* theory, advising that "*It is reasonable and logical to refer most questions relating to a debt to the transaction in which it has its source and to the legal system which governs that transaction.*"<sup>85</sup>

The difficulty inherent in applying a strict and exclusive connecting factor, stemming from a resolute characterisation of the problem in issue, was highlighted in *F&K Jabbour v. Custodian of Israeli Absentee Property*<sup>86</sup> and, more recently, in *Raiffeissen*

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<sup>82</sup> E.g. Goode, R, 'Commercial Law', p1128; and Moshinsky, M, 'The Assignment of Debts in the Conflict of Laws' (1992) 108 L.Q.R. 591, 613.

<sup>83</sup> [2001] 2 W.L.R. 1344, 1359. This would appear to be *mobilia sequuntur personam* cast in a modern light.

<sup>84</sup> Cf. Second Restatement, paragraph 250: "*Whether a voluntary assignment for the benefit of creditors of the debtor's interests in moveables is effective to transfer the debtor's interests in chattels or in intangible rights is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the debtor and the assignment. This state will usually be the state of domicile, if the debtor is an individual, and the state of incorporation, if the debtor is a corporation.*" Cf. Graveson, *ibid.*, at p474: "[The proper law theory] proceeds on a treatment of property, not as rights existing independently of, and unrelated to the transaction out of which they arose, but as part of the contract or transaction which created them."

<sup>85</sup> Cheshire, G C, 'Private International Law', 7th edition, p422.

<sup>86</sup> [1954] 1 W.L.R. 139.



*Zentralbank Österreich v. Five Star Trading LLC*.<sup>87</sup> Similarly, Staughton, LJ. preferred to apply, not the *situs* rule *per se*, but the related, though more flexible, factor of ‘proper law of the right’: “*Situs is now replaced by the proper law of the contract by which the debt was created. But with other monetary obligations the choice of the law governing the creation of the thing approximates closely, in my opinion, to the lex situs.*”<sup>88</sup>

Accordingly, it seems that relating a debt or other incorporeal right to the transaction which underpins it, now justifies, not only in Article 12 cases,<sup>89</sup> but also in non-contractual cases, reference to the ‘proper law’ of that transaction, that is, to the legal system with which the transaction has its closest and most significant connection. As Staughton, LJ. suggested, however, the proper law of the right will, in many cases, constitute the *lex situs* of the incorporeal moveable property.

The proper law approach, while leading often to application of the *lex situs*, permits additional flexibility insofar as the constituent parts of a particular transaction (*e.g.* capacity of the parties, formal validity of the transaction, essential validity of the transaction *etc.*) may be referred to the particular legal system with which those parts, respectively, enjoy the closest and most significant connection. It might be argued that the court in *Republica de Guatemala v. Nunez*<sup>90</sup> adopted this ‘discrete’ approach, separately tackling the various problems of capacity to take, formal validity, and priorities. Unfortunately for the theorists, however, development of the *lex actus* theory was stunted by the emergence of a false conflict, with the various competing

<sup>87</sup> [2001] 2 W.L.R. 1344; [2001] 3 All E.R. 257. (Note 140 *et seq.*, *infra*)

<sup>88</sup> *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, 401.

<sup>89</sup> Note 135 *et seq.*, *infra*.

<sup>90</sup> [1927] 1 K.B. 669, *per* Scrutton, LJ., at p693.

factors being represented by the same law, namely, the law of Guatemala.<sup>91</sup> It is possible that *Lee v. Abdy*<sup>92</sup> may also be construed in this light.

### Aspects of validity: capacity to assign

The tendency of the courts has been to mask the contract/conveyance (or agreement/assignment) distinction by referring the question of capacity to make or accept an assignment, to the law which governs capacity to contract (*i.e.* to the proper law of the contract, traditionally the *lex loci actus*).<sup>93</sup> The Rome Convention does not lay down a general rule of choice of law concerning the capacity of a natural person to give or to accept title under an assignment of incorporeal moveable property. Specific provision, however, is made in Article 11, to the effect that, “*In a contract concluded between persons who are in the same country, a natural person who would have capacity<sup>94</sup> under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.*” The effect of this provision is to create, in these restricted circumstances, a presumption in favour of applying the *lex loci contractus*, subject, however, to any

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<sup>91</sup> *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669, *per* Scrutton, L.J., at p 693.

<sup>92</sup> (1886) 17 Q.B.D. 309. *Cf.* Morris, 3<sup>rd</sup> ed., p362, and 4<sup>th</sup> ed., p323. Consider too *Trendtex Trading Corp v. Crédit Suisse* [1982] A.C. 679, *per* Lord Wilberforce, at p695.

<sup>93</sup> *Re Korvine's Trust* [1921] 1 Ch. 343. *Cf.* Graveson, *ibid.*, p477; and Carnahan (1958), *ibid.*, at p453: “The majority of the cases dealing with the question have held that the law of the place of assignment governed the capacity of a married woman to assign or to accept an assignment of an interest in an insurance policy.” Carnahan modified this assertion, at p455, where he stated that, “Capacity to accept an assignment has been determined by reference either to the law of the place where the original policy of insurance was payable (in these cases it may be inferred that that state was also the place of making of the contract of insurance) or to the law of the domicile of the parties to the assignment. In cases of this type it is difficult to determine the true basis of the decision.” As far as capacity to contract is concerned, Dicey & Morris now refer this issue to the law of the country with which the contract is most closely connected, or the *lex domicilii*, or residence. (p1271, paragraph 32R-213)

<sup>94</sup> Capacity, it is presumed, to *contract*, not to *transfer* an interest in property (*i.e.* contractual, rather than proprietary, capacity).



incapacity under, say, the *lex domicilii*, or the *lex loci rei sitae*, of which the other transacting party was, or should have been, aware.<sup>95</sup>

As far as proprietary (as opposed to contractual) capacity is concerned, resort must be had to *Republica de Guatemala v. Nunez*.<sup>96</sup> Once again, due to the coincidence of connecting factors in this case, the factor applicable to the particular issue of capacity is not incontestable.<sup>97</sup> In *Republica de Guatemala* the question of capacity to take an assignment of personal property was held to be governed by *either* of the Guatemalan *lex domicilii*,<sup>98</sup> or the law of the place where the assignment took place. Since both factors denoted the law of Guatemala, a false conflict arose, and the court held that it was immaterial which connecting factor ought to prevail.<sup>99</sup>

In a revisionist view of *Republica de Guatemala*, Morris suggested that, “*The validity or invalidity of an assignment of a chose in action on the ground of lack of form or lack of capacity is governed by the proper law of the assignment.*”<sup>100</sup> Maher has taken

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<sup>95</sup> Dicey & Morris, p1271, paragraph 32R-213.

<sup>96</sup> [1927] 1 K.B. 669.

<sup>97</sup> Consider Sykes (1962), *ibid.*, p594; and Collier, *ibid.*, p255.

<sup>98</sup> Consider Sykes: “*It should be remembered that the ... [Republica de Guatemala] case posed issues both of form and of capacity and the presence of the latter category may explain the tenderness shown in some quarters to the lex domicilii.*” (*ibid.*, p594) According to the *lex domicilii*, a minor could not accept an assignment of the type in question, except by the consent of a judicially appointed representative, a requirement which had not been satisfied. (F P, *ibid.*, p296)

<sup>99</sup> *Ibid.*, per Scrutton, LJ., at p693: “*In my opinion, both the validity of the parties to enter into such a transaction and the validity and effect of such a transaction in form and results must be determined by one or other of those laws [i.e. the lex loci actus or the lex domicilii] and in this case they are the same.*” Cf. Lawrence, LJ., who remarked, at p701, that “*... the gift to the defendant, who by his personal law and by the law of the place where it was made was disabled from accepting it, cannot properly be treated as valid in England notwithstanding that the subject-matter of the gift was situate here.*” Consider Webb & Brown, *ibid.*, at p379: “*The same ambiguity is to be found in this [Republica de Guatemala] case as in that of Lee v. Abdy – viz., as to whether the court was deciding the matter before it according to the lex domicilii or the lex loci actus. In the Guatemala case, however, there is the further complication that two issues were raised with regard to the alleged assignment to Nunez: (1) that of capacity and (2), the question of formal validity.*”

<sup>100</sup> Morris, J H C, ‘*Cases and Materials on Private International Law*’, 4<sup>th</sup> edition, p362. Cf. Second Restatement, paragraph 209: “*The validity of an assignment of a contractual right not embodied in a document, which is assignable under [paragraph] 208, and the rights created thereby as between assignor and assignee are determined by the local law of the state which, with respect to the particular*

issue with this interpretation, suggesting that, “*Although it has been argued ... that issues of capacity to assign a debt should be governed by the proper law of the assignation, the case law suggests that this is governed by the law of the domicile of the parties.*”<sup>101</sup> Maher refers specifically to *Black v. Black’s Trustees*,<sup>102</sup> and to *Republica de Guatemala*, but it is submitted that these cases do not, in fact, entirely support his assertion: any remarks made in *Black* with reference to incorporeal moveable property are *obiter*, and it has already been shown that *Republica de Guatemala* is inconclusive as to which law should determine questions of capacity.

Although there is apparent confusion as to which law should determine proprietary capacity, it is submitted that an *in favorem* approach to capacity is best: “... *capacity should be governed by the proper law of the transfer or possibly the proper law of the right.*”<sup>103</sup>

### **Aspects of validity: formal validity**

The distinction between the validity of a contract to assign property, and of the assignation itself, must be borne in mind. Questions of form,<sup>104</sup> although often referred to the *lex loci actus*,<sup>105</sup> may require to be referred to the *lex loci rei sitae*, for otherwise, were the assignation to fall short of compliance with formalities prescribed

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issue, has the most significant relationship to the assignment and the parties.” Comment (a) explains that this rule applies to the capacity of the assignor to assign, as well as to issues of formal and essential validity.

<sup>101</sup> Maher, *ibid.*, p215.

<sup>102</sup> 1950 S.L.T. (Notes) 32

<sup>103</sup> Crawford, *ibid.*, p320, paragraph 14.22.

<sup>104</sup> Consider Carnahan, *ibid.*, where it is suggested that, “*Questions of formalities necessary for an assignment have arisen in cases relating to the type of writing required, including the form in which the intent of the assignor must be expressed, and the formalities necessary to constitute delivery of an assignment otherwise in proper form.*” (p456)

<sup>105</sup> Carnahan, *ibid.*, states, at p459, that, “*Under the rule which treats an assignment as being a contract, the formalities of delivery – actual or constructive – and the presumption of acceptance by the beneficiary should be decided by the law of the place where the assignment was made.*” Cf.



by the *situs* (e.g. as to registration or notarial execution), the proprietary effects may be ineffective there.<sup>106</sup>

In *Bankhaus H Aufhauser v. Scotboard Ltd.*,<sup>107</sup> Lord Hunter alluded to the possibility of a distinction between the laws which are appropriate to determine the formal and the essential validity of an assignation, but, on account of constricted pleadings, his Lordship was denied the opportunity to explore this possibility: “*It is unnecessary to decide what the position might have been had the pursuers ... distinguished between the formal validity of the assignation and its essential validity ... Their case on record is not presented in a way which permits a decision on the basis of such a distinction, possibly because such a presentation would be pointless.*”<sup>108</sup>

His Lordship also adverted to the fact that *Scottish Provident Institution v. Cohen*<sup>109</sup> “... was also concerned with a question of formal validity, and does no more than vouch the proposition that, in a question between the cedent’s trustees and an assignee, compliance in point of form with the requirements of the *lex loci actus* will entitle an assignment to be regarded by a Scottish court as formally valid.”<sup>110</sup>

It is interesting to note that Article 9 of the Rome Convention takes a liberal, *in favorem* approach to the formal validity of a contract to assign.<sup>111</sup> As regards the assignation itself, it is submitted that an *in favorem* approach should likewise be

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*Republica de Guatemala v. Nunez* [1929] 1 K.B. 669, in which the Guatemalan *lex domicilii* of the assignee required certain formalities for a voluntary assignment of money, which were not observed.

<sup>106</sup> *Dulaney v. Merry* [1901] 1 K.B. 536, 542.

<sup>107</sup> 1973 S.L.T. (Notes) 87.

<sup>108</sup> *Ibid.*, p89.

<sup>109</sup> (1888) 16 R. 112.

<sup>110</sup> *Ibid.* 1973 S.L.T. (Notes) 87, 90.

<sup>111</sup> Cf. Dicey & Morris, *ibid.*, p1257, paragraph 32R-172.

favoured, with formal validity according to one or more of the proper law of the right, the proper law of the assignation, or the *lex loci actus*, sufficing.

### Aspects of validity: priority among competing assignees

Lord McLaren advised in *Scottish Provident Institution v. Cohen*<sup>112</sup> that, “... any question of competing right between the trustee and a creditor claiming upon a preferable security must apparently be determined by the law of the country in which the competition arises ... A competition between parties both deriving their rights from the creditor in the policy is not necessarily to be decided on the same principle as that which would regulate a question as to the liability of the debtor.”<sup>113</sup>

Where there is more than one assignation, the competition is generally governed, not by the proper law of the assignation, but by the proper law of the right.<sup>114</sup> Where the question, “... is simply one of priority in acquiring the *jus crediti* created by the policy, and admittedly subsisting in the person either of the insured or of some one deriving right from him ... that is a question which I think must be regulated by the law of the place where the *jus crediti* was first validly transferred.”<sup>115</sup>

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<sup>112</sup> (1888) 16 R. 112.

<sup>113</sup> *Ibid.*, p114.

<sup>114</sup> *Kelly v. Selwyn* [1905] 2 Ch. 117, *per* Warrington, J. (Although one might query the basis of his decision, at least as interpreted by Scrutton, LJ. in *Republica de Guatemala*, at p693, viz.: “Priorities have been said to be questions for the *lex fori* {*The Colorado* [1923] P. 102}, and I think this is the ground of the decision [in *Kelly v. Selwyn*].” Consider too Morris (4<sup>th</sup> edition), *ibid.*, at p367: “Where there are two or more competing assignments of a chose in action, each valid by its own proper law, questions of priority are determined by the proper law of the original contract.” Cf. the approach in Germany where priority between successive assignments is determined by reference to the law governing the claim assigned. (*per* Mance, LJ., in *Raiffeisen Zentralbank Österreich v. Five Star General Trading LLC* [2001] 2 W.L.R. 1344, 1361)

<sup>115</sup> *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733, *per* Lord Stormonth-Darling, at p734. Cf. Rogerson (1990), *ibid.*, p441.



Priorities are a proprietary, as opposed to a contractual, matter,<sup>116</sup> and unless the competing assignments are governed by the same proper law, it is appropriate that the competition be determined by the proper of the right (which will coincide with the *lex situs*).<sup>117</sup>

### *Lex causae – a contemporary lex actus*

Rule 118(2) of the current edition of Dicey & Morris states that, “(2) *But in other cases*<sup>118</sup> (*semble*), *the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection.*”<sup>119</sup> In effect, the authors equate this law with the proper law of the right, being the “*law of the country under which the right was created or otherwise arises.*”<sup>120</sup> Although Rule 118(2) (unlike Article 12(2)) is overtly expressed in ‘proper law’ language, the essence of the two provisions is the same. Significantly, the authors of Cheshire and North have remarked that, “... *it is to be hoped the courts will now abandon the old rules and apply the provisions of Article 12 by analogy to cases of voluntary non-contractual assignments.*”<sup>121</sup> The fulfilment of this hope may signify the acceptance of a broader proper law approach to incorporeal property law matters. Before applying the analogy, however, it is necessary to examine Article 12 in greater detail.

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<sup>116</sup> Collier, *ibid.*, p259.

<sup>117</sup> Cf. Second Restatement, paragraph 211: “ (1) *Questions of priority as between two or more assignees are determined by the law governing the assignments under [paragraph] 209 if the assignments are governed either by the same law or by different laws having the same rule of priority; (2) In other situations, questions of priority are determined by the law governing the assignability of the right.*” This rule presupposes that the each assignment is valid as against the assignor.

<sup>118</sup> *i.e.* non-contractual assignments.

<sup>119</sup> Dicey & Morris, *ibid.*, p977, paragraph 24R-046.

<sup>120</sup> *Ibid.*, p984, paragraph 24-061. *E.g.* “... *in the case of a legacy of moveables this would be the law of the testator’s domicile at death; in the case of an interest under a trust, the law governing the trust; and in the case of a right of action, the lex fori.*”

## (2) Ascertaining the *lex causae* – original-parties/remote-parties distinction

Having observed the contractual/non-contractual distinction, it is important to recognize the further sub-division, between an original-parties and a remote-parties dispute.<sup>122</sup> The original-parties/remote-parties distinction, which was recently deprecated as regards dealings with corporeal moveables,<sup>123</sup> is of greater significance in the context of dealings with incorporeal moveable property. As Professor Anton has advised (at least concerning *voluntary* assignments), “... *the fundamental cleavage appears to be between questions, on the one hand, arising from or depending upon the original relationship between the debtor and his creditor and questions, on the other hand, arising from the terms of the contract by which the debt is assigned.*”<sup>124</sup> This dichotomy was recognised in Scots and English choice of law rules, even prior to the passing of the Contracts (Applicable Law) Act 1990. In *Dinwoodie’s Executrix v. Carruthers’ Executrix*,<sup>125</sup> Lord Traynor remarked that, “As regards ... any question between the depositor and the depository, it may very well be that English law must govern ... On the other hand, in any question between the depositors themselves ..., Scotch law must govern, seeing that the depositors are both Scotch, that they were dealing with moveable estate situated in Scotland and that they cannot be presumed to have transacted with each other on any footing than that their respective rights should be determined by the only law with which they are supposed to be acquainted, that is, the law of their own country.”<sup>126</sup>

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<sup>121</sup>Cheshire & North, 13<sup>th</sup> edition, *ibid.*, p963.

<sup>122</sup> Collier has remarked that, “The difficulty which pervades this topic stems from two sources of confusion. One, which complicates many of the decisions, is the failure to distinguish between questions which are related to the right assigned, and questions related to the assignment itself and rather old-fashioned views with regard to the latter.” (*ibid.*, p251) Cf. Falconbridge, *ibid.*, p423.

<sup>123</sup> Chapter Eight, *supra* – ‘The Transfer of Corporeal Moveable Property’; *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 Ll. Rep. 284.

<sup>124</sup>Anton, A E, ‘Private International Law’ (1990), p621.

<sup>125</sup>(1895) 23 R. 234.



This view was shared by Lord McLaren in the case of *Scottish Provident Institution v. Cohen*,<sup>127</sup> in which his Lordship advised that, “*The assignment of the right of credit in the policy is a new contract, distinct as regards its nature, mode of constitution and the law that regulates it, from the contract constituted by the policy itself.*”<sup>128</sup>

Similarly, in *Bankhaus H Aufhauser v. Scotboard Ltd.*,<sup>129</sup> Lord Hunter advised that, “*It is easy to understand why, in a question between the assignor and the assignee, the intrinsic validity of the assignment should be governed by the proper law of the assignation;*<sup>130</sup> *but when issues of validity (other perhaps than mere formal validity) arise between the assignee and the other party to the original contract, the argument in support of the application of the proper law of the assignation, in preference to the proper law both of the original contract and of the debt claimed, is, in my opinion, inconsistent with both logic and equity.*”<sup>131</sup>

Where a matter is dependent upon the original contract or other relationship between the debtor and the creditor, Professor Anton has expressed the opinion that the liability of the debtor should be governed, “... *in principle by the legal system under*

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<sup>126</sup> *Ibid.*, p239.

<sup>127</sup> (1888) 16 R. 112.

<sup>128</sup> *Ibid.*, p113. Cf. *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733, per Lord Stormonth-Darling, at p734: “*I shall assume that the policy of insurance was a Scottish contract, and that all questions connected with its constitution and fulfilment would be regulated by [Scots] law. But the transference of the right of credit in the policy was a new contract distinct in all its particulars from the contract constituted by the policy itself.*”

<sup>129</sup> 1973 S.L.T. (Notes) 87.

<sup>130</sup> Consider in this regard comment (c) to paragraph 209 of the Second Restatement: “*When the acts of assignment on the part of both assignor and assignee are done in the same state, this state will usually be the state of most significant relationship, except when the place of assignment bears no normal relation to the transaction.*” The reporter has not commented upon what is intended by the expression ‘normal relation’. It is expected, however, that a common-sense approach would be taken to construction of this phrase.

<sup>131</sup> *Ibid.*, p89. Accordingly, his Lordship concluded that, “... *the pursuers, who, by virtue of the assignation claim in a Scottish court a real right in a Scottish incorporeal moveable, cannot in a question with the defenders [the Scottish debtors], who are parties to the contract but not to the*

*which the debt arose, whether this is the law governing the succession in which he is acting as executor or trustee, the law of the deposit which constituted the debt, or the law governing a contract entered into between the debtor and the creditor.”*<sup>132</sup> It is reckoned that the measure of the debtor’s liability (at least in respect of his creditor) must be apparent from the outset of the parties’ transacting. Accordingly, the creditor should not be able to augment, or make more onerous, the debtor’s liability, by assigning his or her right to a third party by assignation governed by a law which differs from the proper law of the right in question. The nature and extent of the debtor’s obligation crystallises at the point of its creation, and cannot thereafter be intensified, save by virtue of its own proper law.

In contrast with this, however, questions arising between the cedent and the assignee are determined by the proper law of the assignation.<sup>133</sup> Furthermore, that law determines whether the rights of the assignee have been extinguished.<sup>134</sup>

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*assignation, insist on having the validity of the assignation and the defender’s title to challenge that assignation determined by German law [the law of the assignation].”*

<sup>132</sup> Anton, (1990), *ibid.*, p621; *Williamson v. Taylor* (1845) 8 D. 156, 162. Cf. Collier, *ibid.*, at p254: “Presumably, ‘the law governing the right’ means the law applicable to the contract, if any, out of which the interest arises, and not the *lex situs* of the interest. If this is so, the applicable law will be determined by the rules laid down in the Rome Convention if the contract out of which the right arises is one which falls within the Convention. If it is not within the Convention ... the applicable law will have to be determined by reference to the rules of common law ... [As regards rights which do not arise out of contract], the governing law should be the *lex situs*.”

<sup>133</sup> Anton (1990), *ibid.*, p623; and Crawford, *ibid.*, p320, paragraph 14.24, and p322, paragraph 14.27. Consider *Strachan v. McDougle* (1835) 13 S. 954; *Taylor v. Scott* (1847) 9 D. 1504; and *Scottish Provident Institution v. Cohen* (1888) 16 R. 112, *per* Lord McLaren, at p114: “Where the assignment is made between parties dealing with reference to the law of England ... we ought to recognize the assignment, provided it is in accordance with the requirements of that law.” Cf. Collier, *ibid.*, at p254: “Article 12(1) ... now makes it clear that, insofar as the assignment is by way of contract (and if it is by way of gift the choice of law rules for contract can be applied by way of analogy), contractual issues are decided by the law which governs the contract of assignment and not by that which governs the interest assigned.” Cf. Note 121, *supra*.

<sup>134</sup> *Re Anziani* [1930] 1 Ch. 407.



The original-parties/remote-parties distinction has now been statutorily endorsed by the Contracts (Applicable Law) Act 1990. Article 12 of the Convention incorporates two discrete provisions,<sup>135</sup> viz.:

1. *The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law<sup>136</sup> which under this Convention applies to the contract between the assignor and assignee.*<sup>137</sup>
2. *The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against*

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<sup>135</sup> The authors of Dicey & Morris explain that the pre-1990 law (*per* 'The Conflict of Laws', 11<sup>th</sup> edition, p979, rules 121 and 122) was, in fact, akin to that which is encapsulated in Article 12 (13<sup>th</sup> edition, p980, paragraph 24-050 *et seq.*)

<sup>136</sup> Note that Article 15 of the Convention *excludes* the operation of *renvoi*.

<sup>137</sup> Professors Giuliano and Lagarde have stated that the interpretation of this provision should give rise to no difficulty: "... *the relationship between the assignor and the assignee of a right is governed by the law applicable to the agreement to assign.*" ('Report on the Convention on the Law Applicable to Contractual Obligations' [1980] OJ C282, 1, 34) Somewhat critically, however, the reporters remark that, "Although the purpose and meaning of the provision leaves hardly any room for doubt, one wonders why the Group did not draft it more simply and probably more elegantly. For example, why not say that the assignment of a right by agreement shall be governed in relations between the assignor and the assignee by the law applicable to that agreement." (*ibid.*) It seems, however, that use of the expression "assignment" may have caused difficulties for the German delegation, since that particular expression in German law includes reference, not only to the effects upon the assignor and the assignee, but also upon the debtor (*i.e.* upon an individual who is not a party to the assignment). Cf. the more flexible American approach, viz.: "The validity of an assignment of a contractual right not embodied in a document, which is assignable under [paragraph] 208, and the rights created thereby as between assignor and assignee are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the assignment and the parties." (Second Restatement, paragraph 209) *Sed contra*, Wolff, *ibid.*, at p538: "In view of the character of an assignment as an alteration of the content of the debt it would appear reasonable for it to be governed by the same law as governs the assigned debt."

*the debtor*<sup>138</sup> and any question whether the debtor's obligations have been discharged.<sup>139</sup>

The operation of Article 12 was subjected to close judicial scrutiny in the case of *Raiffeisen Zentralbank Österreich AG v. Five Star General Trading LLC and others*.<sup>140</sup> It is instructive to consider this case in detail. The claimant Austrian bank lent money to the first defendants, Dubai shipowners, to assist them in the purchase of a certain vessel, the '*Mount I*'. In turn, the owners mortgaged the vessel to the plaintiffs, agreeing to assign to the bank the policy of marine insurance in respect of the vessel. Although the insurers were French, the insurance policy was governed by English law. By deed of assignment (also governed by English law), the owners purported to assign to the plaintiff "*all their right, title and interest in and to the insurances.*" Two weeks after the assignment, the *Mount I* collided with a second vessel, causing the latter to sink. The owners of the sunken vessel, together with the Taiwanese owners of its cargo, sought, in France, attachment orders in respect of the *Mount I* insurance proceeds. Accordingly, the bank commenced proceedings, in England, against the Dubai owner, the French insurers and the Taiwanese cargo owners, seeking various declarations, including one that, as from the date of the assignment, the owners had no right, title or interest, in or to the insurances, or to moneys payable thereunder, and that as from the same date, the bank was entitled to all such interests and money. The cargo owners, pleading French law, denied that the notice of assignment was valid or binding on them.

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<sup>138</sup> Giuliano & Lagarde suggest that the expression '*conditions under which the assignment can be invoked*' includes the "*conditions of transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor.*" (*ibid.*, p34)

<sup>139</sup> The present author agrees with Collier's remark that, "*Logically, the treatment of such matters as assignability should have preceded a provision concerning the assignment.*" The view is expressed that Article 12 is "*inelegantly drafted.*" (*ibid.*, p254, note 53)



The principal issue for decision was whether the assignee of a marine insurance policy, made with French insurers, but governed by English law, was entitled to recover to the extent of his interest. According to French law, the assignment was invalid,<sup>141</sup> but according to English law, it was valid. The choice of law issue arising was a complex one of characterisation,<sup>142</sup> namely, whether the assignee's claim was to be determined by English law, as the proper law governing the underlying contract of insurance, or by French law, the *lex situs* of the chose in action which had been assigned. Counsel for the plaintiff argued that the matter should be governed by Article 12(2) of the Rome Convention, whereas Counsel for the defendant contended that since the Convention was applicable only to contractual obligations, it did not apply to the dispute in hand.

The case called before Longmore, J.,<sup>143</sup> who applied the conflicts methodology recommended by Staughton, LJ. in *MacMillan Inc. v. Bishopsgate Investment Trust Plc.*,<sup>144</sup> namely, "*First it is necessary to characterise the issue that is before the court ... The second stage is to select the rule of conflict of laws which lays down a connecting factor for the issue in question ... Thirdly it is necessary to identify the system of law which is tied by the connecting factor found in stage two to the issue characterised in stage one.*"<sup>145</sup>

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<sup>140</sup> [2000] 2 Ll. Rep. 684; [2001] 2 W.L.R. 1344; [2001] 3 All E.R. 257.

<sup>141</sup> French law denied the bank's claim because notice of the assignment had not been given to the French insurers by or through a French bailiff, as required under Article 1690 of the French Civil Code.

<sup>142</sup> Longmore, J., explained it thus, "*When he opened this case Mr Gruder, Q.C. [Counsel for the plaintiffs] said he proposed to set me an examination question.*" ([2001] 2 Ll. Rep. 684, 685)

<sup>143</sup> In the Commercial Court of the Queen's Bench Division, [2000] 2 Ll. Rep. 684.

<sup>144</sup> [1996] 1 W.L.R. 387, *per* Staughton, LJ., at p391.

As regards the first stage, Longmore J., having attempted the characterisation task, concluded that, “... *the first stage ... may be quite difficult to adopt especially since claims to different relief may give rise to different issues. If one has to ask the question whether the issues are contractual (as [Counsel for the plaintiffs] would say) or proprietary (as [Counsel for the defendants] would say), the answer would appear to be that [two issues<sup>146</sup>] are contractual while [two issues<sup>147</sup>] are proprietary.*”<sup>148</sup>

In spite of this bifurcated characterisation, Counsel for the plaintiff contended that Article 12 of the Rome Convention should apply to each of the four issues. Conversely, Counsel for the defendants submitted that the Convention should apply only to ‘pure’ contractual issues,<sup>149</sup> and that proprietary issues should be decided “*in some other, more traditional way.*”<sup>150</sup> His Lordship was troubled by the call to characterise the plaintiff’s claim as one related purely to the *proprietary* effects of the assignment: “*In the case of the sale of goods (and, indeed, the sale of land) one is entirely used to the different concepts of contract on the one hand and the transfer of*

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<sup>145</sup> [2000] 2 Ll. Rep. 684, at p686. This process was endorsed by Mance, LJ. at [2001] 2 W.L.R. 1344, at p1355. Mance, LJ. added that, “*The process falls to be undertaken in a broad internationalist spirit in accordance with the principles of conflict of laws of the forum.*”

<sup>146</sup> *Ibid.*, p686. The two ‘contractual’ issues concerned, first, the question of validity of the notice of assignment of the contract of insurance, and secondly, the question to whom the insurance moneys were payable.

<sup>147</sup> *Ibid.*, p686/7. The two ‘proprietary’ issues concerned the right, title and interest in the contract of insurance, and the moneys payable thereunder.

<sup>148</sup> *Ibid.*, p687.

<sup>149</sup> Counsel relied upon the authority of Professor Goode, who has stated that, “... *it is widely assumed that Article 12 ... governs all aspects of assignment of debts but ... such assumption is based on the misconception that assignment of debts is to be equated with a contract whereas such assignment is also a transfer of property and, as such is outside the scope of the Rome Convention.*” (Goode, R, ‘Commercial Law’, 2<sup>nd</sup> edition, p1126) (*ibid.*, p687) Cf. Comment 2 to Article 1 of the Giuliano & Lagarde Report, which states that, “... *since the Convention is concerned only with the law applicable to contractual obligations, property rights and intellectual property rights are not covered by these provisions.*” (*ibid.*, p10)

<sup>150</sup> *Ibid.*, p687. Further, “*Professor Goode then concludes that the proprietary effects of an assignment, like the proprietary effects of a contract of sale of goods, have nothing to do with the law applicable to the underlying contract and should be governed by the lex situs. [Counsel for the defendants] submitted that I should follow this guidance and decide that the lex situs is (at least arguably) the applicable law.*” Cf. Collier’s comment that, “... *the tendency to regard the questions as mostly contractual may*



conveyance of title on the other<sup>151</sup> ... It is much less easy to apply this analysis to intangible things ... it is difficult, if not impossible, to divorce the concept of such title from the underlying contract which has created the chose in action in the first place.”<sup>152</sup> It appears that too much importance is placed upon the semantics of the matter and upon the precise formulation of the plaintiff’s claim: “... is the relevant question a question whether title or property in the contract of insurance has been transferred to RZB or is it not rather a question whether the insurers owe the obligation of payment contained in the contract of insurance to the shipowners or to RZB or to some third party?”<sup>153</sup> If the former approach were taken, the question would be characterised as one of property, but if the latter were preferred, then the question would become one of contract. Longmore, J. advised that, “It is unsatisfactory for the application of the Rome Convention to depend merely on the way in which one phrases the relevant question.”<sup>154</sup> Rather opaquely, his Lordship adjudged that, “... as a matter of English law, the Rome Convention should apply to any assignment of a contract unless, on its<sup>155</sup> wording, such application is inappropriate.”<sup>156</sup>

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be thought to lead to an overemphasis on the law governing the contract rather than on the *lex situs*.” (ibid., p252/3)

<sup>151</sup> His Lordship considered that, “It is comparatively easy to see that a different rule of conflict of laws may apply to determine whether a party to a contract is in breach of that contract from the rule that applies to determine whether title to particular goods (or land) has been transferred.” (ibid., p687)

<sup>152</sup> Ibid., p687.

<sup>153</sup> Ibid., p687. Cf. Falconbridge, *ibid.*, at p424, where the author proffers three possible formulations of the tri-partite debtor/assignor/assignee scenario. The nature of the characterisation problem is apparent also from the judgment of Pearson, J., in *F&K Jabbour v. Custodian of Israeli Absentee Property*, [1954] 1 W.L.R. 139, where his Lordship explained, at p152, that, “... a debt or chose in action can be regarded in two ways: (1) it can be regarded as properly moveable property, and when so regarded it naturally falls under the *lex situs*; (2) it can be regarded as a still unperformed obligation under a contract, and therefore it might be still subject to the proper law of the contract and liable to be discharged or altered by that law.”

<sup>154</sup> Ibid., p687.

<sup>155</sup> Does ‘its’ refer to the Rome Convention (e.g. where, on the basis of Article 1, the Convention rules are not applicable to the dispute in hand), or to the assignment in question (e.g. where the particular contract excludes or overrides the operation of the Convention)?

In the immediate case, the court held that Article 12(2) *was* applicable, and by virtue of that provision, the *lex causae* was deemed to be the law governing the right to which the assignment related (*i.e.* English law, the law of the underlying obligation).<sup>157</sup> The effect of the decision was that the plaintiffs were held entitled to the policy proceeds. Dissatisfied with this result, the cargo owners appealed, but without success.<sup>158</sup>

Although the Court of Appeal affirmed the substantive result of Longmore, J.'s decision, nevertheless, it varied his judicial declarations.<sup>159</sup> Mance, LJ.<sup>160</sup> appraised the conflicting contractual and proprietary analyses of the issues in dispute. The respondent bank maintained that the issue in dispute was a contractual one, that is, whether the insurance contract had been validly assigned by the owners to the bank. The appellant cargo owners, on the other hand, maintained that the issue was essentially a proprietary one, concerning the validity (against third parties) of the assignment of an intangible right of claim against insurers.<sup>161</sup>

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<sup>156</sup> *Ibid.*, p687.

<sup>157</sup> *Ibid.*, p688. According to English law, there was no doubt that the plaintiffs had a legitimate claim.

<sup>158</sup> [2001] 3 All E.R. 257. Mance, LJ. noted, at p261, paragraph 2, that, "*The appeal raises at least one moot issue of private international law. The judge was warned that he was being set an examination question on the applicable law. We have to consider the judge's response, conscious that our own may itself be reviewed. Although a central issue involves the scope of the ... 'Rome Convention' ... there is, as yet, no court to which such an issue may be referred to ensure a uniform international interpretation.*" Cf. Plender, R, and Wilderspin, M, *'The European Contracts Convention'* (2001), 2<sup>nd</sup> ed.: "*When the first edition of this book was published in 1991, at the same time as the entry into force of the Rome Convention, it could scarcely have been imagined that, ten years later, the Protocols on the interpretation by the European Court of the Convention would not be in force. There are consequently at the time of writing no judgments of that court on the interpretation of the Convention.*" (Preface, p.ix)

<sup>159</sup> Consider Rogerson's view that, "... Longmore, J. did not very satisfactorily answer the difficult question of whether such questions are proprietary or not." (Rogerson, P J, [2000] All E.R. Annual Review, p106)

<sup>160</sup> Mance, LJ., delivered the leading judgment, Aldous, LJ. and Charles, J. merely expressing their concurrence.

<sup>161</sup> The cargo owners had no contractual nexus with the bank (*ibid.*, p266). *Contra* Rogerson (2000), *ibid.*, at p106: "... a simple proprietary analysis is unattractive because of the English court's fondness for the *lex situs* to answer proprietary issues ... Where the parties to a contract have chosen a law to govern their obligations, the application of the *lex situs* to determine issues like the form of notice leads to unpredictable results, both for the parties and others (such as assignees)." Mance, LJ. confessed that



His Lordship pointed to the straitened nature of the litigants' respective approaches, stating that, "*These opposing analyses both assume that the factual complex raises only one issue and, in their differing identification of that issue, emphasise different aspects of the facts. In my judgment a more nuanced analysis is required.*"<sup>162</sup> Whilst the first issue concerned the effect of the voluntary assignment by the owners to the bank, upon the insurers' liability under the contract of insurance, the second issue concerned the effect of the preventative attachments obtained by the cargo owners (i.e. third parties) in the French courts.

In exhorting the parties to make a '*more nuanced analysis*', it is significant that Mance, LJ. recommended a more flexible approach to choice of law, in general, and to the process of characterisation, in particular, viz.: "*While it is convenient to identify this three-stage process,*<sup>163</sup> *it does not follow that courts, at the first stage, can or should ignore the effect at the second stage of characterising an issue in a particular way. The overall aim is to identify the most appropriate law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law. A mechanistic application, without regard to the consequences, would conflict with the purpose for which they were*

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he had entertained, "...an initial impression that the case fits readily into a contractual, and less readily into a proprietary, slot." (ibid., p270, paragraph 34)

<sup>162</sup> Ibid., p266, paragraph 20. Further, per Mance, LJ., at p267, paragraph 25: "... a proper legal analysis cannot depend exclusively upon the legal systems for which two parties happen to contend in their own partisan interests. The jurisprudential and academic material which we have been shown indicates the existence of other possible candidates – such as the law of the assignor's place of residence or business and the law governing the contract of assignment – which may need to be kept in mind."

<sup>163</sup> Per Staughton, LJ. See note 145, *supra*.

conceived.<sup>164</sup> They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules at stage (2), if this is necessary to achieve the overall aim of identifying the most appropriate law ... The three-stage process identified by Staughton LJ. cannot therefore be pursued by taking each step in turn and in isolation ... There is in effect an interplay or even circularity in the three-stage process.”<sup>165</sup>

Ultimately, the Court of Appeal favoured a teleological approach: “... article 12(2) of the Rome Convention manifests the clear intention to embrace the issue and to state the appropriate law by which [the dispute between the insurers, the bank, the vessel owners and the cargo owners] must be determined.”<sup>166</sup> The appellants contended that the reference in Article 12(2) to ‘the relationship between the assignee and the debtor’ merely referred to their relationship under the contract, *provided* that there had been an effective transfer of property (*i.e.* that the contractual provision is only triggered when it can be demonstrated that there has been a transfer of property, valid according to the *lex situs*). Mance, LJ., however, rejected this submission, stating that it “postulate[d] a most unlikely thought process on the part of the draftsmen of the Convention ... there is no hint in article 12(2) of any intention to distinguish between contractual and proprietary aspects of assignment. The wording appears to embrace all aspects of assignment.”<sup>167</sup> This, it is submitted, is the correct interpretation, for too many questions would be left unanswered were the appellant’s proposition considered

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<sup>164</sup> Cf. Harding, *ibid.*, p354: “... it is undoubtedly the case that, in the process of making a subject more comprehensible, categories are devised and subjects are put into compartments so that, consciously or not, the interplay of rules and the true conflict of interest at the root of legal drama is left in the background or missed altogether ... borderlines are often drawn with an arbitrariness which belies the complexity of the interaction between different sets of rules.”

<sup>165</sup> *Ibid.*, p268/9, paragraphs 27/8.

<sup>166</sup> *Ibid.*, p272, paragraph 43.

<sup>167</sup> *Ibid.*, p272, paragraph 45.



to be correct (*e.g.* is the *lex situs* to be determined by the *lex fori*, or the applicable law of the contract, and are conditions such as delivery to be characterised as contractual or proprietary according to the *lex fori*, the *lex situs*, or the contractual *lex causae*?).

Accordingly, the Court of Appeal concluded that, “... *whatever might be the domestic legal position in any particular country ... the Rome Convention now views the relevant issue – that is, what steps, by way of notice or otherwise, require to be taken in relation to the debtor for the assignment to take effect as between the assignee and debtor – not as involving any ‘property right’, but as involving – simply – a contractual issue to be determined by the law governing the obligation assigned.*”<sup>168</sup>

Hence, the issue whether, following assignment to the bank of the benefits under the insurance policy, the French insurer had to pay the insurance proceeds to the bank as assignee, rather than to the vessel owner, was characterised as a contractual, not a proprietary, issue. In consequence, Article 12 was deemed to be applicable and the tripartite dispute fell to be determined according to English law, the law governing the obligation assigned.<sup>169</sup> Although this view is buttressed by the Giuliano & Lagarde Report,<sup>170</sup> in which it is stated that, “[t]he words ‘conditions under which the assignment can be invoked’ cover the conditions for transferability of the assignment as well as the procedures required to give effect to the assignment in relation to the debtor”,<sup>171</sup> it is submitted that characterisation of notice provisions *etc.* as contractual,

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<sup>168</sup> *Ibid.*, p273, paragraph 48.

<sup>169</sup> According to English law, there was “... *a valid equitable assignment of the benefit of the claims arising under the insurance, including any claim in respect of collision liability.*” (*ibid.*, p286, paragraph 85)

<sup>170</sup> OJ [1980] C282 1.

<sup>171</sup> *Ibid.*, p34/5 (*per* Mance, LJ., at p273, paragraph 47).

even *vis-à-vis* the debtor, with whom the assignee has no contractual nexus, is a curious and anomalous conclusion.

It is submitted that to characterise all of the matters arising under Article 12(2) as contractual, is rather strained. That said, to provide that the law governing the right to which the assignment relates is, by virtue of the significance of that law's relationship with the parties and their circumstances, the law which is appropriate to determine the issue in dispute, is a sensible rule of choice of law (*i.e.* the choice of connecting factor and choice of law rule will generally be appropriate, even if characterisation of the issue as a purely contractual matter is not). Accordingly, it is submitted that a preferable approach would be one which demands not strict characterisation of the issues *qua* contractual or proprietary, but application, *qua lex actus*, of the law which governs the right to which the assignment relates, being the law which has the closest and most significant connection to the particular issue in dispute.<sup>172</sup>

### **(3) Involuntary assignments**

Reference was made at the beginning of this chapter to a third significant distinction which pertains, namely, between voluntary and involuntary assignments. Article 12 of the Rome Convention applies only to voluntary assignments (*i.e.* those cases where the creditor, of his own volition, assigns incorporeal moveable rights to a third party). The Convention does not apply to involuntary assignments, that is, those cases where the creditor's rights in the property are conveyed, against his will, by operation of

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<sup>172</sup> See, in agreement, Plender and Wilderspin, *ibid.*, p229, paragraph 11-25. Cf. Rogerson, who has suggested that, "All that is required is for the English court to apply the same rule as laid down in art 12(2) of the Rome Convention to proprietary questions of intangible property." (Rogerson, 2000, *ibid.*, p106)



law.<sup>173</sup> Involuntary assignments occur by virtue of legal process against the debtor's property, the most familiar means being by way of arrestment, or the equivalent English remedy of garnishment. According to these remedies, the judgment creditor arrests a sum of money due to the judgment debtor from a third party arrestee. If a debt is enforceable within the jurisdiction, even though it may be payable elsewhere, the courts will generally exercise jurisdiction to arrest funds in connection therewith.

Since there is no common contractual law which can be applied to determine priority, the question of priority among competing voluntary and involuntary assignments is governed by the proper law of the right, that is, the *lex loci rei sitae*.<sup>174</sup> Application of the *situs* rule to involuntary assignments of incorporeal moveable property has been endorsed, in spite of the fictional nature of the *situs* of such property: "... *the idea that the lex situs should be adopted to determine proprietary questions regarding debts is particularly prevalent in cases where the English courts are called upon to decide whether to recognise a foreign government's actions or whether to garnish a debt.*"<sup>175</sup>

The law of the *situs* of the debt is generally relevant to the question of jurisdiction, as well as to that of priority of competing claims: "*If ... an involuntary assignment occurs after a voluntary assignment has already been made, the law of the situs determines whether the rights of the voluntary assignee have been postponed or defeated; if the involuntary assignment occurs first, the law of the situs determines what rights, if any, the voluntary assignee has acquired.*"<sup>176</sup> The *lex situs* may require to determine whether or not it should arrest funds, or perhaps more significantly,

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<sup>173</sup> E.g. Upon the appointment of a receiver, or liquidator.

<sup>174</sup> *Re Maudslay* [1900] 1 Ch. 603.

<sup>175</sup> Rogerson (1990), *ibid.*, p442.

<sup>176</sup> Cheshire & North, *ibid.*, p965.

whether it should recognise a foreign court's 'arrestment order' as having duly discharged a debt,<sup>177</sup> for "... *a debt is a species of property which may be recoverable by legal process from a debtor in more than one jurisdiction.*"<sup>178</sup>

In *Raiffeisen Zentralbank Österreich v. Five Star General Trading LLC*,<sup>179</sup> Counsel for the appellants sought to argue that application of the *lex situs* in cases of voluntary assignment would be consistent with its recognised application in cases of involuntary assignment.<sup>180</sup> Mance, LJ., however, sustained the distinction, stating that, "... *consensual and non-consensual situations are, in their nature, quite different and it is neither surprising nor even inconvenient if the differences lead to the application of different laws.*"<sup>181</sup>

## Conclusion

The category of incorporeal moveable property is broad and diverse. In transactions concerning such property, it would appear that the borderland between contract and conveyance is more extensive, and from a choice of law perspective, more hazardous, than typically affects other types of property. As regards contractual assignments, this choice of law borderland may be negotiated with the assistance of Article 12 of the Rome Convention, but as the *Raiffeisen Zentralbank*<sup>182</sup> case has demonstrated, litigants seeking to rely on the *prima facie* clear direction offered by Article 12, may yet stumble on the preceding obstacle of characterisation. In cases of non-contractual

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<sup>177</sup> This is the 'double jeopardy' factor: if the foreign order were denied recognition, the debtor would, in effect, be required to pay double the sum owed. Cf. *Martin v. Nadel* [1906] 2 K.B. 25, *per* Vaughan Williams, LJ., at p29.

<sup>178</sup> *BST v. Shell International* [1990] A.C. 295, *per* Lord Oliver, at p343; Rogerson (1990), *ibid.*, p449.

<sup>179</sup> [2001] 2 W.L.R. 1344.

<sup>180</sup> *Ibid.*, p1359. E.g. *In re Queensland Mercantile and Agency Co.* [1891] 1 Ch. 536; [1892] 1 Ch. 219.

<sup>181</sup> [2001] 2 W.L.R. 1344, 1359.

<sup>182</sup> [2001] 3 All E.R. 257.



assignments, the decreasing influence of the *lex situs* may be noted,<sup>183</sup> coupled with a movement towards a more impressionistic, proper law approach: the contemporary *lex actus* approach indicates that the *lex causae* in such cases should be the law with which the subject matter of the right being assigned has the closest and most significant connection.<sup>184</sup> The approach is impressionistic because, as in *Republica de Guatemala*<sup>185</sup> and *Lee v. Abdy*,<sup>186</sup> reliance is placed not on the particular capacity in which the *lex causae* is being applied, but upon a legal system's overall connection with the parties and their circumstances. This more generalist approach, combined with sensitivity to the original-parties/remote-parties distinction, and a more flexible characterisation of the issues as urged by Mance, LJ. in *Raiffeissen Zentralbank*,<sup>187</sup> paves the way for a more flexible, proper law approach to other property law matters.

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<sup>183</sup> Save, perhaps, as regards involuntary assignments.

<sup>184</sup> Dicey & Morris, *ibid.*, Rule 118(2). (Note 119, *supra*)

<sup>185</sup> [1927] 1 K.B. 669.

<sup>186</sup> (1886) 17 Q.B.D. 309.

<sup>187</sup> *Ibid.*, at p266, paragraph 20.

## Chapter Twelve

### The 'Situs' Rule – For and Against

#### ▪ Supporting the monolith – arguments in favour of the *lex situs* rule

In view of the unquestionable support for application of the *lex situs* to property disputes, it is interesting to consider some of the arguments which have been promulgated in support of this ineluctable connecting factor.<sup>1</sup> There is a wide variety of arguments, and it is revealing to note Wolff's remark that, "*There is ... no unanimity on the reason why the law of the situs should be decisive.*"<sup>2</sup>

As regards immoveable property, one of the most commonly cited reasons for applying the *lex situs* is the need to conserve the integrity and accuracy of title records/registers.<sup>3</sup> Practical convenience is a prerequisite of the sale and purchase of immoveable property and, as Alden has explained, "*Without the situs rule, title searchers would be forced to analyze foreign laws to determine the effect of conveyances, and to search foreign courts to ensure that no extant litigation might destroy their interests.*"<sup>4</sup> If the rule were otherwise, "*Recording systems would ... be*

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<sup>1</sup> Consider Goodrich's observation that, "*Like some other general rules of law, the reasons which lie underneath are seldom stated.*" (Goodrich, H F, 'Two States and Real Estate' (1941), 89 *Uni. of Penn. L. Rev.* 417, 418). Cf. Dicey & Morris, 'The Conflict of Laws', 10<sup>th</sup> edition (1980), at pp555/6: "*The English authorities on the law which governs the transfer of tangible movables are scanty and unsatisfactory, though sweeping dicta are common.*"

<sup>2</sup> Wolff, M 'Private International Law' (1950), p511.

<sup>3</sup> Consider Reese, W L M, 'Restatement of the Law Second, Conflict of Laws' ('Second Restatement') Introductory Note: "*In most instances, the courts of the situs would decide the case in accordance with their own local law. They would do so for sentimental and historical reasons as well as ... for the sake of their title recording systems.*"

<sup>4</sup> Alden, R, 'Modernizing the Situs Rule for Real Property Conflicts' (1987) 65 *Texas L. Rev.* 585, 592. Cf. Nott, S M, 'Title to Moveables Acquired Abroad' (1981) 45 *Conveyancer and Property Lawyer* 279, at p279: "*When an individual or company acquires goods abroad it is a matter of fundamental importance to ascertain whether or not a valid title has been established to those items.*"; and Goodrich, *ibid.* p419.



*rendered too cumbersome, costly and uncertain.”*<sup>5</sup> There is obvious value in keeping the search process as simple, expeditious and inexpensive as is possible; restricting the operation to the confines of one legal system is clearly advantageous.<sup>6</sup>

Whilst there ordinarily exists a comprehensive system of title recording in respect of corporeal immoveable property, generally no such system pertains to moveable property.<sup>7</sup> Vernon has explained that, “... *personal property filing systems traditionally are incomplete in noting only security interests. Ownership interests, if unrelated to security, normally are not made a matter of record.*”<sup>8</sup> Accordingly, the title recording argument carries no weight other than in relation to land, but within that context, it is highly persuasive.

Inherent in the title recording argument, is the notion that only application of the *lex situs* will protect creditors or third party purchasers. Cheshire has stated that in

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<sup>5</sup> Alden, *ibid.*, p592. Cf. Nott, *ibid.*, at p281: “... [the] inconvenience of re-assuring oneself of the propriety of the transferor’s title ... might be a difficult thing to do.”

<sup>6</sup> Consider Weintraub, R J, ‘An Inquiry into the Utility of ‘Situs’ as a Concept in Conflicts Analysis’ (1966) 52 Cornell L. Q. 1, at p3: “... it would substantially complicate the title search and enormously increase its costs to require the searcher to ferret out the foreign law, gain an understanding of its nuances, and apply it to the problem at hand ... In short, the recording system would be thrown into chaos and transactions in realty would become impossibly expensive, risky and impractical if any law other than that of the situs were to govern.”

<sup>7</sup> Or, indeed, to certain types of incorporeal immoveable property (e.g. prescriptive servitudes. Since servitudes of this nature relate entirely to the use of land, however, it is inconceivable that the law appropriate to determine and regulate such rights would be other than the *lex situs* of the [corporeal] immoveable property in respect of which the servitude is exigible. In a scenario where a servitude right pertained to a certain plot of ground, say, in Belgium, in respect of an adjacent plot, say, in the Netherlands, one would surmise that the existence and exercise of the right would be determined by the *lex situs* of the servient, rather than of the dominant, tenement.) (Cf. Wolff, M, ‘Private International Law’ (1950), p534) *E.g. Sherrens v. Maenhout* Case 158/87, [1988] E.C.R. 3791.

<sup>8</sup> Vernon, D H, ‘Recorded Chattel Security Interests in the Conflict of Laws’ (1962) 47 Iowa L. Rev. 346, at p346. In any event, “Due to the mobility of personal property ... local filing is inadequate ... If a security interest is placed on record in County A and the property is moved to County B, checking the record in B is useless. Unless the debtor discloses the existence of the security interest – and if he does, filing is unnecessary – the prospective purchaser or lender in County B is in a difficult position. If he knows the person in possession brought the item from A to B, he can check the record in A. In the absence of such information, he must check in all counties in the state.” (*ibid.*, p347) Obviously, this problem would be exacerbated in the international, as opposed to the interstate, context. See also



questions affecting third parties, "... *business exigencies require that proprietary rights to moveables shall be determinable by the lex situs.*"<sup>9</sup> This view echoes earlier judicial pronouncements, in particular, the dictum of Maugham, J., in the case of *In re Anziani*:<sup>10</sup> "*I do not think that anybody can doubt that, with regard to the transfer of goods, the law applicable must be the law of the country where the moveable is situate. Business could not be carried on if that were not so.*"<sup>11</sup> This is in accord with the view of Kruse, who considered that, "*If we describe economic life by means of the*

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Carnahan, W, '*Tangible Property and the Conflict of Laws*' (1935) 2 *Uni. of Chi. L. Rev.* 345, 361 *et seq.*

<sup>9</sup> Cheshire, '*Private International Law*' 7<sup>th</sup> edition (1965), p411. This view was reiterated in the 8<sup>th</sup> and 9<sup>th</sup> editions, the 9<sup>th</sup> being the first edition for which Dr P M North carried sole editorial responsibility (although the preface confirms that the work was subjected to the former author's "*careful scrutiny*"). Cf. Baxter, I F G, '*Conflicts of Law and Property*' (1964) 10 *McGill Law Journal* 1, 21; Morse, C G J, '*Retention of Title in English Private International Law*' (1993) *J.B.L.* 168, at p171: "*The goods may be dealt with in a way which affects third parties, who, it is said, should be entitled to rely on the lex situs.*"; and Williams, S A, '*The International and National Protection of Moveable Cultural Property*' (1978), at p87: "*Any other solution would cause greater hardship to commerce in general and untold complications.*" Even Hancock was "... *troubled by a vague fear that the possibility of resort to foreign law in real property litigation might in certain cases jeopardize the claims of purchaser and mortgagees and so create cloud on titles.*" (Hancock, M, '*Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws*' (1967) 20 *Stanford L. Rev.* 1, 37)

<sup>10</sup> *In re Anziani, Herbert v. Christopherson* [1930] 1 Ch. 407.

