Report of the Oxford Conference on "Characterisation in the Conflict of Laws"

The author of this report is Meltem Ece Oba (Koç University, Istanbul). The post is being published simultaneously on Conflictoflaws.net and on the EAPIL blog.

On 20-21 March 2025, a conference on "Characterisation in the Conflict of Laws" was convened at St Hilda's College, Oxford. Under the auspices of the Institute of European and Comparative Law in the Law Faculty of the University of Oxford, the conference was jointly organised by Dr **Johannes Ungerer** (University of Oxford and Notre Dame University in England), Dr **Caterina Benini** (Catholic University of Sacred Heart, Milan) and PD Dr **Felix Berner** (University of Tübingen). The conference brought together scholars and practitioners from several jurisdictions around the world.

The conference's topic, characterisation, is the process for identifying the nature or category of a particular cause of action (for instance contractual, tortious, proprietary, corporate, matrimonial), so that the correct connecting factor can be employed which then points to the applicable law or to the competent court. Characterisation poses difficulties where the action is domestically unknown or falls in-between two categories and could thus be potentially litigated in different

fora or under different laws, leading to different outcomes. Different methods proposed for characterisation make this process even more complex. In this conference, participants explored characterisation from historical, methodological, critical, practical, and further perspectives with the aim to shed light on some of the most pressing and controversial issues of what arguably is the most crucial step for a court when determining its international jurisdiction and the applicable law.

Following the opening remarks by the three organisers, the first presentation addressed the history of characterisation. Professor **Martin Gebauer** (University of Tübingen) explored three main themes: striking parallels in time and content, strong contrasts, and finally the tensions in characterisation. Gebauer initially touched upon the 'discovery' of characterisation as 'a child of the nineties of the 19th century' in the works of Franz Kahn and Etienne Bartin. This was followed by the examination of the internationalist approaches. This led him to discuss autonomous characterisation and functional comparative law approaches as the 'third direction' through the work of Scipione Gemma and the changed views of Franz Kahn. Gebauer highlighted that the doctrinal views in this decade reflected the ideological battles over the foundations of private international law. He further discussed the developments in characterisation in the 20th century, such as the developments in comparative law and Rabel's approach to characterisation. Finally, Gebauer considered characterisation in transnational and European law and its contribution to the homogenous understanding of conflict-of-laws rules within the EU. In the discussion following his presentation, the challenges of comparative law methodology and the need to consider a range of perspectives on characterisation (instead of a single one) were debated amongst other aspects.

The following presentations were dedicated to the process and particular problems of characterisation. The paper given by Professor **Andrew Dickinson** (University of Oxford) raised the question of "Is there any magic in characterisation?" with a focus on the courts of England and Wales. He provided seven steps of dealing with how the courts must engage with characterisation. Using a metaphor, he compared the attempts of describing the characterisation

process to an attempt of describing the elephant in the Indian parable of 'blind men and an elephant'. In this regard, Dickinson underlined that one can only provide an informative tool kit and cannot describe a full process of characterisation. He emphasised that all parts of a given rule and most importantly its purpose must be taken into account when characterising it. In this regard, he explained that 'substance' should be valued higher than 'form' and that 'labels' should not play a major role. Dickinson considered characterisation as being more of a practical issue from the common law perspective, and a process of interpreting a rule or a particular subset of settings; he thus concluded that there is no 'magic' in characterisation. Participants used the subsequent discussion for instance to contrast the Common law position with the Civilian approaches and to question the role of the judge and the parties when characterising a claim.

The next presentation was delivered jointly by Associate Professors **Brooke Marshall** and **Roxanna Banu** (both University of Oxford) on characterisation's role in the jurisdictional inquiry in English courts. They began with an overview of the instances where the choice of law questions are raised at the jurisdictional stage in the context of granting permission for service out of the jurisdiction, exploring the relevant gateways in the Practice Direction 6B of the Civil Procedure Rules. Marshall critically examined the UK Supreme Court decision in *UniCredit Bank v RusChemAlliance,* demonstrating how the choice of law matters affect the international jurisdiction of English courts. Banu, from a more theoretical point of view, then discussed the *a priori* application of the *lex fori* to jurisdictional matters and the importance of theorising characterisation to understand the reasons why jurisdiction and substance are to be distinguished. The presentation was followed by a fruitful discussion which, among other issues, highlighted the problematic circular reasoning employed at the intersection of choice of law and jurisdictional characterisation.

