What is this thing called international financial law? Part 2

PAUL SEBASTIANUTTI

This is the second article in a four part series in which the author investigates the nature of international financial law (IFL). In this article he delves in detail into the nature and sources of law in IFL and how these sources interact with each other, an analysis which tends to underscore the differences between IFL and cognate legal disciplines.

A. Introduction

In a globalised market we know that any number of jurisdictions might be involved in a typical cross-border transaction, each importing its own set of legislation, rules and regulations. Historically, in the less technologically sophisticated world that existed before the communications revolution of the twentieth century, international transactions tended to involve physical goods such as plant, machinery, bullion and passengers. As these assets physically traversed the globe, and consequently travelled across jurisdictional boundaries, they could potentially trigger any number of legal consequences. The factual circumstances involved would have been material, physical and visibly apparent. Imagine, if you will, a nineteenth-century clipper ship sailing from Boston in the United States to Athens in Greece after calling into a port in the United Kingdom. As it sailed to its destination, crossing notional areas of jurisdiction as it went, it could potentially have attracted the rules of the United States, the United Kingdom and, finally, Greece; these presumably may have applied to any legal dispute relating to the cargo or to the ship. If the charterer of the ship was Portuguese, then the laws of Portugal could in certain circumstances also have been invoked. If the owner was Dutch, then perhaps Dutch law would also have proved relevant. If, on its way over, the clipper ran aground and shipwrecked off the coast of, say, Spain, then perhaps Spanish rules could also have been attracted. Every day on the global financial markets, shiploads of financial assets sail from one end of the system to the other. Potentially subject in the same way – willingly or not – to a myriad of regulations and law.

We saw in the first article of this series[1] how, by its very nature, international financial law arises from this constant need to deal with multi-system contexts. In considering this rather obvious fact, in that previous article I suggested that the static approach – which I dubbed the "shopping basket" approach – was barely adequate for the task at hand. The task at hand being, of course, the management of legal problems preferably before – rather than after – they (to moderate the expression) hit the Bench, as it were.

At this point, a number of questions need to be addressed and a few perplexities resolved. If one cannot depend on a simple static approach, what then are the available options? How treacherous are the legal ripples ebbing around the financial pond and why can't one just use the traditional floats afforded by private international law, and similar disciplines, to navigate out of the problem?

Best tackle the last question first.

* * *

Traditionally, the legal discipline known as private international law (also known as conflicts of law in the common law tradition) comprises a system of rules which each individual jurisdiction uses in order to solve legal conundrums emerging from transactions or legal situations involving more than the local law. Ultimately the aim is to decide which law is to apply in the presence of foreign elements.[2]

When the local judiciary is faced with a legal situation which attracts foreign law elements, it normally proceeds by trying to establish its competence to hear the case (the question of jurisdiction), what law needs to be applied (the applicable, or governing, law question) and if and how to enforce foreign judgments (the enforcement question).

How does it do this? Normally, the local court will apply its local rules to decide whether it has jurisdiction to hear the matter or not. That makes sense, since if local law is not to apply, then the court will want to know this immediately so as not to waste any of its precious time with legal problems that are none of its business. In an international trade dispute, involving the non-payment for a cargo delivered in Greece by an English ship owned by a Dutchman, then the Greek, English and Dutch courts may be called upon by any one of the plaintiffs to decide on the question. In very general terms, each court may or may not feel it has jurisdiction on the basis of its local rules. The English courts may feel that the nationality of the ship is sufficient grounds to found jurisdiction, the Dutch court the nationality of the plaintiff (the ship owner), the Greek courts perhaps, the place where the cargo was deliverable. As it turns out, the plaintiff may in the event actually be the charterer, who we said was Portuguese, and the Portuguese courts may be asked to intervene; it is presumably open to them to feel they may do so on the basis of the nationality of the charterer – or perhaps not – depending on their indigenous rules of jurisdiction.

A similar situation would arise in relation to the international loan cited as an example in the previous article: a loan governed by English law between a bank incorporated and regulated in New York and a Chinese corporate borrower

guaranteed by its Italian parent company. In case of litigation action, each plaintiff might address its local court (New York, Chinese, Italian); alternatively, all or some of the parties involved might wish to invoke the English courts. Each of the courts called into play will need to first decide according to its own local rules whether it has standing to hear the case. It may well decide that it does not.

Nonetheless, the first step that always needs to be taken is to ascertain jurisdiction. Once it has been, and the local court establishes to its own satisfaction that it has the proper credentials to act as the forum, it then usually proceeds with what appears to be the second step in the private international law process most common in the jurisdictions of which the writer is aware: the identification of the applicable law. By all accounts, the usual manner in which this is done is by pointing the figure at the law which appears to the local court to have the "closest connection"[3] or the "most significant relationship"[4] to the matter in hand. Once identified, this "governing" or "applicable" law is then used by the court to reach a legal resolution to the question at hand. The law identified as the "applicable law" may be the local law or it may be a foreign law. It is this law which the local court would then seek to apply to the extent permitted by its local rules.