<sup>11</sup> *Ibid.*, *per* Maugham, J. at p 420. This sentiment was endorsed in *Winkworth v. Christie, Manson & Woods Limited* [1980] 1 Ch. 496, *per* Slade, J. at p502, and again at p512 *et seq.*, viz.: "*Security of title is as important to an innocent purchaser as it is to an innocent owner whose goods have been stolen from him. Commercial convenience may be said imperatively to demand that proprietary rights to moveables shall generally be determined by the lex situs under the rules of private international law. Were the position otherwise, it would not suffice for the protection of a purchaser of any valuable moveables to ascertain that he was acquiring title to them under the law of the country where the goods were situated at the time of the purchase ... In these circumstances, there are ... very strong grounds of business convenience for applying the principle of Cammell v. Sewell even in a case such as the present ... [Maugham, J.'s dictum] was putting the point very strongly. I think, however, that the most undesirable uncertainty in the commercial world would result if the choice of the system regulating the validity of a disposition of chattels were to depend not only on the situation of the goods at the time of the disposition, but also on the additional factors suggested on behalf of the plaintiff.*" Further, *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 *Ll. Rep.* 284, *per* Moore-Bick, J., at p294: "*Any other rule would require extensive and probably fruitless enquiries into the provenance of the goods and expose the transferee to great uncertainty.*" Cf. Redmond-Cooper, R, at p150 (In Palmer, N, ed., '*The Recovery of Stolen Art: A Collection of Essays*'): "... *concerns for commercial certainty and a policy of security of transactions frequently combine with a deep-seated sentiment that the dispossessed owner is to be regarded as more blameworthy than the good faith purchaser, with the result that title will pass more readily to the latter.*"; and Harding, C S P and Rowell, M S, '*Protection of Property Versus Protection of Commercial Transactions in French and English Law*' (1977), at p358: "*As commerce becomes more important to a society and a fast commodity turnover becomes crucial to the economic well-being of all, so the balance in the legal game is likely to tip in favour of the acquirer: active commercial life depends on some degree of security of acquisition.*"



*hackneyed simile of an organism, we might call this incessant passage of property from hand to hand the blood circulation of economic life.”*<sup>12</sup>

The widely held view is that commercial transparency can only be guaranteed by application of the *lex situs*: as Wolff has explained, “*Real rights should be as manifest as possible; third parties who intend to acquire a right in a thing must be protected against the risk that such a thing might be subject to a foreign law under which the acquisition would be void.*”<sup>13</sup>

This argument is related, in part, to the more traditional argument which is based upon the principle of territorial sovereignty.<sup>14</sup> Immoveable assets necessarily fall within the

<sup>12</sup> Kruse, V, ‘*The Right of Property*’, p154/5 (per Harding and Rowell, *ibid.*, p358).

<sup>13</sup> Wolff (1950), *ibid.*, p511; Cf. Trautman, D T, ‘*The Revolution in Choice of Law: Another Insight*’ (1986) 99 Harv. L. Rev. 1101, 1110; Alden, *ibid.*, p592; and Zaphiriou, G A, ‘*The Transfer of Chattels in Private International Law*’ (1956), at p40: “*The transfer of property affects third parties and the definition of the applicable law cannot be left to the parties or a posteriori to the discretion of the court. As far as possible, the transfer must be governed by a law which can be ascertained by a third party so as to enable him to test the validity of the title that he will acquire.*” Consider also *Macmillan Inc. v. Bishopsgate Investment Trust plc (No.3)* [1996] 1 W.L.R. 387, per Staughton, LJ., at p399: “*There is in my opinion good reason for the rule as to chattels. A purchaser ought to satisfy himself that he obtains a good title by the law prevailing where the chattel is ... but should not be required to do more than that. And an owner, if he does not wish to be deprived of his property by some eccentric rule of foreign law, can at least do his best to ensure that it does not leave the safety of his own country.*” Cf. Garro, A M, ‘*The Recovery of Stolen Art Objects from Bona Fide Purchasers*’, p511. (In Lalive, P, ed., ‘*International Sales of Works of Art*’ (1988))

<sup>14</sup> E.g. *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 Q.B. 248: *prima facie* a decree of a foreign government will not be effective to transfer property situated in England, and no distinction is to be drawn between those decrees which are confiscatory and those which are not. Consider too *In re Helbert Wagg* [1956] Ch. 323, per Upjohn, J., at p345: “*I may note in passing that the modern tendency is to deny extraterritorial validity to legislation, for example, upon moveables situate outside the State at the time of the legislation.*” Cf. Morris, J H C, ‘*Cases and Materials on Private International Law*’ (4<sup>th</sup> edition), p381; and Goodrich’s (pre-1971) observation that, “*Reference to the law of the situs for questions concerning land is the natural one for the American lawyer to make. He thinks in terms of a law which is territorial, and this reference fits that method of thinking. The combination of practical advantage and theoretical ‘at homeness’ results in a rule the authority of which is unquestioned.*” (*ibid.*, p419) Cf. Cavers, D F. ‘*The Conditional Seller’s Remedies and The Choice-of-Law Process – Some Notes on Shanahan*’ (1960) 35 N.Y. Uni. Law Rev. 1126, at p1136: “*Why one may ask, is the Restatement Second so insistent upon touching base at the situs? Probably its preference is rooted in notions of territorial jurisdiction, predicated in turn on the supposition that only the situs has power to dispose of the property in controversy.*”; and Carter’s remark that, “*The [lex situs] principle is itself a manifestation of the doctrine locus regit actum – the doctrine of the territorial applicability of law – probably the most widely accepted doctrine in the whole of private international law ... the doctrine of locus regit actum has sure foundations in human psychology.*” (Carter, P B,



exclusive control of the state where, for the time being, they happen to be situated.<sup>15</sup> For this reason, according to Weintraub, "... it is natural that the [situs] law should be applied."<sup>16</sup> This argument, too, has found judicial support, at home and abroad.<sup>17</sup> In *Castrique v. Imrie*,<sup>18</sup> Blackburn, J.<sup>19</sup> explained that, "We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under which the authority of which the Court sits."<sup>20</sup> In particular, adherence to this view is apparent in the 'confiscation cases'.<sup>21</sup> These cases evince the principle that "Every foreign State is bound to respect the independence of every other foreign State, and the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory."<sup>22</sup> Similarly, in the American

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'Transnational Trade in Works of Art: The Position in English Private International Law', at p328/9) (In Lalive, *ibid.*)

<sup>15</sup> Venturini, G, 'International Encyclopaedia of Comparative Law, Volume III, Chapter 21 – Property' (1976), p7. Cf. Hellendall, F, 'The Res in Transitu and Similar Problems in the Conflict of Laws' (1939) 17 Can. Bar Rev. 7, 8; Carter, *ibid.*, p329; Goodrich, *ibid.*, at p419: "... the state of [the] situs is the only sovereignty which can exercise physical power over [land] and the exercise of such power is not an infrequent occurrence."; and Cook, W W, 'Immovables and the Law of the Situs' (1939) 52 Harv. L. Rev. 1246, at p1247: "Under the territorial organization of modern society, only the appropriate officers of the government of the state in question [i.e. the situs] may lawfully deal physically with it." Cf. *Polson v. Stewart* (1897) 167 Mass. 211, 45 N.E. 737.

<sup>16</sup> Weintraub (1966), *ibid.*, p4. Cf. Goodrich, *ibid.*, at p419: "It is perhaps quite natural that the sovereign exercise [its] power in accordance with its own rules." Contra Alden, according to whom the assertion that the *lex situs* alone has power over the land, articulates not a reason for applying that law, but merely a conclusion. (*ibid.*, p593)

<sup>17</sup> *Glencore International A.G. v. Metro Trading International Inc.*, *ibid.*, per Moore-Bick, at p294: "The second main ground [justifying the *lex situs* rule] is that it reflects the practical realities of control over moveables." Further, at p295: "Practical control over moveables can ultimately only be regulated and protected by the state in which they are situated and the adoption of the *lex situs* rule in relation to the passing of property is in part a recognition of that fact." Brief consideration, however, of the *conflict mobile* shows that this is not necessarily true. See note 24, *infra*.

<sup>18</sup> (1870) L.R. 4 H.L. 414.

<sup>19</sup> Cited, with approval, by Lord Chelmsford at p448.

<sup>20</sup> This first inquiry is not related purely to the question of jurisdiction, as is apparent from the court's second (and separate) line of inquiry, viz.: "... whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction." (*ibid.*, p448)

<sup>21</sup> E.g. *Luther v. Sagor* [1921] 3 K.B. 532; *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718; *The Jupiter* (No.3) [1927] P. 123, per Hill, J., at, p140/1; *Compania Naviera Vascongado v. S.S. Cristina* [1938] A.C. 485, per Lord Macmillan, at p490; *In re Helbert Wagg* [1956] 1 Ch. 323 per Upjohn, J; and *Williams & Humbert v. W&H Trade Marks (Jersey) Limited* [1986] 1 All E.R. 129, 135.

<sup>22</sup> *Princess Paley Olga v. Weisz*, *ibid.*, per Sankey LJ., at p729. In fact, this is the headnote (cited with approval in *Luther v. Sagor*, *ibid.*) from the American case *Oetjen v. Central Leather Company* 246 U.S. 297.



case of *Polson v. Stewart*,<sup>23</sup> Holmes, J. opined that, “*It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res ... since no other sovereign than that of the situs can exercise dominion over the land, that sovereign must have power to impose whatever requirements it may deem necessary as conditions precedent to the acquisition and transfer of title or any other rights therein.*”

Even if choice of law rules based purely upon territoriality or sovereignty should lose favour, the *lex situs* rule is further buttressed by the argument that it is simple (insofar, at least, as the *situs* is easily ascertainable<sup>24</sup>) and permits of easy application.<sup>25</sup> The popular view is that if a rule of law is framed in simple terms, litigation in respect thereof should decrease.<sup>26</sup> Scoles, however, has verbalised his mild criticism of the rule’s simplistic formulation, stating that, “*In part, this excessive scope of application*

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<sup>23</sup> (1897) 167 Mass. 211, 36 L.R.A. 771, 45 N.E. 737 (*per* Stumberg, G W, ‘Conflicts – American Casebook Series, 1956, p377).

<sup>24</sup> Hellendall (1939), *ibid.*, p8; Carter, *ibid.*, p328; and Williams, *ibid.*, p87. This argument, however, extends only to the *situs* of immovable property and corporeal moveable property, and as regards the latter, not even to all types thereof (*e.g.* goods in transit); Byrne-Sutton, Q, ‘*Qui est le propriétaire légitime d’un objet d’art volé*’, at p501 (In Lalive, *ibid.*) Whilst the *situs* (but in view of the enigmatic doctrine of *renvoi*, not always the *lex situs*) may be relatively easily ascertained where the connecting factor has remained static, where there arises a *conflit mobile*, difficulties may be encountered in ascertaining the connecting factor at the *tempus inspiciendum*. As Dr Crawford has advised, “... *the lex situs in relation to moveables may be forever on the move.*” (Crawford, E B, ‘*International Private Law in Scotland*’ (1998), p53, at paragraph 4.20) Cf. Morris, J H C, ‘*The Transfer of Chattels in the Conflict of Laws*’ (1945) XXII B.Y.I.L. 232, at p233: “*If the situs changes, it is no solution to say that the lex situs governs: we require to know which lex situs to apply.*” (This points, of course, not only to a change in the identity of the connecting factor, but also to a change in the content of the substantive *lex causae*, as occurred in *Starkowski v. Attorney-General* [1954] A.C. 155). See Chapter Four, *supra* – ‘Defining the ‘*Situs*’.

<sup>25</sup> Von Mehren, A T, & Trautman, D T, ‘*The Law of Multistate Problems – Cases and Materials on Conflict of Laws*’ (1965), at p193: “*However lawless a power test may be in some contexts, the simplicity of a reference to the law of the situs, its convenience and appropriateness for conveyancing questions, and the plausibility of its appropriateness for all property issues, has led to the wide acceptance of the rule of the First Restatement, that the law of the situs governs most questions concerning property ...*” Cf. Schott & Rembar, ‘*Choice of Law for Land Transactions*’ (1938) 38 Columbia L. Rev. 1049, at p1053: “... *application of lex situs, it is said, prevents needless complexity.*”; and Alden, *ibid.*, p597.

<sup>26</sup> Hancock (1967), *ibid.*, p9.

[of the *lex situs*] flows from the fact that the *situs* rule is viewed as a welcome simplicity, a kind of security blanket, by lawyers and judges who simply assume that the breadth of the traditionally stated rule enables them to resolve most issues by referring to the easily identified *situs*.”<sup>27</sup>

The *situs* is, in theory, objectively ascertainable.<sup>28</sup> In addition to this, it has been argued that the *lex situs*’ ‘independence’ supports its being applied: Cheshire, for example, has remarked that, “... the *lex situs* has the great advantage of being a single and exclusive system that, possessing effective control over the subject-matter of the suit, can act as an independent arbiter of conflicting claims.”<sup>29</sup> One must doubt, however, the veracity of this reputed nonpartisanship, particularly when the litigation in question is proceeding in the *forum rei sitae*. Nevertheless, application of the *lex situs* does rightly accentuate the focal point of the transaction, namely, the property itself.<sup>30</sup>

In one dimension, application of the *lex situs* rule is entirely neutral: the rule is merely a rule of choice of law, and not, *per se*, one of substantive content.<sup>31</sup> Ultimately, resolution of the dispute in hand depends on a matter which is beyond the reach of the

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<sup>27</sup> Scoles, E F, ‘Choice of Law in Family Property Transactions’ (1988) II *Receuil des Cours* 13, 70.

<sup>28</sup> Cf. Hellendall (1939), *ibid.*, p8. As *per* note 24, *supra*, this assertion does not extend to all types of property.

<sup>29</sup> Cheshire, ‘Private International Law’ 3<sup>rd</sup> edition (1947), p563; and Cheshire & North, 13<sup>th</sup> edition, *ibid.*, p940.

<sup>30</sup> Nott (1981), *ibid.*, at p279: “... any ownership dispute normally centres on the goods rather than the individual involved.”

<sup>31</sup> Cheshire, 3<sup>rd</sup> edition (1947), at p588: “Once this ruling [that the *lex situs* applies] has been given, the choice of law has been made, we pass from the sphere of private international law.”; and Byrne-Sutton, *ibid.*, at p501: “... [the *lex situs*] rule cannot by nature favor or hinder a purchaser in good faith or an illegally dispossessed owner. The final result (attribution of a valid title to one or the other) depends solely on the content of the competent municipal law, applicable at random according to the place of transfer in each particular case.” In the context of illicit trafficking in cultural property, however, the concern is that the *lex situs* is not typically ‘applicable at random’, but rather is applicable only after careful and calculated selection, by the illegal (yet sophisticated) trader or thief, of a tendentious, substantive law. See Chapter Ten, *supra* – ‘The Treatment of Cultural Property’.



conflict of laws, that is, it depends on the substance of the domestic *lex situs* rule, which, sometimes, may favour one party,<sup>32</sup> and, at other times, the opposing party.<sup>33</sup>

It is generally argued that simplicity, objectivity and ease of application of choice of law rule, in turn, promote certainty and uniformity of result, and certainty is often deemed to be the overarching consideration in the field of property.<sup>34</sup> Baxter has argued that uniformity of connecting factor will reduce or eliminate ‘limping titles’; the *lex situs*, he submits, “... has attained a special place as a choice of law determinant, not so much due to its intrinsic merits, as to history aided by frequent repetition of often superficial argument by textwriters and judges, and by its embodiment in codes.”<sup>35</sup>

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<sup>32</sup> E.g. *Winkworth v. Christie, Manson & Woods Limited* [1986] Ch. 496, where application of Italian law protected the title of the *bona fide* purchaser.

<sup>33</sup> E.g. *Goestchuis v. Brightman* 1927 245 N.Y. 186, where the internal law of New York resisted conferring a better title on the *bona fide* purchaser, preferring instead the title reserved to the Californian seller.

<sup>34</sup> Cheatham, E E, ‘Problems and Methods in Conflict of Laws’ (1960) 99 (1) *Receuil des Cours* 237, at p314: “On some matters certainty is the first prerequisite and other elements may be subordinated to it. It is so as to the title to land.” Cf. Schott & Rembar, *ibid.*, at p1053: “... the necessity for the *situs* rule is not apparent. Can it nevertheless earn its own way as a wise rule? Yes ... the rationale is [inter alia] uniformity ...”; and Rabel, E, ‘The Conflict of Laws: A Comparative Study – Volume I’ (1958), at p23/4: “The *lex situs* ... would lose much of its practical reliability if it were subjected to any exceptions at all, especially if it allowed party autonomy as has been repeatedly suggested.” Further, *Winkworth v. Christie, Manson & Woods Limited* [1986] Ch. 496, *per* Slade, J., at p509: “Intolerable uncertainty in the law would result if the court were to permit the introduction of a wholly fictional *lex situs* when applying the principle to any particular case, merely because the case happened to have a number of other English connecting factors.” Consider too the tale recounted by Lalive, regarding the potential ambiguity of applying a non-*situs* rule: “... [consider] the anecdote attributed to a Master of an Oxford College and the famous answer he gave to a student who, upon entering the college, asked, ‘Sir, what are the rules?’ The answer is said to have been the following: ‘There are no rules, but if you break them, you will be expelled.’” (Lalive, P, ‘Closing Comments’, p663, Lalive, *ibid.*)

<sup>35</sup> Baxter (1964), *ibid.*, p34. Cf. Prott, L V, ‘Problems of Private International Law for the Protection of the Cultural Heritage’ (1989) 217 (V) *Receuil des Cours* 215, at p266: “One virtue seen for the [*lex situs* rule] was certainty. If all States apply this rule (as they do now), then theoretically it should be possible to predict what rule of law will be applied, although the results of that application may turn out to be rather bizarre ... or unpredictable.” Bear in mind, however, the problems of definition of connecting factor, outlined in Chapter Four, *supra* – ‘Defining the ‘Situs’’. Differences of interpretation may impede uniformity of result. See note 74, *infra*.



Affiliated to the notion of certainty is the matter of party expectations.<sup>36</sup> The view has been expressed that it is appropriate to apply the *lex situs* since application of that law satisfies any expectations which parties may entertain regarding matters of choice of law.<sup>37</sup> According to Carter, “*The lex situs rule is firmly based upon ... considerations of reasonable human expectations ... The average layman ... is often obsessed (consciously or otherwise) with the territorial application of law.*”<sup>38</sup>

Some commentators, following Savigny, have justified application of the *lex situs* on the ground that the transacting parties have voluntarily submitted to the application of that law. Savigny stated that, “*He who wishes to acquire, to have, to exercise a right to a thing, goes for that purpose to its locality,*<sup>39</sup> and voluntarily submits himself, as to this particular legal relation, to the local law that governs in that region.”<sup>40</sup> Whilst this may have been accurate at the time when Savigny was writing,<sup>41</sup> it is no longer

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<sup>36</sup> Consider Second Restatement, paragraph 222, comment (b): “... protection of the justified expectations of the parties is of considerable importance in the field of property. Parties enter into property transactions with forethought and are likely to consult a lawyer before doing so.” While this may be true of transactions concerning immovable property, it is not generally true of those which concern moveable property.

<sup>37</sup> Cheshire & North, 13<sup>th</sup> edition, *ibid.*, p940. *Glencore International A.G. v. Metro Trading International Inc.*, *ibid.*, per Moore-Bick, J., at p294: “[The *lex situs*] accords with the natural expectations of reasonable men and facilitates business. This reflects the natural expectation that a transaction which is effective to transfer title to goods by the law of the country in which they are situated will vest a good title in the transferee which will be recognized generally.” Cf. Colwyn Williams, D, ‘Land Contracts in the Conflict of Laws – *Lex Situs*: Rule or Exception’ (1959) 11 *Hastings Law Journal* 159, at p160: “... the location of the property to which the contract relates may be an important and in some instances even a controlling circumstance in determining the appropriate law especially when the presumed intention of the parties is the criterion.” See now Article 4(3) of Schedule 1, Contracts (Applicable Law) Act 1990.

<sup>38</sup> Carter, *ibid.*, p329. Cf. Williams, *ibid.*, p87; and Alden, *ibid.*, p595, citing *In re Estate of Erickson* 368 N.W. 2d. 525, 530 (1985), where the court asserted that a Washington widow would not have expected a property agreement validly executed according to Washington law to control the disposition of real property in North Dakota. Cf. Wolff, *ibid.*, at p512: “As the place where a thing is situate is the natural centre of rights over it, everybody concerned with the thing may be expected to reckon with the law of such place.”

<sup>39</sup> Discussing corporeal moveables, Savigny took the view that, “... since their object is perceived by the senses, and therefore occupies a definite space, the locality in space at which they are situated is naturally the seat of every legal relation into which they can enter.” (Savigny, F C, ‘A Treatise on the Conflict of Laws’ (1869), p129)

<sup>40</sup> Savigny, *ibid.*, p129.

<sup>41</sup> But not, it is submitted (even in 1869) in cases of theft and sale by a non-owner in a new *situs*. Cf. Hellendall (1939), *ibid.*, at p7: “[Savigny’s] theory which has the logical consequence that the *lex situs*



true, in a global market where commercial bargaining routinely takes place electronically, and at arm's length. In any event, since the *lex situs* rule is applied by Scottish and English rules of choice of law, regardless of whether or not the property in question has been removed to the new *situs* with the consent of the erstwhile owner,<sup>42</sup> this argument, *per se*, does not justify application of the *lex situs*.<sup>43</sup>

The strongest argument concerning application of the *lex situs* rule affects only immovable property. Naturally, the *lex situs* has a legitimate interest in the proper<sup>44</sup> use of land within its own territory.<sup>45</sup> Pillet even considered that laws which deal with

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*does not apply if the chattel has been removed to a new situs without the consent of its owner is not the basis of the English lex situs rule.*" Savigny does, however, add the caveat that, "It must first be shown, on the one hand, that the laws of the place where the thing is situated claim exclusive authority over all rights in it, without which voluntary submission would not suffice to warrant the application of the *lex rei sitae*; and if it is true, on the other hand, that he who seeks, in point of fact, to exercise a right over a thing must go to the place where it is situated, and therefore may become subject to the laws of that place, it does not follow that other states are obliged to recognise this subjection, - e.g. if a moveable thing is afterwards brought into the territory of another state." (*ibid.*, p129, note 1)

<sup>42</sup> E.g. *Todd v. Armour* (1882) 9 R. 901 and *Cammell v. Sewell* 1860 5 H&N 728. Note, however, Carnahan's Savignian analysis of *Cammell v. Sewell*, to the effect that, "... goods had been entrusted by an agent of the English owner to the captain of the ship and ... the captain had voluntarily brought them within Norwegian territory where the wreck took place." ((1935), *ibid.*, p350) (Emphasis added)

<sup>43</sup> Consider the Scottish Law Commission's Consultative Memorandum No. 27, 'Corporeal Moveables: Protection of the Onerous Bona Fide Acquirer of Another's Property' (1976) (hereinafter 'SLC (Moveables)'), at p45: "The reason why most legal systems protect the original owner against the bona fide purchaser in cases of theft is not because of the heinousness of the crime, but because, unlike other cases of acquisition a non domino, the owner has not voluntarily handed over his moveable to an intermediary and thus facilitated the disposal." (Emphasis added) In raising various domestic law options, the S.L.C. proffered, *inter alia*: "(a) A valid title of ownership of corporeal moveables should be recognised only if the acquirer derived title through a chain of unimpeachable legal acts from the original owner." (*ibid.*, p1); and "(c) An acquirer in good faith ... should be protected against the original owner notwithstanding the fact that the transfer has not been authorised by the owner and was in violation of his right." (*ibid.*, p2) Interestingly, option (g) offered a rule which differed according to the type of object in question (e.g. works of art or other objects created by the owner, or valued for intrinsic merit or sentimental reasons; fungibles; consumer goods; motor vehicles.) (*ibid.*, p3)

<sup>44</sup> Propriety being determined according to the *lex situs*' own standards. *In re Hoyles, Row v. Jagg* [1911] 1 Ch. 179, *per* Farwell, LJ., at p185: "No country can be expected to allow questions affecting its own land, or the extent and nature of the interests in its own land which should be regarded as immoveables, to be determined otherwise than by its own Courts in accordance with its own interests."

<sup>45</sup> Alden explains that "Both use and circulation [of land] affect a state's economy and the well-being of its residents." (*ibid.*, p595) Venturini makes a similar point: "the importance of proprietary rights over moveables and immoveables at the economic, political and social levels implies that they must be directly subordinate to the law of the country where the objects are situated and which in fact often imposes limits in relation to aliens and, more generally, for reasons of public interest." (*ibid.*, p7) Cf. Von Mehren & Trautman, *ibid.*, at p197: "... the primary functional significance of the law of the situs today is its role in providing a body of rules under which transfers of land can proceed expeditiously ...



property fall into the category of '*ordre public*' and ought, for that reason, to be strictly territorial in their application.<sup>46</sup> One suspects, however, that this theory was based upon the premise that property is merely an adjunct of the person, and that it ought to be rejected, alongside the *lex domicilii* rule in relation to property. Alternatively, one might argue that a *lex situs* rule based on public policy arguments should be employed only to permit application of the *lex fori*, and not any foreign law.<sup>47</sup>

The 'legitimate interests' argument, however, could equally extend to certain types of moveable property, in particular, to cultural property. It would be reasonable that a certain state, having, for cultural reasons, a legitimate interest in the preservation and custody of an object of cultural property, may wish to impose special protective provisions in respect of that property (e.g. in respect of its conservation, use, alienation or export).<sup>48</sup> If, however, that property, were to be unlawfully removed from the territory of that legitimately interested state, the *lex situs* rule can operate so as to overlook the legitimate interests of the first state, artificially expunging the interests of the antecedent *situs*.<sup>49</sup>

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*To the extent that any such rules [e.g. of primogeniture] are found in the situs today, they obviously intensify the concern of the situs and might justify the application of its domestic rules. Such cases are rare today, however ...*"; Westlake, J, 'A Treatise on Private International Law' (1925), at p9: "... the estates and interests which English law permitted to be held in land were so peculiar that great confusion would have arisen if its tenure could have been interfered with by deeds in foreign form."; and Cook, W W, 'Immoveables and the Law of the Situs' (1939) 52 Harv. L. Rev. 1246, at p1247: "... the basis of the rule is social convenience and nothing more ..."

<sup>46</sup> Pillet, A, '*Principes de droit international privé*' (1903), pp385, 405.

<sup>47</sup> *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 Q.B. 248, per Devlin, J., at pp263 – 267.

<sup>48</sup> E.g. *Duc de Frias v. Pichon* [1886] 13 *Journal du Droit International* 593; and *Attorney General of New Zealand v. Ortiz* [1984] A.C. 1.

<sup>49</sup> *Attorney General of New Zealand v. Ortiz*, *ibid.*; and *Prott*, *ibid.*, at p264: "The implications of applying the *lex rei sitae* ... are serious for the protection of cultural heritage. Where special protective provisions have been applied to items of cultural heritage by national legislation they will be ignored in foreign jurisdictions; even though similar, sometimes almost identical, protection will be applied to



▪ **Bringing down the bastion – arguments against the *lex situs* rule**

Having surveyed the arguments in favour of applying the *lex situs*, a more difficult task is to outline those arguments which may be promulgated in opposition to the rule.

There has been a “*mechanical reiteration*”<sup>50</sup> of the arguments which support the rule, leading to the almost unanimous conclusion that no other connecting factor is appropriate to deal with questions concerning property.<sup>51</sup> These time-honoured and wonted arguments in support of the rule have largely been endorsed by the courts, which have admitted only a very narrow margin for evasion of the *situs* monopoly.<sup>52</sup>

Criticism of the monopoly, however, has been mounting,<sup>53</sup> the charge being led principally by Moffatt Hancock.<sup>54</sup> In 1966, Weintraub added force to the campaign, stating that, “*If the reasons for the [situs] rule are shallow and the results obtained*

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*national cultural heritage items. This means that restrictions on transfer, State rights of pre-emption, and export controls will all be disregarded once the item crosses the border.”*

<sup>50</sup> Currie, B, ‘*Full Faith and Credit to Foreign Land Decrees*’ (1954) 21 *Uni. of Chi. L. Rev.*, 620, 628 (citing Barbour, ‘*The Extra-Territorial Effect of the Equitable Decree*’ (1919) 17 *Mich. L. Rev.* 527, 548).

<sup>51</sup> Trautman has written of a widespread belief in the ‘inevitability’ of the *situs* rule. (Trautman, D T, ‘*The Revolution in Choice of Law: Another Insight*’ (1986) 99 *Harv. L. Rev.* 1101, 1106)

<sup>52</sup> Cf. Hancock, M, ‘*Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*’ (1967) 20 *Stanford L. Rev.* 1, at p9, where he quotes Cardozo, B, ‘*The Growth of Law*’ (1924), p66, viz.: “*Judges march at time to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity.*” Hancock himself remarked that, “*Festooned with vague sophistries, [the situs formula] was put forward in the most absolute form as a cornerstone of Anglo-American conflict of laws.*” (*ibid.*, p37)

<sup>53</sup> E.g. Colwyn Williams, D, ‘*Land Contracts in the Conflict of Laws – Lex Situs: Rule or Exception*’ (1959) 11 *Hastings Law Journal* 159, 160; Hay, P, ‘*Property Law and Legal Education; The Situs Rule in European and American Conflicts Law*’ (1988), p109; Lowenfeld, A, ‘*Revolt Against Intellectual Tyranny*’ (1985/6) 38 *Stanford L. Rev.* 1411, p1418; Trautman, *ibid.*, p1101; and Alden, *ibid.*, at p631: “*... the absolute rationales supporting the situs rule are invalid.*” Having analysed the typical situations in which the *lex situs* is applied, Weintraub concludes by “[finding] that most of the results reached are irrational and unjust.” (Weintraub, R J, ‘*An Inquiry into the Utility of Situs as a Concept in Conflicts Analysis*’ (1966) 52 *Cornell L. Q.* 1, Pre-note) Weintraub’s response, unlike that of the current author, is to recommend “*extension into the real property area of the type of functional or ‘state-interest’ analysis now rapidly gaining favor in resolving tort and contract conflicts problems.*” (*ibid.*)

<sup>54</sup> “*Writing in the mid-1960s, when what Judge Kaufman called the ‘Ice Age of Conflict of Laws’ had largely been melted in torts and in contracts, Hancock was anxious to keep the momentum going, and to apply the new enlightenment to decedent estates and particularly to interests in land. If he could not break the ‘land taboo’, he at least wanted to show a way around it.*” (Lowenfeld, *ibid.*, p1418)



from applying it are outrageous, an effort will be made to suggest a method of abating the nuisance that the monolith has become.”<sup>55</sup> The purpose of this section is to determine whether the reasons which are frequently parroted in support of the rule are, in fact, ‘shallow’, and whether the results obtained are ‘outrageous’.

In 1935, Cheshire wrote that, “*The proposition* [that questions concerning the acquisition or transfer of ownership of corporeal moveables are generally to be decided by the *lex situs*], *although it has the support of Cammell v. Sewell*,<sup>56</sup> *an authority which has never been impugned, can scarcely be regarded as an adequate guide for the future. The law relating to tangible moveables has remained practically stationary for more than half a century, and it is clear that the difficulties which surround this subject cannot be satisfactorily determined by a simple reference to the lex situs.*”<sup>57</sup> More than sixty years on, however, the same connecting factor continues to act as the conflict lawyer’s guide, despite opportunities having arisen for changes or modifications to be introduced.<sup>58</sup>

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<sup>55</sup> Weintraub (1966), *ibid.*, p3.

<sup>56</sup> (1858) 3 H&N 617, (1860) 5 H&N 728.

<sup>57</sup> Cheshire, G C, ‘*Private International Law*’ (1935) 51 L.Q.R. 76, 84. Cheshire predicted that, “*The private international law concerning the transfer of corporeal moveables is still remote from its full development.*” (*ibid.*, p85) In 2002, the promise of ‘full development’ is yet to be fulfilled. Cf. the views expressed by the same author at p563 of the 3<sup>rd</sup> edition of ‘*Private International Law*’ (1947), viz.: “... [the *lex situs*] is not without its disadvantages ... even though the *lex situs* may remain constant, it would not seem to be the appropriate system in every type of case.” Cf. Trautman (1986), *ibid.*, at p1106: “*Although in tort and in contract the place of wrong and the place of contracting have been replaced by more discriminating and sophisticated approaches, in property the traditional proposition ... has proven more tenacious and unshakable.*” Similarly, in 1945, Morris declared that, “*The English law on [the transfer of chattels in the conflict of laws] is rudimentary in the extreme. The cases are scanty, old and inconclusive.*” (Morris (1945), *ibid.*, p232)

<sup>58</sup> E.g. *Winkworth v. Christie, Manson & Woods Limited* [1980] 1 Ch. 496. Consider Jefferson, M, ‘*An Attempt to Evade the Lex Situs Rule for Stolen Goods*’ (1980) 96 L.Q.R. 508, at p511: “*Would it not have been reasonable to reach a fair solution on the facts justified not by reference to a framework of watertight legal concepts but ... the balancing of competing values such as those mentioned in the judgement, but preferably with evidence led to determine their weight?*”



The *situs* rule has been mechanically applied, without reference either to the content of the *lex situs*, or to the result which its application generates.<sup>59</sup> Hancock, in particular, has proved to be critical of Story's unqualified reference to the *lex situs*, "[Story] insisted that one broad, general principle must determine all cases. This is surely the hoariest fallacy of legal thinking – that a rule must be followed blindly, even in cases where it produces harsh and inconvenient results, for the sake of certainty, simplicity, uniformity, and symmetry of the law."<sup>60</sup>

One harsh criticism of the *lex situs* rule has been the breadth of its application.<sup>61</sup> Little attempt has been made to formulate narrower rules which are cognisant of the precise nature of the relationship arising in a particular dispute (e.g. buyer/seller; owner/creditor, owner/thief),<sup>62</sup> or to measure the actual impact of the particular problem on the property in question (e.g. does the essence of the problem affect the property directly, or merely tangentially?). Depending upon the relationship between the parties, and the specific nature of the problem in issue, different questions may arise, which may vary quite fundamentally in character.<sup>63</sup> Similarly, Goodrich has reminded us that, "*One of the characteristics of a mature mind is its ability to make*

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<sup>59</sup> Von Mehren & Trautman (1965), *ibid.*, at p196: "... it is significant that there is no suggestion ... that the content of the various laws involved or the policies underlying the rules are in any way relevant to the solution of the problem." Cf. Trautman (1986), *ibid.*, at p1108, where reference is made to an "ensuing parade of cases that mechanically applied the law of the situs."

<sup>60</sup> Hancock (1967), *ibid.*, p10.

<sup>61</sup> Carnahan, W, 'Tangible Property and the Conflict of Laws' (1935) 2 *Uni. of Chi. L. Rev.* 345, at p354: "Perhaps it may be objected that we have stated too broadly a rule that the law of the situs is everywhere to be given effect." Cf. Trautman who criticised the "... tidal wave of formalism and overgeneralization." (*ibid.*, p1108)

<sup>62</sup> Cf. Venturini, *ibid.*, at p4: "... opinion in Scandanavia regards it as preferable not to submit all the effects of a transfer of property to one single rule of private international law, but to distinguish the various relationships connected therewith (between the seller and the buyer, between the buyer and the creditors of the seller etc.) and to apply to each of these its own proper law."; and Weintraub (1966), *ibid.*, p3.

<sup>63</sup> Perceiving this, Cheshire remarked that, "... it does not take much acumen to appreciate that each one of these [different factual scenarios] cannot satisfactorily be submitted to one system of law." (Cheshire, G C, 'Private International Law', 3<sup>rd</sup> edition (1947), p558). Cf. Schott & Rembar, *ibid.*, at p1054: "Particular issues are crucial for choice of law."



*distinctions and gradations; people and issues are not black and white, but varying shades of gray. Likewise, a mature system of law ... develops distinctions, limitations and qualifications as called for, instead of fitting all problems of litigants into a limited series of grooves.*"<sup>64</sup> Likewise, of the domestic scholars, Cheshire adopted the view that, "... *the search for the proper law to govern questions arising out of the transfer of corporeal moveables will produce nothing but confusion and obscurity, unless the possible questions are first broken up into their separate categories.*"<sup>65</sup>

While certain matters naturally fall within the legitimate concern of the *lex situs* (e.g. alienability of land, title recording and land use), other matters do not (e.g. capacity to contract in respect of land or moveables); the interest of the *situs* (genuine, though *not* unlimited) does not, it is submitted, justify a "universal" *situs* rule.<sup>66</sup> For example, Schott and Rembar have explained that some relevance may lie in the nature of the relief sought by the pursuer: "*Thus, it is sometimes said that if damages are asked, there is no objection to the forum's use of a law other than that of the situs, but that where there is sought relief of a more 'specific nature' ... lex situs must be used.*"<sup>67</sup>

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<sup>64</sup> Goodrich (1941), *ibid.*, p419.

<sup>65</sup> Cheshire (1947), *ibid.*, p559. Cf. Weintraub, R, 'The Conflict of Laws Rejoins the Mainstream of Legal Reasoning' (1986) 65 Texas L. Rev. 215, 231; Travers, J N, 'The Inter Vivos, Voluntary and Particular Transfer of Tangible Moveable Property Rights in Private International Law' (Uni. College, Dublin) (1989), p79; and Lowenfeld, *ibid.* (citing Hancock), at p1426: "... by reason of their oversimplified, indiscriminating character, choice of law principles of the conventional type are a hopelessly inadequate set of verbal tools for deciding, discussing or even thinking about choice of law problems." Also Cheshire (1935), *ibid.*, at p84: "The principle of the *lex situs* is no doubt of predominant importance, but it is clear that the problems which a transfer of moveables may create are too complex and too varied to be resolved by any one single principle."

<sup>66</sup> Cf. Alden, *ibid.*, p597; Hancock (1967), *ibid.*, at p10: "Story unfortunately failed to see that the laws of the forum-situs affecting title to real property fall into two categories: those whose policies require their enforcement in all cases and those whose policies do not." Even in matters of alienability, the present *situs* may not always demonstrate the greatest interest e.g. *Duc de Frias v. Pichon* [1886] 13 *Journal du Droit International* 593. Consider too paragraph A4-35 of the Giuliano & Lagarde Report on the Convention on the Law Applicable to Contractual Obligations, where it is stressed that Article 4(3) of the Convention "does not extend to contracts for the construction or repair of immoveable property ... because the main subject-matter of these contracts is the construction or repair rather than the immoveable property itself."

<sup>67</sup> Schott & Rembar, *ibid.*, p1052. Cf. Gambaro, A, 'Perspectives on the Codification of the Law of Property: An Overview' (1997) 5 *European Review of Private Law* 497, 502. This distinction is



A rule, or approach, is called for, which satisfactorily protects legitimate *situs* concerns, but which also “ [eliminates] *the harsh injustice worked by the mechanical, territorial situs formula.*”<sup>68</sup> Although there is wisdom in having a rule of general application, and not complete elasticity of approach (such as has been advocated by certain proponents of interest and functional analysis), “*general doctrines should not be adhered to when confronted by more important principles.*”<sup>69</sup>

In light of this remark, one may re-consider the argument in favour of the *situs* rule which is based on maintaining the accuracy and integrity of title registers. It is accepted that this is a compelling reason for applying the *lex situs* when a third party,

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unlikely to convince *situs* rule protagonists, for as Schott & Rembar conclude, “... *should the [money] judgment be not otherwise satisfied, the plaintiff has the ultimate resource to the land by the expedient of suing on the judgment in the state in which the land is located.*” (*ibid.*) Consider also Zweigert, K and Müller Gindullis, D, ‘*International Encyclopaedia of Comparative Law, Volume III, Chapter 30 – Quasi-Contracts*’ (1973), who remark, at p17, that, “... *differences in the classification of the claim [e.g. in tort or property] according to the individual legal systems are irrelevant in the conflict of laws.*”, and Carey Miller, D L, ‘*Corporeal Moveables in Scots Law*’ (1991), at p179: “*That an owner has an action to recover his property from one who holds, without a right against him to the same, is not in doubt. How this action is designated [as a proprietary claim, or as an obligation to make restitution] is unimportant ...*” These views, it is submitted, are fundamentally wrong, at least in a conflict of laws context, for the connecting factor (and, in turn, the *lex causae*) clearly depends upon classification of the cause of action.

<sup>68</sup> Alden, *ibid.*, p597/8. ‘*Harsh injustice*’ may sometimes, but will not always, ensue; it is more likely to result in cases concerning the transfer of *moveable* property. Alden adopts the view that an interest analysis approach would secure the desired balance of interests, but, with respect, the present author would reject such an approach, at least, in relation to the United Kingdom.

<sup>69</sup> Jefferson, *ibid.*, p511. Cf. the experience in tort and delict, where one may trace the development of the law, from the strict operation of the double actionability rule (resulting in application of the *lex causae*, in spite of overwhelming connections with another legal system; *Szalatnay-Stacho v. Fink* [1947] K.B. 1), towards a more enlightened approach, via *Boys v. Chaplin* [1971] A.C. 356, *Johnson v. Conventry Churchill International Ltd* [1992] 3 All E.R. 14, and *Red Sea Insurance Co. Ltd v. Bouygues SA* [1994] 3 All E.R. 749. (Consider Crawford, *ibid.*, p290, at paragraph 13.16: “*As an exception to the ... general rule, a particular issue might be governed by the law of the country which, as regards that issue, had the most significant relationship with the occurrence and the parties.*”) The current, more flexible, rule of displacement permits consideration of the parties, the events constituting the tort or delict in question, and the circumstances or consequences of those events. (Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995: e.g. *Edmunds v. Simmonds* [2001] 1 W.L.R. 1003, per Garland, J., at p1004: “... *in all the circumstances ... the factors connecting the tort to England were overwhelming and it was substantially more appropriate for the applicable law to be the law of England.*” Contra *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 Ll. Rep. 284, per Moore-Bick, J., at p298) Even now, however, in spite of its predominantly Czech *mise en scène*, *Szalatnay-Stacho v. Fink* might not be decided any differently. (Section 13, 1995 Act)



acting in good faith,<sup>70</sup> has relied upon the title register maintained at the *situs*. However, as Weintraub has explained, “*Such matters ... have absolutely no relevance to the original parties to the transaction for which we are seeking the governing law. But it is here, between the original parties, that almost all the conflicts problems in the cases and the literature arise and here that the situs rule has been dominant.*”<sup>71</sup> It is generally assumed, *a priori*, that the *lex situs* must be applied to govern the essential validity of a transfer of land, by reason of third party reliance upon the *situs*’ title registers, but this may not, in fact, be a consideration which is relevant to the case in hand (*e.g.* where the dispute affects land in state X and concerns a matter which is of significance only to the original contracting parties, domiciled in state Y, and does not relate to the accuracy of the *situs*’ land record or to a third party’s reliance thereon, or to land use<sup>72</sup>). Moreover, as earlier stated, the title recording argument is of no import to most disputes concerning moveable property, in respect of which title registers are seldom maintained.

One of the arguments against a more flexible approach to the determination of the *lex causae* is the perceived need to guarantee certainty and uniformity. Alden has suggested that whilst these are appropriate desiderata, “*they should not be controlling ... these supposed advantages do not outweigh the more important concerns of fairness [and] due process ... The argument could not save ... other territorial rules,*

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<sup>70</sup> Note 132 *et seq.*, *infra*.

<sup>71</sup> Weintraub (1966), *ibid.*, p3. Weintraub urges that, “*If it should be decided to apply some law other than that of the situs to such a transaction between the original parties, the victor, in order to preserve his victory against subsequent bona fide purchasers would have to enter of record [at the situs] the evidence of the adjudication of his rights.*” (*ibid.*, p4) (Cf. appreciation of the interests of different states, inherent in the distinction between the choice of law rules governing formal validity and essential validity of a marriage.) Cf. Alden, *ibid.*, p593.

<sup>72</sup> Consider Weintraub (1966), *ibid.*, at p3: “*The first transaction is in no way impeached and there is no competition with anyone obtaining title under lex situs.*”



*and is no more persuasive for real property conflicts.*"<sup>73</sup> It is, nevertheless, submitted that there *is* greater reason to preserve a strict territorial rule in relation to property, than in relation, say, to contract or delict. But, it is also submitted that application of the *lex situs* connecting factor is not, *per se*, sufficient to ensure uniformity. Schott and Rembar, for example, have observed that, "... *as a matter of fact* [the] *lex situs* *has not been uniformly applied; so ... it cannot be contended that departures produce any new confusion.*"<sup>74</sup> As was considered in Chapter Four, *supra*, there can be difficulties in identifying or locating the '*situs*' of property, and more so, in interpreting the expression '*lex situs*'.<sup>75</sup> It is quite feasible, therefore, that these nuances of interpretation do, in any event, detract from the uniformity reputedly achieved through application of the *situs* rule.<sup>76</sup>

Moreover, although there is a need for uniformity, this attribute may be measured according to a different benchmark standard: uniformity may be achieved not only through application of a universal connecting factor, such as the *lex situs*, but also, more simply, by treating comparable cases commensurably.<sup>77</sup> It would be objectionable if Litigant A's claim against X, in Forum Y, were determined by the *lex*

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<sup>73</sup> Alden, *ibid.*, p597. Consider *Winkworth v. Christie, Manson & Woods Ltd* [1986] 1 Ch. 496, *per* Slade, J., at p506: "Consistency is an important element in the administration of justice." (Emphasis added) His Lordship did not suggest that consistency was *the* most important element; the aim, first and foremost, is the administration of justice, not absolute consistency.

<sup>74</sup> Schott & Rembar, *ibid.*, p1053.

<sup>75</sup> Cook (1939), *ibid.*, at p1248: "Like most principles, the one under consideration [the *lex situs*] is expressed in words which seem at first sight clear in meaning but which ultimately prove to be ambiguous." (See also Cook, W W, 'The Logical and Legal Bases of the Conflict of Laws' (1942), p253 *et seq.*) Cf. Cheshire (1935), *ibid.*, at p84: "Circumstances may be imagined in which it is not even obvious what *lex situs* ought to be chosen."; and Baxter, *ibid.*, at p10: "The choice of the *lex situs* may be artificial."

<sup>76</sup> Cf. Prott (1989), *ibid.*, at p266: "Any application [of certainty] which may have been thought to have been given by the rule as to *lex rei sitae* has rather been lost because of the varieties of interpretation to which the rule is now subject."

<sup>77</sup> Cf. Cheatham (1960), *ibid.*, p339 *et seq.* Cheatham identified five discrete meanings of uniformity. Pertinent to the present discussion is that interpretation which ensures that all similar occurrences, no matter where they take place, should be treated alike in the forum, in the sense that the same treatment should be accorded to each, and the same principles applied to each.

*situs*, but for no explicable reason, and in equivalent circumstances (*i.e.* with no distinguishing facts), Litigant B's claim against X, also in Forum Y, were resolved by a law identified by an entirely different connecting factor. The existing *situs* rule is not concerned with the substance of that law which is deemed to be applicable (save where it offends the forum's public policy), and it does not guarantee that the substantive results of two equivalent cases will be identical, even though, technically, the same connecting factor is applied to each.<sup>78</sup> In practice, therefore, there is no greater certainty for a litigant whose goods have been stolen from him and sold abroad, and who is thereafter seeking to recover his stolen property, in having the *lex situs* determine the question of ownership (the *situs* being the place where, by chance or design, his goods were sold by the thief to a third party), than in having the *lex causae* determined according to a proper law approach. Either way, some uncertainty as to ultimate result will prevail.

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<sup>78</sup> Contrast, for example, the result of *Winkworth v. Christie, Manson & Woods Limited* [1986] 1 Ch. 496 with that of *Goetschuis v. Brightman* 245 N.Y. 186, 156 N.E. 660. Cf. Byrne-Sutton's remark that, "The *lex situs* rule unfortunately results in the application of municipal (national) laws whose solutions are extremely variable. Some legal systems prefer to protect a purchaser in good faith by allowing him to acquire immediate ownership over stolen objects ..., thus trying to preserve the security of transaction and commercial convenience. Others tend on the contrary to allow an illegally dispossessed owner to claim his property for many years after the theft, thus promoting morality in favour of the original owner." (Byrne-Sutton, Q, 'Qui est le propriétaire légitime d'un objet volé?' - In Lalive, *ibid.*, p500) In this regard, it is interesting to note that a 1974 Draft Convention providing a Uniform Law on the Acquisition in Good Faith of Corporeal Moveables (based on a 1968 UNIDROIT Draft Uniform Law on the Protection of the *Bona Fide* Purchaser), although approved by a Committee of Experts in 1974 and subsequently submitted for governmental negotiation, ultimately came to naught; the project was eventually abandoned in 1981. (Goode, R, 'The Protection of Interests in Movables in Transnational Commercial Law' (1998) Uniform L. Rev. 453, 454) Goode has advised, however, that, "Over the past decade there has been a radical shift in thinking and renewed efforts have been made to introduce at least some measure of harmonisation into the legal treatment of real rights in commercial assets." (*ibid.*, p458) E.g. 1988 UNIDROIT Conventions on International Factoring and International Financial Leasing, UNCITRAL Draft Convention on Assignment in Receivables Financing; and the Preliminary Draft Convention on International Interests in Mobile Equipment.



Although the *lex situs* rule, *per se*, is impartial (*i.e.* as a choice of law rule it does not dictate the substantive result of the point in issue), the result of applying the law identified by the connecting factor, is, ultimately, the determination of ownership.

In 1949, in the case of *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd*,<sup>79</sup> Denning, LJ. declared that, “*In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title.*”<sup>80</sup>

The first principle is enshrined in the maxim, ‘*nemo dat quod non habet*’,<sup>81</sup> whereas the latter, opposing policy, is encompassed in the French ‘*en fait de meubles, la possession vaut titre.*’ This distinction is rooted in fundamentally different approaches to the matter of ownership: the former maxim recognizes the right of an owner, and considers the notion of security of title to be deserving of protection, while the latter accords greater importance to commercial expediency, the right of a good faith purchaser, and the notion of security of transaction.<sup>82</sup>

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<sup>79</sup> [1949] 1 K.B. 322.

<sup>80</sup> At p336/7. Denning, LJ. advised that, in England, “*The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.*” (p337)

<sup>81</sup> Alternatively, ‘*nemo plus juris ad alium transferre potest quam ipse habet*’: no one can transfer to another a greater right than he himself has.

<sup>82</sup> Cf. Redmond-Cooper, R, (1997), at p59: “*Differing legal philosophies may cause the court to make certain presumptions from the outset as to which party is more deserving.*”; and Redmond-Cooper, R, ‘*Recovery of Stolen & Looted Works*’ (1998), p1. Cf. *Sanders Brothers v. Maclean & Co.* [1883] 11 Q.B.D. 327, *per* Bowen, LJ., at p343: “*credit, not distrust is the basis of mercantile dealings ... mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery.*” *Sed contra*, *Clayton v. Le Roy* [1911] 2 K.B. 1031, *per* Scrutton, J., at p1044: “*A custom which takes away one man’s property and gives it to another must, in my view, be carefully watched, especially when it is not a universal custom, but limited to certain favoured localities.*” [This dictum was directed to the rule of *market overt*, then operative in the City of London.]



It has been suggested that the *nemo dat* rule “owes as much to logic as it does to legal principle.”<sup>83</sup> This is the approach preferred by Scots law, as was early expounded by Viscount Stair, viz.: “*That the dispositive will of the owner alone, without any further, is sufficient to alienate his right, without delivery or possession, is evident in personal rights ... That the dispositive will is also sufficient to transmit real rights, it appeareth, because the will alone is sufficient to retain, not only rights, but even possession itself, though there be no corporeal act exercised therein;*”<sup>84</sup>

The Scottish Law Commission has noted that certain exceptions have been grafted onto the Scots common law rule by Sale of Goods legislation,<sup>85</sup> the Factors Acts and

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Consider, however, Harding’s observation that, “*French law and English law here begin from diametrically opposed premises, but the result in practice is not dissimilar, as one would expect in societies at a similar level of commercial and social development. In both systems, the general principle is qualified by exceptions, so that a broad area of agreement is achieved as regards the majority of cases ... The moral is that what amounts to one man’s principles may constitute another’s exceptions.*” (Harding, C S P, and Rowell, M S, ‘*Protection of Property Versus Protection of Commercial Transactions in French and English Law*’ (1977) 26 I.C.L.Q. 354, 379/80) Cf. also Eisen, L, ‘*The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*’ (1991) 81 Jo. of Criminal Law and Criminology 1067, 1092.