The last paper of this session was presented by Professor **Pietro Franzina** (Catholic University of Sacred Heart, Milan) on '*renvoi de characterisation*', that is, characterisation for the purposes of *renvoi*. At the beginning, he set the scene with regard to the meaning of *renvoi* and characterisation as well as the

distinction between primary and secondary characterisation. Franzina explained that where the private international law of the forum contemplates the possibility of *renvoi*, the conflict of laws conceptions of a foreign applicable law should also be appreciated. In that regard, Franzina demonstrated through examples how the 'second characterisation' should reflect the taxonomy of the designated legal system (and, in some instances, the taxonomy of the different system specified under the conflict-of-laws rules of the latter system). He explained that characterisation for the purposes of *renvoi* is not given as much attention today as it used to receive, especially due to the greater weight that substantive policy considerations have progressively gained in private international law. The subsequent discussion addressed concerns over consistency in the interpretation of connecting factors in jurisdictional and applicable law matters.

The next session of the conference consisted of four presentations on challenges of characterisation in specific areas. The first speaker, Assistant Professor **Joanna Langille** (University of Western Ontario), focused on the distinction between substance and procedure. In this regard, Langille critically examined the use of the traditional common law distinction of rights and remedies for characterisation purposes. She took a Kantian rights-based approach to explain that the idea of right and remedy essentially merged or 'shaded into' one another. Langille argued for an alternative distinction between substance and procedure based on the nature of private rights. The adjudication process through which that determination is made should be subjected to the *lex fori* as the law of the community. In that sense, she viewed procedural law as being about publicity or the capacity of the courts to make law for the community as a whole and hence operating on a vertical plane. On the other hand, where the court is faced with a question that relates only to the horizontal relationship and, thereby, the reciprocal rights and duties between the two parties, foreign substantive private law should apply. Accordingly, the 'provisions that are determinative of the rights of both parties' were considered as substantive, whilst 'the machinery of the forum court' as procedural. She exemplified her views by reference to statutes of limitation. Among the issues raised during the subsequent discussion were the role of procedural law and of the *lex fori* in light of state sovereignty as well as the transcending boundaries of substance and procedure in instances like limitation statutes.

The next paper was delivered by Professor **Yip Man** (Singapore Management University) on the characterisation of equitable doctrines. While characterisation might have to start from a domestic law understanding, she embraced a functional approach in characterisation and argued for the pursuit of uniformity with an internationalist spirit and therefore against being constrained by domestic law notions. In that regard, she emphasised the importance of understanding the function of equity in arriving at the appropriate category. The conceptual diversity and complexity of equitable doctrines in Common law systems both in conflict of laws and domestic laws were discussed. Yip Man highlighted the objective of identifying the predominant characteristic of a legal institution, which she illustrated by reference to both remedial and institutional features. The relationship between the parties underlying the equitable obligations and remedies were also discussed as possibly being the predominant features to be taken into account. Finally, Yip Man analysed two recent decisions, *Xiamen Xinjingdi Group Co v Eton Properties* of the Hong Kong Court of Final Appeal and *Perry v Esculier* of the Singapore Court of Appeal. The discussion addressed the challenge of characterising equitable doctrines in Civilian courts, possible advantages when differentiating between substance and procedure when characterising equitable concepts, and the 'fusion' approach.