<sup>83</sup> Palmer, N, ‘*Conversion, Trespass and Title to Art Works*’ (1998), p13. Palmer explains, “*Where a thief steals a chattel from its owner and purports to sell it to X, the owner’s property therefore endures and no property is conferred on X.*” ‘Property’ in this context clearly means, not the chattel itself, but the right of ownership attaching thereto. (See Chapter Three, *supra*, note 2 – ‘The Distinction between Moveable and Immoveable Property’)

<sup>84</sup> Stair, *Institutions*, III.ii.4. Cf. Erskine, *Institutes*, II.i.18.: “*The property of such subjects as have already had an owner, is chiefly acquired, or transferred from the owner to another ... Two things are therefore required to the conveyance of property in this manner; 1st, The intention or consent of the former owner to transfer it upon some just or proper title of alienation, as sale, gift, exchange, &c; 2dly, The actual delivery of it, in pursuance of that intention.*” Cf. Hume’s *Lectures* (1786 – 1822), Volume III. 235: “*The nature of a proper rei vindicatio, or real action for recovery of property, is that it attaches and follows the thing as the possession shifts from hand to hand.*” See also Carey Miller, D, ‘*Corporeal Moveables in Scots Law*’ (1991), p101 *et seq.*; note, however, Carey Miller, *ibid.*, at p171: “*The Institutional treatises and earlier case law refer to the vindicatory action available to an owner to recover possession of a moveable thing. In most modern legal writings, however, one does not find this term, but, broadly speaking, what it would cover seems to be subsumed under ‘restitution’.*” Cf. *Todd v Armour* (1882) 9 R. 901, *per* Lord Young, at p907: “*By our law the vitium reale attaching to stolen goods is indelible til they return to the original owner.*” Consider also section 8(2) of the Prescription and Limitation (Scotland) Act 1973, as amended, and Schedule 3(g) thereof: specified as an imprescriptible right is “*any right to recover stolen property from the person by whom it was stolen or from any person privy to the stealing thereof.*”

<sup>85</sup> In respect of which, see Griffiths, A, ‘*Implied Terms in the Sale of Goods Act 1979*’ (1998), pp1, 4.



Hire Purchase legislation.<sup>86</sup> Similarly, Palmer has advised that the *nemo dat* rule is only a rule of *general* application; it remains subject to certain exceptions.<sup>87</sup>

If, as Denning, LJ. has suggested,<sup>88</sup> the struggle between these two doctrines has been evident on the domestic plane, the wider *global* struggle has only been more pronounced.<sup>89</sup> For example, French law, as a general rule, supports the *possession vaut titre* doctrine,<sup>90</sup> as does Italian law,<sup>91</sup> whereas in the U.S.A., as in Scotland,<sup>92</sup> the

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<sup>86</sup> SLC (Moveables), p16. E.g. Factors Act 1889; Hire Purchase Act 1964 (as amended by the Consumer Credit Act 1974, Schedule 4); and the Sale of Goods Act 1979, as amended. Note, however, Carey Miller's assertion that, "... there is no general basis in terms of which the right of a bona fide possessor is elevated above that of the owner ... The only general form of protection of an acquirer in good faith is through the rebuttable presumption that the possessor of a moveable thing is owner." (1991, p197)

<sup>87</sup> Palmer (1998), *ibid.*, p14; and Palmer, N, ed., 'The Recovery of Stolen Art: A Collection of Essays' (1998), p48. Cf. Harding & Rowell, *ibid.*, at p364: "Despite the demands of commercial expediency there seems to have been little resistance to the entrenchment of this [*nemo dat*] concept on the part of the judges in the eighteenth and early nineteenth centuries; indeed they appear to have been quite prepared to swallow it whole ... However, in the early part of the nineteenth century, Parliament recognised that in the interests of mercantile convenience there must be occasions in which the interests of the owner should give way to those of the innocent acquirer of the goods in question."

<sup>88</sup> *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* [1949] 1 K.B. 322, 336.

<sup>89</sup> Cf. Falconbridge, J D, 'Essays on the Conflict of Laws' (1947), at p382, where the author refers to the "ancient question upon which different systems of local laws have taken different views, namely where the line is to be drawn between the protection of an interest of an owner out of possession and the protection of the interest of an innocent purchaser from the possessor." Cf. Benjamin, J 'The Law of Global Custody' (1996), at p71: "The heart of the problem is that different jurisdictions conceive of property in fundamentally different ways."; and Siehr, K, 'The Protection of Cultural Heritage and International Commerce' (1997) 6 I.J.C.P. 304, at p306: "International commerce ... faces problems because national rules differ with respect to transaction concerning moveable property in general and, especially, with regard to cultural objects."

<sup>90</sup> Article 2279, French Civil Code. Bell, J, Boyron, S, and Whittaker, S, 'Principles of French Law' (1998), p284 *et seq.*, especially at p288: "The basic principle is that where a thief or the finder of goods is still in possession of the thing, the true owner can bring an action of revendication to reclaim in at any time – there is no prescription period. But where the property has been passed on, then Article 2279 operates to protect the good faith transferee." Cf. Franklin, M, 'Security of Acquisition and of Transaction: Law Possession Vaut Titre and Bona Fide Purchase' (1932), p593; Brissaud, J B, 'History of French Private Law' (1968), p288; SLC (Moveables), Appendix, p1; Harding and Rowell, *ibid.*, p359 *et seq.*; and Williams, *ibid.*, p86. Under Article 2268, good faith is always presumed and the onus rests on the party who alleges bad faith to prove it. Under Article 2269, it suffices that good faith existed at the time of acquisition of the object in question. (Crabb, J H, 'French Civil Code' (1977), p406; Redmond-Cooper, R, 'Good Faith Acquisition of Stolen Art' (1997) 2 Art, Antiquity and Law 55, 60; and Harding and Rowell, *ibid.*, at p361: "... in practice it would not be reasonable to expect the good faith acquirer, upon discovery of the fraud, to renounce his title: after all, he had taken possession and paid for the property in good faith.")

<sup>91</sup> Article 1153, Italian Civil Code. The Scottish Law Commission has referred to the Italian model as that which offers comprehensive protection to a purchaser in that country: "Protection is given because of the apparent power of the transferor to alienate." (SLC (Moveables), Appendix, p1) (Beltramo, M, 'Italian Civil Code, Appendix F' (1996), Biondi, A, 'The Merchant, The Thief, and The Citizen: The Circulation of Works of Art Within the E.U.' (1997) C.M.L.R. 1173, at p1173; and Luzzatto, R, 'Trade



*vitium reale* which attaches to stolen property generally ensures enduring protection of the title of the original owner.<sup>93</sup> Of course, some legal systems may adopt a *via media* between these two doctrines<sup>94</sup> (e.g. by permitting a dispossessed owner to recover his property from the *bona fide* purchaser, but only in exchange for payment of a sum equivalent to the purchase price).<sup>95</sup> And, as has been noted, statute may make inroads on either position.<sup>96</sup>

Prott has observed that, “*There has been some debate about the morality of the respective rules: civilian lawyers sometimes ask whether there is anything more moral about protecting the owner, who has done nothing to deserve losing his property, than protecting the bona fide purchaser who is equally innocent.*”<sup>97</sup> In truth, it is submitted, neither approach is any more commendable than the other, for the application of either maxim guarantees that, in cases of sale by a non-owner, at least one innocent party (either the innocent original owner, or the good faith third party

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in *Art and Conflict of Laws: The Position in Italy*, p409 (In Lalive, P, ed. ‘*International Sales of Works of Art*’ (1988))

<sup>92</sup> Carey Miller, D L, ‘*Title to Art: Developments in the U.S.A.*’ (1995) S.L.P.Q. 115, at p121: “*In Scots law the vitium reale, or ‘real vice’ of theft means that, in principle, an owner can always recover stolen property.*” Cf. Stair Memorial Encyclopaedia, Volume 18, paragraph 618 (although note that the reference therein to the English rule of *market overt* [“*a preposterous loophole, feared by private owners and opposed by the reputable market*” - Palmer, N, ‘*Recovering Stolen Art*’ (1994) 47 Current Legal Problems 215, 233] is no longer correct, in respect of transactions concluded on or after 3 January 1995: Section 1, Sale of Goods (Amendment) Act 1994).

<sup>93</sup> Merryman, J H, ‘*American Law and the International Trade in Art*’, at p427 (In Lalive, *ibid.*): “*... who, as between the owner and a good faith purchaser from a thief, had the better legal claim to the paintings? Applying American law, the answer was clear: our law prefers the owner in such a case.*”; and Carey Miller (1995), *ibid.*, at p116: “*The basic rule in the USA is that neither a thief nor any subsequent acquirer of stolen property can give a good title.*”

<sup>94</sup> Cf. SLC (Moveables), p1 *et seq.*, at p3: “*At one extreme, a dispossessed owner is granted the right to claim his property where he finds it ... At the other extreme an acquirer who took possession animo domini is protected, even though the goods had been stolen and acquisition was gratuitous.*”

<sup>95</sup> E.g. Switzerland (Article 954(ii), Swiss Civil Code) (*per* Steinauer, P-H, ‘*L’acquisition d’objets d’art selon le droit privé suisse*’, p119 - In Lalive, *ibid.*) The sum payable could, alternatively, comprise the current market value of the *res litigiosa*, or a sum halfway between that figure and the purchase price. Cf. Fox, C, ‘*The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*’ (1993), p229.

<sup>96</sup> E.g. In a ‘*vitium reale*’ jurisdiction, the owner may yet lose ownership if s/he has permitted another to possess and deal with property in such a way as to raise reasonably held expectations in a buyer that, on payment of the price, s/he will obtain good title: section 1 of the Factors (Scotland) Act 1890.



purchaser) will suffer denial of his or her (putative) rights of ownership.<sup>98</sup> On occasion, the notion of personal bar may operate to persuade us that the innocent purchaser is the party more deserving of our favour.

Prott's verdict on this 'morality' debate is interesting: the real issue, she concludes, is not whether one or other of the two rules is theoretically more laudable, but rather, "*which is the rule which will best deter illicit traffic?*"<sup>99</sup> Prott poses this question with particular reference to the problem of illicit trafficking in cultural property, but her general answer to the question is that, "*The rule which will require purchasers to be more diligent about the status of what they are buying is best able to do this.*"<sup>100</sup> In fact, 'nemo dat' systems, and those 'possession vaut titre' systems which impose additional qualifications concerning the *bona fides* of the third party purchaser, require that third party purchasers exercise a high standard of diligence in checking the ownership or provenance of the object in question. If the requisite care cannot be evidenced, then, according to both doctrines, the title of the original owner may be preferred. Conversely, however, one might also enquire whether the original owner

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<sup>97</sup> Prott, L V, 'Problems of Private International Law for the Protection of the Cultural Heritage' (1989) V *Receuil des Cours* 215, 274. Cf. Falconbridge, *ibid.*, p382.

<sup>98</sup> Baxter, I F G, 'Conflicts of Law and Property' (1964) 10 McGill Law Journal 1, at p22: "*The protection of buyers in good faith and for value involves a distribution of loss between two parties both in good faith.*" Cf. Redmond-Cooper's view: "... there is rarely a notionally 'innocent plaintiff' suing a 'perpetrator defendant' (because each party is, in most cases, effectively a victim of a third party who has disappeared from the picture)." (In Palmer, N, ed., 'The Recovery of Stolen Art: A Collection of Essays', *ibid.*, p146) But consider Hayworth, A E, 'Stolen Artwork: Deciding Ownership is No Pretty Picture' (1993) 43 Duke Law Journal 337, at p380: "... purchasers of paintings have better opportunities to verify the provenance of works of art than owners have in trying to locate or uncover stolen pieces."

<sup>99</sup> Prott, *ibid.*, p275.

<sup>100</sup> Prott, *ibid.*, p275. Prott further explains that, "*It is not an answer to state that the [original] owner can insure against his loss: in respect of cultural heritage items, monetary compensation is not a satisfactory solution compared to the recovery of a unique object.*" (*ibid.*) Both 'owners' could be expected to insure against possible loss, and although Prott's contention regarding the inadequacy of monetary compensation is correct, it may be expected that at least one of the two innocent parties will require to be satisfied with a pecuniary remedy. Cf. SLC (Moveables), at p54: "*Insurance is small compensation to the collector or to the heir of family treasures. Moreover, articles of no particular economic value may be of inestimable value to an owner, as in the case of a memento of a deceased*

had maintained his or her intrinsically, or sentimentally, valuable pieces in sufficiently secure conditions.<sup>101</sup>

Although these thoughts may be more germane to the harmonisation of substantive laws,<sup>102</sup> it is apparent that dynamic conflicts concerning choice of law are inextricably linked to the dichotomy between *nemo dat* and *possession vaut titre* policies. While the internal régime of the relevant *lex situs* will determine the resolution of the substantive problem in issue, the present work is concerned, not with identifying the better, or most effective, substantive provision, but rather, with formulating the most appropriate rule of choice of law.

Returning then to the arguments against application of the *lex situs* rule, it can be seen that, related to the notion of uniformity of result, is the argument founded upon party expectations. This argument presupposes that transacting parties know where the property in question is situated at the *tempus inspiciendum* (generally the time of acquisition or transfer of the right). Whilst the *situs* may be self-evident with regard to immoveables, that is not the case in respect of all corporeal moveables,<sup>103</sup> or *a fortiori*, incorporeal moveables.<sup>104</sup> Furthermore, one would surmise that any expectations which parties do, in fact, entertain are suppositions as to substantive

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*relative ... it cannot readily be assumed that insurance has superseded the need for special treatment of involuntary dispossession of property."*

<sup>101</sup> Cf. Note 114, *infra*.

<sup>102</sup> Consider Siehr, K, 'International Art Trade and the Law' (1993) VI *Receuil des Cours* 9, at p72: "Although the problem of bona fide purchase is a universal and important one, it is very strange and puzzling that divergency in the law still exists." However, note Goode's verdict that, "There is little doubt that the harmonisation of the law governing proprietary aspects of dealings in moveables is a great deal more complex than that of the law relating to the contractual aspects." (*ibid.*, p455)

<sup>103</sup> Consider, for example, goods purchased from mail order catalogue.

<sup>104</sup> To impute to transacting parties knowledge and understanding of the legal concept of fictional *situs* (and, therefore, expectations as to applicable law) would be preposterous.



result, not choice of law.<sup>105</sup> Accordingly, Alden has concluded (correctly, it is submitted) that, “... *protecting expectations and promoting predictability do not require the situs rule; any choice-of-law rule will accomplish the same result.*”<sup>106</sup>

One area in which party expectations are likely to be strong is in relation to commercial transacting. With this in mind, it is noteworthy that Story identified certain objections to the application of the *lex situs*: “*If the lex rei sitae were generally to prevail in regard to moveables, it would be utterly impossible for the owner, in many cases, to know in what manner to dispose of them during his life ...; not only from the uncertainty of their situation in the transit to and from different places,*<sup>107</sup> *but from the impracticality of knowing with minute accuracy the law of transfers inter vivos ... in the different countries in which they might happen to be. Any sale or donation might be rendered inoperative, from the ignorance of the parties of the law of the actual situs at the time of their acts.*”<sup>108</sup> Although Story’s remarks were penned in the context of his recommending adherence to the *mobilia sequuntur personam* principle, it is interesting to consider this rather more propitious perspective on the impact upon commerce of application of a non-*situs* law.<sup>109</sup>

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<sup>105</sup> Cf. Alden, *ibid.*, at p597: “... *when situs law would invalidate any contract, will, trust or other written agreement, that law ipso facto defeats any expectations or intentions of the parties.*”

<sup>106</sup> Alden, *ibid.*, p596.

<sup>107</sup> Consider now the specific exception concerning goods in transit. See Chapter Eight, *supra* – ‘The Transfer of Corporeal Moveable Property’.

<sup>108</sup> Story, J, ‘*Commentaries on the Conflict of Laws*’, p552. Cf. Lowenfeld, *ibid.*, at p1419: “*Maybe, [Hancock] suggests, the revolt even against the land taboo will be made easier if he can point to what bolder and more sensible jurists held a century ago.*” Story continues, “*There would be serious evils pervading the whole community, and equally affecting the subjects and interests of all civilised nations. But in maritime nations depending upon commerce for their revenues, their power and their glory, the mischief would be incalculable.*” (*ibid.*, p553) One might draw a modern-day parallel with electronic commerce, or mail order transacting, where the purchaser may have no means of determining the *situs* of the goods, let alone the *lex situs*, at the *tempus inspiciendum*.

<sup>109</sup> Consider also Westlake, J, ‘*A Treatise on Private International Law*’ (1925), at p192: “*No doubt the interests of commerce require that great freedom of disposition should be allowed to proprietors, and this consideration speaks in favour of the validity of an alienation made in the manner prescribed by the law of the alienor’s domicile, but not less so in favour of the validity of one made in the manner prescribed by the law of the place of sale.*” In contrast with Story, who appears to have advocated an

Although there has been no overt judicial dilution of Maugham, J.'s dictum,<sup>110</sup> his Lordship's pronouncement has nevertheless been enervated by the subsequent writing of certain distinguished scholars, including Wolff and Cheshire. Wolff was moderate in his criticism, stating that, "*It was possibly a slight exaggeration when Maugham, J. said obiter [that the *lex situs* must apply] ... But at least this dictum states the goal to which the development of English law tends and which it has probably attained.*"<sup>111</sup> Cheshire, on the other hand, was more trenchant in his censure of Maugham, J.'s *obiter dictum*, stating that, "*It is submitted with respect that there is much room for doubt.*"<sup>112</sup>

In particular areas of international trading, there is strong concern that operation of the *lex situs* rule, in fact, impedes legitimate trading, or at least that it countenances or encourages clandestine operations.<sup>113</sup> Although the *lex situs* rule has been shown to be impartial, insofar as it does not dictate the substantive result of property litigation, sophisticated traffickers may abuse the rule, so as intentionally to purge *objets d'art*

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exclusive *lex domicilii* rule, Westlake seems to favour a cumulative rule of choice of law: the validity of a transaction may be tested either according to the *lex domicilii*, or to the *lex situs*, the choice depending upon which factor upholds the validity of the transaction (*i.e.* choice of law should operate *in favorem* commerce). If, of course, both laws would reach the same result, then this would constitute a false conflict.

<sup>110</sup> *In re Anziani, Herbert v. Christopherson* [1930] 1 Ch. 407, *per* Maugham J., at p420: "*I do not think that anybody can doubt that, with regard to the transfer of goods, the law applicable must be the law of the country where the moveable is situate. Business could not be carried on if that were not so.*"

<sup>111</sup> Wolff, *ibid.*, p516.

<sup>112</sup> Cheshire (1947), *ibid.*, p559.

<sup>113</sup> Von Plehwe, T, '*European Union and the Free Movement of Cultural Goods*' (1995) 20 *European L. Rev.* 431, at p440: "*Long established case law and doctrine require that the [situs] rule be adhered to also in cases of 'laundering' o [sic] stolen art works ...*" Cf. Garro, A M, '*The Recovery of Stolen Art Objects from Bona Fide Purchasers*' (In Lalive, *ibid.*), at p512: "*... the problem with this classical choice-of-law rule is that it may encourage laundering of stolen art through jurisdictions with very generous protection of bona fide purchasers. Thus the very reason that the goods are where they are may be that their present possessor believes that the law in that jurisdiction may be favorable to him.*" ; and Prott, *ibid.*, p268.



of known defects in title.<sup>114</sup> Although, in theory, exploitation of the *situs* rule may affect all stolen property,<sup>115</sup> in practice, the repercussions are particularly deleterious to the art market,<sup>116</sup> prompting certain experts to advise that “... *some of the rules of private law, which reflect the concerns of promoting trade, should not be applied to works of art and other cultural items. Some have even suggested that new rules should be adopted specifically for cultural property.*”<sup>117</sup>

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<sup>114</sup> Cf. Prott, *ibid.*, at p264: “As long as stolen goods are funnelled through Italy and an apparently *bona fide* transaction they can circulate freely ... as long as the goods are in Italy (or other chosen jurisdiction) at the time of the transaction, Italian (or other chosen) law will apply to the transfer of title wherever it takes place.” At p265, Prott advises that, “These choices are open not just to the wrongdoer (thief, receiver or other acquirer in bad faith), but also to the person who has suspicions, but does not make inquiries because he does not want to be fixed with knowledge of a possible defect in title.” Cf. Byrne-Sutton, *ibid.*, at p500: “[The *situs* rule] not only creates legal uncertainty for all those concerned by international art trade, but enables calculating dealers or purchasers to buy or sell in countries whose solutions favor their personal transactions, thus potentially enhancing the black market (which in turn facilitates the sale [sic] unauthentic works of art.)”; and UNESCO (Lalive), *ibid.*, at p670: “... the attention of the Secretariat of UNESCO has been drawn to some of the rules of private law which hamper the efforts of public institutions as well as private individuals to protect cultural property. Particular reference has been made to the rules concerning the *lex rei sitae*, the *bona fide* purchaser and statutes of limitation.” Consider too Lalive (1988), *ibid.*, at p307: “... it is inevitable that certain people take advantage of the differences among the various laws within Europe, just as for instance they go to get a divorce to some places and not to others.” See generally Chapter Ten, *infra* – ‘The Treatment of Cultural Property’. It is significant also that, as regards works of art, the value of an object to an owner may be non-patrimonial: it may be valued purely for artistic or sentimental reasons. Consider in this regard SLC (Moveables), *ibid.*, at p4, and p53: “If the original owner was himself the creator of an artistic object, his moral right to reclaim it from a *bona fide* acquirer might be thought stronger than the deprived owner of a consumer product. Nevertheless, the multiplication of fine distinctions and exceptions has few advocates.” Cf. Morris, J H C, ‘The Transfer of Chattels in the Conflict of Laws’ (1945) XXII B.Y.I.L. 232, who refers, at p238, to “An alarming vista of apparently endless permutations and combinations ...” (e.g. depending upon good or bad faith, consent to removal, or lack thereof etc.)

<sup>115</sup> Palmer, N, ‘Recovering Stolen Art’ (1994) 47 Current Legal Problems 215, at p233, where it is stated that the general rule of the common law is “*applicable to cultural goods and commercial commodities alike.*” In 1998 Palmer stated that, “*The principles ... are of general application, affecting all types of chattel from the mundane to the aesthetically unique.*” (‘Conversion, Trespass and Title to Art Works’, p1, and further, at p18) Consider also Goode, *ibid.*, at p459: “At the international level, the growth of cross-border finance has made creditors acutely aware of the risks they face when dealing with assets based in a jurisdiction that is hostile to real rights ...”; and Travers, J N, ‘The Inter Vivos, Voluntary and Particular Transfer of Tangible Moveable Property Rights in Private International Law’ (1989), at p184: “*International financing cannot develop if the financier knows that a removal of the subject matter of the security interest across international frontiers will adversely affect his or its right.*”

<sup>116</sup> Consider *Embiricos v. Anglo-Austrian Bank* [1905] 1 K.B. 677, affirming [1904] 2 K.B. 870, per Walton, J., at p874: “*An assignment of a moveable which can be touched (goods) giving a good title thereto according to the law of the country where the moveable is situate at the time of the assignment (lex situs) is valid.*’ It cannot be disputed that this statement is correct in regard to ordinary chattels; and if this document were not a cheque, but a valuable and portable article such as a diamond, which had been stolen from the plaintiffs and sold in Vienna under circumstances which gave the purchasers a good title there to the jewel, the English courts would recognise that title if it was good according to the Austrian law, although it might not be good according to English law.”

<sup>117</sup> UNESCO Paper, *ibid.*, p671.



Other critics of the *situs* rule have disparaged certain of its proponents' reliance upon what are perceived to be antiquated notions of sovereignty and territoriality.<sup>118</sup> Hay, for example, has argued that, "*In both its jurisdictional and choice-of-law aspects the [situs] rule is indeed an anachronism in a conflicts jurisprudence no longer focused predominantly on territoriality but on 'affiliating circumstances' ... of substantive importance.*"<sup>119</sup> More generally, a "*power analysis*" has been held to be inappropriate in relation to moveable property, not least because, by the time the proceedings are raised, the *situs* of the property in question may no longer be the same as when ownership *etc.* of the property in question was allegedly acquired or transferred.<sup>120</sup> Similarly, application of the *lex situs* has been opposed when the matter in issue is only of indirect concern to the *situs* (e.g. capacity to deal with land, or *a fortiori*, moveable property).<sup>121</sup> The territorial power analysis, *per se*, does not reflect the enlightened, purposive approach which is characteristic of choice of law rules in other

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<sup>118</sup> E.g. Stumberg, G W, 'Chattel Security Transactions and the Conflict of Laws' (1942) 27 Iowa L. Rev. 528, at p550: "Abstract theories of state power and exaggerated views of local policy are insecure foundations on which to build satisfactory doctrines of conflict of laws."

<sup>119</sup> Hay, *ibid.*, p109. Cf. Weintraub (1966), *ibid.*, at p4: "Even if it were true that only a court at the *situs* of realty has constitutional jurisdiction over the subject matter in litigation affecting interests of persons in that realty, this would not logically compel application of the law of the *situs* e.g. if the *situs* courts believed that a more rational result would be reached in such a case by applying the law of some other state, they would be free to apply that other law." (Weintraub would seem to be proposing not merely the operation of a *renvoi* remission or transmission, but rather, complete capitulation by the *lex situs* in favour of the choice of law rule, or even substantive rule, of a third state.) Goodrich has remarked that, "... there is no logical reason why the exercise of that power [by the *forum rei sitae*] should not follow a prior determination of the rights of the parties, that determination being reached by reference to the laws of some other place. Moreover, well advanced civilized society should not have to rely upon the primitive concept of power to enforce as the justification for a rule." (*ibid.*, p419) Cf. Alden, *ibid.*, p593: it could be said that the (present) *situs* has power and control over all property, moveable and immoveable, within its territory, "... yet those who jealously guard a state's control over real property within its borders do not assert that such exclusive control must be maintained over personal property, or even persons." (e.g. in intestate succession to moveable property).

<sup>120</sup> Von Mehren & Trautman, *ibid.*, p197. E.g. *Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496.

<sup>121</sup> Alden, *ibid.*, at p593: "... physical control over the land ... is no justification for applying *situs* law to issues that only fortuitously involve that land."



fields. Savigny even ventured to suggest that application of a non-*situs* rule could, on occasion, promote increased comity and reciprocity in the international sphere.<sup>122</sup>

As regards corporeal moveable property, it may be argued that the fact that there are certain recognised exceptions to the *lex situs* rule demonstrates that any arguments proffered in support of the rule can never be absolute;<sup>123</sup> on the other hand, however, it is said that exceptions prove the rule. The admitted exceptions to the rule were enumerated by counsel for the second defendant in *Winkworth v. Christie, Manson & Woods Ltd*,<sup>124</sup> and approved by Slade, J.:<sup>125</sup> “[Mr Gilman, on behalf of the second defendant] *specifically recognised that there are five exceptions to [the general rule regarding the transfer of corporeal moveable property.] The first ‘if goods are in transit and their situs is casual or not known, a transfer which is valid and effective by its proper law will (semble) be valid and effective in England’ ... The second exception ... arises where a purchaser claiming title has not acted bona fide. The third exception is the case where the English court declines to recognise the*

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<sup>122</sup> Writing in the context of rules of succession to immoveable property, Savigny remarked that, “We might suppose the interest of our fellow-subjects to be imperilled, if in some cases landed estate in our country were to fall by inheritance, according to the rules of a foreign country, to a foreigner, instead of to a native. But the opposite result might as probably occur ... Or it might be supposed that the dignity and independence of our country would be endangered, if foreign rules of law were applied to the succession to an estate on its soil. But this objection is also refuted by the supposed reciprocity, which, more generally viewed, resolves itself into an international community of law, as the foundation and highest aim of our whole doctrine.” (Savigny, *ibid.*, p93/4) Note, however, Hancock (1967), *ibid.*, at p37: “It is one of the ironies of legal history that Story should have felt himself compelled to abandon his objective [of promoting comity and reciprocity among states] in the field of land titles and to advocate a needlessly parochial adherence to the law of the forum-situs in all cases.”

<sup>123</sup> Consider *Winkworth v. Christie, Manson & Woods Ltd* [1986] 1 Ch. 496, *per* Slade, J., at p513: “The [*situs*] rule is not one of universal application; in particular it is not likely to be applied in any of the five exceptional cases already mentioned.” Consider also Gardner’s remark that, “Dicey, ... while recognising the former supremacy of the *lex situs* in regard to every question dealing with immoveable property, points out that this predominance of the *lex situs* has during the last eighty years been undermined or limited by the recognition of several limitations thereto”; the limitations referred to include the example that a marriage between persons domiciled in a foreign country and subject to the laws of that country may operate as an assignment of English land. (Gardner, J C, ‘*The Decreasing Influence of the Lex Situs*’ (1934) 46 J.R. 244, 246)

<sup>124</sup> [1986] 1 Ch. 496. Counsel was quoting from Dicey & Morris, ‘*Conflict of Laws*’ (1973), 9<sup>th</sup> edition, p539.

<sup>125</sup> *Ibid.*, pp501 and 510.



*particular law of the relevant situs because it considers it contrary to English public policy. The fourth exception arises where a statute in force in the country which is the forum in which the case is heard obliges the court to apply the law of its own country. One example of the application of this exception might have been the former section 24 of the Sale of Goods Act 1893, recently repealed.<sup>126</sup> Fifthly ... special rules might apply to determine the relevant law governing the effect of general assignments of movables on bankruptcy or succession.”<sup>127</sup>*

As Nott has pointed out, it is unclear whether the exceptions detailed by Slade, J. were intended merely to reiterate previously recognised exceptions, or whether “*they represent a new departure.*”<sup>128</sup> Nott concludes (correctly, it is submitted) that the former is true.<sup>129</sup> It is arguable that the five exceptions referred to do, in fact, represent five manifestations of one wider, *general*, exception, applicable in any case where the *lex situs* is not the most appropriate law.<sup>130</sup>

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<sup>126</sup> Section 24(1) stated that, “Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts to the person who was the owner of the goods, or his personal representative notwithstanding any intermediate dealing with the, whether by sale in market overt or otherwise.”

<sup>127</sup> Slade, J., remarked that, “None of these exceptions, however, ... has any relevance on the facts of the present case.” (*ibid.*, p501) Cf. Carter, *ibid.*, p323. The current edition of Dicey & Morris, ‘Conflict of Laws’, 13<sup>th</sup> edition, p963, paragraph 24R-001 expressly details only one particular exception to the general rule. This exception (in respect of goods in transit) is to be found at p968, paragraph 24E-015.

<sup>128</sup> Nott, S M, ‘Title to Moveables Acquired Abroad’ (1981) 45 Conveyancer and Property Lawyer 279, 281.

<sup>129</sup> Nott states that, “... it appears that of the five exceptions mentioned in Winkworth’s case, none is new in that all are either mentioned in earlier authorities, are part of some general exception that could apply equally well in this field as any other or else are characterised by the law as something other than a simple transfer of moveable property.” (*ibid.*, p284) Cf. Cheshire & North, ‘Private International Law’, 13<sup>th</sup> edition, p945.

<sup>130</sup> Although Dicey & Morris do not articulate the possibility of a universal exception of this nature, neither do they expressly narrate the five particular exceptions. Even so, it would be strained to suggest that the form of possible exception to the general rule is broader than Slade, J.’s dictum implies.



Certain criticisms can be levelled at the specific exceptions articulated by Slade, J.<sup>131</sup>

In particular, the rationale behind the second exception (where a purchaser claiming title has not acted *bona fide*<sup>132</sup>) is unclear,<sup>133</sup> and the general tenor of this exception gives rise to two objections, one regarding interpretation, and the other regarding substance.

In the first place, one must inquire according to which law the question of *bona fides* should be interpreted.<sup>134</sup> Whilst this should pose few problems where the forum and the *situs* coincide (good faith being determined according to the *forum rei sitae*), there may be difficulties of interpretation where the forum differs from the *situs*, and *a fortiori*, where the *situs* of the goods at the time of the action is different from that which pertained at the time when the alleged acquisition or transfer of title (or other right) took place. In the latter case, should good faith be determined according to the domestic *lex fori*, or the *lex situs* at the time of the transfer, or even the *lex situs* at the time of litigation (which is likely to be the forum)?<sup>135</sup> In effect, the determination of good or bad faith may give rise to an incidental question.<sup>136</sup>

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<sup>131</sup> Mention has already been made in Chapter Eight, *supra*, of the difficulties concerning the first exception, regarding goods in transit, and the fifth exception, it is submitted, is not so much an exception to the general rule, than a discrete choice of law rule.

<sup>132</sup> Nott suggests that this exception includes “*the occasion when a purchaser is, or even should have been, aware of the suspect antecedents of the items in question.*” (*ibid.*, p281) Cf. *Cammell v. Sewell* (1860) 5 H&N 728, *per* Crompton, J., at p743, where his Lordship speaks of an “*innocent purchaser*” acquiring good title to the property in question. (Emphasis added) How, or according to which system of law, innocence is to be determined, is not explicit.

<sup>133</sup> *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 Ll. Rep. 284, *per* Moore-Bick, J., at p295: “*The second of these exceptions, that of a want of good faith on the part of the person acquiring title, is to my mind more doubtful.*”

<sup>134</sup> This may be critical for, as Augustinos has reported, “*unknown provenance, artificially high appraisals, suspicious middlemen and lightening transactions are the stuff of the antiquities trade.*” (Augustinos, N, in Palmer, N, ed, ‘*The Recovery of Stolen Art: A Collection of Essays*’, *ibid.*, p248) Cf. Prott’s comment that, “*The dispossessed owner’s problem of disproving good faith is made the more difficult by the traditional practices of the art trade.*” (Prott (1989), *ibid.*, p271) Prott’s citation of *Porter v. Werta* 416 N.Y.S. 2d. 254, 259 is enlightening: “*In an industry whose transactions cry out for verification of title ... it is deemed poor practice to probe.*” (*ibid.*, p272) See also Lacey, R, ‘*Sotheby’s – Bidding for Class*’ (1998), pp 266-269, 297 and 300.

<sup>135</sup> Cf. Prott (1989), *ibid.*, at p262: “*One version [of the lex situs rule] is to apply the law of the place where the goods are at the time of the litigation. This interpretation of the rule has been used in France*

Furthermore, there arises the matter of onus of proof: upon whom does the onus of proving that the purchaser acted in good faith rest? Must the pursuer/plaintiff (*i.e.* the original owner) in a Scottish or English forum establish *mala fides*, or does the defending purchaser bear the burden of demonstrating his or her *bona fides*? Slade, J.'s judgment provides no answer to these questions.<sup>137</sup> If the *lex fori* incorporates a presumption that a party acts in good faith, but the *lex situs* comprises no such presumption, then a true conflict of laws exists.

In the case of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts Inc.*,<sup>138</sup> judicial attention was drawn to the notion of good faith, albeit without any obvious conclusions being reached as to the law according to which this concept should be determined. In the U.S. Court of Appeals, Chief Justice Bauer stated that, "... we should note that those who wish to purchase art work on the international market, undoubtedly a ticklish business, are not without means by which to protect themselves. Especially when circumstances are as suspicious as those that faced Peg Goldberg, prospective purchasers would do best to do more than make a few last minute phone calls ... in a transaction like this, 'All the red flags are up, all the red lights are on, all the sirens are blaring.'"<sup>139</sup>

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[*Stroganoff-Scherbatoff v. Bensimon* 56 Rev. Crit. de Dr. Int. Privé (1967), 120] – Had the court in [Winkworth] applied its own law (as a French court would have done under the version of the rule applied there, Winkworth would have won ..."

<sup>136</sup> See Crawford, *ibid.*, p54, paragraph 4.21. Alternatively, it could be argued that the determination of good or bad faith amounts to a 'stand-alone' forum requirement. Cf. note 147, *infra*.

<sup>137</sup> Likewise, *Bumper Development Corp. v. Commissioner of Police of the Metropolis* [1991] 4 All E.R. 638, in which Purchas, LJ. stated rather starkly that Bumper had purchased the London Nataraja (a bronze Hindu idol) in good faith, but without divulging his route to this conclusion. Cf. *In the Estate of Fuld* 1968 P. 675, regarding the presumption of sanity and testamentary capacity; in the event of very slight differences between German and English law, Scarman, J. chose the presumptions of the *forum* as matters of evidence.

<sup>138</sup> 717 F. Supp. 1374 (1989), 917 F.2d. 278 (1990) (Westlaw report)

<sup>139</sup> *Ibid.*, p294.



In determining whether Goldberg, the purchaser of the mosaics in question, had acted in good faith, the District Court judge, Noland, J. considered the following factors to be relevant: -

- (a) whether the purchaser knew the seller lacked title; and
- (b) whether an honest and careful purchaser would have had doubts with respect to the seller's capacity to transfer property rights, and, if so, whether the purchaser reasonably inquired as to the seller's ability to pass good title.<sup>140</sup>

In the case in hand, the Court of Appeals held that the purchaser had *not* demonstrated good faith, for the following reasons: -

- (a) The purchaser knew that the mosaics originated from a belligerently occupied state, namely, Turkish-controlled northern Cyprus;
- (b) The mosaics, which were extraordinary, and essentially immovable property, were of great and unique value;
- (c) The mosaics were not ordinary commercial merchandise, but bore religious and cultural significance;
- (d) There was a vast disparity between the appraised value of the mosaics and the purchase price: Goldberg paid \$1.8 million in cash, and six months later offered them to the Getty Museum for \$20 million;
- (e) It was odd that a Turkish archaeologist was in the business of selling Cypriot antiquities;

- (f) The cast of characters who acted as middlemen were highly suspicious; and
- (g) The transaction was carried out with surprising haste.<sup>141</sup>

Since the presence or absence of good faith would appear to be a critical ingredient of the test employed by many states in determining the validity of a transfer of property, and especially since it comprises a specific exception (whether or not well-founded) to the general rule of *Cammell v. Sewell*, it seems rather surprising that more detailed consideration has not been paid to the choice of law complexities of proving *bona fides*, and to the different conceptions thereof.

Problems of interpretation aside, it is not clear why a substantive condition as to good faith, in particular, should be superimposed by our conflict rules; it is difficult to see how or why innocence is relevant unless the *lex situs* demands it, and the purchaser's behaviour falls short of the *situs*' definition thereof.<sup>142</sup> If the *lex situs* (being the *lex causae* identified by the forum) does not expressly stipulate, as a condition precedent to the valid acquisition or transfer of rights, that the putative purchaser must act in good faith, then there is no justifiable reason why this prerequisite should be prescribed by the forum.<sup>143</sup> Effectively, this exception elevates the criterion of good

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<sup>140</sup> See Augustinos, *ibid.*, p248. Cf. Crewdson, R, 'Some Aspects of the Law as it Affects Dealers in England' (In Lalive, *ibid.*), at p49/50, where the author outlines the questions which a prudent dealer should ask him or herself.

<sup>141</sup> Cf. Harding and Rowell, *ibid.*, at p358: "... if to be safe [intending purchasers] must make time-consuming and irksome investigations of title, the pace of trading will slow down and some of the advantages (i.e. the profits) of trading will be lost." This, it is submitted, may be a necessary, and proper, sacrifice. Cf. Crewdson, *ibid.*, at p51: "[The dealer] cannot just shut his eyes and claim 'good faith'. Any suspicion requires a certain degree of investigation."

<sup>142</sup> Carter speaks of an English forum "[injecting] its own domestic notions of bona fides into a foreign *lex causae*." (Carter, *ibid.*, p324)

<sup>143</sup> *Glencore International A.G. v. Metro Trading International Inc.* [2001] 1 Ll. Rep. 284, per Moore-Bick, J., at p295: "For my own part ... I would regard the absence of good faith as essentially a matter for the *lex situs*, subject only to the right of the English court to refuse to recognize the transfer on well established public policy grounds if it regarded its effect as morally repugnant." Cf. Nott, *ibid.*, at p281: "... in some ways this proposition [that the purchaser must act in good faith] is a trifle confusing ... what if that alternative system [i.e. the *lex situs*] were to acknowledge the subsequent purchaser's



faith to the rank of public policy.<sup>144</sup> It is doubtful whether this provision (which is essentially a forum-imposed safeguard against a weak or easily satisfied *lex situs*) is warranted, particularly since good faith does not appear to be a forum-imposed condition in any other rule of choice of law (e.g. contract<sup>145</sup>).

A more constructive interpretation of this good faith requisite would be to assert that what is prescribed is good faith, not only on the part of the purchaser, but also on the part of the vendor, or transferor of the right in question, as regards his or her selection of the relevant *situs*. If, for example, in *Winkworth*, the thief had deliberately identified Italian law as showing greater sympathy to *bona fide* purchasers, than to original owners (i.e. supportive of the *possession vaut titre*, rather than the *nemo dat maxim*), with a view to purging the *netsuke*, in Italy, of any *vitium reale* attaching under English law (the law of the country from which they had been stolen or illegally removed), then it could be argued that the general rule that the *lex situs* determines validity, should be displaced and some other law applied, on the grounds that there

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*title – mala fides or otherwise?*”; Travers (1989), *ibid.*, at p123, who avers that this ‘quasi-choice of law rule’ is “confusing private international law with domestic property laws.”; and Carter, *ibid.*, at p324: “Of course, if the effect of the lack of good faith would vitiate the transfer under the *lex situs* ... no question of its recognition as being nevertheless valid in English law could arise.”

<sup>144</sup> Cf. Siehr (1993), who refers, at p57, to the German case of *Hamburger Stadtsiegel, Bundesgerichtshof* (5/10/89): in 1945, following World War II, a seal of the City of Hamburg, in use since 1810, was stolen. Several years later, according to Siehr, the seal was purchased at an antiques fair in Braunschweig, by a couple who later sold it, in 1986, to an art dealer. The dealer advertised it for sale at the Cologne Antiques Fair for 6,800DM. The City of Hamburg sued the dealer, relying upon a particular provision of the German Civil Code which stipulated that stolen goods could not, *in point of principle*, be acquired in good faith. Consider too Cheshire & North, 13<sup>th</sup> edition, at p945: “This is a dubious exception ... It is suggested that this exception can only be justified, if at all, as an example of the broader public policy exception and that would mean that it would not apply in every case where the English concept of good faith had not been satisfied; but only in the rare case where the application of the law of the *situs* in the particular circumstances was quite unacceptable to English public policy.”

<sup>145</sup> Although consider the pre-1990 restrictions on party autonomy in contract, as *per* Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277, at p290: as well as the choice of law being legal, and not contrary to public policy, there was a requirement that the law selected by the parties be chosen in good faith. Rather than attempt to curtail parties’ self-interest by means of this nebulous and much-debated concept, the modern approach is to insist upon the addition to the contract of ‘mandatory rules’ of certain legal systems other than the chosen system. In this way, much debate and litigation is avoided, and there is greater certainty for parties.



was lack of good faith on the part of the vendor.<sup>146</sup> Such an interpretation would assist in tackling the problem of ‘day-trip’ laundering of stolen goods.<sup>147</sup> This problem will be expanded in Chapter Fourteen, *infra*.

Some ambiguity is inherent in the third exception to the general *situs* rule, that is, where the English court declines to recognise a particular law of the relevant *situs* because the court considers it to be contrary to English public policy.<sup>148</sup> It is indeterminable whether ‘it’ refers purely to the particular rule of the *lex situs*, or, additionally, to the result of applying that rule.<sup>149</sup> While an abstract rule of law, *per*

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<sup>146</sup> In fact, in *Winkworth*, there was no evidence that Dr D’Annone had not purchased the *netsuke* in good faith. Accordingly, as Carter has explained, “There was ... no occasion for the judge to elaborate on the nature or extent of this exception. It is to be noted that previous authority for its existence is very slender.” (Carter, *ibid.*, p324) Under Article 1147 of the Italian Civil Code, “One who possesses without knowledge that he prejudices another’s right is a possessor in good faith.” (Beltramo, M, Longo, G E, and Merryman, J H, ‘The Italian Civil Code’ (1969), p303); Garro, *ibid.*, at p510: “Under Italian law a purchaser in good faith acquires title notwithstanding that the property had been stolen or lost or any defect in the seller’s title ... good faith is presumed under Italian law [Article 1147].”; Müller-Katzburg, (unofficial transl.), “Article 1153 [of the Italian Civil Code] generally allows credulous [*bona fide*] acquisition of property of moveable objects and thus also of stolen ones. In allusion to this peculiarity of Italian law, trading circles also speak of the ‘Italian Connection’.”; and Prott (1989), *ibid.*, at p258, where it is stated that, ‘possession vaut titre’ states can be used to launder stolen goods so that “although identifiably stolen, [the goods] can recirculate on the art market within a very short period of time.”

<sup>147</sup> Bear in mind Siehr’s remark: “Talking all the time of ‘stolen goods’ might give the impression that all jurisdictions agree whether goods have been stolen or not. This is in fact not the case.” (1993, *ibid.*, p60) “The classification as stolen property has to be determined by the law governing in the state of the [alleged?] theft (*lex loci furti*).” (*ibid.*, p80) Siehr later remarked that, “In all countries stealing is a crime, therefore, the acquisition of title to property by theft is forbidden.” (Siehr (1997), *ibid.*, p304) Evidently, classification of the goods as stolen, or not, may give rise to another incidental question. (Cf. note 136, *supra*)

<sup>148</sup> Nott inquires, “Might it cover legislation that sanctioned the transfer of property to an individual who was not a *bona fide* purchaser, for instance the purchaser of stolen goods? Might it cover legislation that allowed the confiscation of property by the government of a foreign state?” (*ibid.*, p282) Cf. Carter, *ibid.*, at p324: “... there could, of course, come a point at which the *mala fides* permissible under a rule of a particular *lex situs* is so flagrant that the rule will be denied effect on established public policy grounds.” Cf. Beale, J H, ‘Jurisdiction Over Title of Absent Owner in a Chattel’ (1927) 40 Harv. L. Rev. 805, 806.

<sup>149</sup> Slade, J.’s remarks at p510 suggest that the former interpretation was the one intended: “If therefore a case arose where ... a person claimed a title to goods in an English court, which he would not be able to establish by reference to English law alone, and the content of the particular foreign law on which he relied was so outrageous that this court regarded it as wholly contrary to justice and morality, then it would, I conceive, probably refuse to recognise the rights conferred on the claimant by the relevant foreign law.” Cf. *Cammell v. Sewell* (1869) 5 H&N 728, *per* Crompton, J., at p743: “It does not appear to us that there is anything so barbarous or monstrous in this state of the law [of Norway] as that we can say that it should not be recognised by us. Our own law as to market overt is analogous.” (See now, however, section 1 of the Sale of Goods (Amendment) Act 1994); and *Glencore*



se, may not contravene the forum's public policy, the product of its application may well be repugnant to the forum (e.g. by favouring a thief). If 'it' were to be construed in the second sense (i.e. as the result of applying the rule in question), then it is submitted that there would be greater scope for utilising this exception so as to evade the operation of a *lex situs* which, in a particular case, would work in favour of a thief.

The fourth exception detailed in *Winkworth*, which arises where a statute in force in the forum state obliges the court to apply the law of its own country, sanctions the overriding of common law conflict rules by domestic statutory provision. Naturally, this 'mandatory rules' exception is accompanied by difficulties of statutory interpretation.<sup>150</sup> Carter has suggested, however, that this exception could be cultivated so as to confer special protection on particular types of property.<sup>151</sup> This idea is, in principle, attractive, but, as has been evidenced elsewhere, the chief difficulty would be likely to be one of definition.<sup>152</sup>

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*International A.G. v. Metro Trading International Inc.*, *ibid.*, per Moore-Bick, at p295: "... the court might refuse to recognize a transfer of property under the *lex situs* on public policy grounds if it regarded the relevant rules of foreign law to be morally repugnant."

<sup>150</sup> Nott, *ibid.*, at p283: "... everything depends on assessing the scope of the legislation in question ... whether its provisions are confined to transactions in England and Wales or else whether it affects any intermediate dealing wherever it may have occurred."; and Reese, W L M, 'Statutes in Choice of Law' (1987) 35 Am. Jo. Comp. Law 395, at p395/6, and p398: "Most statutes do not contain any legislative directive with respect to their extraterritorial application and leave the entire problem to the judgment of the courts ... It is highly possible that a legislature with only some of the many possibilities in mind will provide for an extraterritorial application that is either too broad or too narrow. This legislative determination will be binding on the courts and may compel them to reach unfortunate results ... In any event, considerable difficulty will usually be involved in drafting a satisfactory provision that deals in details with a statute's extraterritorial application." Cf. *Goetschuis v. Brightman* 245 N.Y. 186, 156 N.E. 660, per Lehman, J., at paragraph 663: "Clearly the statute may not be interpreted so as to include attempted regulation of the validity of contracts made without the state in regard to property situated elsewhere."

<sup>151</sup> "There could be room for the view that such a statute ought to be enacted in order to accord some special treatment to transfers of works of art and collectors' items." (Carter, *ibid.*, p323)

<sup>152</sup> See, for example, the problem of defining cultural property and cultural objects under the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects. See Chapter Ten, *supra* – 'The Treatment of Cultural Property'.

*Winkworth* illustrates only one of the ways in which a good faith purchaser of stolen goods may seek to protect the title which has been conferred upon him or her according to the *lex situs* of the country to which the *res litigiosa* has been surreptitiously removed, that is, by relying upon his or her own good faith. A second way (which may be averred independently,<sup>153</sup> or in addition to the first) is to assert a prescriptive title to the property in question. This too involves reliance upon the relevant *lex situs*.

Two concepts are relevant, namely, prescription and limitation of actions. Bell has stated that, “*The mere lapse of time in some cases bars action on an obligation; in others, it extinguishes the obligation entirely ... Limitation is a denial of action ... after the lapse of a certain time ... Prescription is a legal presumption of abandonment or of satisfaction.*”<sup>154</sup> Thus, the passage of time may perfect a *bona fide* purchaser’s title to the *res litigiosa*, simultaneously extinguishing the original owner’s rights in relation thereto, or alternatively, the original owner may find that, likewise by virtue of the passage of time, he is no longer entitled to raise an action for recovery of the property, or for damages. Thus, the (*bona fide*) purchaser is armed with the sword of prescription and the shield of limitation.<sup>155</sup>

The purpose of such provisions is threefold, namely, to protect defenders from stale claims, to encourage claimants to institute proceedings without unreasonable delay, and to confer upon a potential defender confidence that he or she will be free from

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<sup>153</sup> *E.g.* Where the *lex situs* at the time when ownership is alleged to have passed operates a strict *nemo dat* policy.

<sup>154</sup> Bell, ‘*Principles*’, paragraph 586. See further paragraphs 587-604, concerning limitation, and paragraphs 605-635, concerning prescription.

<sup>155</sup> *Cf.* Siehr (1997), *ibid.*, p306.



suit following the expiry of a certain period of time.<sup>156</sup> Different states, however, adopt different approaches to prescription and limitation, first, in respect of the *terminus a quo*,<sup>157</sup> and, secondly, as regards duration of the requisite period. The different approaches largely reflect the balance which different states may strike between favouring security of title and security of transaction (*i.e.* between incorporation of the *nemo dat* or *possession vaut titre* principles).<sup>158</sup>

Section 23A of the Prescription and Limitation (Scotland) Act 1973,<sup>159</sup> contains the relevant provision of Scots international private law, according to which the prescription and limitation rules of the *lex causae* (*i.e.* in this context, the *lex situs*) should be applied, in preference to those of the *lex fori*: “(1) *Where the substantive law of a country other than Scotland falls to be applied by a Scottish court as the law governing an obligation, the court shall apply any relevant rules of law of that country relating to the extinction of the obligation or the limitation of time within which proceedings may be brought to enforce the obligation to the exclusion of any corresponding rule of Scots law.*” In short, if the *terminus a quo*, and the prescriptive or limitation period laid down by the *lex situs*, are, respectively, earlier and shorter

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<sup>156</sup> *Gotha City v. Sotheby's; Federal Republic of Germany v. Sotheby's*, The Times, October 8, 1998, Q.B.D, *per* Moses, J., at p4. Cf. Redmond-Cooper, R, ‘Exceptions to the Nemo Dat Principle: Passing of Title to the Good Faith Buyer’ (1998), p3; Redmond-Cooper, R, p145, (In Palmer, N, ed., ‘The Recovery of Stolen Art: A Collection of Essays’); Kaye, L M, p101 (In Simpson, E, ed., ‘The Spoils of War – World War II and Its Aftermath: The Loss, Reappearance and Recovery of Cultural Property’ (1997)); Kaye, L M, International Foundation for Art Research Journal (1998), Volume 1, Number 3, p22; and Hayworth, A E, ‘Stolen Artwork: Deciding Ownership Is No Pretty Picture’ (1993) 43 Duke Law Journal 337, 342.

<sup>157</sup> *i.e.* The date of accrual of the cause of action.

<sup>158</sup> *E.g.* If a state considers that the right of ownership is paramount, it will generally favour a lengthy limitation period, and a postponed date of accrual.

<sup>159</sup> Inserted by section 4 of the Prescription and Limitation (Scotland) Act 1984 (regarding proceedings commenced on or after 26 September 1984). This provision circumvents the difficulties previously encountered in classifying foreign rules of prescription and limitation as substantive or procedural (*e.g.* *Higgins v. Ewing's Trustees* 1925 S.C. 440; and *Stirling's Trustees v. Legal and General Assurance Society* 1957 S.L.T. 73). Equivalent legislation has been passed in England, namely, the Foreign Limitation Periods Act 1984. See Walker, D M, ‘Prescription and Limitation of Actions’ (5<sup>th</sup> edition, 1996), pp5, and 125; and Crawford, *ibid.*, p411.



than those imposed by the *lex fori*, a third party purchaser will enjoy the benefits of the more favourable provisions. Hence, in the same way that the *lex situs* rule permits exploitation by a thief of the '*possession vaut titre*' policy operational in a particular state, so too a thief may capitalize on the more lenient prescriptive and limitation rules of a third state, so as deliberately to act to the detriment of the original owner.<sup>160</sup> As Fox has noted, "*The dishonest may have an incentive to 'shop' for jurisdictions that would likely rule in their favour and that have shorter statutory periods.*"<sup>161</sup>

There exist several potential *termini a quo*, including, the date of acquisition of the *res litigiosa* by the present possessor, the date of discovery by the deprived owner of the identity of the present possessor, and the date on which the deprived owner's demand for return of the goods from the present possessor was refused.<sup>162</sup>

Inevitably, states which employ an early *terminus a quo* facilitate the exploits of those who are engaged in the illicit trade in cultural property.<sup>163</sup> In contrast, those states which operate a 'demand and refusal' policy, serve to protect the interests of deprived

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<sup>160</sup> Not only overt thieves: consider Kaye, L M (In Briat, M and Freedberg, J A, eds., '*International Sales of Works of Art, Volume 5: Legal Aspects of International Trade in Art*' (1996), at p217: "Some fifty years after the end of hostilities, we are witnessing the re-emergence of art treasures missing since World War II and thought to have been lost or destroyed. This is in one sense extraordinary that invaluable collections ... could have been hidden for so long. At the same time, however, the re-emergence of these treasures should really come as no surprise: many of those who plundered them originally are now gone and holders of stolen art treasures often operate under the assumption that if secrecy is maintained for a long enough time the Statute of Limitations will ultimately protect them." In light of Kaye's remarks, perhaps we should anticipate more significant 'discoveries'. Also Kaye, (IFAR), *ibid.*, at p27: "New York's position as the pre-eminent art centre of the world, and the need to prevent it from becoming a haven for stolen art requires that the demand and refusal rule be retained

<sup>161</sup> Fox, C, '*The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*' (1993) 9 Am. Jo. Inter. Law and Policy 225, 245.

<sup>162</sup> Further, O'Keefe, P J, '*Trade in Antiquities: Reducing Destruction and Theft*' (1997), p86.

<sup>163</sup> Prott, L V, '*Problems of Private International Law for the Protection of the Cultural Heritage*' (1989) V *Receuil des Cours* 215, at p260: "... as long as the objects are kept out of sight during the running of that period, title will eventually pass. There could hardly be a rule better designed for the purpose of curing defects in title and depriving owners, however, diligent, of their rights of recovery."



owners. The middle route, which endeavours to protect both the deprived owner and the present possessor, holds that the action will accrue on the date on which the deprived owner, exercising reasonable diligence, could have identified either the present possessor, or the present whereabouts of the property.

The discovery, or due diligence, rule<sup>164</sup> places emphasis upon the conduct of the deprived owner. In *O’Keeffe v. Snyder*,<sup>165</sup> it was stated that “*The purpose of a statute of limitations is to stimulate to activity and punish negligence and promote repose by giving security and stability to human affairs.*”<sup>166</sup> This embodies the rationale of the discovery, or due diligence, rule. In *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.*, Noland, J. further explained that, “*The discovery rule ... is based on the reasoning that it is inconsistent with our system of jurisprudence to require a claimant to bring his cause of action in a limited period in which, even with due diligence, he could not be aware a cause of action exists.*”<sup>167</sup>

Ascertaining whether or not a party has exercised due diligence is, according to Noland J., fact-sensitive and determinable only on a case-by-case basis.<sup>168</sup> The due

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Cf. International child abduction, where time runs in favour of the abductor. (Child Abduction and Custody Act 1985, Schedule 1, Article 12)

<sup>164</sup> Strictly, the *terminus a quo* under the discovery rule, is the date of *actual* discovery of the stolen goods, as opposed to the date when a reasonable owner exercising ‘due diligence’ could have discovered the current location of the property.

<sup>165</sup> 83 N.J. 478, 416 A.2d 862, 868 (1980). (*Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* 717 F. Supp.1374, *per* Noland, J., (Westlaw), paragraph 1386)

<sup>166</sup> Cf. *De Weerth v. Baldinger* 836 F.2d 103, 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed. 924 (1988), in which the court concluded that a plaintiff who seeks protection under the discovery rule must use reasonable diligence to locate the stolen property (which, in this instance, was a Monet painting entitled, ‘*Champs de Ble à Vetheuil*’) and must make a demand for return within a reasonable period after the current possessor is identified.

<sup>167</sup> *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* 717 F. Supp.1374, *per* Noland, J., (Westlaw), paragraph 1387.

<sup>168</sup> *Ibid.*, paragraph 1389. In the instant case, due diligence was deemed to have been exercised: the plaintiff engaged in an organised and systematic effort, first, to notify those persons who might assist them (including UNESCO, museum organisations, leading Byzantine scholars and curators, and the press), and secondly, to seek the return of the mosaics. Cf. Fox, *ibid.*, p240. *Contra De Weerth v.*



diligence rule, however, has been criticised precisely because “*the courts have not established objective standards of conduct for possessors and owners to follow.*”<sup>169</sup>

Nonetheless, the court in *De Weerth v. Baldinger* held that the due diligence rule is especially appropriate with respect to stolen art, since much art is held in private collections, unadvertised and unavailable to the public: “*An owner seeking to recover such property will almost never learn of its whereabouts by chance.*”<sup>170</sup> Due diligence would appear to be the counter-balancing consideration to the requirement of good faith which is regularly imposed upon a purchaser of goods.

The due diligence rule can be contrasted with the demand and refusal rule which was applied in the case of *Solomon R. Guggenheim Foundation v. Lubell*.<sup>171</sup> Wachtler, CJ. held that no duty of reasonable diligence to search for missing art is imposed upon owners of stolen artwork.<sup>172</sup> The decision operated in favour of the deprived original owner, despite the fact that the gouache in question had been publicly exhibited on at least two occasions. By Wachtler, CJ.’s own admission, “... *the demand and refusal*

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*Baldinger, ibid.*, where the plaintiff failed to demonstrate that she had exercised due diligence; she had not taken advantage of post-war mechanisms specifically designed to assist in locating art lost during times of war, and had failed to publicise her loss. Consider, however, *Solomon R. Guggenheim Foundation v. Lubell* 77 N.Y. 311, 569 N.E.2d. 426, 567 N.Y.S. 2d. 623, *per* Wachtler, CJ., at paragraph 319: “... *the facts of this case reveal how difficult it would be to specify the type of conduct that would be required for a showing of reasonable diligence.*” (This dictum was based on the fact that members of the art community were divided upon whether publicising an art theft was the best way to recover a stolen painting; there was strong feeling that publication of the theft might drive the work further underground.)

<sup>169</sup> Eisen, L E, ‘*The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*’ (1991) 81 Jo. of Criminal Law and Criminology 1067, at pp1071, and further, at p1090: “... *an owner may tend to overcompensate by taking excessive investigatory measures.*” Cf. Fox, *ibid.*, at p245: “*Unclear standards place a tremendous burden on claimants by forcing them to spend inordinate amounts of money and time on potentially fruitless investigation.*”; and Hayworth, *ibid.*, p357.

<sup>170</sup> *Ibid.*, *per* Newman, J., paragraph 107.

<sup>171</sup> 77 N.Y. 311, 569 N.E.2d. 426, 567 N.Y.S. 2d. 623. This case concerned a stolen gouache by Marc Chagall entitled, ‘*Le Marchand de Bestiaux.*’ Cf. *Kunstsammlungen zu Weimar v. Elicofon* 678 F.2d 1150, in which it was held that, “*Under New York law, innocent [sic] purchaser of stolen goods becomes a wrongdoer only after refusing the owner’s demand for return; until the refusal, the purchaser is considered to be in lawful possession.*”

<sup>172</sup> “*Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful.*” (*ibid.*, paragraph 318)



rule ... does appear to be the rule that affords the most protection to the true owners of stolen property.”<sup>173</sup> The court concluded that, “... the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser.”<sup>174</sup>

As regards the duration of the prescriptive or limitation period, each legal system is able to prescribe such length of period, and conditions of possession, as it may deem appropriate to extinguish the right, or bar the action.<sup>175</sup>

The passing of the prescriptive period may generate a classic problem of conflict of laws in time. If, during the running of the relevant period, a change in the connecting factor should occur, from *situs* A, to *situs* B, a ‘*conflit mobile*’ will materialise. Rabel has written that, “An unfinished period as such does not generate any effect ... the law of the last *situs* decides conclusively.”<sup>176</sup> If a prescriptive title to moveable property has not been effectively conferred by the *lex situs* at the time when the goods in question are removed to a new *situs*, thereafter, the *bona fide* purchaser’s prescriptive title can only be consummated by virtue of the new *lex situs*.<sup>177</sup> It may be that the new

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<sup>173</sup> *Ibid.*, paragraph 318. Cf. *Menzel v. List* 49 Misc.2d 300, 267 N.Y.S. 2d 804, *per* Klein, J., at paragraph 316: “The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.” (This case concerned the theft of another Marc Chagall painting, ‘*Le Paysan à L’échelle*’.) Cf. Kaye, *ibid.*, p105.

<sup>174</sup> *Ibid.*, paragraph 431.

<sup>175</sup> Consider Savigny, F C, ‘A Treatise on the Conflict of Laws’ (1869), at p140: “... the foundation of all prescription is continuing possession; but possession, as being essentially a relation of facts is, with even less doubt than any real right, to be judged by the *lex rei sitae*.”

<sup>176</sup> Rabel, E, ‘The Conflict of Laws: A Comparative Study – Volume I’ (1958), p97/98. Cf. Savigny, *ibid.*, at p140: “The term of the prescription ... and the complete acquisition of the property, must be judged by the law of the place at which the thing is last found, because it is only at the expiry of the whole period that the change of property takes place; before, it has only been in preparation.”; Westlake, J, ‘A Treatise on Private International Law’ (1925), p194; and Venturini, *ibid.*, at p20: “[The *lex situs*] decides ... the conditions of possession, the time necessary for completing the period of acquisitive prescription, whether an interruption or suspension of prescription is permissible and what circumstances are relevant for this purpose.”

<sup>177</sup> Cf. Wolff, M, ‘Private International Law’ (1950), p530. *Contra* First Restatement, paragraph 259, comment (b): “If a chattel is successively held adversely in two or more states, title is acquired by the

*lex situs* will take account of the period of possession in the former *situs*, but alternatively, that period may be wholly discounted, the new *situs* requiring that the full prescriptive period be expended within its own territory.<sup>178</sup>

Section 23A(2) of the Prescription and Limitation (Scotland) Act 1973 states that “*This section shall not apply where it appears to the court that the application of the relevant foreign rule of law would be incompatible with the principles of public policy applied by the court.*” In this regard, Redmond-Cooper has opined that, “*the operation of a limitation period may be considered to be an aspect of public policy: to ensure that the legal situation corresponds with the ostensible situation, and thereby to protect innocent third parties who may deal with the goods in reliance upon the apparent situation in ignorance of the legal state of affairs.*”<sup>179</sup>

The public policy hurdle is famously difficult to surmount. Professor Walker has advised that there was cited in the Scottish Standing Committee one example of a situation where section 23A(2) could feasibly operate, namely, where a foreign

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*possessor if it is held successively in the two or more states for the longest period of adverse possession required by any one of the states in which it is held.*” Note also Zaphiriou’s reference to ‘proportionate calculation’, according to which, if, for example, two-thirds of *situs A*’s prescriptive period had expired when the goods were situated in *situs A*, following removal of the goods to *situs B*, title would vest in the possessor upon the expiry of one-third of *situs B*’s prescriptive period. (Zaphiriou, *ibid.*, p115)

<sup>178</sup> Consider, for example, *Kunstsammlungen zu Weimar v. Elicofon* 678 F.2d 1150, where the American court was asked to determine the ownership of two Albrecht Durer portraits stolen from a castle in East Germany and fortuitously discovered in 1966 in the Brooklyn home of Elicofon, an American citizen, who had purchased the portraits, in Brooklyn, in good faith, more than twenty years earlier. The United States Court of Appeals dismissed Elicofon’s claim that subsequent to his purchase of the goods he had acquired title under the German doctrine of *Ersitzung*, which awards title to the holder upon ten years uninterrupted good faith possession. The Court held that New York’s interest in regulating the transfer of property located within its border overrode any interest which the German Democratic Republic might have had in applying its policy of *Ersitzung* to extraterritorial transactions: New York law, rather than German law, governed the claim of the good-faith purchaser of the portraits stolen in Germany in World War II.

<sup>179</sup> Redmond-Cooper, R, ‘*Exceptions to the Nemo Dat Principle: Passing of Title to the Good Faith Buyer*’, *ibid.*, p4; and Redmond-Cooper (In Palmer), *ibid.*, p145.



prescriptive or limitation provision discriminates on grounds of race or nationality.<sup>180</sup> Significantly, however, in the case of *Gotha City v. Sotheby's*,<sup>181</sup> the court identified an English public policy to the effect that time did not run either in favour of a thief, or in favour of any transferee who did not act in good faith.<sup>182</sup> Moses, J. stated that “*Public policy should be invoked for the purposes for [sic] disapplying a foreign limitation period only in exceptional circumstances. Too ready a resort to public policy would frustrate our system of private international law which existed to fulfil foreign rights not destroy them.*”<sup>183</sup> Furthermore, the court stated that the fundamental principle of justice with which it was alleged the relevant foreign law conflicted, had to be clearly identifiable,<sup>184</sup> and that the public policy escape-route should not be invoked, save where the relevant foreign law was *manifestly* incompatible with public policy.<sup>185</sup> Moses, J. expressly advised that a foreign limitation period would not be disapplied as being contrary to public policy merely because it was less generous to a particular party than was the comparable English provision.<sup>186</sup>

In spite of these relatively stringent conditions, the court in *Gotha City* concluded that, “*To permit a party which admitted it had not acted in good faith to retain the advantage of lapse of time during which the plaintiffs had no knowledge of the*

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<sup>180</sup> Walker, *ibid.*, p126.

<sup>181</sup> *Gotha City v. Sotheby's*; *Federal Republic of Germany v. Sotheby's*, The Times, October 8, 1998, Q.B.D.; and Dicey & Morris, ‘*The Conflict of Laws*’, p175, paragraph 7-044.

<sup>182</sup> Moses, J., *ibid.*, p1, with reference to section 4 of the Limitation Act 1980. Note, however, that his Lordship’s remarks were *obiter*, since, “*In light of his Lordship’s conclusions, ... he did not have to consider whether [German law] conflicted with English public policy ...*” (*ibid.*, p3)

<sup>183</sup> Moses, J., p3.

<sup>184</sup> “*The process of identification must not depend upon a judge’s individual notion of expediency or fairness but upon the possibility of recognising with clarity a principle derived from our own law of limitation or some other clearly recognised general principle of public policy.*” (*ibid.*, p4)

<sup>185</sup> Like the Scottish Standing Committee, his Lordship cited, as an example, discriminatory rules of limitation (*e.g. Oppenheimer v. Cattermole* [1976] A.C. 249) (*ibid.*, p3) Cf. *In re Estate of Fuld (No.3)* [1968] P. 675, *per* Scarman, J., at p698: “*An English court will refuse to apply a law which outrages its sense of justice or decency.*”

<sup>186</sup> *Durham v. T&N plc*, unreported, C.A., May 1, 1996. “*Some reason other than mere length must be identified for invoking public policy.*” (*Gotha City*, *ibid.*, p4)

*whereabouts of the painting and no possibility of recovering was ... contrary to the public policy which found statutory expression in section 4 of the 1980 Act.*"<sup>187</sup> It is slightly surprising that the court deemed it necessary to rely on the provisions of the Foreign Limitation Periods Act 1984, when the second exception to the general rule of *Cammell v. Sewell*<sup>188</sup> (applicable in cases where a purchaser claiming title has not acted *bona fide*), had been clearly endorsed by Slade, J., in *Winkworth v. Christie, Manson & Woods Ltd.*, and could have been utilised in this case.<sup>189</sup>

The purpose of this section has not been to extol the benefits or otherwise of particular rules of prescription and limitation, *termini a quo*, or prescriptive periods. Rather, the purpose has been to illustrate that, as with the *nemo dat/possession vaut titre* policy dichotomy, the differences which pertain among substantive rules of prescription and limitation serve to aggravate the existing manipulation of the *situs* rule. In this manner also, the *situs* rule sanctions its own exploitation by thieves (particularly dealers in the illicit art market), who are able to abuse the rule in order to launder the commodities in which they trade, to the detriment of the original owners of those goods.

### **Ownership - *ius nudum* or vested right?**

When assessing the arguments against application of the *lex situs* rule, with special reference to those cases where localisation of the connecting factor has been

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<sup>187</sup> *Gotha City, ibid.*, p4. The court continued, "To allow Cobert to succeed, when, on its own admission it knew or suspected that the painting might be stolen or that there was something wrong with the transaction or had acted in a manner which an honest man would not, did touch the conscience of the court." This was found to be the case, even although the Court recognised that where an action was brought in respect of a *stolen* chattel, German law provided a "lengthy period of limitation." (*ibid.*, p5) "... that consideration seemed to his Lordship to be insufficient to subordinate the rights of the victim of a theft in favour of one who had acted without good faith." (*ibid.*)

<sup>188</sup> (1858) 3 H&N 617, (1860) 5 H&N 728.



deliberately contrived, it is worthwhile also considering the theory of vested rights. In the first edition of *The Conflict of Laws*, Dicey advised that, "... *the application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign ... to show courtesy to other states. It flows from the impossibility of otherwise determining those classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.*"<sup>190</sup> Although the author's reference was to '*the application of foreign law*', Dicey, a leading proponent of the theory of vested, or acquired, rights, actually intended that what should be enforced by the forum were those *rights* which had been acquired abroad, according to the law of the relevant foreign state.<sup>191</sup> The late nineteenth and early twentieth centuries proved to be the halcyon period for the theory of vested rights,<sup>192</sup> its popularity having diminished substantially in more recent decades.<sup>193</sup>

The theory appeases territorialists, who contend that a state can apply only its own law, not foreign law:<sup>194</sup> "*since foreign law cannot be directly enforced, the*

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<sup>189</sup> [1980] 1 Ch. 496, *per* Slade J., at p501. (Though see doubts regarding the second exception, expressed at note 133 *et seq.*, *supra*.)

<sup>190</sup> '*The Conflict of Laws*' (1896), p10 (*per* Graveson, R H, '*Philosophical Aspects of the English Conflict of Laws*' (1962) 78 L.Q.R. 337, 344)

<sup>191</sup> Dicey, A V, '*The Conflict of Laws*' 6th edition, (1949), at p12: "*English judges never in strictness enforce the law of any country but their own and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country.*" Cf. Cheshire, G C, '*Private International Law*' (1935) 51 L.Q.R. 76, at p90: "... *the central doctrine of private international law exists to fulfil, not to destroy foreign acquired rights.*"

<sup>192</sup> Graveson (1962), *ibid.*, p354. Crawford, *ibid.*, p24, at paragraph 3.05: "*The germ of the vested rights theory ... can be found in Huber's third maxim: 'Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.'*"

<sup>193</sup> Cf. Carswell, R D, '*The Doctrine of Vested Rights in Private International Law*' (1959), at p269: "*It is the conclusion of this article that the doctrine has outlived its usefulness ... when it is put to a difficult test, inadequacies appear.*"; and Kegel, G, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 3 – Fundamental Approaches*' (1986), p10.

<sup>194</sup> There is some truth in this statement, insofar as foreign law must be proved (in a Scottish or English forum, at least) as a matter of fact (else it is presumed to be the same as the substantive *lex fori*). Technically, once proved as a fact, the foreign law cannot thereafter be applied as a point of law (*e.g.* *Bonnor v. Balfour Kilpatrick Ltd* 1975 S.L.T. (Notes) 3). Consider *Godard v. Gray* (1870) L.R. 6 Q.B. 139, *per* Blackburn, J., who, with reference to the decision in *Castrique v. Imrie* (1870) L.R. 4 H.L. 414 (in which the French tribunal made an error as to English law), stated that, "... *a mistake as to*

*territorialists must say that what the courts do is to recognise rights vested or acquired in other countries.*"<sup>195</sup> More recently, Sauveplanne has said of the vested rights theory that, "According to this doctrine the forum recognises a legal situation created outside the country of the forum, even though it was not created in conformity with the law which would have been applicable under the forum's conflict rule ... the court does not directly apply any law at all, but accepts as an accomplished fact a situation that already existed elsewhere."<sup>196</sup>

A distinction, drawn by Zaphiriou, should be noted between, first, a set of facts relating to a certain object, which are completed in state X (thereby conferring ownership rights upon a named individual), followed by the removal of that object, without the owner's consent, to state Y; and, secondly, an incomplete set of facts in state X (with the result that no ownership rights are conferred according to the law of state X), coupled with the subsequent removal of the object to state Y.<sup>197</sup>

Taking the first scenario, in Savigny's opinion, "*If the transmission [of property] has once taken place, every subsequent change of the locality of the thing is immaterial for the destiny of the property since the right of property once acquired cannot be affected by such a change of place.*"<sup>198</sup> More recently, Siehr has echoed Savigny's

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*English law on the part of a foreign tribunal does not operate in all cases so as to prevent the courts of this country from giving effect to the [foreign] judgment."*

<sup>195</sup> Carswell, *ibid.*, p271.

<sup>196</sup> Sauveplanne, G, 'International Encyclopaedia of Comparative Law, Volume III, Chapter 6 – Renvoi' (1990), p5. See Anton's criticism that the theory is defective in assuming that a foreign-acquired right should be enforced without offering justification that the foreign law in the forum's view is the correct law to apply. (Anton (1990), *ibid.*, p28)

<sup>197</sup> Zaphiriou, *ibid.*, p162 *et seq.* The second scenario, where action of some description is required in state Y, in order to complete the transfer of ownership, is not intended to be the focus of the present discussion.

<sup>198</sup> *i.e.* Without the knowledge and consent of the owner. Savigny, *ibid.*, p139. Further, at p280: "... new laws leave acquired rights unaffected. Neither the truth nor the importance of this principle can be disputed."; at p289: "Every one ought to be able to reckon upon the continued efficacy in the future of



words, advising that, "... once a right has been acquired under the applicable *lex rei sitae* this right should not be questioned once the object has changed its *situs*."<sup>199</sup> In short, the act of taking Mr Winkworth's *netsuke* across international frontiers, into Italy, did not affect his legal title to the collection.<sup>200</sup>

As a general rule, whilst removal of an object across state borders should not, *per se*, undermine pre-existing, or vested, rights in the object, this will pertain only so long as there are no further dealings with the object in the new *situs*.<sup>201</sup> Thereafter, according to the current choice of law rule, the new *lex situs* will determine the existence and priority of interests in the object.<sup>202</sup> As Venturini has pointed out, however, even the mere removal of an object to a new *situs* may adversely affect 'vested' rights, insofar

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*the juridical acts which he has performed for the acquisition of rights, according to the existing laws.*"; and, finally, at p307: "In the law of things, the principle of non-retroactivity generally receives simple and complete application ... If [property] is alienated by a simple contract under a law which recognises such alienation as valid, the right of property thus acquired remains, even if a subsequent law requires delivery in alienation." Cf. Rabel, *ibid.*, at p70: "Real rights in a moveable, validly created under the law of ... X, persist with extraterritorial effect after the moveable has been transported into ... Y. It does not matter that the same right could not have been created in Y, whose law has more exacting conditions."

<sup>199</sup> Siehr (1993), *ibid.*, p77. Cf. Siehr, K, 'The Protection of Cultural Heritage and International Commerce' (1997) 6 I.J.C.P. 304, at p306: "[The *situs* rule] implies that once a moveable object has been acquired *bona fide*, this acquisition is a vested right and will be protected as such even if the location of the moveable changes in the future."; Carter, P B, 'Decisions of British Courts During 1981' (1981) 52 B.Y.B.I.L. 329, 330; Carter, P B, 'Transnational Trade in Works of Art: The Position In English Private International Law', at p319 (In Lalive, *ibid.*): "English private international law holds that generally the mere fact that property is moved in this way [from one *situs* to another] does not in itself affect title."; Luzzatto, *ibid.*, p415; and Baxter, *ibid.*, at p13: "There is a general feeling that property rights acquired in one country should be respected in another." Consider Cheatham, E E, 'Problems and Methods in Conflict of Laws' (1960) I *Receuil des Cours* 237, at p278: "The policy in favour of enforcement of foreign-based legal interests is stability of legal rights."

<sup>200</sup> *Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496.

<sup>201</sup> Note, however, that the quality of inalienability may well be undermined by mere removal of the object from the 'classifying' *situs*: *Duc de Frias v. Pichon* [1886] 13 *Journal du Droit International* 593. It would appear, therefore, that inalienability is not a vested quality. Cf. Siehr (1993), *ibid.*, p85. But inalienability, even if not vested, may, nevertheless, be reascent: "Property declared inalienable in France, which has been misappropriated or stolen then traded in a country where French inalienability measures have no effect, is again declared inalienable if it is brought back into France." (Lagarde, P, 'Le commerce de l'art en droit international privé français', p408; in Lalive, *ibid.*)

<sup>202</sup> Carter (1988), *ibid.*, p329. Cf. Second Restatement, paragraph 247., comment (a): pre-existing interests will be recognised "... even though no such interest would have been acquired in the latter state if the chattel had been there at the time of the conveyance. Conversely, no interest is acquired in a chattel upon its removal to a second state merely because such an interest would have arisen under the local law of the second state if a particular transaction which occurred prior to the chattel's removal to the state had taken place after the chattel had been removed there."



as, “A change of situs and thus of the applicable law may give rise to a problem of substitution inasmuch as it may be necessary to integrate proprietary rights.”<sup>203</sup>

Accordingly, the concept of a vested right of property may prove to be something of an empty right. If the property to which an acquired right attaches is transferred to a state whose property rules incorporate the ‘*possession vaut titre*’ principle, the right may emerge a hollow entitlement: “... the rights of innocent purchasers are certainly governed by the *lex rei sitae* at the time of acquisition. To this effect, rights earlier acquired by others under a former *lex rei sitae*, although recognized in principle, may be restricted.”<sup>204</sup>

### Ownership – universal or provincial?

Akin to the theory of vested rights, is the theory of universality of status. For the purposes of international private law, it may be possible to characterise ownership, not only as a right which exists relative to an object of property, but also as a right

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<sup>203</sup> Venturini, *ibid.*, p14. Even without a subsequent transaction taking place in the second *situs*, difficulties of transposition may still occur: “In order that a proprietary right can be recognised, the categories of legal interests envisaged by the first and second *lex situs* of the object must show some measure of equivalence. This equivalence exists, at least in general, in so far as full ownership is concerned. It is frequently absent where other proprietary rights are in issue, with the result that in some cases an adaptation of the original legal status of the moveable object proves impracticable.” (e.g. Transplantation of a right in security over moveable property without possession, or of fiduciary ownership or management of property held in trust, may prove troublesome.) Cf. Wolff, M, ‘Private International Law’ (1950), at p529: “It may be that a *ius in rem* has come into existence under the law of the *situs* and that subsequently the chattel is transported into a country where it would not have been possible to create the right in the same way. In such cases the right ‘acquired’ elsewhere usually remains in force.” (e.g. *Re The Anchor Line (Henderson Bros) Ltd* [1937] Ch. 483) Cf. First Restatement, paragraph 260, comments (a) and (b). Wolff has warned that, “The question whether an institution known to the law of one country is equivalent to a similar institution developed in the legal system of a different country, in the sense that in private international law one of them may be replaced by the other, bristles with difficulties.” (*ibid.*, p535) Cf. in matrimonial property, *In re Bettinson* [1956] Ch. 67, where the new English *situs* adopted a helpful, positive attitude.

<sup>204</sup> Verheul, J P, ‘Foreign Export Prohibitions: Cultural Treasures and Minerals’ (1984) 31 N.I.L.R. 419, 422. Note Baxter’s remarks that, “Respect for foreign rights seems to show a desire for something with more moral appeal than the mathematical objectivity of some choice of law theories.” (*ibid.*, p14)



which confers upon the owner of property a unique status as owner.<sup>205</sup> If the latter characterisation is adopted, then it may be necessary to take into account the theory of universality of status: *“Perhaps the most far-reaching characteristic of status ... is its quality of universality ... The general principle of status is that, when created by the law of one country, it is or ought to be judicially recognised as being the case everywhere, all the world over. By ‘everywhere’, I mean at least in every ‘country’ where the rule of law prevails.”*<sup>206</sup>

The conferral of status carries the consequences of a right *in rem*: *“A judgment or decree determining what is the status of an individual is a judgment or decree in rem. It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognised as binding in all suits and by all parties ... [that is, it is to be] treated as binding and final, not only by all the courts of the same country, but by the courts of all countries.”*<sup>207</sup>

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<sup>205</sup> *Re Luck's Settlement Trusts* [1940] Ch. 864, per Scott, LJ., at p890: *“Status is in every case the creature of substantive law: it is not created by contract, although it may arise out of contract.”*; and *Niboyet v. Niboyet* (1878) L.R. 4 P.D.1, per Brett, LJ., at p11: *“The status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community.”* While status is normally interpreted to mean *“a person's legal condition in society, either absolute or in relation to another person”* (Graveson (1974), *ibid.*, p226), is there any reason why status should not concern a person's legal condition in relation to property, particularly when, as Graveson has advised, the status is imposed *“in order to secure and protect interests of society in its institutions, and carries with it rights, duties, capacities, incapacities, powers and disabilities.”*? (*ibid.*) Graveson remarks that, *“... whether any particular matter is one including a special status can only be judged by the degree of social interest in its existence and protection.”* (*ibid.*, p227) Consider Beale, J H, *‘Jurisdiction over Title of Absent Owner in a Chattel’* (1927), at p811: *“Ownership is a legalized relation between a person and a thing. The owner's property does not exist in the thing alone, but in the person of the owner as well.”* (Emphasis added)

<sup>206</sup> *Re Luck's Settlement Trusts* [1940] Ch. 864, per Scott, LJ., at p891. Dr Crawford has advised that, *“The ideal is that status should be universal so that a condition of status which our conflict rules regard as having been validly conferred in one country, particularly if it is the country of a person's domicile, should be recognised in all other countries.”* (*ibid.*, p118, paragraph 8.03)

<sup>207</sup> *Niboyet v. Niboyet* (1878) L.R. 4 P.D.1, per Brett, LJ., at p12. Cf. *Re Luck's Settlement Trusts* [1940] Ch. 864, per Scott, LJ., at p891: *“... where a competent court in any country adjudicates upon the particular status of some person, it recognises the presence or absence of that status, and its judgment has effect as a judgment in rem.”*

From this dictum, one might suppose that the status of owner would be recognised by the law of another country into which the property in relation to which the status existed, was removed.<sup>208</sup> But, it is evident that if another transaction should take place in the subsequent *situs*, purporting to confer the right of ownership upon a *bona fide* purchaser in that later *situs*, the status of the original owner is no longer recognised as a right which exists *in rem*.

In this regard, it is interesting to consider a dictum of Littledale, J. in the case of *Birtwhistle v. Vardill*, viz.: “*The very rule that a personal status accompanies a man everywhere, is admitted to have this qualification, that it does not militate against the law of the country where the consequences of that status are sought to be enforced.*”<sup>209</sup> The distinction between the abstract status which ownership confers, and the incidents of that status, is significant.<sup>210</sup> In particular, it is important to note Graveson’s warning that, “*The law which governs the incidents of a status is not necessarily that which governs the status itself.*”<sup>211</sup> Even if, theoretically, the original owner’s status is initially recognised in the new *situs* (to which the property in question has been removed), by virtue of further dealings with the property in that new *situs*, the status itself, and any incidents thereof, will be abrogated if the substantive provisions of that law (*i.e.* the new *lex situs*) incorporate the *possession vaut titre* principle, preferring the rights of a *bona fide* third party purchaser within that jurisdiction, to those of the deprived ‘owner’.

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<sup>208</sup> Cf. Notes 198 and 199, *supra*, relative to the theory of vested rights.

<sup>209</sup> *Birtwhistle v. Vardill* (1826) 5 B&C 438, *per* Littledale, J., at p455. (*per* Graveson (1974), *ibid.*, p235)

<sup>210</sup> The incidents of status comprise the rights, duties, capacities, incapacities, powers and disabilities which are bestowed by virtue of the status. See Crawford, *ibid.*, p121, paragraph 8.06.

<sup>211</sup> Graveson (1974), *ibid.*, p232; *Re Langley’s Settlement Trusts* [1962] Ch. 541.



Although the vested rights theory has declined in popularity, and the apparent simplicity of its territorial approach belies the complexities inherent in its application, its ethos is still to be welcomed.<sup>212</sup> So too, the underlying rationale of the universality of status theory is to be commended.<sup>213</sup> If no meaningful recognition is to be accorded to the ‘vested’ right of an ‘original’ owner whose property has been stolen from him, and taken, without his knowledge or consent, to a new state, with a view to its being sold there to a third party purchaser, then it transpires that, on occasion, the concept of ‘ownership’ is reduced, regrettably, to a rather ephemeral and shallow right.

### **The situs rule - promoting the peaceful enjoyment of possessions?**

One further factor which requires to be taken into account is the relevance of human rights in relation to property. Article 1 of Protocol Number 1 of the European Convention on Human Rights<sup>214</sup> reads as follows: -

*“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance*

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<sup>212</sup> Consider Crawford, *ibid.*, p25, at paragraph 3.05: “... *there is no doubt that the vested rights theory, as encapsulated in a form of words as a guide, instils the correct attitude of international co-operation and open-mindedness.*”

<sup>213</sup> E.g. Crawford, *ibid.*, at p119, “... [in the personal law area of the subject] {*sed quaere*: only in that area?} *the theory is an excellent starting point ...*” ({...} added)

<sup>214</sup> Effective in the United Kingdom by virtue of the Human Rights Act 1998. Consider the fourth exception to the general *lex situs* rule, arising, “... *where a statute in force in the country which is the forum in which the case is heard obliges the court to apply the law of its own country ...*” (*Winkworth v. Christie, Manson & Woods Ltd.* [1986] 1 Ch. 496, *per* Slade, J., at p501)

*with the general interest to secure the payment of taxes or other contributions or penalties.”*

As was stated in *Scotts of Greenock Ltd. and Lithgows Ltd. v. United Kingdom*,<sup>215</sup> “... *these rules [i.e. the two principles stated in paragraph one, and the third principle, in paragraph two] are not separate or watertight. The first rule contains a general guaranteed right to property. This general rule is then qualified or limited by the second and third rules.*”<sup>216</sup>

In a partly dissenting opinion in the case of *Agosi v. United Kingdom*,<sup>217</sup> one of the judges, Mr Pellonpää, remarked that, “... *deprivation [of property] is the most serious interference with the rights of the owner ... Deprivation, whether it takes place through formal expropriation or other proceedings, or de facto by way of fundamental interference with the owner’s position, can be defined as the taking of property which is irreversible in the sense that there is no reasonable prospect of its return.*”<sup>218</sup>

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<sup>215</sup> Application Number 9006/80.

<sup>216</sup> *Ibid.*, paragraph 76. Cf. *The Leeds Permanent Building Society and The Yorkshire Building Society v. United Kingdom* (117/1996/736/933-935), paragraph 78; *Agosi v. United Kingdom* [1986] A-108, paragraph 48; *James and others v. United Kingdom* [1986] A98-B; *Case of the Holy Monasteries v. Greece* [1994] Case A301-1, at paragraph 56: “Article 1 (p1-1) ... guarantees in substance the right of property ... The first [rule] ... lays down the principle of peaceful enjoyment of property. The second rule ... covers deprivation of possessions and subjects it to certain conditions. The third ... recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.”; and *Case of Air Canada v. United Kingdom* [1995] Case A316-A, at paragraph 29.

<sup>217</sup> [1986] A-108.

<sup>218</sup> *Ibid.*, p20 (Hudoc report). This case concerned the seizure and forfeiture of an aircraft belonging to the applicant company. There was held to have been no violation of Protocol 1(1).



In the subsequent case of *The Leeds Permanent Building Society and The Yorkshire Building Society v. United Kingdom*,<sup>219</sup> the Strasbourg court stated that, “According to the Court’s well-established case-law ..., an interference, including one resulting from a measure to secure the payment of taxes, must strike a ‘fair balance’ between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole, including the second paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued.”<sup>220</sup>

The question which should be asked, therefore, is whether an interference with property (by a public authority) is compatible with Article 1 of Protocol 1, namely, whether it strikes a fair balance between the demands of the general interests of the community and the requirement of protection of an individual’s fundamental rights.<sup>221</sup>

Any legitimate interference with the exercise of the right to peaceful enjoyment of possession must, accordingly, pursue an aim in the public interest. The principle of ‘fair balance’ presupposes the existence of a general interest of the community in the property in question.<sup>222</sup> It has been further stated that the issue of whether or not a fair balance has been struck, “...becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not

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<sup>219</sup> (117/1996/736/933-935).

<sup>220</sup> *Ibid.*, paragraph 80.

<sup>221</sup> Cf. *Beyeler v. Italy* (33202/96, 5 January 2000). See Renold, M-A, ‘A Landmark Decision in Art Law by the European Court on Human Rights: *Beyeler v. Italy*’ 2000, Volume 5(1), Art, Antiquity and Law 73, 75.

<sup>222</sup> *Beyeler v. Italy* (33202/96, 5 January 2000), paragraph 111. Significantly, the Court pointed out that national authorities enjoy a certain margin of appreciation in determining what is, in fact, in the general interest of the community. (*ibid.*, paragraph 112) Consider in this regard *Belvedere Alberghiera S.R.L. v. Italy* (31524/96), concerning the order of an Italian municipality for possession of the applicant company’s land, in implementation of a road-building scheme. Cf. *Carbonara and Ventura v. Italy* (24638/94).

arbitrary.”<sup>223</sup> Compliance with the principle of lawfulness is the first condition for an interference to be deemed compatible with Article 1 of Protocol 1. Lawfulness, it is presumed, is to be determined according to the *lex loci actus* (which, it is anticipated, will generally coincide with the *lex situs*).<sup>224</sup>

Although the possibility of a violation of Article 1 of Protocol 1 is most likely to arise in the context of state confiscations or expropriations,<sup>225</sup> one could inquire whether a Scottish or English forum’s strict application of the *lex situs* rule in cases where the effect of applying that rule is to deprive an ‘innocent’ owner of his or her right to the peaceful enjoyment of his possessions, could, in fact, be said to violate Article 1. One might predict arguments which seek to maintain that the *situs* rule achieves a fair balance between the deprived owner’s rights of possession, and the community’s general interest in the security of commercial transacting, but in cases where (as a result of application of the choice of law rule in respect of property transfers) the deprived owner has no right of action or recourse in respect of his property, there would appear to be an *ex facie* violation of his or her proprietary rights.

### **Arguments against the *lex situs* rule – incorporeal moveable property**

Finally, as regards the application of the *lex situs* rule to assignments of incorporeal moveable property, the most serious criticism to be levelled against the rule relates less to its substance, than to its nomenclature.<sup>226</sup> Whilst writing, in 1935, about choses

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<sup>223</sup> *Beyeler v. Italy* (33202/96, 5 January 2000), paragraph 107.

<sup>224</sup> If the two do not coincide, then it is expected that the *lex situs* would prevail: *Princess Paley Olga v. Weisz* [1929] 1 K.B. 718, *per* Sankey, L.J., at p729.

<sup>225</sup> E.g. *Oppenheimer v. Cattermole* [1976] A.C. 249; and *Williams and Humbert v. W&H Trade Marks (Jersey) Ltd.* [1986] A.C. 368.

<sup>226</sup> Although note Benjamin’s general remark that, “Some might argue that the *lex situs* rule itself is anachronistic in the electronic era, and a new rule of private international law should be developed.” (Benjamin, J, ‘Determining the Situs of Interests in Immobilised Securities’ (1998) 47 I.C.L.Q. 877, 933)



in action, Cheshire adjudged that, "... *the lex situs is nothing but an inconstant guide. There can be no issue out of the present confusion unless the Courts approach the difficulty in a more scientific manner.*"<sup>227</sup> More recently, Rogerson has criticised the simplicity, illogicality and irrationality of the *situs* rule as it applies to incorporeal moveable property.<sup>228</sup>

While it may be straightforward to state that a debt is situated in the place where the debtor is resident, this assertion offers no guidance as to what is meant by the term 'residence',<sup>229</sup> or by whom and according to which law that factor is to be determined. Furthermore, it disregards the fact that a debtor may be resident in more than one country<sup>230</sup> (particularly in the case of commercial, as opposed to personal, debtors).<sup>231</sup> Likewise, as has already been demonstrated,<sup>232</sup> a company may maintain more than one share register, and simply to fix the *situs* at the place of incorporation may not be conclusive. Even to reduce the factors of residence and incorporation to the place of enforcement (*i.e.* the place where the debt may be enforced, or the share transfer effected),<sup>233</sup> will not necessarily be decisive since the possibility of enforcement will

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<sup>227</sup> Cheshire (1935), *ibid.*, p85.

<sup>228</sup> Rogerson, P, '*The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading*' [1990] 49 C.L.J. 441.

<sup>229</sup> Does it, for example, equate to ordinary, or habitual, residence? Consider Crawford, *ibid*, p71, paragraph 6.02, and p102, paragraph 6.29. If the rationale is to nominate as *situs* the place where the debt is *enforceable*, then *ordinary* residence should probably suffice. (Crawford, *ibid.*, p319, paragraph 14.19)

<sup>230</sup> Or, indeed, in none! Consider the phenomenon of the floating or itinerant debtor: the Financial Times has carried reports of the peripatetic existence of high net worth passengers aboard '*The World of ResidenSea*', a self-styled 'seaborne-city'. (The Weekend FT March 2001, p8)

<sup>231</sup> Rogerson has suggested that, "*Where the debtor has more than one residence, either the debt could be said to be situate in more than one place or the courts must adopt further rules to isolate one location for the debt.*" (*ibid.*, p442)

<sup>232</sup> Chapter Four, *supra* – 'Defining the *'Situs'*'.

<sup>233</sup> Cf. Baxter, *ibid.*, at p16: "*Situs can be given a meaning for any kind of property, by thinking of it, not as the location of an object, but as the place where property rights can be enjoyed or made effective.*"

not automatically be confined to one country.<sup>234</sup> Amorphous tests such as that of ‘primary enforceability’ have been adopted;<sup>235</sup> while the place of primary enforceability may be apparent when the right in question is a contractual right (e.g. the right to payment of a sum of money under an insurance policy),<sup>236</sup> a hierarchy of potential places of enforcement is unlikely to have been articulated where the right is non-contractual (e.g. goodwill<sup>237</sup>).

Rogerson has also accused the *situs* rule of being illogical. The aim, which is implicit in the rule, is to anchor the right in the state in which it may be enforced. The rule presupposes that enforcement will be readily achievable at the place where the debtor resides. This, however, is an ill-founded assumption, particularly in a situation where the debtor’s residence has changed between the time when the debt, or other right, was created and the time when enforcement proceedings commenced, and where, in the interim, the debtor has taken steps to relocate his or her assets to a different jurisdiction.<sup>238</sup>

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<sup>234</sup> Consider *Deutsche Schachtbau v. Shell International Petroleum Co.* [1990] 1 A.C. 295, per Lord Oliver, at p343: “It has to be recognised that a debt is a species of property which may be recoverable by legal process from a debtor in more than one jurisdiction.”

<sup>235</sup> E.g. *F&K Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 All E.R. 145.

<sup>236</sup> Cf. Falconbridge, J D, ‘*Essays on the Conflict of Laws*’ (1947), at p422: “In order to decide which of the several residences of the debtor is the criterion of locality of a particular debt, it is necessary to look at the contract which creates the debt.”

<sup>237</sup> Goodwill has been defined as, “the attractive force which brings in custom” (*I.R.C. v. Muller & Co’s Margarine Ltd* [1901] A.C. 217, per Lord Macnaghten at p224), or “whatever adds value to a business by reason of situation, name and reputation.” (*ibid.*, per Lord Lindley at p235) Lord Macnaghten further explained that, “One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down ... seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole.” (*ibid.*, p224) Accordingly, in order that its full, or collective, value might be recognised, goodwill must be enforced as a whole, not separately. If the assets in respect of which the goodwill attaches are in different states, it may not be immediately obvious in which state that right would be most effectively enforced. See *Stair Memorial Encyclopaedia*, Volume 18, paragraph 1364.

<sup>238</sup> Consider also Rogerson’s remark that, “... it is a naïve assumption in the modern world that the debtor will have assets at his residence against which enforcement of the debt can be ordered. The



Finally, there is a certain irrationality in the ‘hypostatization’<sup>239</sup> of incorporeal moveable rights. This process takes place in order to align the rules affecting this type of property with those which regulate corporeal moveable assets, and immoveable property, but it is, in effect, a false analogy.<sup>240</sup> Reification introduces an additional step into what is an already complicated process. It would be preferable to simplify the process of ascertaining the *lex causae*, and as Rogerson has suggested, to reformulate the apposite connecting factor with greater frankness and transparency: “*The choice of law rule which says ‘apply the lex situs’ can be rewritten as ‘apply the law of the debtor’s residence’.*”<sup>241</sup> By clothing the rule in the garb of the *lex situs*, the courts have simultaneously imprinted upon it the mark of the taboo, thereby discouraging enlightened consideration of the appropriateness (or otherwise) of applying the *situs* rule<sup>242</sup> to incorporeal moveable property. It is the stamp of the taboo which has deterred many commentators from subjecting the *situs* rule to the rigorous scrutiny and/or criticism which should accompany eminence.

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*debtor may have many assets elsewhere – why are these other places not also contenders for the situs of debts?”* (ibid., p455) See Chapter Fourteen, *infra* – ‘The Lex Proprietatis’.

<sup>239</sup> Cook (1942), *ibid.*, p285.

<sup>240</sup> Cf. Baxter (1964), *ibid.*, at p15: “*The fictional situs of an intangible is ... a concept of greater generality than an aid in solving choice of law problems.*” Scots law recognises the separate categories of incorporeal moveable property and corporeal moveable property (and *a fortiori* immoveable property) precisely because these types of property differ fundamentally in nature. Rules formulated to deal with tangible property cannot (or at least should not) be extended, without modification, to deal with property which exists only in the abstract.

<sup>241</sup> Rogerson, *ibid.*, p453. The author continues, “*By using a choice of law rule which hides this fundamental process the court deludes itself as to the real basis for its decision and also denies itself any opportunity to ask whether the choice of law rule is appropriate.*” Further, “*By focusing attention on the situs the courts are drawn into a mechanical application of some particularly complex and unpredictable rules, and fail to enquire whether these rules are consistent with the purpose of the conflict of laws, which is the desire to achieve justice.*” (p459)

<sup>242</sup> Or, at least, of applying the law of the country where the debt is primarily enforceable – which might necessitate ‘moving the debt’ to the debtor’s residence as at the date of commencement of proceedings. (Cf. *mobilis sequuntur personam*)

## Conclusion

The purpose of this chapter has been to recount the arguments in support of, and against, the *lex situs* rule. It is hoped that the reader will have been persuaded that the opposing arguments are stronger than may, at first, have been anticipated.

In 1986, Trautman concluded that, “*Many courts and scholars have yet to embrace fully the lesson that Professor Hancock provided long ago.*”<sup>243</sup> Trautman’s words remain equally true today, particularly in relation to British conflict lawyers. By endeavouring to reinforce and to elaborate upon the arguments of Professor Hancock and his fellows, the aim has been to illustrate that certain of the pro-*situs* arguments, when tested in particular contexts at least, do prove to be ‘shallow’. The hope now is to formulate a rule fit to deal adequately, in the author’s submission, with the problems encountered and described to this point.

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<sup>243</sup> Trautman (1986), *ibid.*, p1101.



## Chapter Thirteen

### Framing An Alternative Choice of Law Rule

Traditionally, the *lex situs* rule has enjoyed a special status in conflict of laws theory and practice, having secured upon the choice of law rostrum a position of longevity which is exceeded by few other choice of law rules. The intransigence of the land taboo is such that to suggest that the *lex situs* rule should now be altered or modified, is tantamount to conflicts heresy. Hancock has suggested, however, that, “... *despite the continual reiteration of the situs formula by the courts and commentators, perceptive judges have not infrequently refused to make the needless sacrifices that it demands.*”<sup>1</sup> Covertly, through the technique of manipulative characterisation,<sup>2</sup> or by

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<sup>1</sup> Hancock, M, ‘*Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws*’ (1967) 20 Stanford L. Rev. 1, 38. He is of the view that, “*To justify their unorthodox decisions, they have had recourse to various escape devices. These escape devices have in most instances had the unfortunate effect of obscuring the real ground of the unorthodox decision: a strong sense of dissatisfaction with the result the situs formula would have produced. Hence, the judges deciding subsequent cases have sometimes failed to recognise for what it was, have taken it too seriously, and so have been beguiled into reaching regrettable results.*” (*ibid.*) Consider also Carter who takes the view that it is the “*acceptance of the orthodoxy that choice of law denotes choice of legal system [that] has given rise to the need for escape routes. Rules permitting or requiring rejection of the lex causae in particular circumstances mark out these escape routes.*” (Carter, P B, ‘*Rejection of Foreign Law: Some Private International Law Inhibitions*’ (1984) 55 B.Y.B.I.L. 111, 112)

<sup>2</sup> Hancock takes the view that, “*The commonest device of all ... is that of alternative classification ... Various disadvantages attend the use of this evasion technique ... The most basic and subtle difficulty encountered in using the alternative-classification device is that of explaining why, when the situs formula is overlapped with another, the other formula should necessarily prevail. The short practical answer to this question would be that, for reasons that he has not been able to articulate fully, the judge believes that the nonsitus formula points to the preferable result. Because such a statement would sound like a confession of judicial instability, most judges have wisely left this question unanswered or rather have let readers of the opinion answer it for themselves.*” (*ibid.*, p38/9) Consider *Anton v. Bartolo* (1891) Clunet 1171; *Johnstone v. Baker* (1819) 4 Madd. 474; *Chatfield v. Berchtoldt* (1827) L.R. 7 Ch. App. 192; *De Nicols v. Curlier* [1900] A.C. 21; and *Re Cohn* [1945] 1 Ch. 5. Consider the same sentiment, albeit in a different context: “*Experience both here and abroad (but particularly in the United States) has shown that a choice of law rule of great simplicity may produce results which ‘begin to offend our common sense’, and the courts may therefore seek to escape from them, for example by applying to a particular issue a different classification and hence also a different choice of law rule.*” (Scottish Law Commission Consultative Memorandum No 62/Law Commission No 87 – ‘*Private International Law – Choice of Law in Tort and Delict*’ (1984), paragraph 4.17) (hereinafter ‘SLC-Delict’). Consider also Dine, who has stated that, “*it is clear that characterisation has been used to achieve what the judges considered a just result.*” (Dine, J, ‘*Choice of Law by Characterization*’ 1983 J.R. 73, 97)



deliberate failure to prove the content of the *lex situs*,<sup>3</sup> and overtly, in cases of financial provision in divorce, intestate succession to property, and the guardianship of property belonging to children and incapable adults, the *lex situs* rule has, in certain cases and to varying degrees, been supplanted.<sup>4</sup> In these latter instances, this has occurred because proprietary issues and questions of title have generally been considered to be secondary, or incidental, to the primary legal relationship or obligation in dispute (*e.g.* divorce or succession).<sup>5</sup>

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<sup>3</sup> Failure by the parties to prove the content of the *lex situs* would result in the forum applying the substantive *lex fori*, not *qua lex fori*, but rather *qua lex causae*. Although it is difficult to imagine a scenario in which neither party would wish to prove the content of the foreign *lex situs*, in the event that neither party, for any reason, plead and/or proved the content of that law, then the forum would be unable, *ex proprio motu*, to establish the content of, or to apply, the *lex situs*. The substantive content of the *lex causae* (*i.e.* nominally the *lex situs*) would be presumed to be identical to that of the *lex fori*. Accordingly, the substantive *lex fori* would be applied *eo nomine lex situs*; it is most unlikely that the content of the *lex causae* would reflect the substantive domestic law actually in force at the *situs* at the relevant time. (See *Rodden v. Whatlings Limited* 1960 S.L.T. (Notes) 96; *Pryde v. Proctor & Gamble Limited* 1971 S.L.T. (Notes) 18; *Bonnor v. Balfour Kilpatrick Limited* 1975 S.L.T. (Notes) 3; *De Reneville v. De Reneville* [1948] P. 100; and Crawford, E B, 'International Private Law in Scotland' (1998), paragraphs 4.11 and 4.12) This situation could feasibly arise if the executors and beneficiaries of a deceased person's estate agreed to enter into a deed of family arrangement in respect of the (testate or intestate) distribution of the deceased's estate, comprising, *inter alia*, immoveable property situated abroad. If neither the executors nor the beneficiaries wished the foreign *lex situs* to apply to the deed of arrangement, or to the consequences thereof, both may elect not to plead or prove the content of the *lex situs*. The substantive rules of the *lex fori* (presumably the *lex ultimi domicilii* of the deceased) would then apply to determine the effect upon the foreign property of the deed of arrangement.

<sup>4</sup> Chapter Seven, *supra* - 'Cracks in the Monolith – Particular Instances'. Cf. Colwyn Williams: "Ever since the *lex situs* became a governing rule of choice of law did incidental questions such as those concerning capacity, form, matrimonial rights and succession cut through its regime." (Colwyn Williams, D, 'Land Contracts in the Conflict of Laws – *Lex Situs*: Rule or Exception' (1959) 11 Hastings Law Journal 159, 163) Alternatively, Colwyn Williams observes the avoidance of the *situs* rule via other routes, referring to the "flexible doctrine of comity ... leaving open avenues of escape from a purportedly dominant *lex situs*." (*ibid.*, p164) Cf. Hancock who has warned that, "Because they conceal the true grounds of decision, legal fictions and other escape devices frequently mislead the judges in subsequent cases." (*ibid.*, p25)

<sup>5</sup> Cf. Von Mehren & Trautman: "The problem is complicated by the fact that in cases of any doubt the issue of title usually arises out of some kind of transaction – contract, tort, trust or marriage – that has significant ties with some jurisdiction other than that of the *situs* ... escape from the rules of the Restatement can be covertly achieved by a process of characterising the problem not as one of property but as one of some other body of law." (Von Mehren, A T & Trautman, D T, 'The Law of Multistate Problems – Cases and Materials on Conflict of Laws' (1965), p197) Cf. Scoles' observation that, "The *situs* rule is a generalization that seems to cloud thinking about the particular issue involved. There are many instances of judicial avoidance of unjust application of the *situs* rule either by characterisation or by frank recognition of its inappropriateness to particular issues." (Scoles, E F, 'Choice of Law in Family Property Transactions' (1988) II *Receuil des Cours* 13, 75) To illustrate his premise, Scoles cited *Polson v. Stewart* (1897) 167 Mass. 211, 36 L.R.A. 771, and *Proctor v. Frost* 89 N.H. 304, 197 A. 813 (1938). It is submitted that Scots and English cases demonstrating "frank recognition of [the *lex situs*'] inappropriateness to particular issues" are extremely rare, if not unknown. Cf. Carter's conclusion that, "... private international law has been bedevilled by the generality of many of its choice-of-law rules." (*ibid.*, p112)



It is hoped that the preceding chapters have demonstrated that there are identifiable cracks in the *situs* monolith. Acting on that premise, it is intended now to propose an alternative choice of law rule in respect of property law matters.