Moving on to the insightful presentations by two academically distinguished practitioners, Dr **Alex Critchley** (Westwater Advocates, Edinburgh) spoke about the characterisation of contractual arrangements in the context of family law where some of the most challenging questions arise. Critchley focused on two main issues, namely the way family law agreements differ from other contracts (or as to whether they can be characterised as contracts at all) and the extent to which they relate to other fields of law such as company law. In this context, he explained the international framework for contracts in international family law by exploring the EU and HCCH rules. He then exemplified family law agreements and their different forms such as nuptial agreements, care arrangements for children or agreements addressing corporate or property relationships between family members. This led to a discussion among all participants about choice of law rules for nuptial agreements, the characterisation of maintenance agreements, the 2007 Hague Protocol on the Law Applicable to Maintenance

Obligations, and case law referenced by Critchley, such as *F v M* 2021 SLT 1121.

Looking at a very different area of law, Dr **Thomas Klink** (Higher Regional Court of Stuttgart) addressed characterisation in international M&A disputes, where issues arise in judicial practice especially when the purchase agreement did not contain a relevant and valid choice of law clause. In his presentation Klink initially examined the characterisation of purchase agreements both in the form of a 'share deal' or – less common – an 'asset deal'. He hinted at the tricky ramifications if the selling shareholder is a natural person and could be considered to be a consumer for the purposes of Article 6 of the Rome I Regulation. He then moved on to characterisation challenges encountered in the preparation of the transaction and in respect of non-disclosure agreements/letters of intent, access to information, exclusivity, and the issues arising from the termination of negotiations such as break-up fees. Klink also touched upon company law issues such as the transfer of shares. Post-M&A disputes such as fraud cases were also addressed. Looking ahead, he expressed his expectation that the number of M&A disputes in the newly established International Commercial Courts will increase, which was then also discussed further by the conference participants. Other issues in the discussion included the consumer status of investors, the parallels between choice of law and jurisdictional characterisation in M&A disputes, and the latest case-law developments on concurrent claims. This concluded a day full of fruitful debates.

The second day of the conference began with a session on what the organisers had termed rethinking characterisation, exploring novel and more critical approaches to characterisation.

The first speaker in this session was Professor **Jeremy Heymann** (University of Lyon III Jean Moulin). Heymann's presentation was entitled 'characterisation from a unilateralist perspective'. He outlined the approach of unilateralism in contrast to multilateralism. Heymann argued that, from a methodological point of view, it is necessary to first identify a 'legal order of reference' and then to determine if the legal issue at hand and the facts of the case fall under the scope

of this ‘legal order of reference’. Whilst indicating that the ‘legal order of reference’ of the judge should be the *lex fori* in most instances, he also highlighted that the law to be taken into account should correspond to the expectation of the parties. Through this conception of unilateralism Heymann argued that the law applicable to characterisation should be ‘much more the *lex causae* than *lex fori*’. In the subsequent discussion, the designation of the ‘legal order of reference’ was debated in addition to the challenges of taking into account the expectations of the parties. Heymann further commented on how some EU Regulations might provide for unilateral rules on certain private international law matters, such as the GDPR and the Air Passenger Regulation.

The second presentation in this session was delivered jointly by **Philomena Hindermann** and Professor **Ralf Michaels** (both Max Planck Institute for Comparative and International Private Law, Hamburg) with the provocative title ‘Against Characterisation?’. Michaels began the paper with a critique of the current approach to characterisation with reference to the English decision in *Macmillan v Bishopsgate Investment Trust*. He explained how such a methodology in fact conceals the real essence of legal reasoning behind characterisation. He then touched upon the attempts of the American Conflicts Revolution to overcome characterisation through interest analysis. Whilst acknowledging that overcoming characterisation is not possible, he argued for taking account of the policies behind legal rules in the process of characterisation. In this regard, Michaels criticised a process of characterisation through preliminary categories and argued instead that characterisation should be an ‘end result’. Building on this finding, Hindermann continued with the question as to whether there could be such a thing as ‘post-categorical characterisation’. She also criticised characterisation as reflecting certain presumptions and as omitting the policies and various functions of legal rules. Considering characterisation as an epistemological process she then questioned the need for categories and advocated for embracing a non-exhaustive / post-categorical functional approach. Therefore, instead of reducing characterisation to a pre-determined taxonomy, she argued that categories should be built based on each case by way of looking at the functions of the legal institution at hand. Participants to the discussion engaged with the reasons why the American realist thinking approach might or might not be compelling and also deepened the discussion from an EU

perspective. The idea of categories under national laws having an open-ended nature as opposed to close-ended categories was further discussed on the one hand, as well as the concerns of legal uncertainty on the other hand.