### **The objectives of a new choice of law rule**

In traditional conflicts methodology, choice of law is less an art, than a science.<sup>6</sup> On the American platform, Von Mehren and Trautman have remarked that one shortcoming of the traditional approach is the breadth of categories for which a particular connecting factor may be deemed apposite: *"The larger the category, the less rational the results are likely to be in cases somewhat removed from the category's core or central conception."*<sup>7</sup> Also articulating his objection to the rote application of broad, general rules to particular or peculiar issues, Scoles has expressly called for narrower, more detailed rules, to replace over-inclusive (albeit time-honoured), single-contact rules.<sup>8</sup>

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<sup>6</sup> According to Von Mehren & Trautman, choice of law involves *"little more than an inquiry into the proper categorization of cases and a selection of an appropriate connecting factor for each category."* (*ibid.*, p178)

<sup>7</sup> Von Mehren & Trautman, *ibid.*, p104.

<sup>8</sup> Scoles, *ibid.*, p90. Cf. Cheatham's remark that, *"The issues in conflict of laws are not simple and uniform ones, which might be dealt with by broad and sweeping rules. The issues are numerous and diverse and the rules which deal with them must be correspondingly numerous and diverse so as to reflect the variety of factors involved. Each issue can then be viewed in its full setting: narrow issues broadly viewed."* (Cheatham, E E, 'Problems and Methods in Conflict of Laws' (1960) I *Receuil des Cours* 237, 308) Consider Baade, who more recently has opined that, *"When a broad category is segmented into narrower frames of reference with custom-tailored choice-of-law rules, there arises the possibility of dépeçage or 'patching': different segments or phases of a legal connection ... are determined potentially by rules emanating from different legal systems. This is an accepted feature of modern codified choice-of-law systems and treaties, and a built-in feature of the most significant relationship method and of governmental interest analysis, both of which proceed issue by issue."* (Baade, H W, 'International Encyclopaedia of Comparative Law, Volume III, Chapter 12 – Operation of Foreign Public Law' (1991), p31) Contra Baxter, who quotes Zaphiriou in asking, *"Is it desirable to subject a transaction to a single law as regards all its aspects or is it preferable to split the transaction into various questions and subject these various questions to different laws?"* ... [It is] *desirable to keep to a minimum the number of rules ... governing a class of transaction. 'Specialization' multiplies the chances of doubt."* (Baxter, I F, 'Conflicts of Law and Property' (1964) 10 *McGill Law Journal* 1, 13, quoting Zaphiriou, G, 'Transfer of Chattels in Private International Law' (1956), pp66/67)



As was suggested in Chapter One, *supra*, the widespread preference for certainty has resulted in rules of choice of law concerning property in respect of which there are few exceptions. More recently, some commentators have argued that transactions concerning 'special' types of property (*e.g.* cultural property or intellectual property), do not fit naturally, or comfortably, into the traditional *lex situs* groove.<sup>9</sup>

Throughout this work, criticism has been levelled at the blanket use of mechanically-applied, single-contact connecting factors.<sup>10</sup> Baxter has pointed out that, "*If choice of law depends on location, this will lead to an 'atomised' set of answers where a man's property is in various jurisdictions, or to uncertainty where goods are in transit.*"<sup>11</sup>

Similarly, criticism has been levelled at the adoption of certain 'approaches' to choice of law, such as interest analysis, functional analysis, and the broad test of the Second

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<sup>9</sup> As regards the treatment of cultural property, Lyndel Prott (UNESCO Cultural Heritage Section) has called for a discrete set of conflict rules applicable only to items of cultural property and tailored accordingly. (Prott, L V, '*Problems of Private International Law for the Protection of the Cultural Heritage*' (1989) V (217) *Receuil des Cours* 215, 306) As regards intellectual property rights, Fawcett and Torremans have submitted that to apply the standard choice of law rule in respect of moveable and immoveable property, to intellectual property rights, is ill-advised: "... *their application to intangible rights, such as intellectual property rights, would be particularly cumbersome. We submit that the international nature of intellectual property rights and their exploitation, ... require a sui generis regime ... a modified or sui generis regime in relation to choice of law is equally called for.*" (Fawcett, J J, and Torremans, P, '*Intellectual Property and Private International Law*' (1998), p487) Fawcett and Torremans expressly state that, "[the] *application of the traditional property approach, as it has been outlined by Dicey & Morris, to intellectual property is problematical. It is submitted that a sui generis approach, that is closely linked to certain property principles, would be a better solution.*" (*ibid.*, p494) Fawcett & Torremans have even suggested that because intellectual property rights are effectively competition rules (conferring as they do exclusive rights of use and exploitation), they do, in fact, form part of the public policy of each legal system. (*ibid.*, p494)

<sup>10</sup> Cf. Alden: "*The unjust results created by blind application of territorial conflicts rules still obtain in real property disputes while more enlightened legal theories govern practically all other disputes ... Why this solitary territorial rule has survived is unclear ... the situs rule leads to exactly the same sort of unjust and inequitable decisions that led to the demise of other territorial rules.*" (Alden, R, '*Modernizing the Situs Rule for Real Property Conflicts*' (1987) 65 *Texas Law Review* 585, 586); and Lando: "*The more rigid rules are, the more frequent the clash between law and equity will be. This is a serious objection to rigid solutions ... An excessively remorseless rigidity should be avoided.*" (Lando, O, '*International Encyclopaedia of Comparative Law, Volume III, Chapter 24 – Contracts*' (1976), p78)

<sup>11</sup> Baxter (1964), *ibid.*, p11. Cf. Alden: "*During the last half century, American conflicts law and principles of jurisdiction have abandoned this territorial approach for issues other than real property ... Unfortunately, this re-evaluation and reformation has not extended to the situs rule.*" (*ibid.*, p591)



Restatement, as methods by which to resolve concrete, international (as opposed to interstate) choice of law disputes. In 1976, Lando inquired (in the context of choice of law rules of contract) whether, “... *a method [is] to be adopted which ensures justice in the individual case, but which will abandon to a greater or lesser degree the quest for predictable solutions? Or are rules to be introduced which pay regard to the need for foreseeability, but which, if applied consistently, will sometimes cause hardship in the individual case.*”<sup>12</sup> It is the responsibility of those who would advocate a new choice of law rule in property to provide a balanced response to these questions.

At this juncture, the present author parts company with those American and Canadian scholars with whom, to some extent at least, she has hitherto allied herself, namely, Hancock, Weintraub<sup>13</sup> and Alden. The interest and functional analysis approaches promulgated by those scholars mark the apogee of choice of law flexibility, the pendulum having swung as far as is possible from the certainty and predictability of the *situs* rule.<sup>14</sup> These approaches bring to mind early criticism of the principle of comity. Savigny, for example,<sup>15</sup> cited a dictum of Lord Wensleydale in *Fenton v. Livingstone*,<sup>16</sup> namely, “*How could any reasonable results be attained with an idea so infinitely vague and illegal? In fact one cannot even approximate to a correct*

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<sup>12</sup> Lando, *ibid.*, p78.

<sup>13</sup> Kegel has suggested that Weintraub is “... *the most moderate of the American innovators in the extent to which he deviates from traditional conflicts law.*” (Kegel, G, ‘*International Encyclopaedia of Comparative Law, Volume III, Chapter 3 – Fundamental Approaches*’ (1986), p58)

<sup>14</sup> In noting these extremes, it is interesting to consider Carnahan’s view that, “*As a consequence, perhaps, of the youthfulness of the subject, Conflict of Laws doctrines are frequently marked by extreme indefiniteness or by equally extreme rigidity. At times its principles are stated in the vaguest terms ... At other times the principles are expressed with definiteness, real or apparent ... This definiteness may be productive of great injustice.*” (Carnahan, C W, ‘*Conflict of Laws and Life Insurance Contracts*’ (1958), p.xi, foreward to 1<sup>st</sup> edition) Cf. Kegel: “*The [traditional] conflicts rule ... is the product of efforts ... to allocate legal problems among territorial jurisdictions, not to decide cases justly.*” (1986, *ibid.*, p192); and Baxter: “*Private international lawyers seem at times fascinated by intellectual systems, regarding as irrelevant the comparative justice of the final answers.*” (Baxter, I F, ‘*Recognition of Status in Family Law*’ (1961) 39 Can. Bar Rev. 301, 348)

<sup>15</sup> Savigny, F C, ‘*Treatise on the Conflict of Laws*’ (1869), p33.

<sup>16</sup> (1858) 3 Macq. 497.



*decision of the simplest case of private international law upon this principle. Where is the beginning of the end of comity? How can questions of law be solved according to views of policy, which are the most shifting and uncertain things in the world?"*<sup>17</sup> As has been demonstrated in the opening chapter of this thesis, the two extremes of the *situs* rule and interest/functional analysis, are manifest in the polarised styles of the First and Second Restatements.<sup>18</sup>

It has been argued that the risk of injustice which may result from the mechanical approach could be minimised by what Carter has described as, "... *the careful and detailed formulation of a large number of choice of law rules, each tailored to cover a fairly precisely defined, and often relatively narrow, range of situations.*"<sup>19</sup> It is necessary, therefore, to expand upon what are considered to be more appropriate connecting factors and particularly to consider what emphasis should be attributed to non-territorial contacts which connect the dispute in question with a legal system other than the *lex situs*.<sup>20</sup>

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<sup>17</sup> *Ibid.*, at p548.

<sup>18</sup> Contrast the First Restatement, paragraph 257, and the Second Restatement, paragraph 222 (Chapter One, *supra* – 'Choice of Law Methodology'). Cf. Morris' observation that, "*The policy behind the original Restatement seemed to be 'This is the law because we say so; we give no reasons; we cite no authority; we state no history; we concede no doubt nor divergence.' But now the Restatements have abandoned dogma and seek to persuade, to rationalize and to justify. And quite right too. Nowhere is this retreat from dogma more apparent than in the Restatement Second of the Conflict of Laws.*" (Morris, J H C, 'Law and Reason Triumphant – or – How not to Review a Restatement' (1973) 21 Am. Jo. of Comp. Law 322, 322/3)

<sup>19</sup> Carter (1984), *ibid.*, p112. Cf. Goodrich who, in 1941, stated that, "*it was a point too clear to be labored*" that "*courts should be prepared to reexamine broad theories and shape them to fit the complications of changing life.*" (Goodrich, H F, 'Two States and Real Estate' (1941) 89 Uni. of Pen. L. Rev. 417, 429)

<sup>20</sup> Consider Alden: "*The situs rule emphasizes, like its sibling the 'wooden' lex loci delicti doctrine, one isolated contact – the presence of land. That contact may or may not be significant given the facts of the case and the issues in the underlying litigation.*" (*ibid.*, p629) Cf. in the context of delict, the dictum of Lord Wilberforce in *Boys v. Chaplin* [1971] A.C. 356, at p391: "*No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems.*" Consider too Briggs' remark that, "*In the past several years there has developed a now widely held idea that in the solution of a conflict-of-law problem all foreign contacts should be considered in order that the result most satisfactory to the forum may be selected.*" (Briggs, E W, 'The



### Finding flexibility within the connecting factor

In seeking to formulate an alternative choice of law rule in respect of property law matters, the aim, expressed in Chapter One, is to provide flexibility through the medium of the connecting factor. Flexibility, however, must be tempered by respect for simplicity, for as Baxter has advised, “... *the purpose of law is to solve disputes, not to give intellectual pleasure.*”<sup>21</sup>

Previous (largely unsuccessful) attempts have been made to reform choice of law rules concerning property. The Hague Conference on Private International Law has delivered three conventions in this area, viz.: the 1955 Convention on the Law Applicable to International Sales of Goods,<sup>22</sup> the 1958 Convention on the Law Governing Transfer of Title in International Sales of Goods,<sup>23</sup> and the 1958 Convention on the Jurisdiction of the Selected Forum in the case of International Sales of Goods.<sup>24</sup>

The endeavours, in this context, of the Hague Conference having proved largely ineffectual, European member states took steps, in 1969, to harmonize “... *matters most closely involved in the proper functioning of the common market.*”<sup>25</sup>

Negotiations concerning the first of these ‘matters’, the law concerning contractual

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*Jurisdictional-Choice-of-Law Relation in Conflicts Rules*’ (1948) 61 Harv. L. Rev. 1165, at 1165. (Emphasis added)

<sup>21</sup> Baxter (1964), *ibid.*, p37.

<sup>22</sup> Concluded 15 June 1955. See also the 1980 Declaration and Recommendation Relating to the Scope of the 1955 Convention. This Convention is in force in nine states, but not in the United Kingdom.

<sup>23</sup> Concluded 15 April 1958. This Convention was signed by Greece and Italy, but has never entered into force. As its name suggests, the scope of the Convention was limited to proprietary issues arising from the sale of goods, and endorsed the *lex situs* rule.

<sup>24</sup> Concluded 15 April 1958. This Convention was signed by Austria, Belgium, the Federal Republic of Germany, and Greece, but likewise, has never entered into force.

and non-contractual obligations, proved partially successful, resulting as they did in the 1980 Rome Convention on the Law Applicable to Contractual Obligations.<sup>26</sup> Less successful, however, were the efforts concerning the second matter, namely, “*the law applicable to corporeal and incorporeal property.*”<sup>27</sup>

### The structure of a new rule

In contrast with the truth of the words penned by Professor Cheshire in 1935,<sup>28</sup> it may no longer be asserted that International Private Law is free from legislative intervention. The view has recently been expressed that, “... *choice of law structures ... are increasingly becoming legislative in origin.*”<sup>29</sup> Acting on the assumption that material changes in this area of the law are likely to be orchestrated not by the judiciary, but by parliamentary draftsmen, it is important to consider the various structures which could be employed in the formulation of an alternative choice of law rule.

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<sup>25</sup> Giuliano & Lagarde Report on the Convention on the Law Applicable to Contractual Obligations (‘G&L Report’) [1980] OJ C282 1, p5/6.

<sup>26</sup> Applicable in the United Kingdom by virtue of the Contracts (Applicable Law) Act 1990. The remit of the original project having proved too ambitious, it was decided, in 1978, to concentrate purely on contractual obligations. (Dicey & Morris, ‘*The Conflict of Laws*’ 13<sup>th</sup> edition, p1199, paragraph 32-010; and Scots Law Commission Number 129/Law Commission Number 193, Joint Report ‘*Private International Law: Choice of Law in Tort and Delict*’, 1990, p1, paragraph 1.2 {‘the 1990 Report’}) A convention (colloquially termed ‘Rome II’), concerning non-contractual obligations, is currently under negotiation.

<sup>27</sup> G&L Report, p5/6. Professor Arndt, *Oberlandsgerichtspräsident*, was appointed *rapporteur* for negotiations concerning proprietary harmonization. (*ibid.*, p6) It is possible that the lack of progress in this matter is attributable to the appointment of a *German* reporter, for it is explained that “... *the Member States’ delegations (with the sole exception of the German delegation) declared themselves to be fundamentally in agreement on the value of the work in making the law more certain in the Community.*” (G&L Report, p5) Professors Giuliano and Lagarde’s last words on property matters explain that, “*It was agreed that Mr Arndt’s report on the law applicable to corporeal and incorporeal property would be discussed later, Mr Arndt having explained that a comparative study of the principal laws on security rights and interests should precede his report.*” (p6) No further action appears to have been taken regarding the original remit.

<sup>28</sup> ‘*Private International Law*’ (1935), Preface; ‘*Private International Law*’, 13<sup>th</sup> edition, p.viii. (Note 13, Chapter Two, *supra* – ‘The Land Taboo’)

<sup>29</sup> Leslie, R D, ‘*Building Blocks for Choice of Law Structures*’ (1998) 19 Statute Law Review 202, at p202.



**(a) A simple rule comprising a single-contact connecting factor**

In the context of choice of law in delict, the Scottish Law Commission ('the SLC') advised that, "*To achieve maximum certainty, a choice of law rule must be based on a clear and simple connecting factor, with as few exceptions as possible.*"<sup>30</sup> By analogy, such a model would point towards an exclusive *lex situs* rule, free from exception.<sup>31</sup> In view of the existing exceptions to the *situs* rule (at least as concerns moveable property),<sup>32</sup> this model would not be a feasible alternative.<sup>33</sup> In any event, the danger of blunt, general rules has already been mentioned,<sup>34</sup> and is pithily summarised by Professor Siehr, thus: "*Forgotten is the wisdom and experience shown by the ... proverb: grasp all, lose all.*"<sup>35</sup>

**(b) A rule comprising a single-contact connecting factor, coupled with exceptions**

This model describes the choice of law rule which currently applies to corporeal moveable property. Exceptions, it is said, prove the rule, and their benefits are clear:

*"The use of an exception provides the flexibility which is lacking where a single point*

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<sup>30</sup> SLC (Delict), paragraph 4.16. Such rules, it was acknowledged, "... have a high degree of rigidity." (*ibid.*)

<sup>31</sup> As regards choice of law in delict, the SLC acknowledged that, "... cases may arise where the law selected on the basis of a simple connecting factor is that of a country which has in reality very little connection with the actual occurrence." (SLC (Delict), paragraph 4.16.) Cf. *Boys v. Chaplin* [1971] A.C. 356, per Lord Wilberforce, at p391: "No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction, for different purposes with different pre-existing relationships, from the background of different legal systems."

<sup>32</sup> Chapter Eight, *supra* – 'The Transfer of Corporeal Moveable Property'.

<sup>33</sup> "A certain but crude choice of law rule which is not sufficiently subtle to cater adequately for the circumstances of particular cases may result in the application of what is clearly not the most appropriate law." (SLC Delict, 1984, paragraph 4.17) This is as true of an exclusive *lex situs* rule as it was of an exclusive *lex loci delicti* rule. Consider Carter's view that, "In this sphere of law [property], somewhat ironically and uncharacteristically, the rules of private international law can be, and largely are, relatively simple." (Carter, P B, 'Transnational Trade in Works of Art: The Position in English Private International Law' in Lalive, P, 'International Sales of Works of Art' (1988), p330)

<sup>34</sup> Cf. Knoepfler: "... the law applicable which, by definition, should be the closest to the actual situation, may sometimes prove very remote." (Knoepfler, F, 'Le commerce de l'art en droit international privé suisse', in Lalive, *ibid.*, p387)

<sup>35</sup> Siehr, K, 'International Art Trade and the Law' (1993) VI *Receuil des Cours* 9, 255.



*of contact is used on its own.*"<sup>36</sup> The currently-recognised exceptions to the general property rule constitute 'sub-rules', each sub-rule "... *designed to deal with different circumstances.*"<sup>37</sup> Exceptions which attend a general rule may be formulated in one of two ways: -

**(i) A series of specific exceptions**

It would technically be possible to expand the list of currently recognised exceptions,<sup>38</sup> so as to cater, specifically, for other 'exceptional'<sup>39</sup> circumstances (e.g. an exception might be created to deal specifically with stolen goods, or with cultural property).<sup>40</sup>

The call for exceptions to general rules is not new. In 1959, Colwyn Williams wrote that, "*In recent years, many scholars writing in the field of conflict of laws have*

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<sup>36</sup> Cheshire & North, '*Private International Law*' 13<sup>th</sup> edition, p680.

<sup>37</sup> Cheshire & North, *ibid.*, p680.

<sup>38</sup> Note, however, the reluctance so to do in the case of *Glencore International AG v. Metro Trading International* [2001] 1 Ll. Rep. 284; [2001] 1 All E.R. 103.

<sup>39</sup> 'Exceptional' relates, not to the rarity of the factual scenario or the nature of the dispute, but to the weight of argument in favour of displacement or reversal of the general rule (*i.e.* the 'exception' may be applied more often than the 'rule' itself; such a result, of course, may justify a re-casting of the 'general' rule).

<sup>40</sup> This is akin to Von Mehren & Trautman's 'hierarchical' single-contact rule. Von Mehren and Trautman have suggested that, "... *if one is not prepared, in the atypical situation, to abandon the traditional approach and work with other methods of analysis, an intermediate solution may be to use connecting factors, developing alternative ones for the unusual situation ... for example, a hierarchy of connecting factors.*" (*ibid.*, p167) Consider Jefferson's view that, "*General doctrines should not be adhered to when confounded by more important principles ... Even within the unreformed scheme is there not still room for argument that a different connecting factor might be adopted where the goods have been stolen.*" (Jefferson, M, '*An Attempt to Evade the Lex Situs Rule for Stolen Goods*' (1980) 96 L.Q.R. 508, 511) Cf. Byrne-Sutton: "*Stressing the rather weak position of illegally dispossessed owners, at the mercy of a well organized black market in art, certain writers have suggested the possibility of giving up the lex situs rule in the case of sales involving stolen chattels, and applying instead the law of the country where the object was stolen.*" (Byrne-Sutton, Q, '*Qui est le propriétaire légitime d'un objet d'art volé?*', in Lalive, *ibid.*, p500); and Prott (1989), *ibid.*, p281. Prott has suggested that, "*Since rigid application of the lex rei sitae rule to cases concerning disputes about important cultural objects seems to lead almost inevitably to the evasion of protection (whether the protection is of owners' rights or community access), there is good reason, in this area at least, to look for some other appropriate connecting factor.*" (Prott (1989), *ibid.*, p280) In fact, Prott favours the creation of a new legal category (that is, cultural property as a category *sui generis*), and the formulation of a bespoke choice of law rule, rather than an exception to a more general property rule. (*ibid.*, pp306 and 314)



*argued that the now overgeneralized choice of law rules be broken down to a much larger number of narrower rules of more specific application.”*<sup>41</sup>

Two difficulties pertain to the operation of specific exceptions: the first concerns the definition and delimitation of an exception,<sup>42</sup> while the second relates to the connecting factor which is denoted by the exception.

When examining choice of law in delict, the SLC recognised that, “*a rule which applies the lex loci delicti without exception is inadequate to cope with all the varied and unpredictable circumstances in which tort and delict cases occur.*”<sup>43</sup> The same may be said, *mutatis mutandis*, of the *lex loci rei sitae* regarding choice of law in property. However, it would be impossible specifically to enumerate the ‘varied and unpredictable circumstances’ in which application of a general rule (whether *lex loci delicti*, or *lex loci rei sitae*) would prove inadequate.<sup>44</sup> Even if it were possible to articulate the potentially numerous exceptions, it is questionable, from the perspective of simplicity, whether it would be desirable so to do.<sup>45</sup>

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<sup>41</sup> Colwyn Williams (1959), *ibid.*, p159.

<sup>42</sup> Note the distinction drawn by Dr Leslie between an exception *within* a rule (e.g. section 12 of the Private International Law (Miscellaneous Provisions) Act 1995 { ‘the 1995 Act’ }), and an exception *to* a rule (e.g. section 13 of the 1995 Act). (Leslie, *ibid.*, p208)

<sup>43</sup> SLC (Delict), paragraph 4.92.

<sup>44</sup> “*The circumstances in which the application of the lex loci delicti produces results which ‘will begin to offend our common sense’ are difficult to define with accuracy.*” (SLC (Delict), paragraph 4.93) Nevertheless, “... it may at least be said that the policy reasons which support the application of the *lex loci delicti* become less weighty or disappear entirely when the occurrence and the parties are more closely connected with a country other than the locus delicti than they are with the locus delicti itself.” (*ibid.*)

<sup>45</sup> “... variations from simplicity [i.e. from a single rule] ought to be in common sense terms, enabling people to make their arrangements without fear of legal quixotics.” (Von Mehren & Trautman (1965), p292) Cf. Goode: “In an international instrument it is better to have rules that are tough and simple than those which seek to do equity through a myriad of finely tuned detail. It is the fear of complexity that may in the past have deterred transnational commercial lawyers from tackling the proprietary aspects of commercial dealings.” (Goode, R, ‘The Protection of Interests in Movables in Transnational Commercial Law’ (1998) Uniform Law Review 453, p463)

It is likely that specific exceptions to a general rule would, in turn, designate single-contact connecting factors, possibly supported by a further exception.<sup>46</sup> This is probably preferable to reference, within an exception, to open-ended rules of closest connection,<sup>47</sup> which would provide no guidance, save to exempt the property or transaction referred to, from the operational reach of a general rule.<sup>48</sup>

## **(ii) A general exception**

In its analysis of choice of law in delict, the SLC discovered that, “*Attempts to refine the [lex loci delicti rule] by the introduction of well-defined exceptions seem to ... run up against the paradoxical difficulty that no single specific exception is wide enough.*”<sup>49</sup> This echoes an earlier reflection by Professor Cheshire to the effect that, “*... the possible permutations of the questions that it [private international law] raises are so numerous that the diligent investigator can seldom rest content with the solution that he proposes.*”<sup>50</sup> Accordingly, in choice of law in delict, the pursuit of specific exceptions was jettisoned in favour of a recommendation for one general exception.<sup>51</sup> The obvious disadvantage of such a provision is the “*uncertainty inherent*

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<sup>46</sup> E.g. The formal validity of marriage is referred to the single-contact *lex loci celebrationis*, except where application of that law is unreasonable (e.g. in cases of belligerent occupation – *Taczanowska v. Taczanowski* [1957] P. 301), or impossible (*Penhas v. Tan Soo Eng* [1953] A.C. 304). (Crawford, E B, ‘*International Private Law in Scotland*’ (1998), p145, paragraph 9.22)

<sup>47</sup> i.e. Without the assistance of presumptions etc.

<sup>48</sup> E.g. Goods in transit.

<sup>49</sup> SLC (Delict), paragraph 4.115.

<sup>50</sup> Cheshire & North, Preface to 1<sup>st</sup> edition.

<sup>51</sup> “... a general exception whose operation would not be confined to any particular set of circumstances ... the only test would be that the occurrence and the parties had their closest and most real connection with a country other than the locus delicti ... it would not be practicable to define further the concept of ‘closest and most real connection’.” (SLC (Delict), paragraph 4.116, and paragraph 4.121) See now section 12 of the 1995 Act.



in a general exception.”<sup>52</sup> In contrast, however, the perceived benefits of generality have found expression within ‘proper law’ formulae.<sup>53</sup>

### (c) A proper law approach

In order to describe the concept of ‘*situs*’, Wolff employed what may be termed ‘proper law’ language, viz.: “... *the place where a thing is situate is the natural centre of rights over it.*”<sup>54</sup>

The objective of a proper law approach is to identify and apply the most appropriate law in each case, that is, the law of the country with which the particular transaction or occurrence, and the parties had, at the relevant time,<sup>55</sup> the closest and most real or significant connection.<sup>56</sup> It has already been suggested that the ascertainment of a ‘proper law’ necessitates a *qualitative*, rather than a purely *quantitative* appraisal of the facts and circumstances.<sup>57</sup> As Professor Lando explained in the context of choice

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<sup>52</sup> SLC (Delict), paragraph 4.121.

<sup>53</sup> In the context of choice of law in contract, Lando advised that, “A *via media* between the inflexible rules ... and the policy directed methods ... is supplied by the centre of gravity method.” (Lando, *ibid.*, p81)

<sup>54</sup> Wolff, M, ‘*Private International Law*’ (1950), p512, and at p507 as regards immoveable property, viz.: “*Immoveables are part of the country and so eternally and closely connected with it that all rights over them have there their natural centre of gravity.*” Cf. Zaphiriou’s comment that “*The centre of gravity of proprietary rights is the situation of the chattel.*” (*ibid.*, p216); and Von Mehren & Trautman’s suggestion that, “*Another device for avoiding the rigidity of the single-contact approach is to take a look at all significant contacts and to attempt to ascertain the center (sic) of gravity, or primary focus, of the transaction; when a number of contacts are concentrated in a single jurisdiction, it may be that the aggregation of contacts indicates that this jurisdiction’s law is more appropriate than the law indicated by any one single contact point.*” (*ibid.*, p168) Similarly, Baxter considered the ‘centre of gravity’ to be the place where rights and obligations have ‘functional effect’. (1964, *ibid.*, p16)

<sup>55</sup> The *tempus inspiciendum* must be expressed or implied within each choice of law ‘rule’.

<sup>56</sup> Cf. SLC (Delict), paragraph 4.140, and paragraph 4.130: “*Flexibility is the great attraction of a simple choice of law rule which would apply the law which had the ‘most significant connection with the chain of acts and consequences’.*” Dr Morris had earlier remarked that, “*To those who hanker after certainty in their rules of law, this may seem like taking refuge behind a verbal formula in order to avoid the necessity of following precedent.*” (Morris, J H C, ‘*The Proper Law of a Tort*’ (1951) 64 Harv. Law Rev. 881, 882) Note, however, the belief that the Scots lawyer’s predilection is generally “*for principle rather than for precedent.*” (*Stewart v. London, Midland and Scottish Railway Company* 1943 S.C. (HL) 19, *per* Lord Macmillan, at p39)

<sup>57</sup> Chapter One, *supra* – ‘Choice of Law Methodology’.

of law in contract, “... *the proper law should not be ascertained by counting but by weighing the connecting factors.*”<sup>58</sup>

In the same manner that exceptions to a general rule may be formulated in two different ways, so too a proper law approach has more than one manifestation.

### (i) A ‘bare’ proper law

A proper law approach may be described as ‘bare’ if the choice of law ‘rule’ does no more than stipulate that the law of closest and most real or significant connection should apply.<sup>59</sup> Although a bare proper law approach would avoid problems of definition (*e.g.* of *situs*),<sup>60</sup> it must be questioned whether such a ‘rule’ would, in fact, constitute any rule at all. Whilst it may be easily prescribed that the law of closest connection should apply, the resulting question is: “*How is the closest and most real connection to be identified?*”<sup>61</sup> A provision which narrates merely the intended result, without guidance or direction as to how that result should be achieved, is nothing more than a precatory declaration.<sup>62</sup> In choice of law in delict, the SLC concluded that, “... *the attractions of a bare proper law rule are purchased at a high price. The*

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<sup>58</sup> Lando, *ibid.*, p81. Cf. Cheshire & North, *ibid.*, at p684: “*The points of contact may be evenly spread amongst two or more countries ... It is still, however, possible to identify the country with which the obligation has the closest and most real connection by attaching weight to individual points of contact.*”

<sup>59</sup> This is one of the ‘centre of gravity’ variants described by Professor Lando: “... *one [variant] will rely always on the constellation of the particular connecting factors of the contract to determine its centre individually. No presumptions are admitted.*” (Lando, *ibid.*, p81) Cf. Cheshire & North, *ibid.*, p684: “*The closest and most real connection is identified in the light of the whole facts and circumstances, without the use of sub-rules or the aid of presumptions.*” One particular manifestation of the bare proper law approach was the objectively-ascertained proper law of contract (*e.g.* *The Assunzione* [1954] P. 150).

<sup>60</sup> “*The advantage ... is that it does not place reliance on a single point of contact or series of single points of contact, none of which is on its own satisfactory as the choice of law rule ... it avoids definitional problems.*” (Cheshire & North, *ibid.*, p684) Note, however, that definitional problems emanating from the doctrine of *renvoi* would not be avoided (*i.e.* as to *depth* of the applicable law).

<sup>61</sup> Cheshire & North, *ibid.*, p682.

<sup>62</sup> Cf. SLC (Delict), paragraphs 4.132 and 4.133: “... *a pure proper law rule, without elaboration, would be unacceptably uncertain and unsuitable for statutory reform.*”



*great disadvantage of the proper law approach on its own is its uncertainty.*"<sup>63</sup> This disadvantage would translate into choice of law rules concerning other substantive areas, including property law. Accordingly, steps should be taken to fortify the proper law approach by the use of presumptions.<sup>64</sup>

## **(ii) A 'presumptive' proper law**

To protect the flexible benefits of a proper law approach, but equally, to curtail the uncertainty inherent in a 'bare' approach, a 'presumptive' proper law approach may be adopted.<sup>65</sup> As with exceptions to a specific rule,<sup>66</sup> presumptions may relate either to *specific* circumstances or events,<sup>67</sup> or, alternatively, a *general* presumption may be framed.<sup>68</sup> The purpose of presumptions is to attribute significance, in advance, to particular factual and/or legal connections, and to relieve<sup>69</sup> individual courts of the

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<sup>63</sup> SLC – Delict (1984), paragraph 4.131. Cf. Gow's criticism of the proper law of tort, viz.: "*With respect it is submitted that such reasoning would land in absurdity ... What then will be the proper law of a tort committed in Eire by a Frenchman against a Portuguese and the action against the wrongdoer is raised in the court of a country other than Eire?*" (Gow, J J, 'Delict and Private International Law' (1949) 65 L.Q.R. 313, at p316)

<sup>64</sup> In the delictual context, the SLC perceived that this was "... *a more promising approach.*" (SLC (Delict), paragraph 4.135) Thus, "... *the country with which the occurrence and the parties had the closest and most real connection would, unless the contrary were shown, be presumed to be ...*" (SLC (Delict), paragraph 4.140) See now, of course, sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995. These sections do not, in fact, reflect a true proper law approach, but rather comprise a general rule, with displacement provision. The search for a new choice of law rule in delict necessarily involved presumptions to *identify* the *lex causae/lex loci delicti* (not so termed), from which an exception would be allowed (section 12).

<sup>65</sup> This is the second variant of the proper law approach suggested by Professor Lando (*ibid.*, p81) (E.g. Article 4 of the Rome Convention) Consider Leslie, *ibid.*, p208; and Lando, *ibid.*, at p82: "*Presumptions will perceptively reduce the uncertainty and lack of predictability which are likely to result if the centre of gravity or individualisation without the assistance of presumptions is made the basis of the choice of law.*" Note, however, the point expressed by the authors of Cheshire & North, that presumptions offer "*more flexibility than sub-rules, but correspondingly less certainty.*" (Cheshire & North, *ibid.*, p683) In drawing an analogy between the choice of law rules in contract, and in unjustified enrichment, it is interesting to note that the authors of Cheshire & North observed that, "*The identification of the proper law of the contract was far more predictable than might be thought from the flexible nature of the test. But in the meantime, until the case law has developed, it has to be admitted that there would be considerable uncertainty.*" (*ibid.*, p684)

<sup>66</sup> Paragraph (b), *supra*. (note 36 *et seq.*)

<sup>67</sup> E.g. Articles 4(2), (3) and (4) of the Rome Convention.

<sup>68</sup> E.g. The general presumption in Scottish and English international private law that the content of a foreign *lex causae* is the same as the domestic *lex fori*.

<sup>69</sup> Wholly, or partially, depending upon whether the presumption in question is irrebuttable, or rebuttable.

responsibility of making, in each individual case, a qualitative assessment of the facts and circumstances which have arisen. The purpose is to determine, in each instance, the state in which the (qualitative) preponderance of contacts lies,<sup>70</sup> thereby producing, it is hoped, at least within the conflict rules of one system – or, if a Convention-based rule, in more than one system, depending on the presence or absence of an authoritative Report, and availability of resort to a court of overriding authority – some degree of predictability.

It is submitted that, in the context of choice of law in property, a presumption in favour of the *lex situs* would be justifiable, not only from the point of view of substance, but also from the perspective of securing approval of any alternative rule. As Professor Hancock has advised, “*Many of today’s judges have been trained to regard the situs formula as a basic principle of Anglo-American conflict of laws. They will find it easier to join in an opinion rejecting that principle if the break with tradition has been softened by the use of a conceptual device that ... is itself a part of that tradition.*”<sup>71</sup>

The use of presumptions has provoked some criticism since, “*To enter upon the search with a presumption is only too often to set out upon a false trail. It may tend to divert attention from the necessity to consider every single pointer.*”<sup>72</sup> This criticism,

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<sup>70</sup> Cf. Leslie: “... designation of one of a number of connected legal systems as being that most closely connected will have, in some circumstances, to be rather arbitrary, To help overcome these problems, the ascertainment of the most closely connected system may be assisted by a list of relevant factors or by indications or rebuttable presumptions.” (Leslie, *ibid.*, p205/6)

<sup>71</sup> Hancock (1967), *ibid.*, p40.

<sup>72</sup> Lando, *ibid.*, p81, quoting, Cheshire & North, 9<sup>th</sup> edition, p216.



however, may be deflected by the fact that, in general, presumptive rules of choice of law are rebuttable.<sup>73</sup>

### **(iii) Rebuttal and displacement: setting the threshold**

Where a specific or general presumption is rebuttable, the obvious question is: at what height should the threshold for reversing or overturning the presumption be set?<sup>74</sup>

Article 4(5) of the Rome Convention provides, for example, that, “... *the presumptions in paragraphs 2, 3, and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.*”<sup>75</sup>

The same consideration affects the displacement of a general choice of law rule by means of specific exception(s),<sup>76</sup> (or even the displacement of a specific exception by

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<sup>73</sup> E.g. The *specific* presumptions contained in Article 4(2), (3), and (4) of the Rome Convention may be rebutted (or ‘disregarded’) by operation of Article 4(5). Consider *Definitely Maybe (Touring) Ltd v. Marek Lieberberg Konzertagentur GmbH* [2001] 2 Ll. Rep. 455, *per* Morison, J., at p458, and *Caledonia Subsea Ltd v. Micoperi Srl* 2001 S.L.T. 1186, *per* Lord Hamilton at p1192, for discussion to the effect that ‘disregarded’ equates to ‘rebutted’. Cf. *Cheshire & North, ibid.*, at p683: “*There would be one paragraph setting out the closest and most real connection test, a second paragraph setting out the presumptions, and a third paragraph providing that the presumptions shall be disregarded if it appears from the circumstances that the closest and most real connection is with another country.*” Similarly, the *general* presumption that the content of a foreign *lex causae* is the same as the domestic *lex fori* may be rebutted by averment and proof of the actual content of the foreign law. (Crawford, *ibid.*, p407, paragraph 18.30; and *Bumper Development Corp. Ltd v. Commissioner of Police of the Metropolis* [1991] 4 All E.R. 638)

<sup>74</sup> “... *how easy should it be to rebut the presumptions? ... there would be little point in providing presumptions if they were easily rebutted and this would also reduce the certainty of the proper law scheme as a whole.*” (SLC (Delict), paragraph 4.141) Cf. Leslie, *ibid.*, p208; and *Caledonia Subsea Ltd v. Micoperi Srl* 2001 S.L.T. 1186.

<sup>75</sup> Emphasis added.

<sup>76</sup> Consider the advice of the SLC regarding choice of law in delict: “... *a general exception which was not confined in its operation would render our choice of law rule as a whole unacceptably uncertain ... a threshold or trigger requirement should be built into any general exception, which would serve to prevent departure from the lex loci delicti in the absence of strong grounds for doing so.*” (SLC (Delict), paragraph 1.222)

a more general one).<sup>77</sup> Section 12 of the Private International Law (Miscellaneous Provisions) Act 1995 provides that: -

*“If it appears, in all the circumstances, from a comparison of –*

*(a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule;<sup>78</sup>*

*and*

*(b) the significance of any factors connecting the tort or delict with another country,*

*that it is substantially more appropriate for the applicable law ... to be the law of the other country, the general rule is displaced and the applicable law ... is the law of that other country.”<sup>79</sup>*

As regards choice of law in property, the threshold for rebuttal of a presumption in favour of the *lex situs* could be set at various heights. First, at the lowest and most lenient level, rebuttal could be dependent upon the application of a non-*situs* law being ‘more appropriate’ (i.e. requiring a direct comparison between the appropriateness of applying the *lex situs* and the non-*situs* law). Secondly, the test could stipulate that application of the non-*situs* law must be ‘*substantially more*

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<sup>77</sup> “... the general exception would then apply as a residual or ‘safety-net’ provision.” In choice of law in delict, the SLC rejected the general rule/specific exception/general exception formulation believing that such an amalgam would be, “*undesirably complex*”. (SLC (Delict), paragraph 4.124) Interestingly, this is the formulation adopted in Article 4 of the Rome Convention. It may be surmised that a ‘complex’ form was required in the *international* instrument, so as to satisfy the ‘minimum requirements’ of as many states as possible, whereas such compromise was not required in the purely *domestic* frame of the proposed legislation to deal with choice of law in delict.

<sup>78</sup> “... the applicable law is the law of the country in which the events constituting the tort or delict in question occur.” (Section 11(1) of the 1995 Act)

<sup>79</sup> Section 12 of the 1995 Act. (Emphasis added) Cf. SLC (Delict), paragraph 4.94: the SLC recommended that displacement of a strict, territorial rule would be warranted where parties are in an ‘*insulated environment*’, that is, “... where the occurrence and the parties are such that they do not interact with their geographical location.” (*ibid.*)



*appropriate*' (i.e. imposing a more onerous burden of proof on the party seeking to reverse the presumption). Thirdly, an even stronger preference for the *lex situs* could be sustained through rebuttal being dependent upon the transaction, or occurrence, and the parties having only an *insignificant connection with the situs and a substantial connection with another country*.<sup>80</sup> The third test would necessitate not merely a direct comparison between the competing laws, but would require, in addition, a qualitative appraisal of the connection with the *lex situs* (i.e. before the general rule may be displaced, there requires to be an *insignificant* connection with the *prima facie* applicable law).<sup>81</sup> It could be argued that the third test is, in fact, subsumed within the first or second tests. Arguably, the third formulation is incomplete: the transaction *etc.* may have an insignificant connection with the *situs*, but have *no substantial connection* with any other country. It may be suggested that *unless* there is a substantial connection with another country, the *lex situs*, *however insignificantly connected*, ought to apply. Clearly, the fixing of a threshold represents a policy decision.

### **The 'proper law' precedent**

For the purposes of the current exercise, it is interesting to note Professor Lando's remark that, "*Analogous reasoning is relevant in the field of private international law.*"<sup>82</sup> In 1949, Dr Morris argued that liability for tort should be governed by 'the proper law of the tort', a submission which, even the author himself conceded,

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<sup>80</sup> This is a test of 'cumulative' comparison. Cf. SLC (Delict), paragraph 4.123. *Contra* 1990 Report, p12, paragraph 3.9.

<sup>81</sup> Cf. 1990 Report, p13, paragraph 3.11. This would prevent displacement of the *prima facie* applicable law where there is "... *some significant connection with this law even though there is a much stronger connection with another law.*" (*ibid.*) In delict, this realisation prompted a lowering of the threshold.

<sup>82</sup> Lando, *ibid.*, p81. (i.e. lessons can be gleaned between areas of the subject.)

amounted to “*heterodox*”.<sup>83</sup> Morris’ contention relied heavily upon the successful operation of the proper law doctrine in the field of contract, endorsing as he did Nussbaum’s description of the “*elaboration*”<sup>84</sup> of the proper law doctrine [in contract] as “... *among the outstanding contributions of English learning to the general theory of private international law.*”<sup>85</sup>

Among the recognised merits of a proper law approach are first, that “... *the rule enables proper weight to be attributed in a particular case to factors of constantly varying significance*”,<sup>86</sup> and secondly, that it facilitates isolation of *particular* problems.<sup>87</sup> It is not suggested that the task of ascertaining the proper law would be a simple one, but as Morris observed in the delictual context, “*If we adopt the proper law of the tort, we can at least choose the law which ... seems to have the most significant connection with the chain of acts and consequences in the particular situation before us. The task might not be easy, but at least we should be asking the right questions.*”<sup>88</sup>

Whilst the ‘bare’ proper law approach has been abandoned in contract and delict, in favour of more tightly-framed ‘presumptive’ or ‘*quasi-presumptive*’ provisions,<sup>89</sup> the

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<sup>83</sup> Morris, J H C, ‘*Torts in the Conflict of Laws*’ (1949) 12 M.L.R. 248, 250, and 252.

<sup>84</sup> Morris (1951), *ibid.*, p881.

<sup>85</sup> Nussbaum, ‘*Principles of Private International Law*’ (1943), p168 (*per* Morris (1951), *ibid.*, p881).

<sup>86</sup> Morris (1951), *ibid.*, p882.

<sup>87</sup> Morris argued (with reference to choice of law in tort) that, “*A proper law approach, intelligently applied, would furnish a much-needed flexibility ... we ought to have a conflict rule broad and flexible enough to take care of exceptional situations as well as the more normal ones, or else we must formulate an entirely new rule to cope with the exceptional situations. Otherwise the results will begin to offend our common sense.*” (1951, *ibid.*, p884/5) Morris conceded that, in the general tort case, “... *there would be no need to look beyond the law of the place of wrong.*” (*ibid.*, p884, and also at p894) It is submitted that, in a wide range of property cases, the same would likely be true of the *lex situs*.

<sup>88</sup> Morris (1951), *ibid.*, p888.

<sup>89</sup> Articles 3 and 4 of the Rome Convention, and sections 11 and 12 of the 1995 Act.



‘proper law’ trait<sup>90</sup> still pervades the legislative measures in these fields. It is now intended to apply the analogy employed by Morris,<sup>91</sup> and thereby to extend the proper law approach to choice of law in property.

### **Beyond the ineluctable – framing a new ‘lex proprietatis’**

From what has previously been outlined, two basic models could be proffered: first, a *lex situs* rule, coupled with a ‘proper law’ exception (*i.e.* that, where appropriate, a law of closer and more real, or significant, connection should displace the *situs* rule),<sup>92</sup> and, secondly, a general rule that the applicable law should be the law of the country with which the transaction and the parties had, at the relevant time, the closest and most real connection, coupled with a presumption in favour of the *lex situs*.<sup>93</sup>

While the first model would comprise a *particular* rule softened by *general* exception, the second model would start from a premise of generality, tending towards refinement, in particular cases, by means of rebuttable presumptions.<sup>94</sup>

A further choice-of-law formulation, which is herein proposed, retains the fundamental three-fold division in respect of immoveable property, corporeal moveable property and incorporeal moveable property. Within that division, however,

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<sup>90</sup> Paragraph (c), *supra*.

<sup>91</sup> Also by Baxter, viz.: “A ‘lex proprietatis’ would be similar (in certain respects) to the proper law of a contract ... if the selection is made on the basis of the system most closely associated with the contract and the real issue before the court.” (1964, *ibid.*, p16)

<sup>92</sup> Cf. Model 1, SLC (Delict), paragraph 4.144. The 1990 Report indicated that, in delict, Model 1 (a *lex loci delicti* rule, with proper law [the law of the place of closest and most real connection] exception) was preferred by “the clear majority of consultants”, as well as by the Law Commission and the SLC. (1990 Report, pp3 and 10, paragraphs 1.8 and 3.2)

<sup>93</sup> Cf. Model 2, SLC (Delict), paragraph 4.144/5.

<sup>94</sup> “[A flexible solution] is very much the mirror-image of the sub-rules: it provides the maximum flexibility, so necessary in a rapidly developing area of law, and correspondingly the maximum uncertainty.” (Cheshire & North, pp680, 683) Cf. The two models proposed in the context of delict: “The two options have the same objective: that is, the selection in an acceptably high proportion of cases of the system of law which it is most appropriate to apply. In some sense each option is the converse of the other.” (SLC (Delict), paragraph 4.145)



further sub-divisions have been utilised,<sup>95</sup> specifically to take account of the special characteristics which distinguish *static* conflicts from *dynamic* conflicts, *original-party* disputes from *remote-party* disputes, and cases of *voluntary* dispossession from those of *involuntary* dispossession.<sup>96</sup>

Whilst the over-arching aim of the proposed scheme is to introduce greater flexibility, so as to cater for the ‘exceptional’<sup>97</sup> case, it is recognised that the legitimate interests of the *lex situs* must be protected. Under the proposed scheme, it is intended to protect the legitimate interests of the *lex situs*,<sup>98</sup> and of third parties acting according to, or in reliance upon, the *lex loci rei sitae*, by means of the mechanism of mandatory rules. This mechanism (whereby it is sought to safeguard certain rules of a legal system other than the primary *lex causae*<sup>99</sup>) has proved successful, particularly in the context

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<sup>95</sup> Consider Baxter (1964), *ibid.*, at p16: “Determination of the *lex proprietatis* means the establishment of sub-categories – and the introduction of ‘specialization’.” Recall also Professor Cheshire’s remark that, “It is generally assumed both by judges and jurists that the questions engendered by a transfer of moveables are determinable by one single law ... The assumption, however, is untenable. It represents an over-simplification of the problem, since it ignores the different types of question that may arise.” (Cheshire, G C, ‘Private International Law’ (1947), 3<sup>rd</sup> edition, p558) Cf. the pre-statutory reform position in tort, when Morris recognised that, “The questions that may arise ... are numerous enough to suggest doubts as to whether the application of a single formula ... can possibly produce socially adequate results.” (Morris (1951), *ibid.*, p892) Consider also Schott & Rembar’s assertion that, “Particular issues are to be crucial for choice of law.” (Schott & Rembar, ‘Choice of Law for Land Transactions’ (1938) 38 Colombia L. Rev. 1049, 1054)

<sup>96</sup> Cf. Garro, A M, ‘The Recovery of Stolen Art Objects from Bona Fide Purchasers’, in Lalive, *ibid.*, at p514: “Alternative approaches to the *situs* rule may consider its [i.e. the *situs* rule’s] application only if the owner consented to the removal of the chattel to the jurisdiction where it was sold, so that the wrongdoer may be precluded from choosing a jurisdiction with a generous bona fide purchaser rule.”

<sup>97</sup> See note 39, *supra*.

<sup>98</sup> Which are clear, at least, in respect of immoveables (i.e. integrity of title records, alienability and land use), but are less clear in respect of moveables. As regards the latter, legitimate interests could include the question of alienability of certain objects (e.g. state-designated cultural property – 1970 UNESCO Convention, Articles 1, 4 and 7(b)(ii)). It could be argued that a state’s policy on *vitium reale* falls within the ambit of alienability.

<sup>99</sup> Cf. G&L Report, at p26: “The principle that national courts can give effect under certain conditions to mandatory provisions other than those applicable ... by virtue of the choice of the parties or by virtue of a subsidiary connecting factor, has been recognised for several years.” Lipstein had earlier remarked that, “It may be argued that, within certain limits, foreign rules which claim to be peremptorily applicable and are thus rules of immediate application in the country where they have been introduced should also be respected elsewhere, even if they do not form part of the proper law.” (Lipstein, K, ‘Inherent Limitations in Statutes and the Conflict of Laws’ (1977) 26 I.C.L.Q. 884, 898)



of choice of law in contract.<sup>100</sup> The device has also been employed in the context of the law of trusts,<sup>101</sup> and of agency.<sup>102</sup> Mandatory rules may be conceived of as a means by which to curtail party autonomy, and they constitute, in effect, one facet of public policy.<sup>103</sup> While the operation of mandatory rules is not intended to be far-reaching (Baade, for example, has suggested that, “*It seems likely that the ‘special connection’ principle will become accepted only in areas where the forum too adheres ‘in concreto’ to the ‘internationally recognised’ objectives of a foreign mandatory rule claiming applicability outside of the lex causae*”),<sup>104</sup> the characterisation of rules *qua* mandatory must be performed by the very law whose rules are subject to scrutiny. This calls for an ‘enlightened’ (in the sense of an interest, or functional, analysis) approach, a technique which is ‘foreign’ to jurisdiction-selecting states.

Historically, the interests of the *situs*, and of third parties acting in reliance upon the *lex loci rei sitae*, have been protected by a virtually universal application of the *lex situs*. It is recognised that the *lex situs* will, in many cases (indeed, possibly in *most* cases; but *not* in *all*) constitute the appropriate connecting factor. However, to cater for the exceptional case, in a manner which the present rules do not permit, it is recommended that, as regards the transfer of immoveable property, there should be

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<sup>100</sup> Articles 3(3) and 7 of the Rome Convention. Noting, of course, that the United Kingdom has exercised the right, reserved under Article 22, not to apply the provisions of Article 7(1), which protects the mandatory rules of the law of another country (*i.e.* other than that of the applicable law) with which the situation has a close situation.

<sup>101</sup> Article 16 of the (1985) Hague Convention on the Law Applicable to Trusts and on their Recognition (implemented in the United Kingdom by virtue of the Recognition of Trusts Act 1987).

<sup>102</sup> Article 16 of the (1978) Hague Convention on the Law Applicable to Agency (to which the United Kingdom is not a party).

<sup>103</sup> Consider Baade’s assertion that mandatory rules “... [enlarge] the public policy exception so as to include mandatory provisions of foreign law in addition to those of the forum.” (1991, *ibid.*, p33)

<sup>104</sup> Baade, *ibid.*, p33. Cf. Briggs (1948), *ibid.*, at p1179: “There is little doubt that an enlightened policy of the *situs* would dictate that it often give effect to foreign transactions affecting local land ...

formulated a rebuttable presumption in favour of the *lex situs*, coupled, in cases of rebuttal, with a provision which safeguards the mandatory rules of the *lex situs*.<sup>105</sup> As regards the transfer of corporeal moveable property, a choice-of-law division is introduced, in this thesis, so as separately to deal with cases concerning only the parties to a particular transfer of property, and those cases which affect, in addition, third parties. Moreover, separate treatment has been accorded to those cases where an owner of property has been *voluntarily* dispossessed thereof, and those where he/she has been *involuntarily* dispossessed. Finally, as regards the assignation of incorporeal moveable property, a choice-of-law provision is introduced which takes direct account of the particular parties who are claiming entitlement to the right in question, or who are engaged in dispute in respect thereof.

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*Ordinarily, at least, a property settlement entered in a divorce decree by the domiciliary court would seem to be one of the clearest kinds of such cases."*

<sup>105</sup> See Chapter Fourteen, *infra* – '*The Lex Proprietatis*'. Cf. As regards conveyancing and formal validity, Article 9(6) of the Rome Convention.



## Chapter Fourteen

### The ‘*Lex Proprietatis*’

In this final Chapter, two models are presented for consideration: Model 1, a draft Convention on the Law Applicable to the Transfer of Property, and Model 2, The Transfer of Property (Applicable Law) Bill. Model 1 is intended to be a draft *international* instrument (*i.e.* potentially open to acceptance by any number of contracting states), whereas Model 2, the alternative, more moderate proposal, is intended to constitute a purely *internal* (*i.e.* Scottish and/or English) measure.<sup>1</sup> The drafts are presented merely with a view to ‘opening discussions’ concerning possible legislative intervention in this area.

While the author’s preference would be for continued judicial refinement of choice of law rules in property (this being one of the few areas of choice of law which remains untouched by parliamentary draftsmen),<sup>2</sup> in view of apparent judicial reluctance (demonstrated in *Winkworth v. Christie, Manson & Woods Ltd*,<sup>3</sup> and *Glencore International A.G. v. Metro Trading International Inc.*<sup>4</sup>), to broaden or supplement the existing exceptions to the *lex situs* rule, it is submitted that legislative intervention is now the only feasible means by which to temper the *situs* rule.<sup>5</sup>

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<sup>1</sup> Cf. The relationship between Part III of the Private International Law (Miscellaneous Provisions) Act 1995, and ‘Rome II’ (currently under negotiation).

<sup>2</sup> Dr Crawford has remarked that, “*This is both refreshing and alarming.*” (Crawford, E B, ‘*International Private Law in Scotland*’ (1998), p315, paragraph 14.15)

<sup>3</sup> [1980] 1 Ch. 496.

<sup>4</sup> [2001] 1 Lloyd’s Rep. 284.

<sup>5</sup> Cf. North, P M, ‘*Torts in the Dismal Swamp: Choice of Law Revisited*’ (In ‘*Essays in Private International Law*’) (1993), p88; and Walker, D M, ‘*A Legal History of Scotland*’, Volume VI (2001), p618.

In considering the Models which follow, the reader is asked to assess what is the rightful domain of the *lex situs*, and to consider the range of application which cannot, and should not, rightly be denied the *lex situs*. Equally, however, the reader is respectfully invited to desist from condoning the mechanical application of the *situs* rule; to recognise that in some matters the appropriateness of applying the *lex situs* is outweighed by the appropriateness of applying some other law.

In the opening chapter of this thesis, the author beseeched the reader's indulgence by asking that such doubts as may have existed be cast to one side. In bidding now the reader to look beyond the ineluctable, the epilogue is as expressed by the Bard, viz.:

“... *Our doubts are traitors,*  
*And make us lose the good we oft might win*  
*By fearing to attempt.*”<sup>6</sup>

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<sup>6</sup> William Shakespeare, (1564) – (1616), ‘*Measure for Measure*’, i, 4, [5].



## Model 1

### Draft Convention on the Law Applicable to the Transfer of Property

#### Arrangement of Paragraphs

#### Part I – General

1. Scope
2. Characterisation of issues
3. Applicable law
4. Application to events occurring in the forum

#### Part II – Characterisation

5. Characterisation of property

#### Part III – Choice of applicable law: immoveable property

6. Transfer of immoveable property – general rule and presumption
7. Transfer of immoveable property – displacement rule
8. Passing of risk in respect of immoveable property – general rule and presumption
9. Passing of risk in respect of immoveable property – displacement rule
10. Mandatory rules of the *lex situs*

#### Part IV – Choice of applicable law: corporeal moveable property

11. Proprietary rights
12. Original parties – dynamic conflicts – party autonomy
13. Original parties – dynamic conflicts – applicable law in absence of party choice – general rule and presumptions
14. Original parties – dynamic conflicts – displacement rule
15. Original parties – static conflicts – general rule and presumptions
16. Original parties – static conflicts – displacement rule
17. Competing transferees – applicable law
18. Definition of remote parties
19. Mandatory rule protection of remote parties
20. Remote parties – voluntary dispossession
21. Remote parties – involuntary dispossession
22. Wrongful removal of corporeal moveable property
23. Operation of mandatory rules of *lex loci originis* – or –  
Return of corporeal moveable property to the *locus originis*
24. Wrongful removal – applicable law following return to the *locus originis* – general rule

- 25. Wrongful removal – applicable law following return to the *locus originis* – displacement rule
- 26. Expenses of returning corporeal moveable property to the *locus originis* etc.

### **Part V – Choice of applicable law: incorporeal moveable property**

- 27. Original parties – creation of a right (debtor and creditor) – general rule
- 28. Original parties – creation of a right (debtor and creditor) – general rule – ascertainment of the relevant date
- 29. Original parties – creation of a right (debtor and creditor) – displacement rule
- 30. Original parties – assignation of a right (assignor and assignee) – assignability
- 31. Voluntary assignation of a right – party autonomy
- 32. Voluntary assignation of a right – applicable law in absence of party choice
- 33. Involuntary assignation of a right – general rule
- 34. Remote parties – enforcement of the assignation – mutual rights and obligations of debtor and assignee – applicable law
- 35. Remote parties – competing assignees – applicable law

### **Part VI – General**

- 36. *Renvoi*
- 37. Public policy
- 38. Interpretation



## Part I – General

1. The rules in this Part apply for the purpose of choosing the law ('the applicable law') to be used for determining issues relating to property.<sup>1</sup>
2. The characterisation for the purposes of international private law of issues arising in a claim as issues relating to property is a matter for the courts of the forum.<sup>2</sup>
3. The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether a claim in property has arisen.<sup>3</sup>
4. For the avoidance of doubt the rules stated herein apply in relation to events occurring in the forum as they apply in relation to events occurring in any other country.<sup>4</sup>

## Part II – Characterisation of property<sup>5</sup>

5. (1) The characterisation for the purposes of international private law of property as immovable or moveable property, or corporeal or incorporeal property, is a matter<sup>6</sup> for the courts of the forum applying the law<sup>7</sup> of the country where the property is situated at the date of commencement of the proceedings.<sup>8</sup>

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<sup>1</sup> Cf. section 9(1) of the Private International Law (Miscellaneous Provisions) Act 1995 ('the 1995 Act').

<sup>2</sup> This includes the question whether, say, the passing of risk, or the need for delivery, is a contractual or a proprietary matter. Cf. section 9(2), 1995 Act.

<sup>3</sup> Cf. section 9(4) of the 1995 Act; and in contract, compare the question raised in *Boss Group Ltd. v. Boss France SA* [1996] 4 All E.R. 970. Paragraph 3 above links the provisions of paragraphs 1 and 2. Cf. Current Law Statutes 1995, Volume 3, p42-18. Once the forum has characterised the issue as relating to property (*per* paragraph 2), the applicable law alone will determine whether a claim in property has arisen, as well as other substantive issues.

<sup>4</sup> Cf. section 9(6) of the 1995 Act. If this were not the case, then technically '*possession vaut titre*' States could become the destination for day-trip transactions aimed at laundering stolen goods. It is submitted, however, that if a '*possession vaut titre*' forum is also the *situs* of the object, it should, in appropriate cases (*q.v.*) be able to displace the application of its own law (*qua lex situs*, but not *qua lex fori*).

<sup>5</sup> Paragraph 5(1) merely articulates the process which operates at present (albeit subconsciously).

<sup>6</sup> *i.e.* Characterisation of property, *not* characterisation of issues arising in a claim as issues relating to property (for which, see paragraph 2, *supra*).

<sup>7</sup> See paragraph 36, *infra*. *Renvoi* is essential here, otherwise there would be a possibility that the putative *situs* would not constitute the actual *situs*. Characterisation by the forum of property *qua* immovable *etc.* is, in effect, only a *provisional* characterisation, subject to confirmation by the law (including the conflict rules) of the putative *situs*.

<sup>8</sup> This presents a *conflit mobile*. Cf. section 46(3) of the Family Law Act 1986. The condition as to time ('at the date of commencement of the proceedings') qualifies the words '*country where the property is situated*', not the word '*law*'. In practice, the *situs* at the time of litigation is the only *situs* which can reasonably or practically apply for the purposes of characterisation. In the event of a change in the substantive *lex situs* between the date of the relevant act (*e.g.* the transfer of property), and the date of commencement of the proceedings, and in the event of a change in characterisation of the nature of the property as a result thereof, the question whether or not that change should carry retrospective effect, is one for the internal *lex situs* (*i.e.* the *situs* at the date of commencement of the proceedings).



(2) For the purposes of this Part, property shall be deemed to be situated as follows: -

- (a) Property which is, according to its attributes,<sup>9</sup> immovable and corporeal, at the place where it is physically situated;
- (b) Property which is, according to its attributes, immovable and incorporeal, at the place where the right may be enforced at the date of commencement of the proceedings;<sup>10</sup>
- (c) Property which is, according to its attributes, moveable and corporeal,<sup>11</sup> and, at the date of commencement of the proceedings: -
  - (i) has an ascertainable physical location, at the place where it is physically situated; or
  - (ii) has an unascertainable physical location,<sup>12</sup> at the place where it most recently held an ascertainable physical location;<sup>13</sup> save that
  - (iii) maritime vessels, aircraft, and rolling stock shall be deemed to be situated at their place of registration;<sup>14</sup>
- (d) Property which is, according to its attributes, moveable and incorporeal, and: -
  - (i) in respect of which a register of ownership is maintained, at the place where the register is kept,<sup>15</sup> and in cases where more than one register is kept, at the place where the principal register is kept; or failing which,

<sup>9</sup> This wording underlines the importance of the 'factual', as opposed to the 'legal', *situs*. See Chapter Four, *supra* – 'Defining the *Situs*'.

<sup>10</sup> *E.g.* A servitude right of access over a plot of ground would be enforceable at the place where the plot is physically situated.

<sup>11</sup> Including 'displaced' constructive fixtures (*e.g.* the key, or title deeds, to a house in state X, which is/are taken into state Y, is/are situated in state Y). This Part (*i.e.* concerning ascription of *situs*) does *not* employ the concept of 'fictional' or 'legal' *situs*, save in respect of paragraph 5(2)(c)(iii) (maritime vessels, aircraft and rolling stock).

<sup>12</sup> *E.g.* Goods in transit.

<sup>13</sup> *i.e.* The *lex loci ultimi sitae* (which will generally coincide with the *lex loci expeditionis*, that is, the place of dispatch). For the reasons cited in Chapter Eight, *supra*, the *lex loci ultimi sitae* is preferred to the place of intended destination (*cf.* revival of domicile of origin rule). It should be borne in mind that this paragraph refers only to the ascription of a *situs*, and not to the identification of the applicable law. Separately, whilst it would be possible specifically to define the fictional *situs* of a unit of *aggregate* moveables, it is submitted that it is less strained to attribute to an object which comprises part of an aggregate unit, a factual *situs* in accordance with paragraph (c) (i) or (ii), as is appropriate. It is suggested that it is preferable to take account of the special, aggregate nature of such an object through the mechanism of choice of law rules, rather than through the definition of *situs*.

<sup>14</sup> It may be anticipated that, *ex sua natura*, assets such as these will cross interstate and international boundaries more frequently than will other types of property.

<sup>15</sup> *Cf.* Brussels Convention, Article 16(3) and Regulation 44/2001, Article 22(3); *Standard Chartered Bank Ltd v. I.R.C.* [1978] 1 W.L.R. 1160; and *Macmillan Inc v. Bishopsgate Investment Trust plc (No 3)* [1996] 1 W.L.R. 387.



- (ii) is represented by documentation, in the country in accordance with whose law the documentation has been drawn (the '*lex cartae*'); or
- (iii) is not of a type referred to in paragraph 5(2)(d)(i) or (ii), at any place where the party against whom the right is enforceable ('the debtor') has, or is likely to have, assets in respect of which the right may be satisfied.<sup>16</sup>

### **Part III – Choice of applicable law: immoveable property**

#### **Transfer of immoveable property**

6. (1) Any question pertaining to the creation (including alienability), acquisition,<sup>17</sup> use, disposal or transfer<sup>18</sup> (hereinafter 'the transfer') of an interest in immoveable property, and its effect on the proprietary rights of any person claiming, by any law, to be interested therein, shall be governed by the law of the country with which the transfer is most closely connected.
- (2) It shall be presumed that the transfer of an interest under paragraph 6(1) is most closely connected with the law of the country where the immoveable property is situated<sup>19</sup> (hereinafter 'the relevant *lex situs*').
7. (1) Paragraph 6(2) shall be disregarded if it appears, in all the circumstances, from a comparison of: -
  - (a) the significance of the facts which connect the transfer with the relevant *lex situs*; and
  - (b) the significance of any factors which connect the transfer with another country ('the non-*situs* country')

that it is more appropriate<sup>20</sup> for the applicable law for determining the issues arising in the case, or any of those issues,<sup>21</sup> to be the law of the non-*situs*

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<sup>16</sup> This demonstrates a purposive, 'non-exclusive' approach to the definition of *situs*. See Chapter Eleven, *supra* – 'The Assignment of Incorporeal Moveable Property'.

<sup>17</sup> Including acquisition by means of prescription.

<sup>18</sup> *E.g.* By gift.

<sup>19</sup> Or, properly, the law of the country where the immoveable property was situated at the time when the interest is alleged to have been transferred. It is not necessary, however, to articulate this qualification since the *situs* of such property, *ex sua natura*, cannot change, save in cases of adjustment of territorial boundaries.

<sup>20</sup> There is no need for a higher threshold (*e.g.* '*substantially* more appropriate'), since paragraph 10 will safeguard the interests of the relevant *lex situs*). Cf. paragraphs 9, 14 and 19, *infra*.

<sup>21</sup> Inclusion of the phrase '*or any of those issues*' incorporates, in effect, the doctrine of *dépeçage*. According to Dr Leslie, "*Dépeçage, properly so called, occurs where the connecting factor in a single choice of law rule indicates different legal systems as applicable to different aspects of the same transaction.*" (Leslie, *ibid.*, p205) As the SLC asked in relation to delict, "... the question arises whether our reformed choice of law rule ... should select a single system of law which would apply to all the substantive issues ... or whether the individual ... issues in the case should be identified and the choice of law rule ... applied separately to each." (SLC (Delict), 1984, paragraph 6.73) More



country,<sup>22</sup> and in such cases, the applicable law shall be the law of the non-*situs* country.<sup>23</sup>

(2) The factors that may be taken into account as connecting a transfer with a country for the purposes of paragraph 7(1) include, in particular, factors relating to the parties;<sup>24</sup> any pre-existing relationship, or course of dealings, between the parties;<sup>25</sup> and any contractual or other obligation in implementation of which the transfer was effected or the issue arose.

[OR]

[7<sup>A</sup>. Notwithstanding the provisions of paragraph 6(2), if it appears from the circumstances as a whole that the transfer or issue is more closely connected with another country ('the non-*situs* country'), the rule contained in paragraph 6(2) shall be disregarded, and the applicable law for determining the issue or issues arising (as the case may be) shall be the law of that non-*situs* country.]

## Passing of risk

8. (1) Where: -

(a) one party ('the first party') has agreed, or is otherwise obliged,<sup>26</sup> to transfer<sup>27</sup> an interest in immoveable property to another ('the second party') (together 'the parties'); and

(b) according to the law applicable to the agreement or other obligation to transfer the interest,<sup>28</sup> but not according to the relevant *lex situs*, the property is at the second party's risk, or *vice versa*,<sup>29</sup>

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colloquially, Weintraub has referred to it as an "issue-by-issue, onion-peeling approach." (Weintraub, R, 'Commentary on the Conflict of Laws' (1986), p71)

<sup>22</sup> E.g. Cases of transfer of title to foreign land in the event of divorce (*cf.* Briggs, *ibid.*, p1179), or succession; or as regards capacity to transfer land abroad (*Bank of Africa Ltd. v. Cohen* [1909] Ch. 129); or the transfer of foreign timeshare property (*cf.* Article 16(1)(b), Brussels Convention); or the sale of a plot of ground which straddles two contiguous states (*e.g.* *Scherrens v. Maenhout* Case 158/87 [1988] E.C.R. 3791), where most of the plot is situated in state X and only a small, or low-value, proportion of the plot is situated in state Y. Exclusively to apply the *lex situs* in all cases would disregard, or discount, the possibility or significance of a pre-existing relationship between the parties *etc.*

<sup>23</sup> *i.e.* The non-*situs* country as at the time when the interest is alleged to have been transferred, or the issue to have arisen. Whether or not substantive changes in the *lex situs* (or non-*situs*) are taken into account is a matter for the domestic law of the *situs* (or non-*situs*) to determine. (Note 8 *supra*)

<sup>24</sup> E.g. Domicile and habitual residence. *Cf.* (in the context of unjustified enrichment) *Cheshire & North*, *ibid.*, p677.

<sup>25</sup> E.g. Circumstances concerning succession to the foreign (immoveable) property of a deceased person, or concerning financial provision on divorce and the division of (immoveable) matrimonial property situated abroad.

<sup>26</sup> E.g. By virtue of a gratuitous, or non-gratuitous, unilateral obligation (which, according to Scots law, must be in writing if the obligation concerns an interest in land: section 1(2)(a)(i) and (ii), Requirements of Writing (Scotland) Act 1995).

<sup>27</sup> By means of sale, exchange, donation, succession, or transmission *etc.*

<sup>28</sup> *i.e.* The 'contractual' *lex causae* which may, or may not, be the same as the law applicable to the transfer of property, under paragraph 6(1), *supra*. *Cf.* *Hamilton v. Wakefield* 1993 S.L.T. (Sh.Ct.) 30.



the law applicable to determine whether risk has passed from the first party to the second party, shall be the law with which the issue is most closely connected.

(2) It shall be presumed that any issue arising under paragraph 8(1), is most closely connected with the relevant *lex situs*.

9. (1) Paragraph 8(2) shall be disregarded if it appears, in all the circumstances, from a comparison of: -

(a) the significance of the facts which connect the issue with the relevant *lex situs*; and

(b) the significance of any factors which connect the issue with another country ('the non-*situs* country')

that it is more appropriate<sup>30</sup> for the applicable law for determining the issues arising in the case, or any of those issues,<sup>31</sup> to be the law of the non-*situs* country,<sup>32</sup> and in such cases, the applicable law shall be the law of the non-*situs* country.<sup>33</sup>

(2) The factors that may be taken into account as connecting an issue with a country for the purposes of paragraph 9(1) include, in particular, factors relating to the parties;<sup>34</sup> any pre-existing relationship, or course of dealings, between the parties;<sup>35</sup> any contractual or other obligation in implementation of which the issue arose; and the instrument of transfer by which the purported transfer was effected or the issue arose.

[OR]

[9<sup>A</sup>. Notwithstanding the provisions of paragraph 8(2), if it appears from the circumstances as a whole that the issue is more closely connected with another country ('the non-*situs* country'), the rule contained in paragraph 8(2) shall be disregarded, and the applicable law for determining the issue or issues arising (as the case may be) shall be the law of that non-*situs* country.]

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<sup>29</sup> *i.e.* According to the 'contractual' *lex causae*, the property is at the transferee's risk, but according to the *lex situs*, it remains at the transferor's risk.

<sup>30</sup> Note 20, *supra*.

<sup>31</sup> Note 21, *supra*.

<sup>32</sup> *E.g.* A transfer of land in state X, by A (domiciled in state Y) to B (domiciled in state Y), in implementation of an agreement drawn in accordance with Y law. By Y law, risk passes upon conclusion of the contract, whereas by X law, it passes upon delivery (*i.e.* registration of title). If the land were damaged by fire following conclusion of the contract, but before delivery, there may be grounds for arguing that, in view of the factors connecting the issue with Y law, it is more appropriate that Y law be applied to determine whether or not risk has passed.

<sup>33</sup> Note 23 *supra*.

<sup>34</sup> Note 24 *supra*.

<sup>35</sup> Note 25 *supra*.



10. When applying under Part III the law of a non-*situs* country, effect shall nevertheless be given to the rules of the relevant *lex situs*, if and insofar as, under the last-mentioned law, those rules cannot be derogated from by agreement or any other means, but must be applied whatever the law applicable to the transfer or issue (hereinafter ‘mandatory rules’).<sup>36</sup>

#### **Part IV – Choice of applicable law: corporeal moveable property**

11. (1) This Part shall apply for the purpose of ascertaining the law applicable to determine the existence and validity<sup>37</sup> of proprietary rights in any object of corporeal moveable property.

(2) ‘Proprietary rights’ shall include<sup>38</sup> rights of ownership, possession, enjoyment or use<sup>39</sup> of an object of corporeal moveable property (‘an object’).

#### **Original parties – Dynamic conflicts<sup>40</sup>**

12. Subject only to paragraph 19 below, any question pertaining to the transfer<sup>41</sup> of an interest in an object from one party (‘the first party’) to another (‘the second party’) (together ‘the original parties’) shall be governed by the law chosen by the original parties.<sup>42</sup> The choice must be express, or demonstrated

<sup>36</sup> Cf. Article 3(3), Rome Convention. Such mandatory rules are likely to concern alienability, registration and recording requirements, or land use. This provision should be sufficient to protect ‘state interests’, as well as the interests of ‘remote’ parties (e.g. in the *Scherrens v. Maenhout* scenario [Note 22, *supra*], if the law of the *situs* forbade the sale of its land to a foreign national, that prohibition would ‘trump’ the application of the ‘non-majority’ *situs* law) (See Chapter Nine, *supra* – ‘The Contract/Conveyance Borderland’, at note 12). The ‘mandatory’ character of rules must be determined by the relevant *lex situs*. Accordingly, in practice, only if the relevant *lex situs* were supportive of interest analysis or functional analysis, and only where the *forum rei sitae* would seek to identify the purpose or rationale underlying its own rule, would the *lex situs* be likely to defer to the application of another law: only if the underlying purpose *etc.* of the *lex situs* would *not* be furthered by its application in a particular case, would the *situs* be likely to characterise its rule as *non-mandatory* (e.g. the Transvaal rule concerning the capacity of the transferor in the case of *Bank of Africa Ltd v. Cohen* [1909] 2 Ch. 129). However, were the *lex situs* to reject interest analysis, it would be likely that the *forum rei sitae* would classify *all* of its rules regarding the transfer of immoveable property as mandatory, thereby emasculating paragraphs 7 and 9. Thus, it seems unlikely that a Swiss, Bermudan or Jersey restriction on sale of immoveable property to non-nationals would be regarded, respectively, by Swiss, Bermudan or Jersey law, as other than mandatory or overriding.

<sup>37</sup> Cf. Article 8, Rome Convention. See paragraphs 23 and 23<sup>A</sup>, *infra*.

<sup>38</sup> This is *not* an exhaustive definition. (Cf. Article 10(1), Rome Convention, and section 12(2) of the Private International Law (Miscellaneous Provisions) Act 1995)

<sup>39</sup> It is submitted that this model could extend also to rights in security over corporeal moveable property, but rights in security have not been the focus in this work, and for that reason, specific reference has been omitted.

<sup>40</sup> Paragraphs 12, 13 and 14 deal with *dynamic* conflicts (Appendix A), whereas paragraphs 15 and 16 deal with *static* conflicts (*i.e.* the rules which operate in cases where the *situs* of the object in question does not change, but where there is a clash between the applicable law in contract and in property).

<sup>41</sup> See paragraph 6(1), *supra*. Paragraph 19 deals with aspects of alienability.

<sup>42</sup> It is unclear whether the proper law rule, which currently applies to the transfer of goods in transit, leaves scope for the exercise of party autonomy. See Chapter Eight, *supra* – ‘The Transfer of Corporeal Moveable Property’. Support for the exercise of party autonomy, at least as between the *original* parties, can be gleaned from Cheatham’s observation that, “If some question which depends upon the validity or effect of the transfer arises between the parties themselves, as, for example, where a transfer between two domiciled Englishmen is made in London of goods situate in Paris ... there is no very



with reasonable certainty by the terms and form of the transfer, or the circumstances of the case.<sup>43</sup> By their choice, the original parties may select the law applicable to the whole or a part only of the transfer.

13. (1) To the extent that the law applicable to the transfer of an interest in an object has not been chosen in accordance with paragraph 12, the transfer shall be governed by the law of the country with which it is most closely connected.<sup>44</sup>

(2) For the purposes of paragraph 13(1)<sup>45</sup> : -

- (a) It shall be presumed that the transfer of an interest in an object is most closely connected with the law of the country where the object was physically situated at the time when that interest is alleged to have been transferred (hereinafter 'the relevant *lex loci rei sitae*');
  - (b) In the case of an object, the physical situation of which was unknown or unascertainable<sup>46</sup> at the time when the interest therein is alleged to have been transferred, it shall be presumed that the transfer is most closely connected with: -
    - (i) in the case of an object represented by documentation,<sup>47</sup> the *lex cartae*;<sup>48</sup> and
    - (ii) in all other cases,<sup>49</sup> the law of the place where the object most recently held an ascertainable physical location.<sup>50</sup>

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apparent merit in the view that French law should govern the matter. The more appropriate law in such a case would appear to be that with which the transfer is most closely connected, namely, English law as being the *lex actus* ... the legal system with which the transfer has the most real connexion ..., in other words, equivalent to the proper law of a contract." (Cheatham, E E, *et al*, 'Cases and Materials on Conflict of Laws' (1957), p650/1) It is submitted that this argument extends, *a fortiori*, to property transfers effected by mail order, or distance selling, including transfers of property effected in implementation of electronic contracting.

<sup>43</sup> Cf. Article 3(1), Rome Convention.

<sup>44</sup> Cf. Article 4(1), Rome Convention.

<sup>45</sup> *i.e.* For the purposes of ascertaining the law which is applicable to the transfer of an interest in an object, in the absence of choice by the original parties.

<sup>46</sup> *E.g.* By reason of its being in transit. It is submitted that a *subjective* test should be applied, that is, the *situs* is 'unknown or unascertainable' to or by the parties, rather than an *objective* test (*i.e.* 'unknown or unascertainable' to or by a 'reasonable person').

<sup>47</sup> The question whether the object is, in law, represented by documentation, should be determined by the *lex cartae* – being the law in accordance with which the documentation in question has been drawn, or the applicable law in terms of the Rome Convention.

<sup>48</sup> See paragraph 5(2)(d)(ii) (*i.e.* the country in accordance with whose law the documentation has been drawn).

<sup>49</sup> *i.e.* Where the *situs* of the object is unknown or unascertainable, and the object is not represented by documentation.

<sup>50</sup> Cf. paragraph 5(2)(c)(ii), *supra* (*i.e.* the *lex loci ultimi sitae*).

## Original parties – Dynamic conflicts – Displacement of general rules

14. (1) Paragraph 13(2) shall be disregarded if it appears, in all the circumstances, from a comparison of: -

(a) the significance of the facts which connect the transfer with the country whose law would be applicable under paragraph 13(2);<sup>51</sup> and

(b) the significance of any factors which connect the transfer with another country ('the other country')

that it is more appropriate<sup>52</sup> for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, and in such cases, the applicable law shall be the law of the other country.<sup>53</sup>

(2) The factors that may be taken into account as connecting a transfer with a country for the purposes of paragraph 14(1) include, in particular, factors relating to the parties;<sup>54</sup> any pre-existing relationship,<sup>55</sup> or course of dealings, between the parties; any contractual or other obligation in implementation of which the transfer was effected; the length of time during which the parties were present, if at all, in the country; and the length of time during which, and the reason for which, the object was physically situated, if at all, in the country.

[OR]

[14<sup>A</sup>. Notwithstanding the provisions of paragraph 13(2), if it appears from the circumstances as a whole that the transfer is more closely connected with another country, the presumptions contained in paragraph 13(2) shall be disregarded, and the applicable law for determining the issue or issues arising (as the case may be) shall be the law of the other country.]

<sup>51</sup> *i.e.* The relevant *lex loci rei sitae*, the *lex cartae*, or the *lex loci ultimi sitae*.

<sup>52</sup> As with paragraph 7 (note 20 *supra*), there is no need for a higher threshold (*e.g.* 'substantially more appropriate'), since paragraphs 18 and 19 should safeguard the interests of any remote parties relying upon the relevant *lex loci rei sitae*.

<sup>53</sup> As regards the *conflit mobile*, see note 8 *supra*. Displacement may occur, for example, where A, domiciled in state X, transfers to B, also domiciled in state X, an object situated in state Y. The parties do not choose the applicable law under paragraph 12. Under paragraph 13(2)(a), the applicable law would be Y law. Paragraph 14(1) could operate so as to displace the application of Y law with that of X law. Consider, for example, the engagement ring scenario depicted in Chapter Eight, *supra* – 'The Transfer of Corporeal Moveable Property', at note 92: in cases such as these, where the *situs* is transient or fortuitous (albeit ascertainable), its application may be less appropriate than applying, say, the parties' common personal law.

<sup>54</sup> *E.g.* Domicile and habitual residence.

<sup>55</sup> *E.g.* As regards the transfer of an object situated abroad, where the transfer arises out of the regulation of financial provision on divorce or the division of matrimonial property.



## Original parties – Static conflicts

15. (1) Where according to the law applicable to any agreement between the original parties, or other obligation, to transfer an interest in an object from the first party to the second party,<sup>56</sup> but not according to the law of the country where the object was physically situated at the time when the aforesaid agreement was concluded, or other obligation became binding, the object is at the second party's risk, or *vice versa*, the law applicable to determine whether risk has passed from the first party to the second party,<sup>57</sup> shall be the law with which the issue is most closely connected.<sup>58</sup>

(2) For the purposes of paragraph 15(1), it shall be presumed that the issue<sup>59</sup> is most closely connected with: -

- (a) in any case where the original parties have chosen the applicable law under paragraph 12, the law which is applicable thereunder; and
- (b) in any other case, the law of the country where the object was physically situated at the time when the aforesaid agreement was concluded, or the aforesaid obligation became binding.

## Original parties – Static conflicts – Displacement of general rules

16. (1) Paragraph 15(2) shall be disregarded if it appears, in all the circumstances, from a comparison of: -

- (a) the significance of the facts which connect the issue with the country whose law would be applicable under paragraph 15(2);<sup>60</sup> and
- (b) the significance of any factors which connect the issue with another country ('the other country')

that it is more appropriate<sup>61</sup> for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, and in such cases, the applicable law shall be the law of the other country.<sup>62</sup>

<sup>56</sup> *i.e.* According to the 'contractual' *lex causae*.

<sup>57</sup> *Cf.* Section 20 of the Sale of Goods Act 1979.

<sup>58</sup> This paragraph deals with the problem of *static* conflicts (*i.e.* where a choice of law problem arises, even though the *situs* of the object in question has remained constant). The differential treatment accorded to *static* conflicts and *dynamic* conflicts echoes the distinction recommended by Morris. (Morris, J H C, '*The Transfer of Chattels in the Conflict of Laws*' (1945) XXII B.Y.I.L. 232, 234) Paragraph 16 allows displacement of the general rule set out in paragraph 15(2) in cases where the issue in question (*i.e.* the passing of risk) is more closely connected with another law, and provides for application of the 'contractual' *lex causae*, or the *lex loci rei sitae*, as is appropriate in the individual case, without the forum first having to engage in what, in this context, may be an artificial exercise of characterisation. See Chapter Eight, *supra* – 'The Transfer of Corporeal Moveable Property'.

<sup>59</sup> *i.e.* Whether risk has passed from the first party to the second party.

<sup>60</sup> *i.e.* The law chosen by the parties, or the law of the country where the object was physically situated when the agreement was concluded, or the obligation to transfer the interest became binding.

<sup>61</sup> Note 52, *supra*.

(2) The factors that may be taken into account as connecting an issue with a country for the purposes of paragraph 16(1) include, in particular, factors relating to the parties;<sup>63</sup> any pre-existing relationship,<sup>64</sup> or course of dealings, between the parties; any contractual or other obligation in implementation of which the issue arose; the instrument by virtue of which the purported transfer was effected; the length of time during which the parties were present, if at all, in the country; and the length of time during which, and the reason for which, the object was physically situated, if at all, in the country.

[OR]

[16<sup>A</sup>. Notwithstanding the provisions of paragraph 15(2), if it appears from the circumstances as a whole that the issue is more closely connected with another country, the presumptions contained in paragraph 15(2) shall be disregarded, and the applicable law for determining the issue or issues arising (as the case may be) shall be the law of the other country.]

### Competing transferees<sup>65</sup>

17. In the event that: -

(1) the first party purports to transfer an object to more than one transferee,<sup>66</sup> or proprietary rights in respect of the object and deriving from the first party<sup>67</sup> are claimed by more than one party<sup>68</sup> (hereinafter 'the competing transferees'); *and*

(2) each transfer or claim is valid according to the law which governs it under this Part,<sup>69</sup>

the conflicting claims of the competing transferees shall be determined as follows: -

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<sup>62</sup> Note 53, *supra*. *E.g.* The purported sale of a painting, temporarily situated (for the purposes of exhibition) in state X, by A (domiciled in state Y) to B (domiciled in state Y), in implementation of an agreement drawn in accordance with Y law. By Y law, risk passes upon conclusion of the contract, whereas by X law, it passes upon delivery. If the painting were destroyed by fire following conclusion of the contract, but before delivery, there may be grounds for arguing that, in view of the factors connecting the issue with Y law, it is more appropriate that Y law be applied to determine whether or not risk has passed. *Cf.* Note 32.

<sup>63</sup> *E.g.* Domicile and habitual residence.

<sup>64</sup> Note 55, *supra*.

<sup>65</sup> See Appendices B I and II.

<sup>66</sup> Appendices B I and II.

<sup>67</sup> As opposed to the scenario in Appendices C and D where the competing claim (of C) does *not* derive from the first party, A.

<sup>68</sup> Appendix B I and II.

<sup>69</sup> *E.g.* A purports to transfer an object, situated in state Y, to B, in state X, and simultaneously to C, in state Y. The transfer to B is valid according to X law, which does not require delivery of the object, and the transfer to C is valid according to Y law, which does require delivery of the object. (Appendices B I and II)



- (a) where the validity of the competing transfers and/or claims is governed, under this Part, by the same law, in accordance with that law;<sup>70</sup> and
- (b) in any other case,<sup>71</sup> in accordance with the relevant *lex loci rei sitae*.<sup>72</sup>

## Remote parties

18. The remainder of this Part shall apply for the purpose of ascertaining the law applicable to determine the existence and validity of proprietary rights claimed by any person, institution, or other body, who or which, is not one of the original parties (hereinafter a 'remote party').
19. With respect to the transfer of any object, notwithstanding: -
  - (1) the original parties' choice of applicable law under paragraph 12; or
  - (2) the operation of paragraphs 13 to 16 inclusive,

nothing shall prejudice the operation of any rule of the relevant *lex loci rei sitae*<sup>73</sup> which classifies the object as inalienable,<sup>74</sup> [or which subjects the object to attachment there by creditor(s).<sup>75</sup>]

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<sup>70</sup> Appendix B III.

<sup>71</sup> Appendix B IV.

<sup>72</sup> *i.e.* The law of the country where the object was physically situated at the time when the interest is alleged to have been transferred (paragraph 13(2)(a)) (In Appendices B I and B II, state Y.) But, original parties, A and B, cannot, by their choice of applicable law (*e.g.* X law), 'trump' the rights of any party (C) claiming under the relevant *lex loci rei sitae* (*e.g.* Y law). Note Goode's observation: "*It is not ... open to parties to derogate from rights conferred on third parties ... the power of derogation is necessarily confined to the relations between the grantor and the grantee of those rights, for example, as to additional conditions for the vesting of such rights in the grantee.*" (1998, *ibid.*, p462) *Cf.* Cheatham's remarks concerning the rights of third parties. (1957, *ibid.*, p651) Paragraph 17(2)(b) presupposes that the *situs* is the same at the time of *both* transactions (*i.e.* that the object was situated in state Y, at the time when the property was transferred by A to B, *and* at the time of the transfer from A to C). But, using the scenario depicted in Appendix B I, given that the law of X does not require delivery, theoretically, A could transfer the object to B while it was situated in state X, and thereafter (even although, according to X law, title has passed to B), without authorisation from B, remove the object to state Y and transfer it to C, in state Y. If delivery were made to C in state Y, that transfer would be effective, according to Y law. In such a scenario, the competition between B and C would be resolved as follows: it would *not* be dealt with under paragraph 17; rather, A and C (assuming that C had possession of the object) would be classed as 'original parties', and B as a 'remote party', voluntarily dispossessed of the object (insofar as he did not insist upon delivery of the object to him), and therefore deemed to be acting '*suo periculo*' under paragraph 20.

<sup>73</sup> *i.e.* The law of the country where the object was physically situated at the time when the interest therein is alleged to have passed from the first party to the second party (paragraph 13(2)(a)).

<sup>74</sup> Consider the scenario where A sells to B an object situated in state Y, and under paragraph 12, A and B (original parties) agree that the transfer shall be governed by X law. If, according to X law, the object is alienable, but according to Y law, it is inalienable, the operation of Y law would protect the proprietary rights of any third party acting in reliance upon Y law, as well as the independent interests of state Y in classifying the object as inalienable. This would not, however, lead to a different decision in a case such as *Duc de Frias v. Pichon* [1886] 13 *Journal du Droit International* 593 (inalienability according to a *prior situs*). Such cases would require to be treated as wrongful removals (paragraph 21 *et seq.* 'Inalienable' is nowhere defined within the Model. Classification of property as inalienable



## Remote parties – *Voluntary dispossession*

20. In the event that: -

(1) any person, institution, or other body having proprietary rights in respect of an object (hereinafter 'the deprived party'), relinquishes [control/possession] of the object by voluntarily delivering it, or authorising delivery thereof, to a third party in another jurisdiction and for a particular purpose;<sup>76</sup> and

(2) the third party, in breach of the particular purpose, and without authorisation from the deprived party, purports to transfer<sup>77</sup> the object to another party ('the current possessor'), the transfer being valid according to the law which governs it under this Part;<sup>78</sup> or

(3) the object is attached, in that other jurisdiction, by the third party's creditor(s) ('the attaching creditor'), by attachment valid according to the law of the country where the object was physically situated at the time when the attachment is alleged to have taken effect,

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would be a matter for the relevant *lex loci rei sitae* (cf. *Macdonald v. Macdonald* 1932 S.C. (HL) 79). What the author intends this rule to accommodate is 'Duc de Frias-type' inalienability (e.g. *res sacrae*; *res religiosas*; *res extra commercium*), rather than goods with the taint of theft (i.e. *res furtiva*), since Model 1 contains detailed provisions which deal expressly with property which has been wrongfully removed from a rightful possessor. (paragraphs 21 *et seq*, *infra*)

<sup>75</sup> E.g. If A, domiciled in State X, sends his watch to B, in State Y, for repair, and the watch is subject, in State Y, to B's repairer's lien (or other security right under Y law), A should not be able to defeat B's rights under Y law, by transferring the watch to C, also domiciled in State X (by transfer governed, at the parties' choice under paragraph 12, by X – or any other – law which does not require physical delivery to effect the transfer) (i.e. B's rights under Y law, the relevant *lex loci rei sitae*, should be preserved). *Sed contra*, section 31 of the Bankruptcy (Scotland) Act 1985: "(1) ... the whole estate of the debtor shall vest as at the date of sequestration in the permanent trustee for the benefit of creditors ... (8) the 'whole estate of the debtor' means his whole estate at the date of sequestration, wherever situated ..." (Emphasis added) Cf., in England, sections 306 and 436 of the Insolvency Act 1986. But these provisions must be subject to the view of the *situs*: "There is no territorial limitation, therefore, but in respect of property situated abroad it is for the foreign *lex situs* to determine the effect which it gives to Scottish sequestration." (Crawford, *ibid.*, p344, paragraph 16.10) (i.e. the *lex loci rei sitae* should be able to protect 'remote' parties acting in reliance upon that law.)

<sup>76</sup> See Appendix C. Where the deprived party voluntarily delivers the object to a third party within the same jurisdiction, but the third party *unlawfully removes* it from the jurisdiction, the question of title becomes more difficult: see Appendix D. Whilst it is submitted that the deprived party who voluntarily sends property abroad acts '*suo periculo*', the present author is less certain whether a deprived party, who neither sends the object abroad, nor consents to its removal into a new jurisdiction, should nevertheless be deemed to have acted '*suo periculo*' merely by ceding control/possession of the object to a third party. On balance, it is submitted that the latter type of case should be treated as one of *involuntary dispossession*. (paragraph 21 *et seq*)

<sup>77</sup> See paragraph 6(1), *supra*.

<sup>78</sup> i.e. According to paragraphs 12 to 16. (In this context, the third party and the current possessor being the 'original parties')



the conflicting claims of: -

- (a) the deprived party and the current possessor; or
- (b) the deprived party and the attaching creditor

shall be determined as follows: -

- (i) where the validity of the competing claims is governed, under this Part, by the same law,<sup>79</sup> in accordance with that law; and
- (ii) in any other case, in accordance with the law of the country where the object was physically situated at the time when the interest therein is alleged to have been transferred to the current possessor, or attached by the attaching creditor.

(4) Where the current possessor or the attaching creditor purports to transfer<sup>80</sup> the object to another party, the transfer being valid according to the law which governs it under this Part,<sup>81</sup> the conflicting claims of the deprived party and the other party shall be determined in accordance with the provisions of paragraph 20(3)(i) and (ii), *mutatis mutandis*.<sup>82</sup>

### Remote parties – *Involuntary dispossession*<sup>83</sup>

21. The remainder of this Part shall apply where a deprived party<sup>84</sup> is unable to exercise proprietary rights in respect of an object, by reason of a wrongful removal thereof, by a third party, to another jurisdiction.<sup>85</sup>

<sup>79</sup> Using Appendix C: if A's claim were based on X law, it could be that C's claim might also be based on X law: even if, for example, the transfer from B to C took place in state Y, giving rise to a presumption that Y law should govern the B-C transfer, the application of Y law could feasibly be displaced under paragraph 14 (e.g. in 'day-trip transactions', where the circumstance of a Y *situs* had been contrived by B and/or C). It is more likely, however, that paragraph 20(3)(ii) would apply.

<sup>80</sup> See paragraph 6(1), *supra*.

<sup>81</sup> *i.e.* According to paragraphs 12-16.

<sup>82</sup> *i.e.* In paragraph 20(3)(ii), replace the words 'current possessor' and 'attaching creditor' with the words 'other party'.

<sup>83</sup> *E.g.* Where A's property is stolen, in state X, by B, and then sold by B, in state Y, to C (original parties B and C; remote party A), and A thereafter raises an action for recovery of the object from C. See Appendix E. (*i.e.* the classic *Winkworth* scenario)

<sup>84</sup> See paragraph 20(1).

<sup>85</sup> *E.g.* By virtue of 'surreptitious removal' (*per Edgerly v. Bush* 81 N.Y. 199) of the object, whether by theft or illegal export. Paragraph 21 is not intended to cover any case where an owner of goods has *voluntarily* ceded possession of an object, whether in security or for the purposes of sale (e.g. to a creditor, by security based on agreement [e.g. pledge], or implied by law [e.g. a repairer's lien]; or to a purchaser under a conditional sale or hire purchase agreement). In such cases, the transferor is to be deemed capable of making contractual provision to guard against the wrongful removal of the object by a creditor, conditional purchaser, custodian *etc.* In cases of *voluntary* dispossession, it is submitted that the risk should generally be borne by the deprived party (*i.e.* that party should be deemed to act '*suo periculo*': paragraph 20). While paragraph 21 *et seq* are modelled on the Hague Convention on the Civil Aspects of International Child Abduction (implemented in the United Kingdom by the Child Abduction and Custody Act 1985), they do not extend to the wrongful *retention* of an object: wrongful retention could be said to arise where a deprived party had lent the object in question to a foreign party, for the purpose of valuation, exhibition, or repair, and the custodian failed to return it in accordance with the parties' agreement. It is submitted, however, that such cases would amount to *voluntary*, rather



For the remainder of this Part, '*lex fori*' shall be understood as meaning the law of that other jurisdiction, that is to say, of the *forum rei sitae*.

22. The removal of an object shall be considered<sup>86</sup> wrongful where: -

(1) it is in breach of the proprietary rights attributed to the deprived party, either jointly or alone, under the law of the country<sup>87</sup> in which the object was physically situated immediately prior to the removal (hereinafter '*lex loci originis*'<sup>88</sup>);<sup>89</sup> and

(2) at the time of removal those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal;<sup>90</sup> and

(3) the deprived party did not authorise, consent to, or subsequently acquiesce in, the removal of the object from the country in which the object was physically situated immediately prior to the removal (hereinafter '*locus originis*').<sup>91</sup>

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than *involuntary*, dispossession (e.g. A, domiciled in Scotland, sends his watch to B in Geneva, for repair. B, in breach of his agreement with A, sells the watch, in Switzerland, to C. Since A parted with possession of the watch voluntarily, paragraph 20 would apply. A would constitute the 'remote party', parties B and C being the 'original parties'. According to paragraph 19, the transfer between B and C would be subject to the mandatory rules of the relevant *lex loci rei sitae* (Swiss law) concerning alienability. If Swiss law were to prefer the title of C, the consequences for A would be similar to the consequences for Mr Winkworth, save that A might have a *personal* claim against B.

<sup>86</sup> *i.e.* By the forum.

<sup>87</sup> This would extend to proprietary rights granted by, or recognised by, the *lex loci originis*. See paragraph 36, *infra*.

<sup>88</sup> Cf. Garro, *ibid.*, p514. In referring to the 'country of origin' of a stolen item, Garro recommended application of "*the law of the jurisdiction with the most significant interest in protecting the property which is the object of the transaction.*" It is submitted that a connecting factor such as this would be indeterminate: e.g. as regards protection of '*La Gioconda*', would it be considered that France, the country by whom the painting is currently owned and in which it is presently exhibited, has a greater interest than, say, does Italy, the country of which the artist was a national and in which the artist, and the work, are highly respected? Similarly, as regards protection of the Elgin/Parthenon Marbles, would it be considered that the United Kingdom, or Greece, has a more significant interest in their *protection*? *Contra* Reichelt, who has referred, as regards the transfer of cultural property, to the law of closest connection, presumed to be the state of origin. Reichelt has not, however, explained what she means by the 'state of origin', and the possibility of more than one state claiming that designation is not discussed. (Reichelt, G, '*International Protection of Cultural Property*' (1985) *Uniform Law Review* 43, 91)

<sup>89</sup> In *Todd v. Armour* (1882) 9 R. 901, for example (Appendix F II), the removal of the horse to Scotland, by 'C', would *not* constitute a wrongful removal, since it was *not* in breach of the proprietary rights attributed to the pursuer under Irish domestic law (the sale by market overt was valid according to Irish law, thereby purging the earlier defect in title). Had the sale of the horse in Ireland been *unlawful* according to Irish law, the removal of the horse to Scotland would have been wrongful (e.g. Appendix F I).

<sup>90</sup> Cf. Article 3(b), Hague Convention on the Civil Aspects of International Child Abduction.

<sup>91</sup> Cases where a party has been *voluntarily* dispossessed of an object (e.g. where an owner has voluntarily sent an object forth of the *locus originis*, for the purpose of repair, exhibition or security) do not constitute 'wrongful removals'. As indicated in notes 72, 76 and 85, *supra*, however, *voluntary* dispossession does not encompass owners who did not consent to removal of the object from the *locus originis*: such cases are considered to be instances of *involuntary* dispossession (e.g. *Goetschuis v. Brightman* 245 N.Y. 186, 156 N.E. 660) Appendices D I and II reveal that the terms of the contract in a '*Goetschuis v. Brightman* scenario' will have a significant effect on the outcome under these proposals. Authorisation of, consent to, or acquiescence in, the removal of an object outwith the jurisdiction of the



23. Where an object has been wrongfully removed by a third party, in any proceedings<sup>92</sup> to determine the existence and validity of proprietary rights in respect thereof,<sup>93</sup> notwithstanding the third party's purported transfer of the object to another party,<sup>94</sup> or any subsequent purported transfers thereof,<sup>95</sup> or any purported attachment of the object by the third party's creditor(s), including any choice of law under paragraph 12 hereof, or the operation of paragraphs 13 to 16 inclusive, effect shall nevertheless be given to the mandatory rules<sup>96</sup> of the *lex loci originis*.<sup>97</sup>

In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose, and to the consequences of their application or non-application.<sup>98</sup>

[OR]

- 23.<sup>A</sup> Where an object has been wrongfully removed and, at the date of commencement of proceedings<sup>99</sup> ('the relevant date') to determine the existence and validity of proprietary rights in respect thereof,<sup>100</sup> the object is

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*locus originis*, in effect, converts an instance of *involuntary* dispossession into one of *voluntary* dispossession (to be dealt with under paragraph 20).

<sup>92</sup> Proceedings, that is, in the *forum rei sitae*, or alternatively, in any forum which exercises personal jurisdiction over the current possessor of the object.

<sup>93</sup> Including, in particular, those of the deprived party.

<sup>94</sup> Appendix E.

<sup>95</sup> Appendices F I and II.

<sup>96</sup> *i.e.* Rules which cannot be derogated from by agreement or any other means, but which must be applied whatever the law applicable to the transfer. (*cf.* paragraph 10, *supra*)

<sup>97</sup> *i.e.* The law of the country in which the object was physically situated immediately prior to the removal (paragraph 22(1)). It may be suggested that a more generous provision should be adopted, so as to include, for example, the mandatory rules of "*the law of another country with which the [situation/transfer] has a close connection*" (*cf.* Article 7(1), Rome Convention). If, for example, in *Winkworth v. Christie, Manson & Woods Ltd*, the objects had been stolen from a museum in France, to which Mr Winkworth had lent them for the purposes of a temporary exhibition, arguably, it would be more important for the mandatory rules of English law to apply (*e.g.* as to alienability), than those of the French *lex loci originis*.

<sup>98</sup> *Cf.* Articles 3(3) and 7(1), Rome Convention. The difficulty, of course, is in ascertaining what *are* the mandatory rules of a particular state concerning the transfer of corporeal moveable property. It is submitted that, even if it were possible, it is not, in fact, necessary (in view of the approach of the Rome Convention) to enumerate the particular mandatory rules which may apply. As with the situation outlined in note 36, *supra*, the 'mandatory' character of rules would require to be determined by the *lex loci originis* (or, if appropriate, the law of close connection). Potentially, mandatory rules could include rules concerning inalienability (*e.g.* *Duc de Frias v. Pichon, ibid.*); the exercise of good faith by a purchaser of goods; the rule that a thief cannot transfer valid title to stolen property; and the rule that time must not run in favour of a thief. (*Cf. City of Gotha v. Sotheby's (No.2)* 1998, 8 October, Times, *per* Moses J, paragraph II.4 (p53)) It is presumed that the relevant prescription and limitation rules of the *lex causae* (*i.e.* the *lex loci originis*, or, if appropriate, the law of close connection) would apply.

<sup>99</sup> Proceedings, that is, in the *forum rei sitae*, or alternatively, in any forum which exercises personal jurisdiction over the current possessor of the object.

<sup>100</sup> This formulation (*i.e.* 'to determine the existence and validity of proprietary rights') is designed to test, and rank, competing proprietary rights, rather than merely to test the validity of a particular transfer of an interest in an object.



physically situated in a country other than the *locus originis*,<sup>101</sup> then, notwithstanding the third party's purported transfer of the object to another party,<sup>102</sup> or any subsequent purported transfers thereof,<sup>103</sup> or any purported attachment of the object by the third party's creditor(s), including any choice of law under paragraph 12 hereof, or the operation of paragraphs 13 to 16 inclusive: -

(1) if a period of less than one year<sup>104</sup> has elapsed from the date of wrongful removal, the judicial authority of the country where the object is physically situated at the relevant date shall order return of the object forthwith to the *locus originis*;<sup>105</sup>

(2) if proceedings have commenced after the expiry of a period of one year from the date of wrongful removal, the judicial authority of the country where the object is physically situated at the relevant date shall also order return of the object to the *locus originis*, unless it is demonstrated that: -

(a) the proceedings were brought: -

(i) more than [one]<sup>106</sup> year after the date when the deprived party knew, or ought reasonably to have known,<sup>107</sup> the location of the object and the identity of the current possessor or the attaching creditor; or

(ii) following the expiry of a period of twenty years from the date of wrongful removal;<sup>108</sup>

<sup>101</sup> This last clause is necessary, for in some cases (e.g. *Winkworth v. Christie, Manson & Woods Ltd* [1986] 1 Ch. 496), the object has already been returned to the *locus originis*, and proceedings have been raised in that country.

<sup>102</sup> Appendix E.

<sup>103</sup> Appendices F I and II.

<sup>104</sup> This is an arbitrary, but, it is submitted, a reasonable period. (Cf. Article 12, Hague Convention on the Civil Aspects of International Child Abduction)

<sup>105</sup> Appendix G.

<sup>106</sup> The 1995 UNIDROIT Convention imposes a three year period (Articles 3(3) and 5(5)), whereas the Return of Cultural Property Regulations (S.I. 1994/501) ('the 1994 Regulations') impose a one year period. (Regulation 6(6)(a)) It is submitted that the shorter period would attract wider support.

<sup>107</sup> The wording '*or ought reasonably to have known*' imposes an obligation of due diligence upon the deprived party, and is intended to assist in striking a balance between security of title and security of transaction. But consider note 108, *infra*. Consider also *Robertson v. Robertson* 1998 S.L.T. 468 in which the Inner House held that a father did not truly acquiesce in his children becoming habitually resident in Germany, since his apparent inactivity in seeking to secure the return of his children to Scotland was due to his having received erroneous legal advice. See also note 111, *infra*.

<sup>108</sup> This imposes a special, long-stop limitation period. With reference to 'cultural' property, the 1995 UNIDROIT Convention favours a period of fifty years (Articles 3(3) and 5(5)), whereas the 1994 Regulations favour a general period of thirty years, but with special provision for a seventy-five year period (Regulation 6(7) and (8)). Section 8 of the Prescription and Limitation (Scotland) Act 1973, as amended, imposes a long-stop period of twenty years, and it is submitted that an equivalent period is appropriate for present purposes. As regards cultural property, the (legitimate) concern is that the current possessor may endeavour to conceal the object for the duration of the relevant limitation period. To minimise this, the wording in paragraph 23<sup>A</sup>(2)(a)(i) could be amended so as to read '*more than one year after the date when the deprived owner knew the location of the object and the identity of the current possessor.*' (i.e. This would prescribe a rule of *actual* discovery of the object, rather than one of



[Possible additional/optional bespoke rules concerning {cultural} property<sup>109</sup>: -

(b) the current possessor acquired the object in good faith;<sup>110</sup> and/or

(c) the deprived party failed to exercise due diligence in seeking to identify the current possessor or the attaching creditor, and/or locate and recover the object;<sup>111</sup> and/or

(d) the object has an estimated monetary value of no less than £X;<sup>112</sup>

For the purposes of this Part, the demonstration of [good faith, and/or of] due diligence, shall be determined according to the *lex fori*.]<sup>113</sup>

*diligent* discovery). Equally, difficulties of definition aside, it would be technically possible to formulate a longer 'long-stop' limitation period in respect of cultural property.