The last speaker of this session was Professor **Veronica Ruiz Abou-Nigm** (University of Edinburgh). Her presentation covered characterisation as a tool to manage diversity and hence she focused on an epistemic change of perspectives in characterisation. Her paper started off with an explanation of the creation of a new delict under Scottish substantive law in relation to domestic violence. Furthermore, Ruiz Abou-Nigm considered a possible interplay with the 1980 Child Abduction Convention where under Article 13(1)(b) domestic abuse might constitute a reason to refuse the return of a child. Recognition and enforcement of civil protection orders were also discussed through this lens. As a conclusion Ruiz Abou-Nigm called for an internationalist approach to characterisation that takes into account feminist perspectives as well as the interplay of cultures. Ruiz Abou-Nigm argued that instead of taking the *lex fori* as a starting point, one should embrace an epistemological and pluralistic approach. In her view, the 'order of reference' of the judge in characterising a matter should be much more complex and international than the categories under the *lex fori*. Participants asked her how this inter-cultural approach should affect the application of the new Scottish law in a cross-border setting and raised the problem that embracing an inter-cultural approach might not appear to be supportive of a feminist normative approach. Participants also suggested ways that might foster pluralistic thinking with a feminist approach and commented on how the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence could be used for characterisation or interpretation.

The last session of the conference focused on the interplay of private and public international law. Professor **Alex Mills** (University College London) spoke about private international law treaty interpretation and characterisation. He started by examining the English common law approach to characterisation in order to draw comparisons between the methodology in the common law regarding the characterisation and the interpretation of international treaties. He explained that, since treaties are implemented through national laws in dualist systems,

statutory interpretation is needed in their application whilst principles of international treaty interpretation are also taken into account. Mills argued that international treaty interpretation has commonalities with the common law approaches to characterisation, but that the judge should acknowledge where choice of law rules belong to an international body of law. He used the 2019 Hague Judgments Convention as an example and pointed to its explanatory report which indicates the 'international spirit', echoing the English common law approach. In the subsequent discussion, the internationalist interpretation was generally welcomed but its practical implications were questioned. The idea that international treaty interpretation was reflecting the common law approach was challenged by Civilian representatives, though Continental European approaches could also be understood as being too 'rigid' from the point of view of the English common law doctrine. Participants also pointed to the process in which the 2005 and 2019 Hague Conventions were drafted and how the consistency in the internationalist approach in both Conventions reflected a common understanding of the drafters.

The final paper of the conference was delivered by Professor **Marta Pertegás Sender** (Maastricht University and the University of Antwerp) discussed how characterisation questions were addressed at the Hague Conference for the purposes of drafting Conventions. Three main examples were given: first, Pertegás Sender explained that drafters increasingly employ provisions that regulate the scope of a Convention. As a second example of instances where the HCCH takes into account characterisation matters, she demonstrated how rather broad terms are preferred in the drafting of Conventions' provisions that would establish a common ground for contracting states. Finally, she pointed out the fact that there does not exist a *lex fori* for the drafters of such international Conventions. Sender also highlighted that especially in the last two decades all of the Conventions emphasise the autonomous interpretation and the promotion of uniformity in their application. The preference for broad terms was challenged in the subsequent discussion as being too vague, especially in the absence of a special court system for the interpretation of HCCH Conventions. Interestingly, the consequences of 'negative characterisation' were discussed in relation to the aspects which are kept outside of the scope of the HCCH Conventions, in contrast to a true or 'positive characterisation' of what is within the scope of a particular

Convention.

Concluding the conference proceedings, the three organisers expressed their gratitude to all speakers for their papers and to all attendees for their fruitful contributions to the discussion.