<sup>109</sup> Save perhaps for paragraph 23<sup>A</sup>(2)(d), *infra*, it is not considered that measures such as these would be appropriate in cases concerning 'non-cultural' property. While a bespoke cultural property rule may be attractive in theory (as recommended, for example, by Byrne-Sutton [Byrne-Sutton in Lalive, *ibid.*, p501]), it is suggested that, in practice, its formulation (particularly the definition of key terms such as 'cultural property') and operation (e.g. the reconciliation of competing public and private interests), would be problematic. Consider in this regard Prott's conclusion that, "A solution which takes account of the special characteristics of the cultural heritage to change the *lex rei sitae* rule to a more flexible formula may be easier to achieve than the painstaking effort to concert the many, variable principles of property law in different jurisdictions." (Prott, 1989, *ibid.*, p281) Nevertheless, additional/optional bespoke provision may be acceptable, for example, to states party to the 1995 UNIDROIT Convention and/or the 1970 UNESCO Convention, and could be effected by means of a cultural property protocol to a general property Convention. Moreover, there may be support for a flexible rule such as is contained in Article 9 of the UNIDROIT Convention, viz.: "Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the return of a wrongfully removed object than provided for by this Convention."

<sup>110</sup> The difficulty with this criterion would be that the requirement for a purchaser to exercise good faith would, in effect, be elevated to the rank of public policy (*cf. Winkworth v. Christie, Manson & Woods Ltd.* 1986 1 Ch. 496, *per* Slade, J.) It is likely that states whose domestic law does not require purchasers to exercise good faith would be reluctant to agree to such a provision.

<sup>111</sup> *Cf.* The 1994 Regulations, Regulation 3(1) (e.g. reporting the theft; consulting relevant stolen property databases; if appropriate, alerting Interpol *etc.*). *Cf.* note 107, *supra*.

<sup>112</sup> It would be possible to impose a *de minimis* financial criterion, intended to prevent vexatious litigation. (But see paragraph 26, *infra*.) *Cf.* the financial thresholds laid down in Regulation 2(3) and Schedule 1 of the 1994 Regulations, and The Return of Cultural Objects (Amendment) Regulations 1997 (S.I. 1997/1719). Questions would arise, however, as to the basis of valuation and the impartiality of the valuer. The 1994 Regulations do not prescribe a method of valuation. One possibility would be to use an insurance valuation. Furthermore, as the 1997 Regulations demonstrate, it would be necessary to provide a review, or adjustment, mechanism, by which the monetary values could be altered in line with inflation *etc.* Closely related to the matter of valuation, is the question of authenticity, since authenticity will impact significantly upon valuation.

<sup>113</sup> It is submitted that these criteria can be practicably tested only according to *lex fori*, that is to say, the forum where the object is then situated (*cf.* Hague Convention on the Civil Aspects of International Child Abduction). If bespoke rules regarding cultural property were to be agreed, a bespoke rule concerning the exercise/demonstration of good faith (at the point of purchase) could also be agreed: for example, a rule mirroring Article 4(4) of the 1995 UNIDROIT Convention could be incorporated, viz.: "In determining whether the current possessor [acquired the object in good faith or] exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the current possessor consulted any reasonably accessible register of stolen objects, and any other relevant information and documentation which he could reasonably have obtained, and whether the current possessor consulted accessible agencies or took any other step that



24.<sup>114</sup> Following return of the object to the *locus originis*, the law applicable to determine the conflicting claims of the deprived party and the current possessor, or the attaching creditor, shall be determined as follows: -

(1) where the validity of the competing claims is governed, under this Part, by the same law,<sup>115</sup> in accordance with that law; and

(2) in any other case, in accordance with the *lex loci originis*.<sup>116</sup>

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*a reasonable person would have taken in the circumstances.*” It should be noted, however, that ‘good faith’ and ‘due diligence’ are *bilateral* concepts, affecting both the deprived owner (in endeavouring to locate the object and identify the possessor), and the current possessor (in checking provenance *etc*), and that the standards to be met will vary according to the nature (and apparent value) of the *res litigiosa*. The temporal aspect would also require to be considered: clearly, certain conduct which may now be expected of a good faith purchaser (*e.g.* where relevant, inspection of a complete provenance, or consultation of an Art Loss Register) might not have been expected, say, at the time of acquisition. Conduct should, accordingly, be tested according to the standards which prevailed at the time of acquisition. See Appendix H.

<sup>114</sup> Paragraphs 24, 25 and 26 would apply only to paragraph 23<sup>A</sup>, and not to paragraph 23.

<sup>115</sup> Cf. Note 79, *supra*.

<sup>116</sup> *Contra*, paragraph 20(3)(ii). The significant factor, therefore, is the ‘*locus originis*’, the country in which the object was physically situated immediately prior to the wrongful removal. In the same manner that the return of an abducted child to the state of his/her habitual residence (in terms of the Hague Convention on the Civil Aspects of International Child Abduction) does not guarantee a particular custody result (insofar as the substantive content of the custody law of the state of the child’s habitual residence is not a factor considered by the ‘requested’ state), so too the return of an object to the *locus originis* would not, *per se*, protect the title of the deprived party. Consider Garro, *ibid.*, p514: “... the application of the *lex rei sitae* or the law of the ‘country of origin’ of the stolen property does not warrant a better protection to the dispossessed owner nor assures certainty in the result of the dispute. This is so because the conflict rule *per se* lacks any significant content as to how far should bona fide purchasers be protected; it all depends on the domestic law on bona fide purchasers which is to be applied pursuant to the chosen choice of law process.” But, where the *locus originis* is a ‘*possession vaut titre*’ state, the deprived owner should be presumed to be aware of the content of that law. Accordingly, the application of that law would not prejudice him/her in the same way as may occur under the current choice of law rule, whereby a thief may deliberately exploit the ‘*possession vaut titre*’ or prescription and limitation rules of a third state, for the specific purpose of defeating the deprived owner’s title (*e.g.* in ‘day-trip’ transactions). (See Chapter Twelve, *supra* – ‘The ‘*Situs*’ Rule - For and Against’) The purpose of returning the object to the *locus originis* has been identified by Droz, *viz.*: such a rule “... would simply re-establish the status quo ante without obliging the State where the object is situated [potentially an entirely fortuitous or transient *situs*] to decide on any other aspects of the question.” (Droz, G A L, ‘*La protection internationale des biens culturels et des objets d’art*’, in Lalive, *ibid.*, p543) It is submitted that application, in paragraph 24(2), of the *lex loci originis*, rather than the *lex loci rei sitae* at the time of transfer to the current possessor, or attachment by the attaching creditor, is justified by the *involuntary* nature of the deprived party’s dispossession. It should be noted that Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings enables ‘secondary proceedings’ to be opened in a member state, in addition to the ‘main insolvency proceedings’ opened in a different member state. Article 28 provides that, as a general rule, the law applicable to the secondary proceedings shall be that of the member state within the territory of which those proceedings have opened. The *involuntary* nature of the dispossession is, it is submitted, strong enough a characteristic to override the claims of the creditor in the *lex fori*, and there is no reason, it is submitted, why, following return of the wrongfully removed object to the *lex loci originis*, secondary proceedings could not be opened within that jurisdiction. The purpose of paragraph 24(2) is to treat the deprived party in the same manner as he would be treated by the law of the country in which he voluntarily exercised his proprietary rights (*e.g.* the practical effect of this paragraph in *Winkworth v. Christie, Manson & Woods Ltd* [1986] 1 Ch. 496, would be that the competing claims of Mr Winkworth and Dr D’Annone would be determined, not according to Italian law, but rather according to English law).



25. (1) Paragraph 24(2) shall be disregarded if it appears, in all the circumstances, from a comparison of: -

(a) the significance of the facts which connect the circumstances of the case<sup>117</sup> with the *locus originis*;<sup>118</sup> and

(b) the significance of any factors which connect the circumstances of the case with another country<sup>119</sup>

that it is more appropriate for the applicable law for determining the issues<sup>120</sup> arising in the case, or any of those issues, to be the law of the other country, and in such cases, the applicable law shall be the law of the last-mentioned country.<sup>121</sup>

(2) The factors that may be taken into account as connecting the circumstances of the case with a country for the purposes of paragraph 25(1) include, in particular, factors relating to the deprived party and/or the current possessor, or the attaching creditor,<sup>122</sup> and the length of time during which, and the reason for which, the object was physically situated in that country.<sup>123</sup>

26. Expenses incurred in implementing an order under this Part for return of an object shall be borne, in the first instance, by the deprived party. Upon determining the existence and validity of proprietary rights in respect of an object, the judicial authorities of the *locus originis* may, where appropriate, direct the person who wrongfully removed the object, or the current possessor, or attaching creditor, to pay necessary expenses incurred by the deprived party, including any costs incurred or payments made for locating the object and/or identifying the current possessor, or attaching creditor, and the costs of returning the object to the *locus originis*.<sup>124</sup>

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<sup>117</sup> Wording more specific than 'the circumstances of the case' would prove troublesome. Relevant circumstances may include the nature and provenance of the *res litigiosa*, the parties, and the basis of their claims to the object.

<sup>118</sup> E.g. Length of time during which the object had been situated in the *locus originis*.

<sup>119</sup> E.g. The *lex loci rei sitae* at the time when the object was transferred to the current possessor.

<sup>120</sup> i.e. The existence and validity of proprietary rights in respect of the object.

<sup>121</sup> Accordingly, taking the facts of *Winkworth v. Christie, Manson & Woods Ltd.*, the application of the English *lex loci originis* could be displaced if, for example, it transpired that Mr Winkworth was neither domiciled nor habitually resident in England, but was merely in England on a short-term basis, and that the property had been situated in England on a temporary basis (e.g. for the purpose of having the *netsuke* valued or restored).

<sup>122</sup> E.g. Domicile or habitual residence.

<sup>123</sup> Factors such as the events leading to, and the circumstances surrounding the deprived party's dispossession of the object (e.g. a well-publicised theft or illegal export), and the current possessor's acquisition thereof (e.g. the inspection of provenance details or a database search) would be relevant only to the question of good faith and/or due diligence (which are considered at the stage of returning the object to the *locus originis*, and not at the stage of choosing the applicable law). Similarly, factors such as a decision of the Spoliation Advisory Panel, would be relevant, not to choice of law, but only to the end (substantive) result; accordingly, such a factor could be considered only by a *rule-selecting* forum, which is prepared to 'look before it leaps'.

<sup>124</sup> Cf. 1994 Regulations, Regulation 8, and Hague Convention on the Civil Aspects of International Child Abduction, Article 26.



## **Part V – Choice of applicable law: incorporeal moveable property**

### **Original parties – Creation of a right (Debtor and Creditor)<sup>125</sup>**

27. (1) Any question pertaining to the creation of a right of incorporeal moveable property ('a right') shall be governed by the law of the country with which, at the relevant date (as hereinafter defined), the right is most closely connected.
- (2) For the purposes of this Part, it shall be presumed that a right is most closely connected with the country in which it may be enforced.<sup>126</sup>
28. In this Part, the relevant date shall be: -
- (1) For the purposes of paragraphs 27<sup>127</sup> and 30,<sup>128</sup> the date on which the right in question is purported to have been created; and
- (2) For all other purposes, the date of commencement of proceedings concerning the right in question.<sup>129</sup>

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<sup>125</sup> *E.g.* An insurance company and the insured party. See Appendix I.

<sup>126</sup> This is generally the 'proper law of the right', but there are exceptions (*e.g.* consider a beneficial interest under a trust deed drawn in accordance with Scots law, administered in Scotland, and having Scottish trustees: the (putative) proper law of the right would be Scottish. If, however, the trust fund were invested in an offshore bank account in Jersey, the (putative) place of enforcement would be Jersey). A right will be enforceable in any country in which the debtor has, at the date of creation of the right or any later date, assets against which the right may be satisfied. This may lead to the designation of more than one state. It is submitted that among such states the actual place of enforcement should be at the option of the pursuer.

<sup>127</sup> *i.e.* Creation of a right.

<sup>128</sup> *i.e.* Assignability of a right.

<sup>129</sup> It is necessary to draw a distinction between the country in which the right may be enforced, first of all, at the time of its creation, and secondly, on the date on which it is sought to enforce the right against the debtor. For example, if, at the time when a debt is created, the debtor was resident in France, and his entire estate (against which the debt may be satisfied) was situated in France, any question pertaining to the creation of that debt would (according, at least, to this model) be governed by the law of the country with which the right was most closely connected, which, in turn, would be presumed to be the law of the country in which the right may be enforced. *But*, if there were no qualification as to the temporal aspect of enforcement (*i.e.* no specification of the time at which closest connection were to be determined), the law of closest connection would be deemed to be the law of the country in which the right may be enforced (*i.e.* in which the debtor has assets) *at the date of commencement of proceedings to enforce the debt*. If, by that date, the debtor had relocated his property (and possibly also his person) to another country, say, to Italy, then the effect would be to apply to any question pertaining to the *creation* of the debt not French law, but Italian law. This would be an absurd result since at the time of creation of the debt in question, there was *no* connection between the parties and their transacting, and Italy. Hence, it is submitted that the country of closest connection must be determined *either* on the date on which the right in question is purported to have been created, *or* on the (later) date on which it is sought to enforce the right. The relevant date will depend, in each case, upon the nature of the particular dispute (*e.g.* whether it concerns merely the *existence/creation* of the right; *or* whether the purpose of the proceedings is to *enforce* the right against the debtor). It is submitted that in cases which concern matters *other than* the creation or assignability of a right, the later date should be the 'relevant date', for the aim, in such cases, is to enforce the right against the debtor (*i.e.* it would be inappropriate, in such circumstances, to apply the law of the country in which the debt was enforceable *at the time of its creation*, for by the time the creditor may seek to enforce the debt, the debtor, innocently or with calculating intent, may have relocated his assets to another country, thereby defeating the creditor's attempts to enforce the debt). It is quite possible that a dispute may concern the *existence/creation* of a right, and not the question of enforcement: for



29. The presumption in paragraph 27(2) shall be disregarded if it appears, from the circumstances as a whole that at the relevant date<sup>130</sup> the right (or purported right) was more closely connected with another country.<sup>131</sup>

### Original parties – Assignment of a right (Assignor and Assignee)<sup>132</sup>

30. The assignability of a right shall be governed by the law of the country with which, at the relevant date,<sup>133</sup> the right was most closely connected, as determined in accordance with paragraphs 27(2) and 29 above.<sup>134</sup>

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example, an insured party may seek a declaration that a life assurance contract has been concluded, giving rise to a right enforceable thereunder, but without actually seeking to enforce that right [which may, in any event, be enforceable only upon the death of the insured party] against the assurance company.

<sup>130</sup> Paragraph 28, *supra*.

<sup>131</sup> Cf. Article 4(5), Rome Convention. If, using the scenario depicted in note 129, *supra*, immediately following the (purported) creation of the debt, the debtor (say, an Italian national), as anticipated by himself and the creditor (also, say, an Italian national), and with the consent or acquiescence of the creditor, removed himself and his assets to Italy, and remained there until such time as enforcement proceedings were raised against him in Italy by the creditor, it may be argued that, *on the date on which the debt is purported to have been created*, it was more closely connected with Italian, and not French, law. Consider also *Raiffeisen Zentralbank Österreich AG v. Five Star General Trading LLC and others* [2000] 2 Ll. Rep. 684; [2001] 2 W.L.R. 1344; [2001] 3 All E.R. 257. The dispute concerned a marine insurance policy. Although the insurers in question were French, the insurance policy was, in fact, governed by English law. Hence, English law was the proper law governing the underlying contract of insurance, but French law was the *lex situs* of the chose in action which had been assigned (insofar as France would be the place of enforcement of the right). The ‘presumption’ that the law of the place of enforcement would be the law of closest connection, was, in effect, displaced by an application of English law, the law governing the obligation assigned

<sup>132</sup> E.g. The insured party and a third party creditor, such as a bank. See Appendix I.

<sup>133</sup> Paragraph 28(1), *supra*.

<sup>134</sup> Consider the assignability of future wages (e.g. by a husband, H, to his estranged wife, W). If, at the date of creation of W’s right to the wages, H were domiciled in State X (according to the law of which wages are assignable), but he subsequently acquired a domicile of choice in State Y (according to the law of which wages are non-assignable), the question would arise whether assignability should be governed by the law of the country in which W’s right is/was enforceable (a) on the date on which her right is purported to have been created (i.e. X law); or (b) on the date of commencement of enforcement proceedings against H (i.e. Y law). Save perhaps in cases where the forum would adopt an interest analysis approach, it is submitted that X law should apply. If the rule were otherwise (i.e. if Y law applied), then it would be within H’s power to relocate, deliberately frustrating W’s entitlement (under X law) to his wages. Paragraph 29 would provide scope for applying to the question of assignability another, more closely connected law, but it is to be hoped that the choice made by the forum would not fall upon Y law *unless* there was, on the date when W’s right was purportedly created, a pre-existing connection between H and Y law. Article 12(2) of the Rome Convention does not deal with the temporal conflict of laws, merely applying ‘the law governing the right to which the assignment relates’.



31. The voluntary disposal or assignation<sup>135</sup> ('the assignation') of a right from one party ('the assignor') to another party ('the assignee') (together 'the original parties') shall be governed by the law chosen by the original parties.<sup>136</sup> The choice must be express, or demonstrated with reasonable certainty by the terms and form of the assignation, or the circumstances of the case. By their choice, the original parties may select the law applicable to the whole or a part only of the assignation.<sup>137</sup>
32. To the extent that the law applicable to the voluntary assignation of a right has not been chosen in accordance with paragraph 31, the assignation shall be governed by the law of the country with which it is most closely connected.<sup>138</sup>
33. The involuntary<sup>139</sup> assignation of a right from the assignor to the assignee shall be governed by the law of the country with which, at the relevant date,<sup>140</sup> the right is most closely connected, as determined in accordance with paragraphs 27(2) and 29 above.<sup>141</sup>

#### **Remote parties – Enforcement of the assignation (Debtor and Assignee)<sup>142</sup>**

34. Mutual rights and obligations of the debtor<sup>143</sup> and the assignee shall be governed by the law of the country with which, at the relevant date,<sup>144</sup> the right is most closely connected, as determined in accordance with paragraphs 27(2) and 29 above.<sup>145</sup>

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<sup>135</sup> Contractual, or non-contractual (e.g. donation).

<sup>136</sup> *i.e.* The proper law of the assignation. Cf. Article 12(1) of the Rome Convention.

<sup>137</sup> Cf. Article 3(1) of the Rome Convention.

<sup>138</sup> For contractual assignations, see Article 4 of the Rome Convention, and for non-contractual assignations, the proper law of the assignation will be akin to the objectively ascertained proper law of contract (cf. *The Assunzione* [1954] P. 150).

<sup>139</sup> See Chapter Eleven, *supra* – 'The Assignation of Incorporeal Moveable Property', note 173 *et seq.*

<sup>140</sup> Paragraph 28(2); in effect, the date on which diligence proceedings to enforce the debt are commenced.

<sup>141</sup> Consider, for example, the case where a judgment creditor in State X sought to enforce (in respect of a debt owed to him by his judgment debtor in State Y) a debt owed by a third party to the judgment debtor, by means of an arrestment of funds in the hands of the third party (the third party arrestee) in State Z. The key factor is the law of the place where the debt is enforceable (*i.e.* where it can be enforced against the third party arrestee) *at the date of commencement of proceedings against the third party arrestee*.

<sup>142</sup> *E.g.* The insurance company and the third party creditor, that is, the bank. See Appendix I.

<sup>143</sup> *i.e.* The party against whom the right is enforceable (paragraph 5(2)(d)(iii), *supra*).

<sup>144</sup> Paragraph 28, *supra*.

<sup>145</sup> *i.e.* The law of the country where the right may be enforced at the date of commencement of proceedings against the debtor (paragraph 28(2)). If the rule were otherwise, the debtor would be able to frustrate enforcement of the debt by relocating his assets *after* creation of the debt.



## Remote parties – Competing assignments (Competing Assignees)<sup>146</sup>

35. In the event that: -

- (1) the assignor purports to assign the same right to more than one party, or the same right deriving from the assignor is claimed by more than one party<sup>147</sup> (hereinafter ‘the competing assignees’); *and*
- (2) each assignment is valid according to the law which governs it under this Part,<sup>148</sup>

the conflicting claims of the competing assignees shall be determined as follows: -

- (a) where the validity of the competing assignments is governed, under this Part, by the same law, in accordance with that law;<sup>149</sup> *and*
- (b) in any other case, in accordance with the law of the country with which, at the relevant date,<sup>150</sup> the right is most closely connected,<sup>151</sup> as determined in accordance with paragraphs 27(2) and 29 above.

## Part VI – General

36. The application of the law of any country specified by this Convention means:-

- (1) for the purposes of Part II, and concerning the application of the relevant *lex situs* in cases arising under Part III, the rules of law in force in that country, including the rules of international private law forming part of that law; *and*
- (2) in any other case, subject only to recognition by the *lex loci originis* of proprietary rights attributed to the deprived owner under paragraph 22(1) above, the rules of law in force in that country, excluding the rules of international private law forming part of that law.<sup>152</sup>

<sup>146</sup> E.g. Competing third party creditors. See Appendix I.

<sup>147</sup> i.e. In the event of an involuntary assignment of the right.

<sup>148</sup> i.e. According to paragraphs 30-33. See Appendix J I.

<sup>149</sup> See Appendix J II.

<sup>150</sup> Paragraph 28, *supra*; in effect, the date of commencement of the ‘conjoined’ enforcement proceedings against the debtor.

<sup>151</sup> See Appendix J III.

<sup>152</sup> i.e. *Renvoi* is operative only in respect of (a) the characterisation of property (note 7, *supra*); (b) transfers of immovable property which are governed by the relevant *lex situs* (note 19, *supra*); and (c) note 87, *supra*. *Renvoi* is applied to the characterisation process for reasons of logic, and to immovable property, on account of the enduring physical control of the property by the *situs*.

37. The application of any rule of law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*'ordre public'*) of the forum.<sup>153</sup>

## Interpretation

38. (1) In this Convention: -

“attaching creditor” has the meaning assigned by paragraph 20(3);  
 “competing transferees” has the meaning assigned by paragraph 17(1);  
 “current possessor” has the meaning assigned by paragraph 20(2);  
 “debtor” has the meaning assigned by paragraph 5(2)(d)(iii);  
 “deprived party” has the meaning assigned by paragraph 20(1);  
 “*lex cartae*” has the meaning assigned by paragraph 5(2)(d)(ii);  
 “*lex loci originis*” has the meaning assigned by paragraph 22(1);  
 “*locus originis*” has the meaning assigned by paragraph 22(3);  
 “*lex fori*”, for the purposes of involuntary dispossession in Part IV, has the meaning assigned by paragraph 21.  
 “mandatory rules” has the meaning assigned by paragraph 10;  
 “the original parties” has the meaning assigned by paragraph 12;  
 “the relevant date”, for the purposes of Part IV, has the meaning assigned by paragraph 23<sup>A</sup>;  
 “the relevant date”, for the purposes of Part V, has the meaning assigned by paragraph 28;  
 “the relevant *lex loci rei sitae*” has the meaning assigned by paragraph 13(2)(a);  
 “the relevant *lex situs*” has the meaning assigned by paragraph 6(2); and  
 “remote party” has the meaning assigned by paragraph 18.

(2) All references in this paragraph are to this Convention.

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<sup>153</sup> Cf. Article 16 of the Rome Convention, and section 14(3)(a) of the Private International Law (Miscellaneous Provisions) Act 1995. This provision should *not* apply (i.e. public policy should *not* be invoked) where the forum in question is the *forum rei sitae* in terms of paragraph 21 of Part IV.



## Model 2

### The Transfer of Property (Applicable Law) Bill<sup>1</sup>

#### Arrangement of Sections

#### Part I – General

1. Scope
2. Characterisation of issues
3. Applicable law
4. Application to events occurring in the forum
5. Intra-UK provisions

#### Part II – Characterisation

6. Characterisation of property

#### Part III – Choice of applicable law: immoveable property

7. Transfer of immoveable property – general rule and rule of displacement
8. Passing of risk in respect of immoveable property – general rule and rule of displacement
9. Mandatory rules of the *lex situs*

#### Part IV – Choice of applicable law: corporeal moveable property

10. Proprietary rights
11. Transfer of corporeal moveable property – general rule
12. Transfer of corporeal moveable property – rule of displacement
13. Passing of risk in respect of corporeal moveable property – general rule and rule of displacement
14. Application of mandatory rules of the forum
15. Competing transferees – applicable law

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<sup>1</sup> Unlike Model 1, Model 2 is intended to be a *national*, as opposed to an *international*, instrument, for implementation pending agreement and implementation of an international instrument. Cf. the relationship between Part III of the Private International Law (Miscellaneous Provisions) Act 1995 and 'Rome II', currently under negotiation.

## **Part V – Choice of applicable law: incorporeal moveable property**

- 16. Original parties – creation of a right (debtor and creditor) – general rule
- 17. Original parties – creation of a right (debtor and creditor) – general rule –  
ascertainment of the relevant date
- 18. Original parties – creation of a right (debtor and creditor) – displacement rule
- 19. Original parties – assignation of a right (assignor and assignee) – assignability
- 20. Voluntary assignation of a right – party autonomy
- 21. Voluntary assignation of a right – applicable law in absence of party choice
- 22. Involuntary assignation of a right – general rule
- 23. Remote parties – enforcement of the assignation - mutual rights and obligations of  
debtor and assignee – applicable law
- 24. Remote parties – competing assignees – applicable law

## **Part VI – General**

- 25. Public policy *etc.*
- 26. *Renvoi*
- 27. Interpretation



## **Part I – General<sup>2</sup>**

1. The rules in this Part apply for the purpose of choosing the law ('the applicable law') to be used for determining issues relating to property.
2. The characterisation for the purposes of international private law of issues arising in a claim as issues relating to property is a matter for the courts of the forum.
3. The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether a claim in property has arisen.
4. For the avoidance of doubt the rules stated herein apply in relation to events occurring in the forum as they apply in relation to events occurring in any other country.
5. This Act extends to any country within the United Kingdom; consequently, 'the forum' means the courts of England and Wales, Scotland or Northern Ireland, as the case may be.

## **Part II – Characterisation of property<sup>3</sup>**

6. (1) The characterisation for the purposes of international private law of property as immovable or moveable property, or corporeal or incorporeal property, is a matter for the courts of the forum applying the law of the country where the property is situated at the date of commencement of the proceedings.
- (2) For the purposes of this Part, property shall be deemed to be situated as follows: -
  - (a) Property which is, according to its attributes, immovable and corporeal, at the place where it is physically situated;
  - (b) Property which is, according to its attributes, immovable and incorporeal, at the place where the right may be enforced at the date of commencement of the proceedings;
  - (c) Property which is, according to its attributes, moveable and corporeal, and, at the date of commencement of the proceedings: -
    - (i) has an ascertainable physical location, at the place where it is physically situated; or
    - (ii) has an unascertainable physical location, at the place where it most recently held an ascertainable physical location; save that

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<sup>2</sup> Save for paragraph 5, the provision and notes in Part I are as *per* Model 1, notes 1 - 4.

<sup>3</sup> The provision and notes in Part II are as *per* Model 1, notes 5 - 16.

- (iii) maritime vessels, aircraft, and rolling stock shall be deemed to be situated at their place of registration;
- (d) Property which is, according to its attributes, moveable and incorporeal, and:-
  - (i) in respect of which a register of ownership is maintained, at the place where the register is kept, and in cases where more than one register is kept, at the place where the principal register is kept; or failing which,
  - (ii) is represented by documentation, in the country in accordance with whose law the documentation has been drawn (the '*lex cartae*'); or
  - (iii) is not of a type referred to in section 6(2)(d)(i) or (ii), at any place where the party against whom the right is enforceable ('the debtor') has, or is likely to have, assets in respect of which the right may be satisfied.

### **Part III – Choice of law: immoveable property<sup>4</sup>**

#### **Transfer of immoveable property<sup>5</sup>**

7. (1) The general rule is that any question pertaining to the creation (including alienability), acquisition, use, disposal or transfer (hereinafter 'the transfer') of an interest in immoveable property, and its effect on the proprietary rights of any person claiming, by any law, to be interested therein, shall be governed by the *lex situs*, which: -
  - (a) in the case of property which is, according to its attributes, immoveable and corporeal, shall be the law of the country where the property is physically situated [at the time when the interest therein is alleged to have been transferred<sup>6</sup>]; and
  - (b) in the case of property which is, according to its attributes, immoveable and incorporeal, shall be the law of the country where the right may be enforced.<sup>7</sup>

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<sup>4</sup> Where the wording is the same as that in Model 1, Part III, the notes also are as *per* Model 1.

<sup>5</sup> Model 2 adopts a general rule in favour of the *lex situs*, coupled with a rule of displacement. This demonstrates a stronger leaning towards application of the *lex situs* than does Part III of Model 1. Model 1 comprises a general rule in favour of applying the law of closest connection, combined merely with a presumption that the *lex situs* will be the law of closest connection.

<sup>6</sup> By implication, the applicable law is the law of the *situs* '*at the time when the interest is alleged to have been transferred*', so it is not strictly necessary to articulate this temporal qualification. See Model 1, note 19.

<sup>7</sup> The temporal qualification is as *per* note 6, *supra*.



(2) The general rule expressed in section 7(1) shall not apply where it appears, in all the circumstances, from a comparison of: -

- (a) the significance of the facts which connect the transfer with the *lex situs*; and
- (b) the significance of any factors which connect the transfer with another country ('the non-*situs* country')

that it is more appropriate<sup>8</sup> for the applicable law for determining the issues arising in the case, or any of those issues,<sup>9</sup> to be the law of the non-*situs* country,<sup>10</sup> and in such cases, the applicable law shall be the law of the non-*situs* country.<sup>11</sup>

(3) The factors that may be taken into account as connecting a transfer with a country for the purposes of section 7(2) include, in particular, factors relating to the parties; any pre-existing relationship, or course of dealings, between the parties; and any contractual or other obligation in implementation of which the transfer was effected or the issue arose.<sup>12</sup>

[OR]

(2<sup>A</sup>) The general rule expressed in section 7(1) shall not apply where it appears from the circumstances as a whole that the transfer or issue is more closely connected with another country ('the non-*situs* country'), and in such cases the applicable law for determining the issue or issues arising (as the case may be) shall be the law of that non-*situs* country.

## Passing of risk

8. (1) Where: -

- (a) one party ('the first party') has agreed, or is otherwise obliged,<sup>13</sup> to transfer<sup>14</sup> an interest in immoveable property to another ('the second party') (together 'the parties'); and
- (b) according to the law applicable to the agreement or other obligation to transfer the interest,<sup>15</sup> but not according to the *lex situs*, the property is at the second party's risk, or *vice versa*,<sup>16</sup>

<sup>8</sup> Cf. Model 1, note 20. In Model 2, section 9 will safeguard the interests of the *lex situs*.

<sup>9</sup> Incorporation of the doctrine of *dépeçage* is as *per* Model 1, note 21.

<sup>10</sup> Cf. Model 1, note 22.

<sup>11</sup> *i.e.* The non-*situs* country as at the time when the interest is alleged to have been transferred, or the issue to have arisen. Cf. Model 1, notes 8 and 23.

<sup>12</sup> Cf. Model 1, notes 24 and 25.

<sup>13</sup> Cf. Model 1, note 26.

<sup>14</sup> Cf. Model 1, note 27.

the general rule is that the law applicable to determine whether risk has passed from the first party to the second party, shall be the *lex situs*.

(2) The general rule expressed in section 8(1) shall not apply where it appears, in all the circumstances, from a comparison of: -

(a) the significance of the facts which connect the issue with the *lex situs*; and

(b) the significance of any factors which connect the issue with another country ('the non-*situs* country')

that it is more appropriate<sup>17</sup> for the applicable law for determining the issue arising in the case to be the law of the non-*situs* country,<sup>18</sup> and in such cases, the applicable law shall be the law of the non-*situs* country.<sup>19</sup>

(3) The factors that may be taken into account as connecting an issue with a country for the purposes of section 8(2) include, in particular, factors relating to the parties; any pre-existing relationship, or course of dealings, between the parties; any contractual or other obligation in implementation of which the issue arose; and the instrument of transfer by which the purported transfer was effected or the issue arose.<sup>20</sup>

[OR]

(2<sup>A</sup>) The general rule expressed in section 8(1) shall not apply where it appears from the circumstances as a whole that the issue is more closely connected with another country ('the non-*situs* country'), and in such cases the applicable law for determining the issue or issues arising (as the case may be) shall be the law of that non-*situs* country.

9. When applying under Part III the law of a non-*situs* country, effect shall nevertheless be given to the rules of the *lex situs*, if and insofar as, under the last-mentioned law, those rules cannot be derogated from by agreement or any other means, but must be applied whatever the law applicable to the transfer or issue (hereinafter 'mandatory rules').<sup>21</sup>

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<sup>15</sup> *i.e.* The 'contractual' *lex causae* which may, or may not, be the same as the law applicable to the transfer of property, under section 7(1), *supra*.

<sup>16</sup> *i.e.* According to the 'contractual' *lex causae*, the property is at the second party's (the transferee's) risk, but according to the *lex situs*, it remains at the first party's (the transferor's) risk.

<sup>17</sup> *Cf.* Model 1, note 30, and Model 2, note 8, *supra*.

<sup>18</sup> *Cf.* Model 1, note 32.

<sup>19</sup> *i.e.* The non-*situs* country as at the time when the interest is alleged to have been transferred, or the issue to have arisen. *Cf.* Model 1, notes 23 and 33.

<sup>20</sup> *Cf.* Model 1, notes 34 and 35.

<sup>21</sup> *Cf.* Model 1, note 36.



## **Part IV – Choice of law: corporeal moveable property**

10. (1) This Part shall apply for the purpose of ascertaining the law applicable to determine the existence and validity of proprietary rights in any object of corporeal moveable property.<sup>22</sup>

(2) ‘Proprietary rights’ shall include rights of ownership, possession, enjoyment or use of an object of corporeal moveable property (‘an object’).<sup>23</sup>

### **Transfer of corporeal moveable property<sup>24</sup>**

11. Subject to sections 14<sup>25</sup> and 15<sup>26</sup> below, the general rule is that any question pertaining to the transfer<sup>27</sup> of an interest in an object from one party (‘the first party’) to another (‘the second party’), and its effect on the proprietary rights of any person claiming, by any law, to be interested therein, shall be governed by the law of the country where the object was physically situated at the time when the interest is alleged to have been transferred (‘the *lex loci rei sitae*’).<sup>28</sup>

12. (1) The general rule expressed in section 11 shall not apply in the following cases<sup>29</sup>: -

(a) where the physical situation of the object, at the time when the interest therein is alleged to have been transferred, is unknown and unascertainable;<sup>30</sup>

(b) where the physical situation of the object, at the time when the interest therein is alleged to have been transferred, is casual or accidental;<sup>31</sup>

<sup>22</sup> Cf. Model 1, note 37.

<sup>23</sup> Cf. Model 1, notes 38 and 39.

<sup>24</sup> Model 2, whilst echoing the static/dynamic conflict distinction introduced in Model 1, does not utilise the original-party/remote-party distinction there employed, or the voluntary/involuntary dispossession distinction. Rather, Model 2 employs a general rule in favour of the *lex loci rei sitae*, and seeks primarily to build upon the existing (recognised) exceptions to that rule.

<sup>25</sup> Regarding mandatory rules.

<sup>26</sup> Regarding competing transferees.

<sup>27</sup> Per section 7(1), *supra*.

<sup>28</sup> *Winkworth v. Christie, Manson & Woods Ltd* [1986] 1 Ch. 496, per Slade, J., at p501. The general rule, as argued by Mr Gilman, Counsel for the second defendant, was accepted by Mr Mummery, Counsel for the plaintiff (per Slade, J., at p502/3). Cf. *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 Q.B. 248, per Devlin, J., at p257: “There is little doubt that it is the *lex situs* which as a general rule governs the transfer of movables when effected contractually.”

<sup>29</sup> In *Winkworth*, Slade, J. noted five specific exceptions to the general rule (*ibid.*, p501). Section 12 of Model 2 employs a choice of law structure which comprises *specific* exceptions to a general rule, coupled also with one *general* exception.

<sup>30</sup> E.g. Because the object was in transit at the relevant time.

<sup>31</sup> *i.e.* Ascertainable, but fortuitous, or random. In *Winkworth*, Slade, J. formulated this exception in the following manner, *viz.*: “... if goods are in transit and their *situs* is casual or not known.” (*ibid.*, p501) His Lordship, however, did not explain what was intended by the expression ‘casual’. Was it intended to extend to a ‘fortuitous’ *situs* (e.g. the engagement ring scenario depicted in Chapter Eight, *supra* –



- (c) where the transfer forms part of a general or universal assignation of property occurring upon the event of the first party's marriage, bankruptcy or succession;<sup>32</sup>
- (d) [where an object, having been stolen or otherwise unlawfully removed from one party ('the deprived party') in the jurisdiction of one country ('the first country'), has thereafter been removed from the first country without the consent or acquiescence of the deprived party, has been taken to another jurisdiction ('the second country'), and there transferred to another party ('the current possessor'), and [subsequently] – OR – [within a period of no more than {three<sup>33</sup>} years from the date of {theft or unlawful removal from the deprived party} – OR – {removal from the first country}<sup>34</sup> returned by the current possessor to the first country;<sup>35</sup>] or

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'The Transfer of Corporeal Moveable Property', at note 92) or merely to a 'transient' (*i.e.* continually moving or changing [e.g. a consignment of goods travelling across Europe on a freight train]) *situs*; and does 'transient' denote something more fleeting than 'temporary'? Due to these ambiguities of interpretation, it is submitted that it is preferable to divide this provision into *two* discrete exceptions: the first exception (in this Model), section 12(1)(a), deals with cases where, due to its transient (*i.e.* continually changing) nature, the *situs* is "*unknown and unascertainable*", while the second exception, section 12(1)(b) deals with cases where the *situs* is random or fortuitous. Although an object may be in transit, it might happen that its *situs* at the relevant date was, in fact, known, or at least ascertainable; yet, the *situs* might properly be regarded as '*casual*' in the sense of '*not appropriate for taking account of*.' (*i.e.* the object could be (1) in transit; (2) ascertainable; and (3) casual [e.g. it may be known that the object, though in transit, was situated in the Grand Central Station, Ruritania, at the relevant time and that the *situs*, though identifiable, was fortuitous or random]). In these circumstances, it is submitted, the *situs* is an inappropriate single-contact localising agent or connecting factor. See section 12(2)(a), *infra*.

<sup>32</sup> *Bank voor Handel en Scheepvaart NV v. Slatford* [1953] 1 Q.B. 248, *per* Devlin, J., at p257: "*The maxim mobilia sequuntur personam is the exception rather than the rule and is probably confined to certain special classes of general assignments such as marriage settlements and devolutions on death and bankruptcy.*"

<sup>33</sup> This is an arbitrary figure. A period of one year might encourage concealment of the object by the current possessor, whereas a three-year period would strike a more reasonable balance between the deprived party and the current possessor.

<sup>34</sup> The present author prefers the first *terminus a quo*.

<sup>35</sup> This is, in substance, the 'exception' propounded by Counsel for Mr Winkworth (*ibid.*, p510), but rejected by Slade, J. (*ibid.*, p514) It is submitted that this exception, though narrowly formulated, should now be re-considered. In view of increased concern regarding the illicit international trade in art and antiquities (evidenced, at governmental level, by the Seventh Report of The Culture, Media and Sport Committee, '*Cultural Property: Return and Illicit Trade*', dated 18 July 2000, and the Report of the Ministerial Advisory Panel on Illicit Trade, dated December 2000 [See Chapter Ten, *supra* – 'The Treatment of Cultural Property']), and the recognised problem (which is exacerbated by the *situs* rule), of cross-border 'day-trip' transactions, it is suggested that Mr Mummery's argument is, in the current climate, more persuasive than perhaps it was in 1980, and that the opportunity to temper the *situs* rule, passed over more than twenty years ago by Slade, J., should now be seized. Consider Prott and O'Keefe's conclusion that, "*There is no doubt that, on any version, the application of the lex rei sitae lessens the protection of cultural heritage objects. Restrictions on transfer, export and other protections applied by the country of origin will all fail to be observed, in the interest of 'security of commerce', once the goods have passed through a transaction in another country. Since so many States now have rules on inalienability, classification, pre-emption, notification of transfer and export control, comity and reciprocity would suggest the wisdom of recognizing and enforcing such restrictions, at least in respect of important and identifiable cultural heritage items.*" (Prott, LV and O'Keefe, P J, '*Law and the Cultural Heritage*', Volume 3, p641, paragraph 1241) In view not only of the difficulty in defining terms such as 'cultural property' or 'cultural objects', but also the absence of



- (e) where it appears from the circumstances as a whole that the transfer or issue is more closely connected with another country ('the non-*situs* country')<sup>36</sup>

The factors that may be taken into account as connecting a transfer or issue with a country for the purposes of section 12(1)(e) include, in particular, factors relating to the parties; any pre-existing relationship, or course of dealings, between the parties; the length of time during which the parties were present, if at all, in the country; and the length of time during which, and the reason for which, the object was physically situated, if at all, in the country.

(2) Where application of the general rule expressed in section 11 has been displaced under section 12(1), the applicable law shall be: -

- (a) in cases falling under section 12(1)(a) or (b), the law with which the transfer is most closely connected;<sup>37</sup>
- (b) in cases falling under section 12(1)(c), the law designated by the relevant choice of law rule concerning, as the case may be, matrimonial property, bankruptcy or succession;
- (c) in cases falling under section 12(1)(d), the law of the first country;<sup>38</sup> and
- (d) in cases falling under section 12(1)(e), the law of the non-*situs* country.

## Passing of risk

13. (1) Where according to the law applicable to any agreement between the parties, or other obligation, to transfer an interest in an object from the first party to the second party,<sup>39</sup> but not according to the law of the country where the object was physically situated at the time when the aforesaid agreement

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any cogent reason for treating valuable, 'non-cultural' stolen goods differently from stolen 'cultural' goods, it is submitted that the proposed section 12(1)(d) exception should apply to *all* categories of corporeal moveable property. *However*, while it is submitted that the 12(1)(d) exception would now be justifiable, it is submitted that a greater margin of judicial discretion and flexibility than is permitted by section 12(1)(d) would be desirable. It is likely that such a narrowly formulated exception would rarely be employed. Accordingly, the author's preference would be for the circumstances anticipated by section 12(1)(d) to be incorporated (though not explicitly) within, and dealt with according to, the wider exception enshrined in section 12(1)(e), *infra*.

<sup>36</sup> Cf. Article 4(5) of the Rome Convention.

<sup>37</sup> *i.e.* The 'proper law' approach which currently applies to the transfer of goods in transit. (Chapter Eight, *supra* – 'The Transfer of Corporeal Moveable Property') Notably, the factors which fall to be considered, under the current rule, in determining the proper law in respect of goods in transit, are nowhere articulated. Arguably, therefore, it is not necessary, in this Model, to articulate those factors which are deemed to be relevant for this purpose.

<sup>38</sup> Subject, however, to the general remarks made in note 35, *supra*, concerning the unduly narrow scope of section 12(1)(d).

<sup>39</sup> Cf. Model 1, note 56.

was concluded, or other obligation became binding, the object is at the second party's risk, or *vice versa*, the general rule is that the law applicable to determine whether risk has passed from the first party to the second party shall be the last-mentioned law.<sup>40</sup>

(2) The general rule expressed in section 13(1) shall not apply where it appears, in all the circumstances, from a comparison of: -

(a) the significance of the facts which connect the issue with the country whose law would be applicable under section 13(1);<sup>41</sup> and

(b) the significance of any factors which connect the issue with another country ('the non-*situs* country')

that it is more appropriate<sup>42</sup> for the applicable law for determining the issue arising in the case to be the law of the non-*situs* country,<sup>43</sup> and in such cases, the applicable law shall be the law of the non-*situs* country.<sup>44</sup>

(3) The factors that may be taken into account as connecting an issue with a country for the purposes of section 13(2) include, in particular, factors relating to the parties; any pre-existing relationship, or course of dealings, between the parties; and any contractual or other obligation in implementation of which the issue arose; the instrument of transfer by virtue of which the purported transfer was effected; the length of time during which the parties were present, if at all, in the country; and the length of time during which, and the reason for which, the object was physically situated, if at all, in the country.<sup>45</sup>

## [OR]

(2<sup>A</sup>) The general rule expressed in section 13(1) shall not apply where it appears from the circumstances as a whole that the issue is more closely connected with another country ('the non-*situs* country'), and in such cases the applicable law for determining the issue or issues arising (as the case may be) shall be the law of that non-*situs* country.

<sup>40</sup> *i.e.* The law of the country where the object was physically situated at the time when the agreement was concluded, or other obligation became binding, *not* the 'contractual' *lex causae*.

<sup>41</sup> *Cf.* Model 1, note 60. In contrast with Model 1, in this more moderate Model, since there is *no* scope for exercise by the parties of party autonomy (save in relation to Part V, paragraph 20, *infra*), the law in question is the law of the country where the object was physically situated when the agreement was concluded, or the obligation to transfer the interest became binding.

<sup>42</sup> *Cf.* Model 1, notes 20, 52 and 61, and Model 2, notes 8 and 17, *supra*. In this Model, section 14(2) will safeguard the interests of the *lex loci rei sitae*.

<sup>43</sup> *Cf.* note 18, *supra*.

<sup>44</sup> *Cf.* Model 1, note 62.

<sup>45</sup> *Cf.* Model 1, notes 63 and 64.



14. With respect to the transfer of any object, notwithstanding the operation of sections 12 and 13 above,

(1) Nothing in this Part shall restrict the application of the rules of law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the transfer of an interest in an object;<sup>46</sup> and

(2) Nothing shall prejudice the operation of any rule of the relevant *lex loci rei sitae* which classifies the object as inalienable.<sup>47</sup>

### Competing transferees

15. In the event that: -

(1) the first party purports to transfer the same object to more than one transferee, or proprietary rights in respect of one object and deriving from the transferor are claimed by more than one party (hereinafter 'the competing transferees');<sup>48</sup> and

(2) each transfer or claim is valid according to the law(s) which govern(s) it under this Part,<sup>49</sup>

the conflicting claims of the competing transferees shall be determined as follows:-

(a) where the validity of the competing transfers and/or claims is governed, under this Part, by the same law, in accordance with that law;<sup>50</sup> and

(b) in any other case, in accordance with the law of the country where the object was physically situated at the time of the *later*, or (in the case of more than two competing transferees) *latest*, transaction.<sup>51</sup>

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<sup>46</sup> Cf. Article 7(2), Rome Convention. In principle, this provision could extend to the good faith exception articulated by Slade, J. (*ibid.*, p501), namely, where a party claiming proprietary rights in respect of an object has not acted in [accordance with the forum's conception of] good faith. However, for the reasons stated in Chapter Twelve, *supra* - 'The 'Situs' Rule - For and Against' - it is submitted that this exception should *not*, in fact, be incorporated within any statutory statement of the relevant choice of law rules in relation to property. As has already been argued, unless the exercise of good faith is to be classed as a manifestation of United Kingdom public policy, the significance, or otherwise, of good faith should be a matter for the *lex loci rei sitae*, not the forum. This could be made explicit by inclusion of the following clause: 'save that any rules of law of the forum concerning the exercise and/or demonstration of good faith shall not be classified as mandatory'. Technically, section 14 could also incorporate the third exception detailed by Slade, J., namely, "... where a statute in force in the country which is the forum in which the case is heard obliges the court to apply the law of its own country." (*ibid.*, p501) Slade, J. cited as one example of this exception the former section 24 of the Sale of Goods Act 1893, now repealed. (*ibid.*, p501)

<sup>47</sup> Cf. Model 1, note 74.

<sup>48</sup> Cf. Model 1, notes 65 - 68.

<sup>49</sup> Cf. Model 1, note 69.

<sup>50</sup> Cf. Model 1, note 70.



## **Part V – Choice of law: incorporeal moveable property**<sup>52</sup>

### **Original parties – Creation of a right (Debtor and Creditor)**<sup>53</sup>

16. (1) Any question pertaining to the creation of a right of incorporeal moveable property ('a right') shall be governed by the law of the country with which, at the relevant date (as hereinafter defined), the right is most closely connected.
- (2) For the purposes of this Part, it shall be presumed that a right is most closely connected with the country in which it may be enforced.<sup>54</sup>
17. In this Part, the relevant date shall be: -
  - (1) For the purposes of sections 16<sup>55</sup> and 19,<sup>56</sup> the date on which the right in question is purported to have been created; and
  - (2) For all other purposes, the date of commencement of proceedings concerning the right in question.<sup>57</sup>

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<sup>51</sup> Cf. Prott and O'Keefe, *ibid.*, p640, paragraph 1240. The solution proposed in this paragraph differs from that in paragraph 17 of Model 1 (at note 72), since incidental recourse cannot be taken, within the scope of Model 2 as drafted, to the rules concerning voluntary dispossession by the 'first' competing transferee.

<sup>52</sup> Due to the widespread confusion concerning the choice of law rules applicable to the assignation of incorporeal moveable property, it is submitted that a comprehensive restatement would be valuable. The provision and notes are as *per* Model 1.

<sup>53</sup> *E.g.* An insurance company and the insured party. See Appendix K.

<sup>54</sup> This is generally the 'proper law of the right', but there are exceptions (*e.g.* consider a beneficial interest under a trust deed drawn in accordance with Scots law, administered in Scotland, and having Scottish trustees: the (putative) proper law of the right would be Scottish. If, however, the trust fund were invested in an offshore bank account in Jersey, the (putative) place of enforcement would be Jersey). A right will be enforceable in any country in which the debtor has, at the date of creation of the right or any later date, assets against which the right may be satisfied. This may lead to the designation of more than one state. It is submitted that among such states the actual place of enforcement should be at the option of the pursuer. Cf. Model 1, note 126.

<sup>55</sup> *i.e.* Creation of a right.

<sup>56</sup> *i.e.* Assignability of a right.

<sup>57</sup> It is necessary to draw a distinction between the country in which the right may be enforced, first of all, at the time of its creation, and secondly, on the date on which it is sought to enforce the right against the debtor. For example, if, at the time when a debt is created, the debtor was resident in France, and his entire estate (against which the debt may be satisfied) was situated in France, any question pertaining to the creation of that debt would (according, at least, to this model) be governed by the law of the country with which the right was most closely connected, which, in turn, would be presumed to be the law of the country in which the right may be enforced. *But*, if there were no qualification as to the temporal aspect of enforcement (*i.e.* no specification of the time at which closest connection were to be determined), the law of closest connection would be deemed to be the law of the country in which the right may be enforced (*i.e.* in which the debtor has assets) *at the date of commencement of proceedings to enforce the debt*. If, by that date, the debtor had relocated his property (and possibly also his person) to another country, say, to Italy, then the effect would be to apply to any question pertaining to the *creation* of the debt not French law, but Italian law. This would be an absurd result since at the time of creation of the debt in question, there was *no* connection between the parties and their transacting, and Italy. Hence, it is submitted that the country of closest connection must be determined *either* on the date on which the right in question is purported to have been created, *or* on the (later) date on which it is sought to enforce the right. The relevant date will depend, in each case, upon the nature of the particular dispute (*e.g.* whether it concerns merely the



18. The presumption in section 16(2) shall be disregarded if it appears, from the circumstances as a whole that at the relevant date<sup>58</sup> the right (or purported right) was more closely connected with another country.<sup>59</sup>

### Original parties – Assignment of a right (Assignor and Assignee)<sup>60</sup>

19. The assignability of a right shall be governed by the law of the country with which, at the relevant date,<sup>61</sup> the right was most closely connected, as determined in accordance with sections 16(2) and 18 above.<sup>62</sup>

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*existence/creation of the right; or whether the purpose of the proceedings is to enforce the right against the debtor). It is submitted that in cases which concern matters other than the creation or assignability of a right, the later date should be the 'relevant date', for the aim, in such cases, is to enforce the right against the debtor (i.e. it would be inappropriate, in such circumstances, to apply the law of the country in which the debt was enforceable at the time of its creation, for by the time the creditor may seek to enforce the debt, the debtor, innocently or with calculating intent, may have relocated his assets to another country, thereby defeating the creditor's attempts to enforce the debt). It is quite possible that a dispute may concern the existence/creation of a right, and not the question of enforcement: for example, an insured party may seek a declaration that a life assurance contract has been concluded, giving rise to a right enforceable thereunder, but without actually seeking to enforce that right [which may, in any event, be enforceable only upon the death of the insured party] against the assurance company. Cf. Model 1, note 129.*

<sup>58</sup> Section 17, *supra*.

<sup>59</sup> Cf. Article 4(5), Rome Convention. If, using the scenario depicted in note 57, *supra*, immediately following the (purported) creation of the debt, the debtor (say, an Italian national), as anticipated by himself and the creditor (also, say, an Italian national), and with the consent or acquiescence of the creditor, removed himself and his assets to Italy, and remained there until such time as enforcement proceedings were raised against him in Italy by the creditor, it may be argued that, *on the date on which the debt is purported to have been created*, it was more closely connected with Italian, and not French, law. Consider also *Raiffeisen Zentralbank Österreich AG v. Five Star General Trading LLC and others* [2000] 2 Ll. Rep. 684; [2001] 2 W.L.R. 1344; [2001] 3 All E.R. 257. The dispute concerned a marine insurance policy. Although the insurers in question were French, the insurance policy was, in fact, governed by English law. Hence, English law was the proper law governing the underlying contract of insurance, but French law was the *lex situs* of the chose in action which had been assigned (insofar as France would be the place of enforcement of the right). The 'presumption' that the law of the place of enforcement would be the law of closest connection, was, in effect, displaced by an application of English law, the law governing the obligation assigned. Cf. Model 1, note 131.

<sup>60</sup> E.g. The insured party and a third party creditor, such as a bank. See Appendix K.

<sup>61</sup> Section 17(1), *supra*.

<sup>62</sup> Consider the assignability of future wages (e.g. by a husband, H, to his estranged wife, W). If, at the date of creation of W's right to the wages, H were domiciled in State X (according to the law of which wages are assignable), but he subsequently acquired a domicile of choice in State Y (according to the law of which wages are non-assignable), the question would arise whether assignability should be governed by the law of the country in which W's right is/was enforceable (a) on the date on which her right is purported to have been created (i.e. X law); or (b) on the date of commencement of enforcement proceedings against H (i.e. Y law). Save perhaps in cases where the forum would adopt an interest analysis approach, it is submitted that X law should apply. If the rule were otherwise (i.e. if Y law applied), then it would be within H's power to relocate, deliberately frustrating W's entitlement (under X law) to his wages. Section 19 would provide scope for applying to the question of assignability another, more closely connected law, but it is to be hoped that the choice made by the forum would not fall upon Y law *unless* there was, on the date when W's right was purportedly created, a pre-existing connection between H and Y law. Article 12(2) of the Rome Convention does not deal with the temporal conflict of laws, merely applying 'the law governing the right to which the assignment relates'. Cf. Model 1, note 134.



20. The voluntary disposal or assignation<sup>63</sup> ('the assignation') of a right from one party ('the assignor') to another party ('the assignee') (together 'the original parties') shall be governed by the law chosen by the original parties.<sup>64</sup> The choice must be express, or demonstrated with reasonable certainty by the terms and form of the assignation, or the circumstances of the case. By their choice, the original parties may select the law applicable to the whole or a part only of the assignation.<sup>65</sup>
21. To the extent that the law applicable to the voluntary assignation of a right has not been chosen in accordance with section 20, the assignation shall be governed by the law of the country with which it is most closely connected.<sup>66</sup>
22. The involuntary<sup>67</sup> assignation of a right from the assignor to the assignee shall be governed by the law of the country with which, at the relevant date,<sup>68</sup> the right is most closely connected, as determined in accordance with sections 16(2) and 18 above.<sup>69</sup>

#### Remote parties – Enforcement of the assignation (Debtor and Assignee)<sup>70</sup>

23. Mutual rights and obligations of the debtor<sup>71</sup> and the assignee shall be governed by the law of the country with which, at the relevant date,<sup>72</sup> the right is most closely connected, as determined in accordance with sections 16(2) and 18 above.<sup>73</sup>

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<sup>63</sup> Contractual, or non-contractual (*e.g.* donation).

<sup>64</sup> *i.e.* The proper law of the assignation. *Cf.* Article 12(1) of the Rome Convention.

<sup>65</sup> *Cf.* Article 3(1) of the Rome Convention. *Cf.* Model 1, note 137.

<sup>66</sup> For contractual assignations, see Article 4 of the Rome Convention, and for non-contractual assignations, the proper law of the assignation will be akin to the objectively ascertained proper law of contract (*cf.* *The Assunzione* [1954] P. 150). *Cf.* Model 1, note 138.

<sup>67</sup> See Chapter Eleven, *supra* – 'The Assignation of Incorporeal Moveable Property', note 173 *et seq.*

<sup>68</sup> Section 17(2), *supra*; in effect, the date on which diligence proceedings to enforce the debt are commenced.

<sup>69</sup> Consider, for example, the case where a judgment creditor in State X sought to enforce (in respect of a debt owed to him by his judgment debtor in State Y) a debt owed by a third party to the judgment debtor, by means of an arrestment of funds in the hands of the third party (the third party arrestee) in State Z. The key factor is the law of the place where the debt is enforceable (*i.e.* where it can be enforced against the third party arrestee) *at the date of commencement of proceedings against the third party arrestee*. *Cf.* Model 1, note 141.

<sup>70</sup> *E.g.* The insurance company and the third party creditor, that is, the bank. See Appendix K.

<sup>71</sup> *i.e.* The party against whom the right is enforceable (section 6(2)(d)(iii), *supra*).

<sup>72</sup> Section 17(2), *supra*.

<sup>73</sup> *i.e.* The law of the country where the right may be enforced at the date of commencement of proceedings against the debtor (section 17(2)). If the rule were otherwise, the debtor would be able to frustrate enforcement of the debt by relocating his assets *after* creation of the debt. *Cf.* Model 1, note 145.



## Remote parties – Competing assignments (Competing Assignees)<sup>74</sup>

24. In the event that: -

- (1) the assignor purports to assign the same right to more than one party, or the same right deriving from the assignor is claimed by more than one party<sup>75</sup> (hereinafter ‘the competing assignees’); *and*
- (2) each assignment is valid according to the law which governs it under this Part,<sup>76</sup>

the conflicting claims of the competing assignees shall be determined as follows: -

- (a) where the validity of the competing assignments is governed, under this Part, by the same law, in accordance with that law;<sup>77</sup> *and*
- (b) in any other case, in accordance with the law of the country with which, at the relevant date,<sup>78</sup> the right is most closely connected,<sup>79</sup> as determined in accordance with sections 16(2) and 18 above.

## Part VI – General

25. Nothing in this Act: -

- (1) authorises the application of the law of a country outside the forum as the applicable law in so far as to do so: -

- (a) would conflict with principles of public policy;<sup>80</sup> *or*
- (b) would give effect to such penal, revenue or other public law as would not otherwise be enforceable under the law of the forum;<sup>81</sup> *or*

- (2) affects any rules of evidence, pleading or practice, or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.<sup>82</sup>

<sup>74</sup> E.g. Competing third party creditors. See Appendix K.

<sup>75</sup> i.e. In the event of an involuntary assignment of the right.

<sup>76</sup> i.e. According to sections 19 - 22. See Appendix J I.

<sup>77</sup> See Appendix J II.

<sup>78</sup> Section 17, *supra*; in effect, the date of commencement of the ‘conjoined’ enforcement proceedings against the debtor.

<sup>79</sup> See Appendix J III.

<sup>80</sup> Despite Slade, J.’s treatment of infringement of the forum’s public policy as a *particular* exception to the *situs* rule, it is submitted that this so-called ‘exception’ should merely be absorbed within a *general* public policy provision.

<sup>81</sup> Cf. Section 14(3)(a)(ii) of the Private International Law (Miscellaneous Provisions) Act 1995. E.g. *Attorney-General for New Zealand v. Ortiz & Ors* [1984] A.C. 1.

<sup>82</sup> Cf. Section 14(3)(b) of the 1995 Act.

26. The application of the law of any country specified by this Act means: -

- (1) for the purposes of Part II, and concerning application of the *lex situs* in cases arising under Part III, the rules of law in force in that country, including the rules of international private law forming part of that law; and
- (2) in any other case, the rules of law in force in that country, excluding the rules of international private law forming part of that law.

[OR]

26<sup>A</sup>. The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned.<sup>83</sup>

### Interpretation

27. (1) In this Act: -

“competing transferees” has the meaning assigned by section 15

“debtor” has the meaning assigned by section 6(2)(d)(iii)

“*lex cartae*” has the meaning assigned by section 6(2)(d)(ii)

“*lex loci rei sitae*” has the meaning assigned by section 11

“mandatory rules” has the meaning assigned by section 9

“the original parties” has the meaning assigned by section 20

“the parties” has the meaning assigned by section 8(1)(a)

“transfer” has the meaning assigned by section 7(1)

“first party”, for the purposes of Part III, has the meaning assigned by section 8(1)(a)

“first party”, for the purposes of Part IV, has the meaning assigned by section 11

“second party”, for the purposes of Part III, has the meaning assigned by section 8(1)(a)

“second party”, for the purposes of Part IV, has the meaning assigned by section 11

(2) All references in this section are to this Act.

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<sup>83</sup> Cf. Section 9(5), 1995 Act. The author’s preference is for the first formulation of section 26, and not section 26<sup>A</sup>, but section 26<sup>A</sup> would be in line with recent Hague Conventions and the 1995 Act.



## Postscript

It will be noted that Model 2 adopts a general rule in favour of the *lex situs*, coupled with a rule of displacement. This demonstrates a stronger leaning towards application of the *lex situs* than does Part III of Model 1. Model 1 comprises a general rule in favour of applying the law of closest connection, combined merely with a presumption that the *lex situs* will be the law of closest connection.<sup>84</sup>

Model 2, whilst echoing the static/dynamic conflict distinction introduced in Model 1, does not utilise the original-party/remote-party distinction there employed, or the voluntary/involuntary dispossession distinction. Rather, Model 2 employs a general rule in favour of the *lex loci rei sitae*, and seeks primarily to build upon the existing (recognised) exceptions to that rule.<sup>85</sup>

Whilst the author's preference would be to follow the more refined approach of Model 1, it is evident that the success of a Convention depends not only upon the content of its rules, but also upon the extent of its international acceptability, and upon wider political considerations. Nevertheless, it should be borne in mind that few areas of the conflict of laws (of which this is one) remain unregulated by international convention.

It has been suggested (albeit in a quite different context) that, to many, total abstinence is easier than perfect moderation.<sup>86</sup> As regards choice of law rules in property, it is doubtless true that maintenance of the *status quo* would be 'easier' than

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<sup>84</sup> Cf. Model 2, note 5, *supra*.

would be the cultivation of ‘perfect moderation’. It is hoped, however, that the reader might now have been persuaded that, in this context, moderation of the general rule is desirable. In presenting Models 1 and 2 for consideration, the author avails herself of the words of Sir Winston Churchill, viz.:

*“Now this is not the end. It is not even the beginning of the end.*

*But it is, perhaps, the end of the beginning.”<sup>87</sup>*

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<sup>85</sup> Cf. Model 2, note 24, *supra*.

<sup>86</sup> St Augustine of Hippo, (AD 354 – 430) (*‘On the Good of Marriage’*, AD 401).

<sup>87</sup> Sir Winston Churchill, (1874) – (1965), Speech at the Mansion House, London, 10 November 1942.



**BEYOND THE INELUCTABLE:**  
**AN EXAMINATION OF CHOICE OF LAW RULES**  
**IN PROPERTY**

**APPENDICES**

**JANEEN MARGARET CARRUTHERS**

**Thesis submitted for the degree of Ph.D.**

**School of Law**  
**Faculty of Law and Financial Studies**  
**University of Glasgow**

**March 2002**

**BEYOND THE INELUCTABLE:**  
**AN EXAMINATION OF CHOICE OF LAW RULES**  
**IN PROPERTY**

(Appendices A - K)

**JANEEN MARGARET CARRUTHERS**

**Thesis submitted for the degree of Ph.D.**

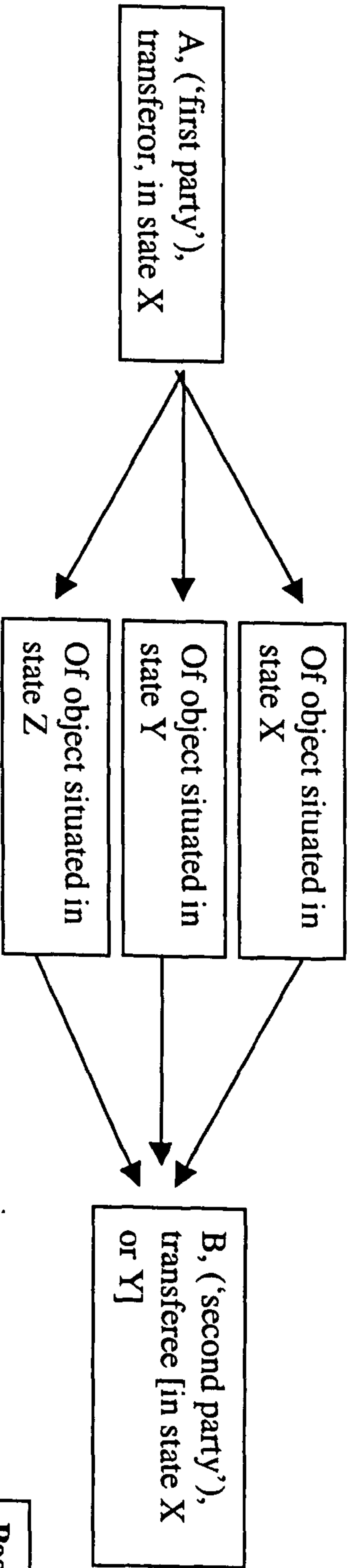
**School of Law**  
**Faculty of Law and Financial Studies**  
**University of Glasgow**

**March 2002**

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TRANSFER FROM THE ‘FIRST PARTY’ TO THE ‘SECOND PARTY’ (‘THE ORIGINAL PARTIES’)

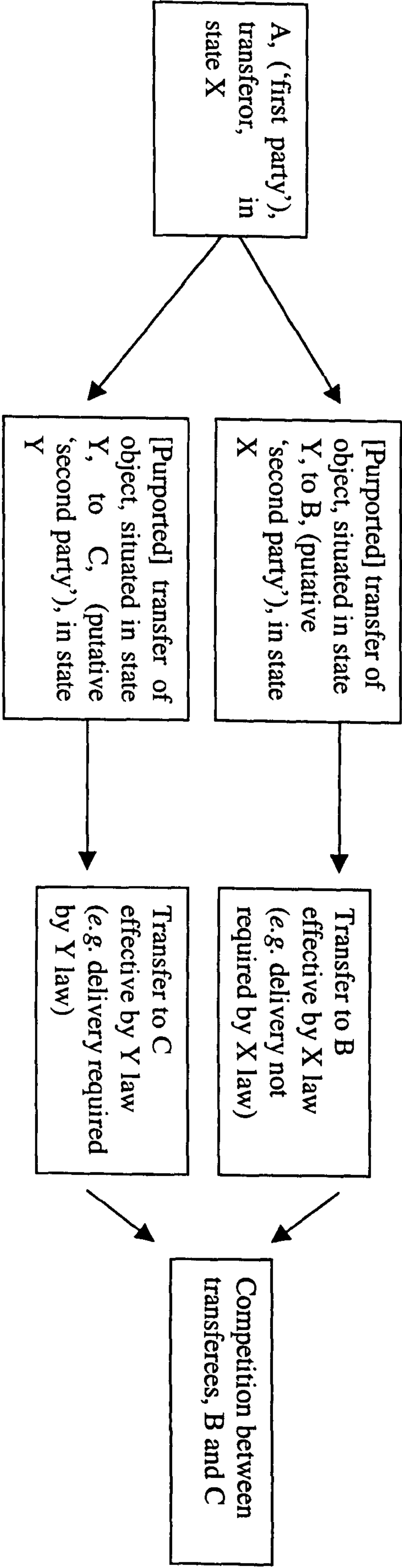


- Paragraph 12 - Party autonomy between original parties, A and B.
- Paragraph 13 - In event of failure to exercise party autonomy, application of the law of closest connection, presumed to be the situation of the object at the time when the interest is alleged to have been transferred, *unless* the situation is unknown or unascertainable.
- Paragraph 14 – As between original parties, A and B, displacement of presumptions in favour of a more appropriate law.
- Paragraphs 15 and 16 – General rule and displacement provisions for *static* conflicts (*i.e.* where the *situs* remains constant, but the *lex loci rei sitae* conflicts with the ‘contractual’ *lex causae*).
- Paragraphs 18 and 19 - Protection of *remote* parties (*e.g.* B’s creditors), via mandatory rules of the *lex loci rei sitae* concerning inalienability [and attachment by creditors].

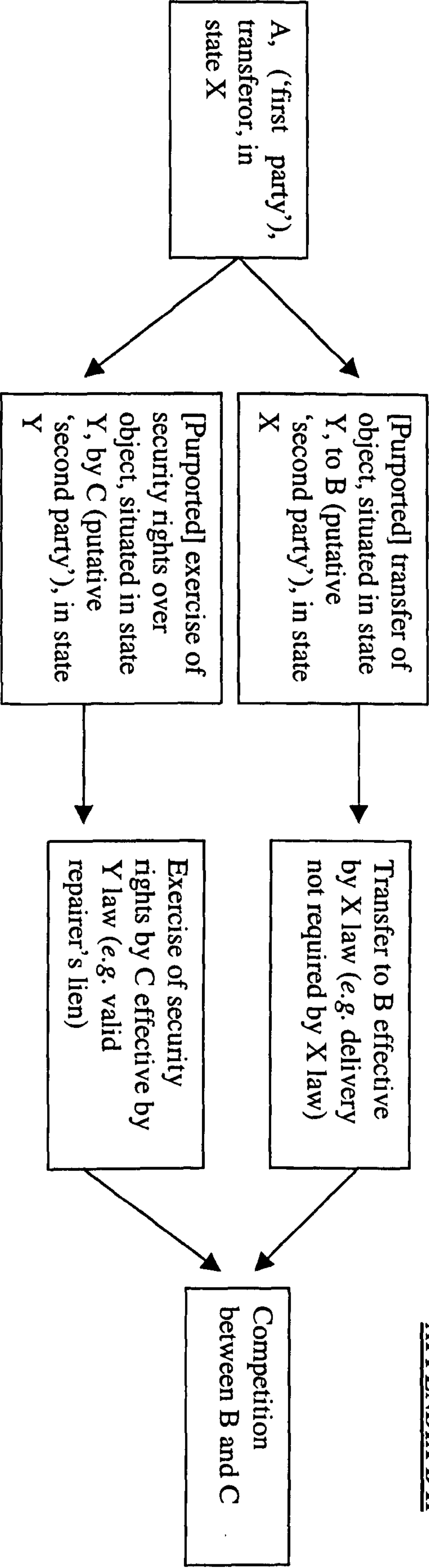
Possible scenarios:-

- ☐ A, B, and object in state X (No choice of law issue, unless through party choice);
- ☐ A and B in state X, and object in state Y;
- ☐ A in state X, B and object in state Y; or
- ☐ A in state X, B in state Y, and object in state Z.

**COMPETING TRANSFERREES**

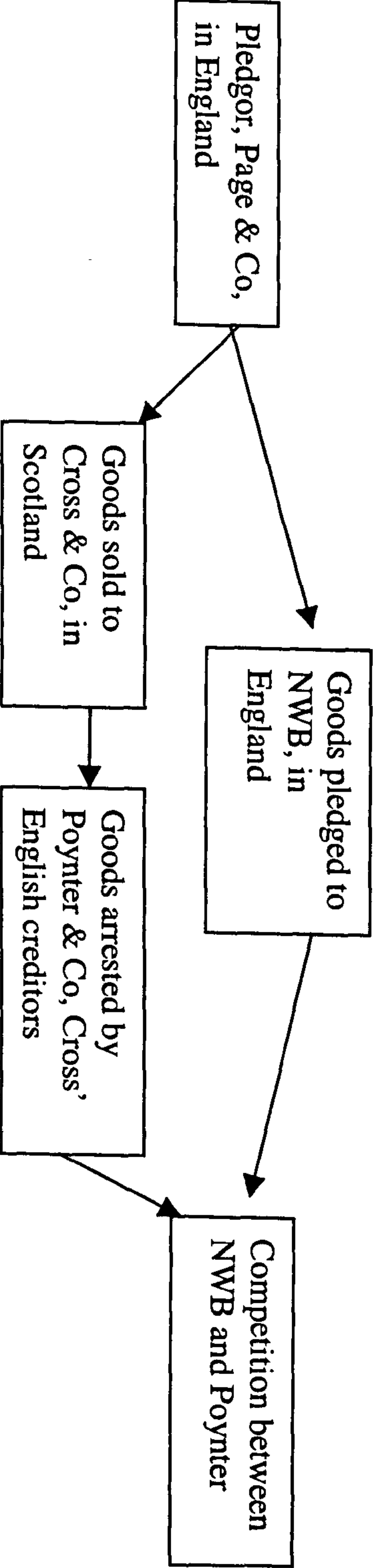


**APPENDIX B II**





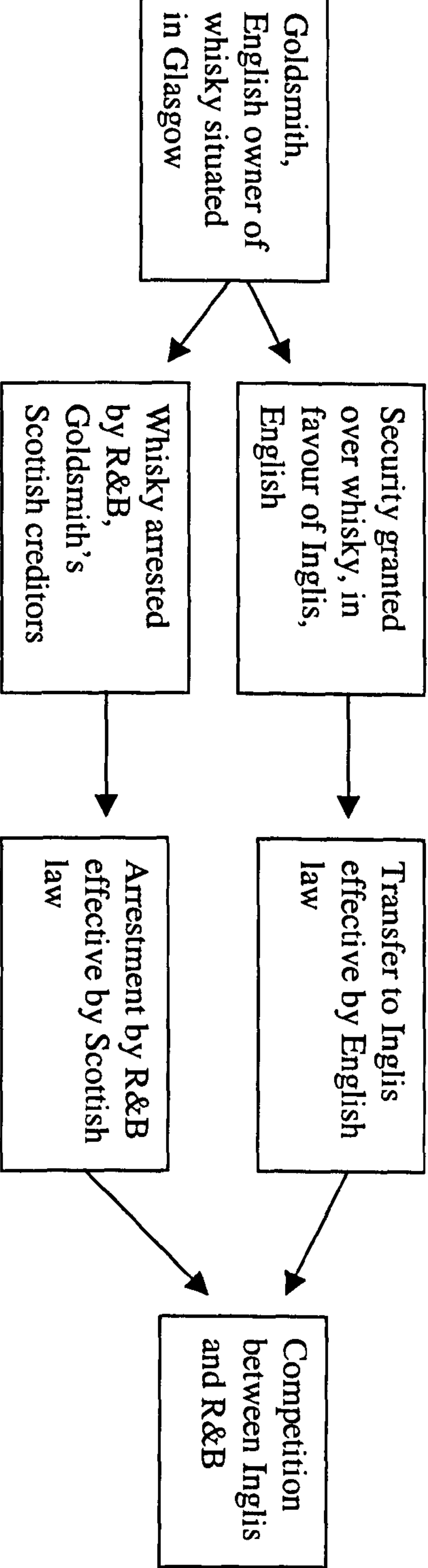
Example: North Western Bank Ltd. v. Poynter, Son & Macdonalds (1894) 22 R. (HL) 1



According to paragraph 17, the competing claims should be resolved by application of (a) the common applicable law; *or* (b) the relevant *lex loci rei sitae* (the situation of the object at the time of the later transaction). *North Western Bank v. Poynter*: paragraph 17(a) results in application of English law

APPENDIX B III

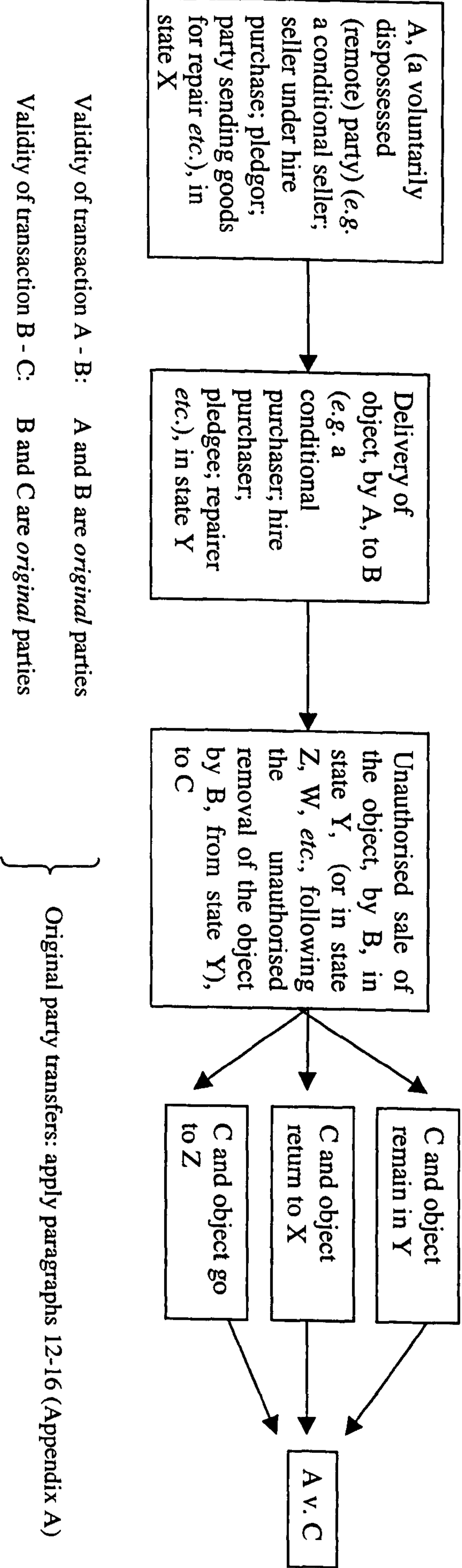
Example: Inglis v. Robertson & Baxter (1898) 25 R. (HL) 70



According to paragraph 17, the competing claims should be resolved by application of (a) the common applicable law; *or* (b) the relevant *lex loci rei sitae* (the situation of the object at the time of the later transaction). *Inglis v. Robertson & Baxter*: paragraph 17(b) results in application of Scots law

APPENDIX B IV

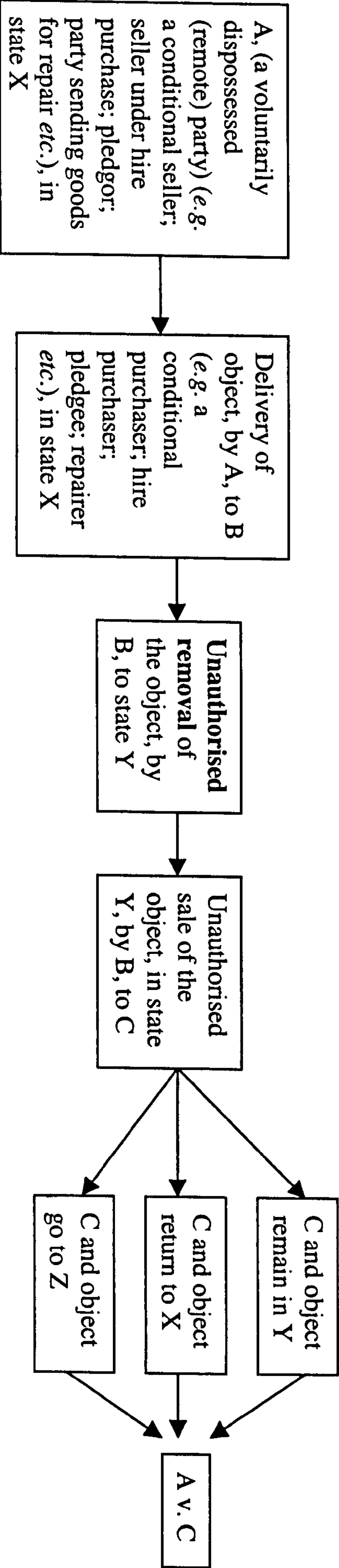
VOLUNTARILY DISPOSSESSED REMOTE PARTY



- Any voluntarily dispossessed (remote) party who, by choice, sends the object abroad, acts '*suo periculo*'.
- A's rights in respect of the *res litigiosa* are limited to such rights as are protected by paragraph 19 (*i.e.* as are protected by operation of the mandatory rules of the *lex loci rei sitae* concerning inalienability).
- Otherwise, the conflicting claims of A (the deprived party), and C (the current possessor/ attaching creditor) are determined in accordance with paragraph 20.



‘VOLUNTARILY’ DISPOSSESSED REMOTE PARTY



Example: *Goetschuis v. Brightman* 245 N.Y. 186, 156 N.E. 660

O purchased car in California under conditional sale contract → Contractual term forbade removal of car from California →

O removed car to New York → O sold car, in New York, to B → Conditional seller's assignee claimed car in New York

Validity of transaction A - B: A and B are *original* parties

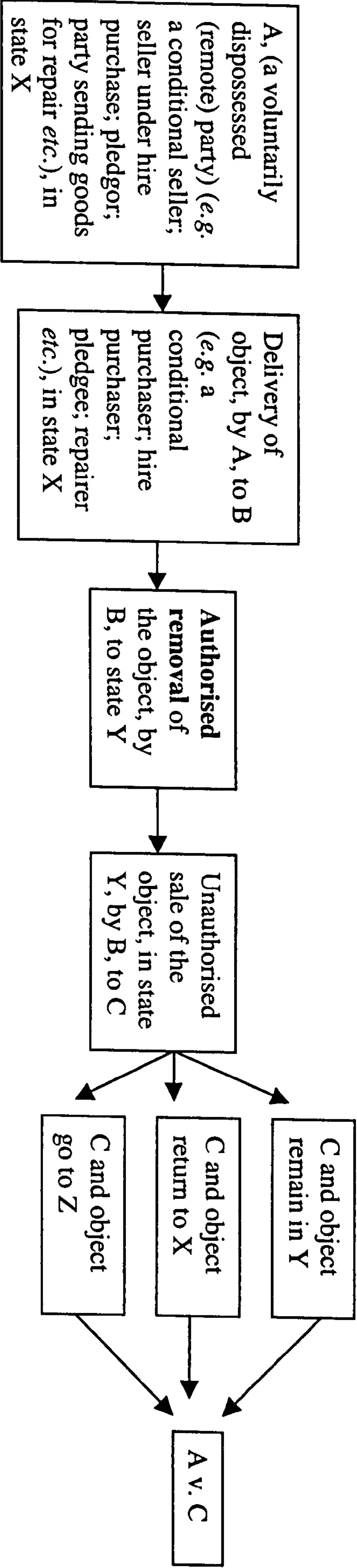
Validity of transaction B - C: B and C are *original* parties

} Original party transfers: apply paragraphs 12-16 (Appendix A)

Claim A v. C: A, the deprived party, is a *remote* party

- Does A, who neither sends the object abroad, nor consents to its removal by B, into state Y, nevertheless act ‘*suo periculo*’ merely by ceding control of the object to B in state X? The answer, it is submitted, is ‘no’. While in *Goetschuis v. Brightman*, the terms of the contract were flouted, in the majority of cases, there will be no such prohibition on removal, with the result that the deprived owner, A, will generally be *voluntarily* dispossessed.

‘VOLUNTARILY’ DISPOSSESSED REMOTE PARTY



Validity of transaction A - B: A and B are *original* parties

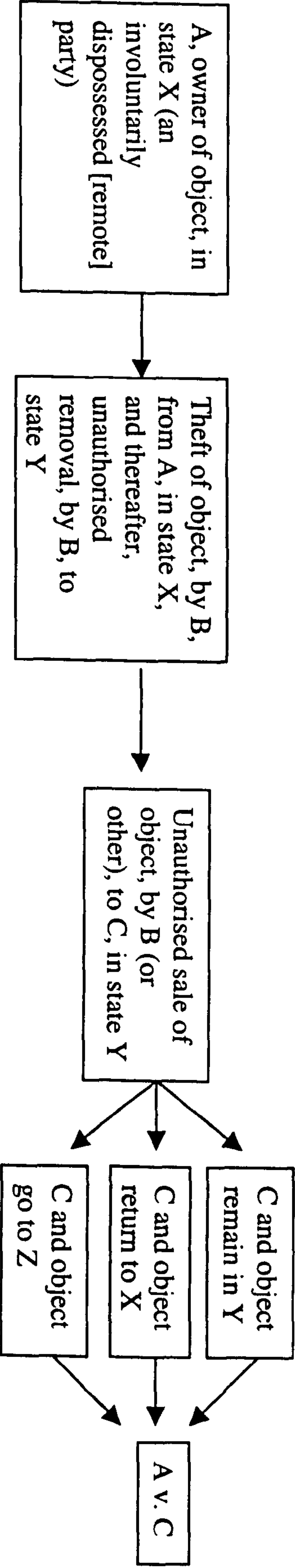
Validity of transaction B - C: B and C are *original* parties

Claim A v. C: A, the deprived party, is a *remote* party

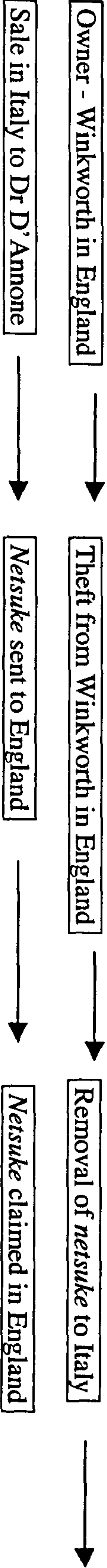
} Original party transfers: apply paragraphs 12-16 (Appendix A)

- Voluntarily dispossessed (remote) party, A, who consents to removal of the object, by B, into state Y, acts ‘*suo periculo*’. (Cf. Appendix C)





Example: *Winkworth v. Christie, Manson & Woods* [1986] 1 Ch. 496



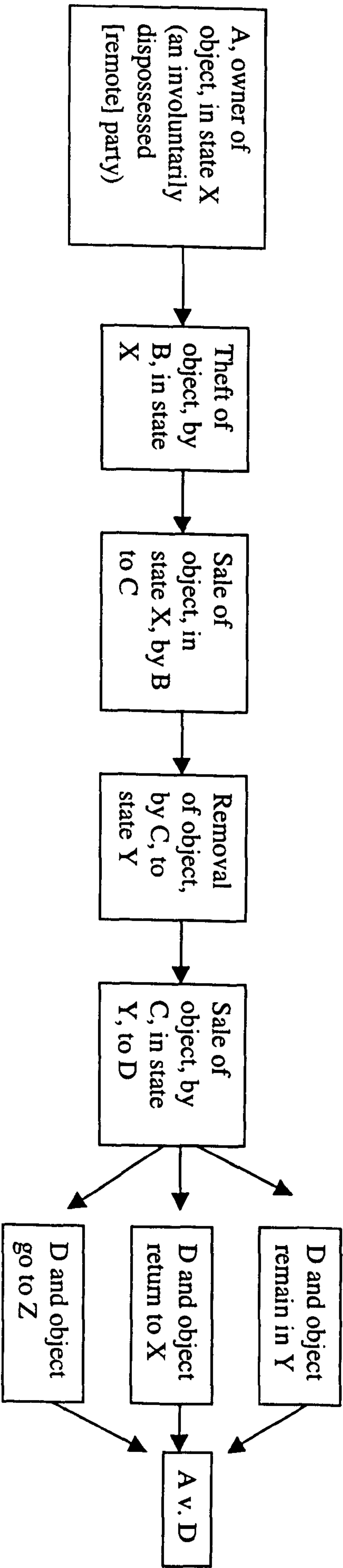
Validity of transaction B - C:    B and C are *original* parties :    Original party transfers: apply paragraphs 12-16 (Appendix A)

Claim by A v. C:                    A, the deprived party, is a *remote* party

- Involuntarily dispossessed (remote) party, A, does *not* act ‘*suo periculo*’

**INVOLUNTARILY DISPOSSESSED REMOTE PARTY**

**APPENDIX F I**



Validity of transaction B - C:

B and C are *original* parties

Validity of transaction C - D:

C and D are *original* parties



Original party transfers: apply paragraphs 12-16 (Appendix A)

Claim A v. D:-

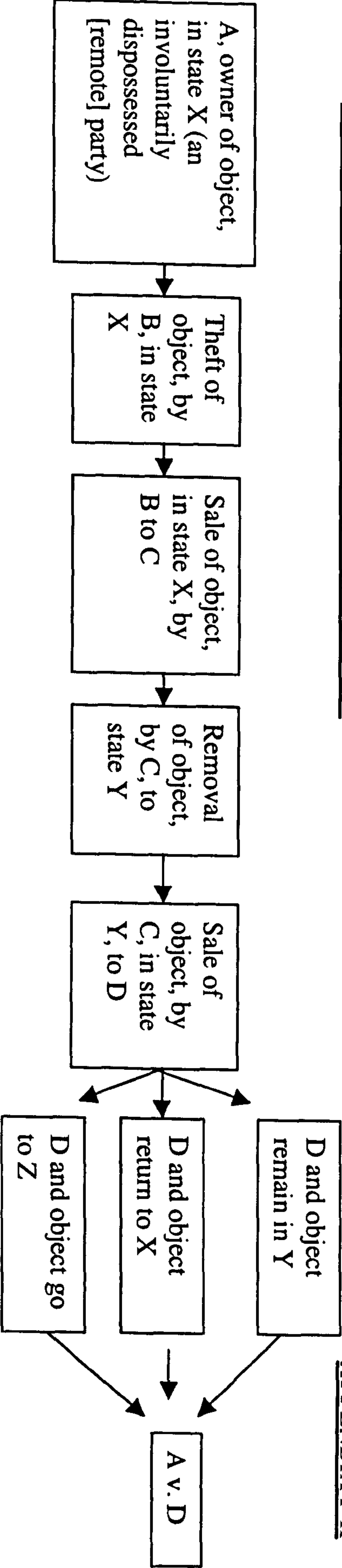
A, the deprived party, is a remote party

- Involuntarily dispossessed (remote) party, A, does *not* act ‘*suo periculo*’
- Sale in X, if *invalid* according to X (domestic) law, is a ‘*wrongful removal*’, since it breaches A’s proprietary rights according to X law



INVOLUNTARILY DISPOSSESSED REMOTE PARTY

APPENDIX F II



Example: *Todd v. Armour* (1882) 9 R. 901



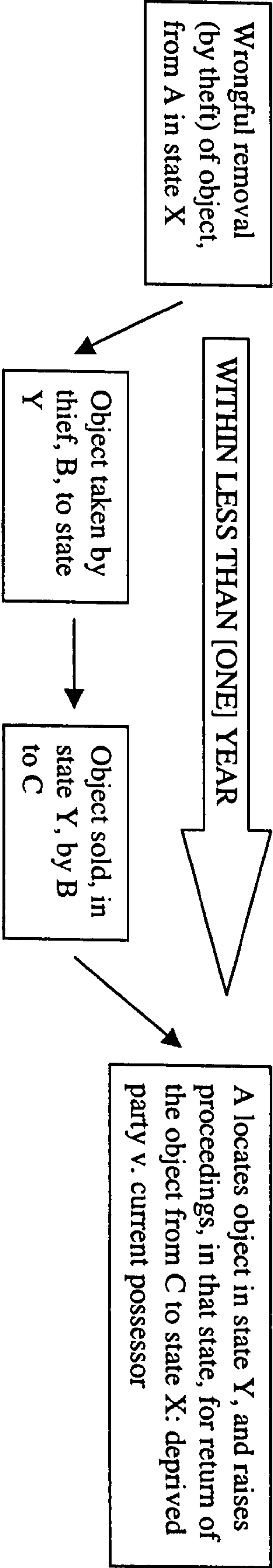
Validity of transaction B - C: B and C are *original* parties

Validity of transaction C - D: C and D are *original* parties

} Original party transfers: apply paragraphs 12-16 (Appendix A)

Claim A v. D: A, the deprived party, is a *remote* party

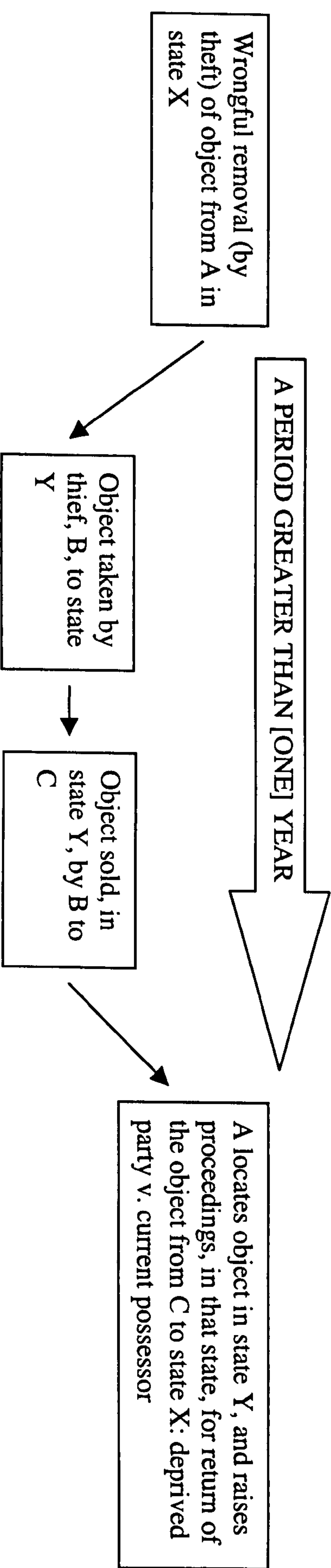
- Involuntarily dispossessed (remote) party, A, does *not* act ‘*suo periculo*’
- Sale in X, if *valid* according to X (domestic) law, is *not* a ‘wrongful removal’, since it does *not* breach A’s proprietary rights according to X law. In such a case, A’s rights in respect of the *res litigiosa* are limited to such rights as are protected by paragraph 19.



AIM: To restore the *status quo ante* (*i.e.* return the object to state X)

This aim can only be fulfilled if State Y is a party to the proposed Convention (*i.e.* State Y shall only order return of the object to State X, the *locus originis*, if State Y is bound by the Convention). If State Y is not a party to the Convention, the dispute shall be determined by the rules of international private law of State Y.



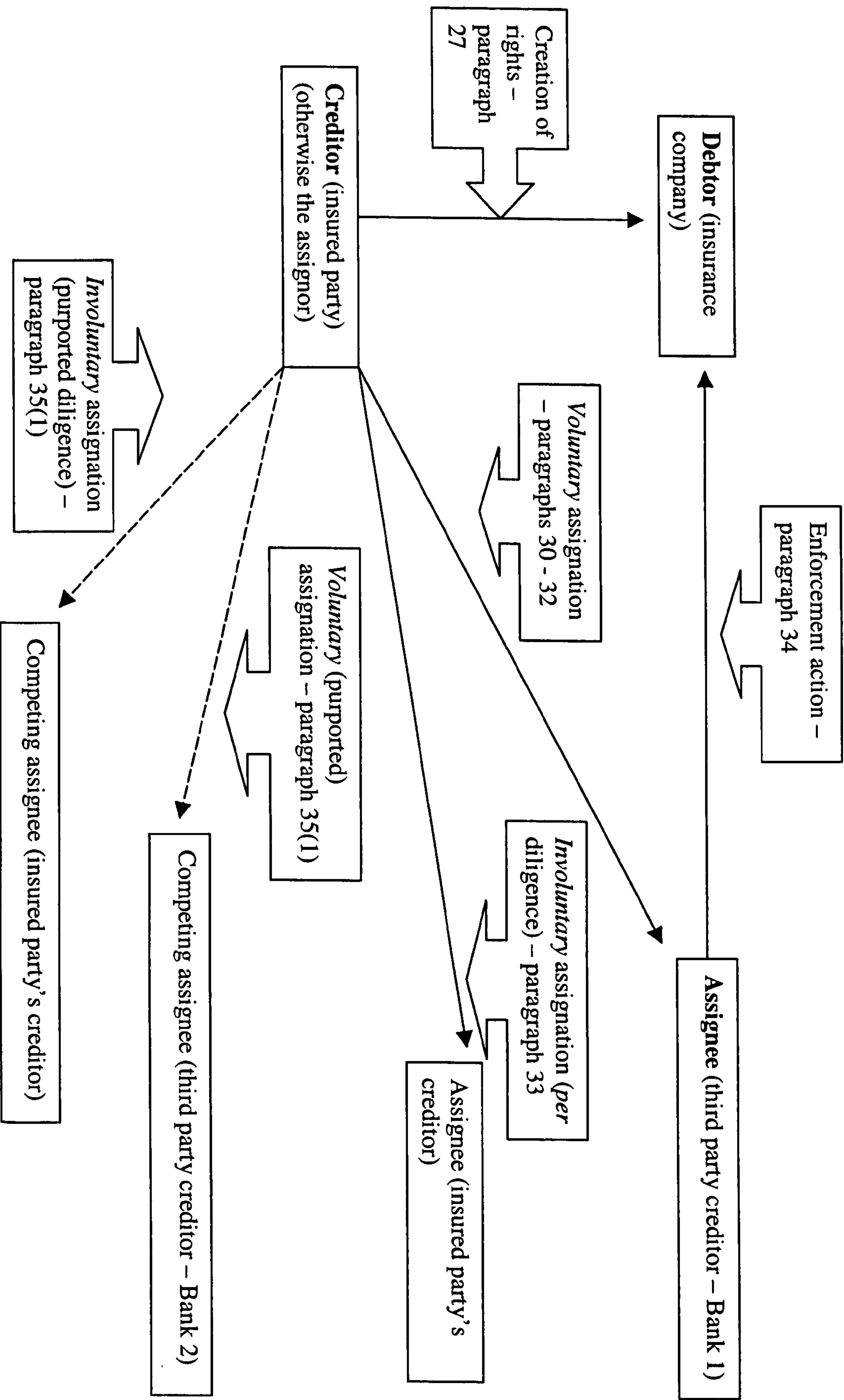


AIM: To restore the *status quo ante* (i.e. return the object to state X) UNLESS: -

- One year has passed since the date when the deprived party knew or ought reasonably to have known the location of the object and/or the identity of the current possessor; or
- Twenty years have passed from the date of wrongful removal.

OPTIONAL CRITERIA: -

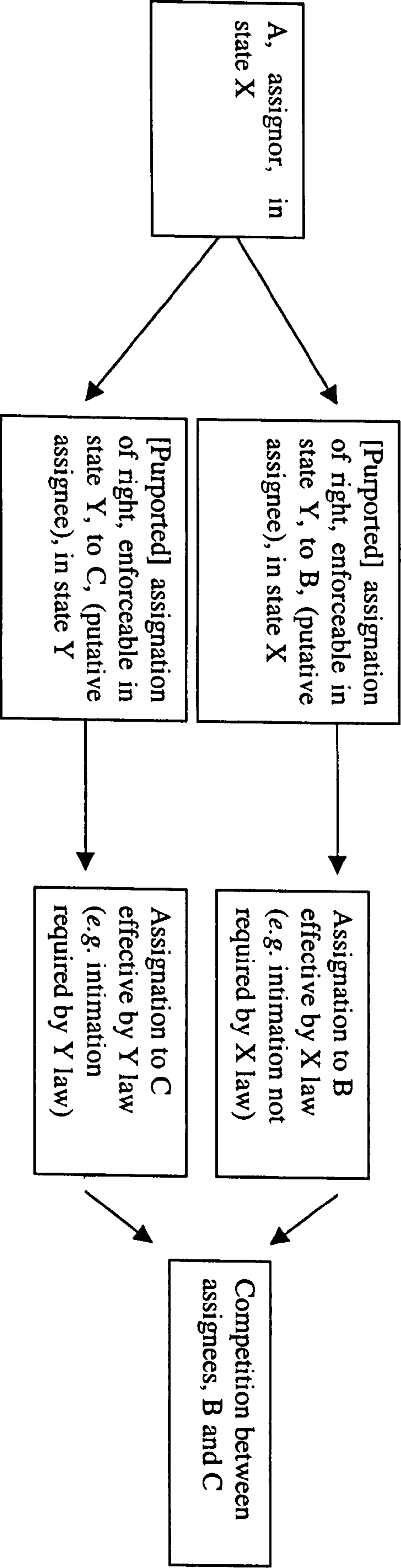
- ❑ Current possessor acquired object in good faith; and/or
  - ❑ Deprived party failed to exercise due diligence; and/or
  - ❑ *De minimis* monetary value
- The difficulties with these criteria are detailed at Model 1, note 109 *et seq.*





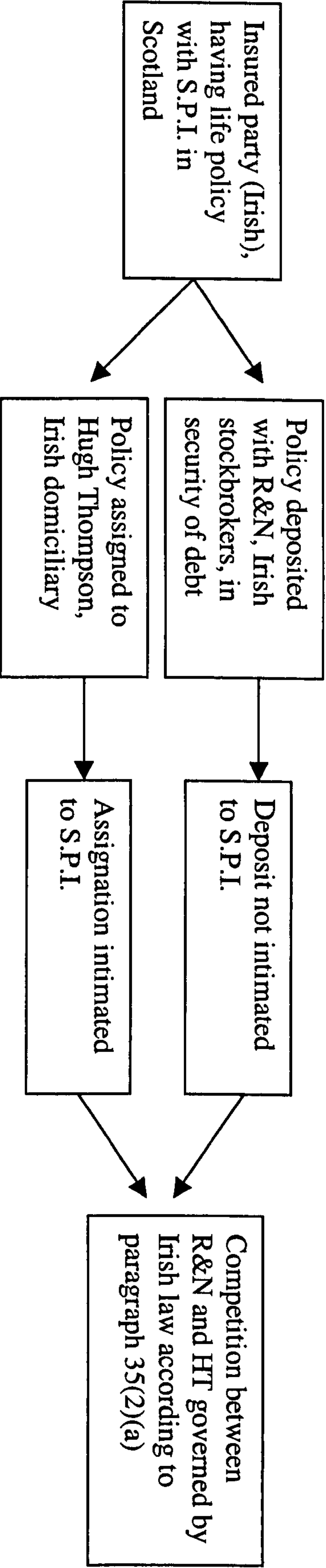
**COMPETING ASSIGNEES: MODEL 1, PARAGRAPH 35**

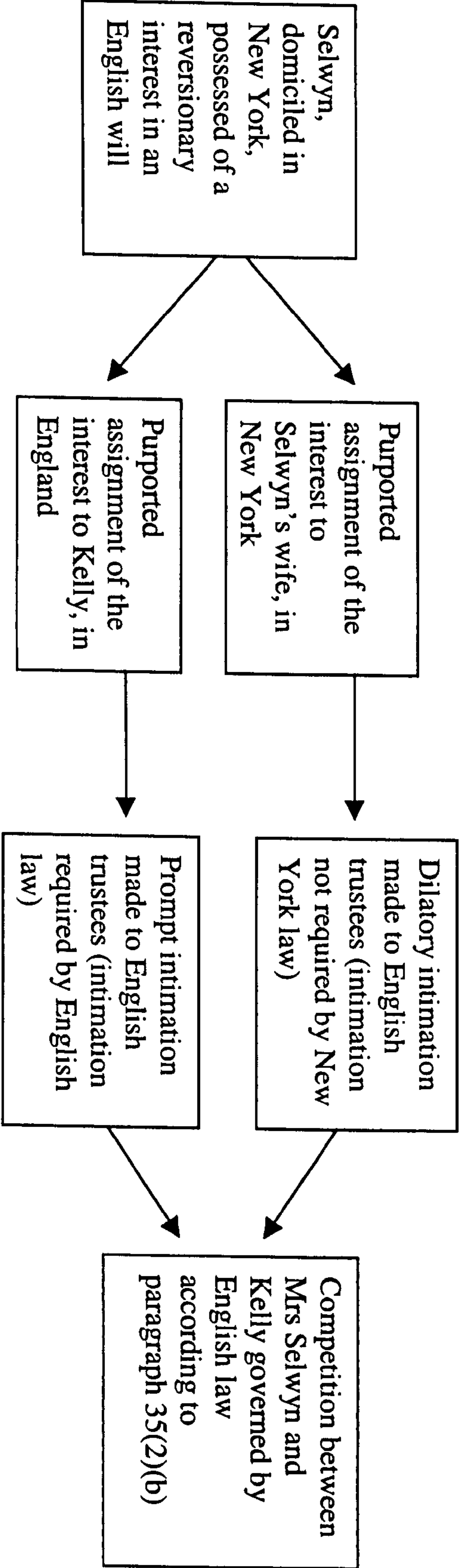
**APPENDIX J I**



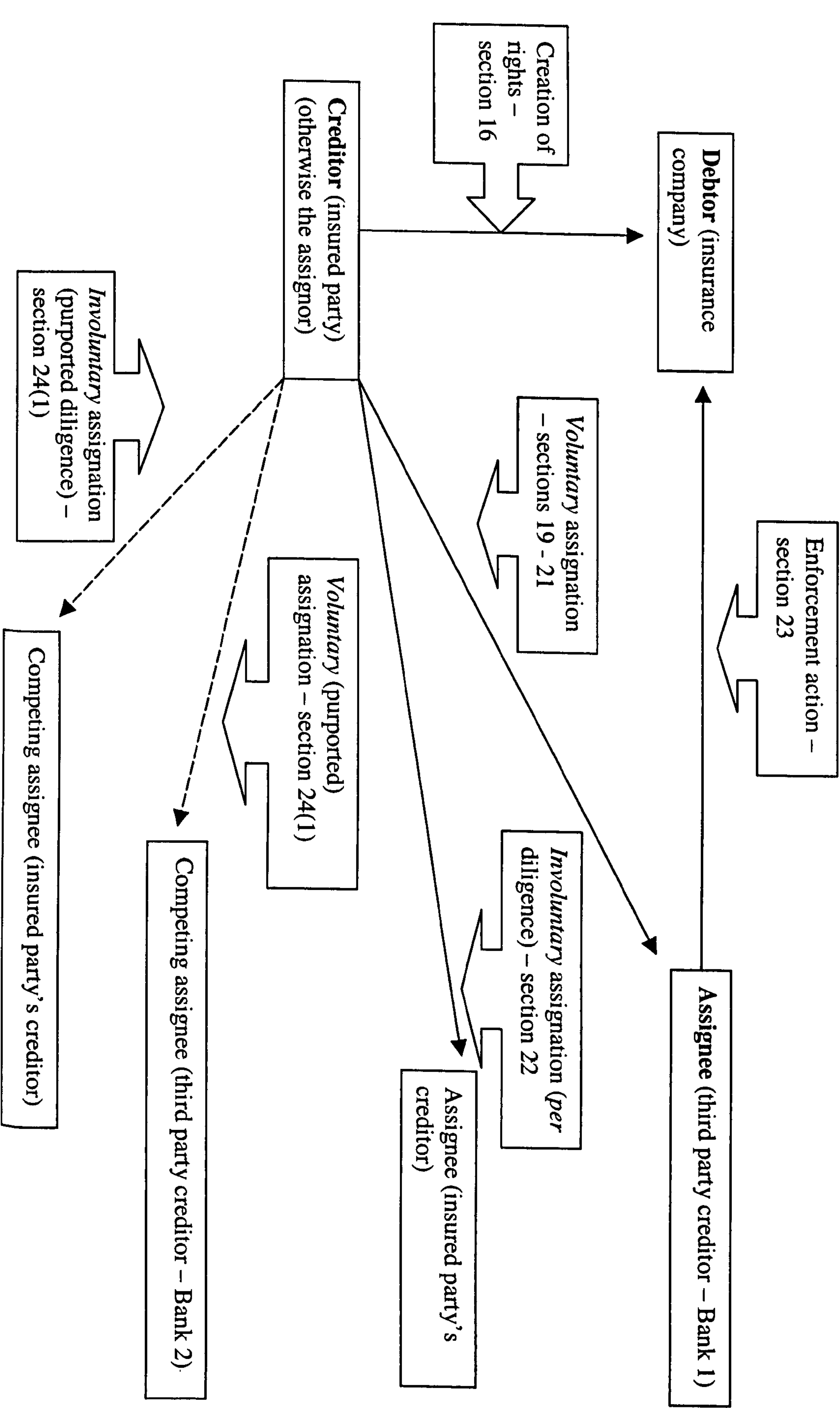
**Example: *Scottish Provident Institution v. Robinson* (1892) 29 S.L.R. 733**

**APPENDIX J II**









**BEYOND THE INELUCTABLE:**  
**AN EXAMINATION OF CHOICE OF LAW RULES**  
**IN PROPERTY**

**BIBLIOGRAPHY**

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