So the basic ratiocination process in private international law seems to be as set forth in Figure 1.

Depending on the answer given to each step, a local court should be able to arrive at what it regards as the proper solution. For most purposes, the legal syllogism based on the protocol depicted in Figure 1 would seem to be more than adequate for the purpose in hand.

In the case of the loan contract dispute we alluded to above, it may well be that the English court feels it has jurisdiction and so applies the express choice of law of the parties (English law) as the applicable law. Equally, the Chinese and New York and Italian jurisdictions may, after applying their local rules, reach the same conclusion. The express choice of law may in fact be considered by all to be the most closely connected to the legal and fact situation. Parallel actions are avoided by applying a common doctrine such as *lis pendens* which basically decrees that a local court will not proceed if it is made aware of another action being proceeded with elsewhere in a relevant court. Unquestionably a matter of respectful comity among courts.

So, by the looks of things not a terribly difficult problem

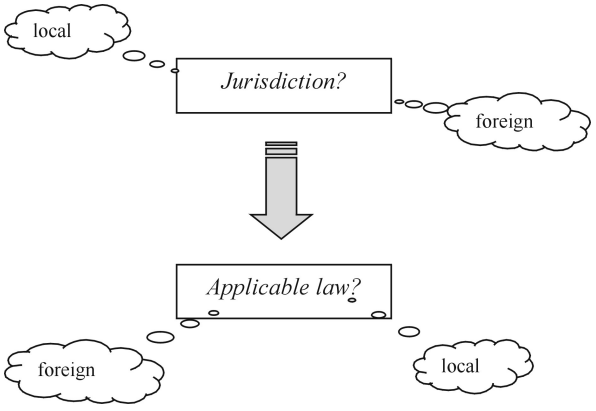

Figure 1

to solve. Nonetheless, life has a knack for throwing up problems. Indeed, the shipping dispute involving the clipper ship sailing to Greece, for example, may well prove to be a little less tractable than the loan example. Just like all those textbook problematics investing private international law with complex questions involving marriage, succession, tort and foreign property (legal conundrums that have given rise to many volumes of learned discussion in a variety of different jurisdictions) divining the identity of the applicable law in the shipping case may require some thought, and there may, in the end, not even be an easy or ready answer available. Precisely because the legal situation is a little more complicated than it might at first appear to be, primarily due to the fact that quite a number of laws are involved. Moreover, in all the well-known private international law puzzles alluded to before, the theoretical categories available for resolving the problem are actually confusingly numerous and varied. What is the applicable law? Is it the law of domicile of the plaintiff or of the defendant, of their nationality, of the location of the property, of the debt, of the goods, of the performance, of the place of delictual behaviour, or of the cause of action? It may be that the answer is "the law that has the closest connection"; yes, but to what? To the cause of action as pleaded? Or to something else? There is a veritable panoply of possibilities.[5] What would be the applicable law in relation to the shipping dispute?

Modern developments in private international law may well be edging towards an idea of *proper law*, ie the law which is particularly pertinent to the case as determined by the local court having regard to all circumstances and the closest and most real connection of the legal and factual situation. In a sense this may be the equivalent of deciding that all other laws, bar one, are incidental, secondary, not core to the situation. So in the shipping dispute, the question could perhaps be resolved by identifying the proper law with reference to the contractual obligation between the debtor (Greek) and the creditor (Portuguese). Obvious candidates: Greek law and Portuguese law. Pick one of these two systems, ignore the rest.

But what if the Dutch owner (who fears not being paid by the charterer, for example) wishes to force the issue and act directly against the debtor in Dutch law so as to capture some of the cash flow directly? If it were possible for him to do so (the writer does not know this) he may argue in a Dutch court that the cause is not to be decided in contract but in accordance with the special rules of maritime law, according to which the applicable law and forum are Dutch. A more convenient forum for him, perhaps, with more amenable procedural rules and enforcement procedures (perhaps the debtor has some assets in Holland). Now what?

It all depends on how the Dutch court characterises the claim. Modern concepts seem to allow courts to look beyond the formulation of the claim and to identify, according to the *lex fori*, the true issue or issues involved.[6]

So now we have introduced an added ingredient: "characterisation", also known as *classification* in common law and as *qualification* in French law. The result of this analysis by the local court is to define the cause of action (procedural characterisation) and the nature of the claim (substantive characterisation). Is it a maritime action or a

contract action? Is it a debt, a contractual claim, a claim for restitution, *quantum meruit*, unjust enrichment, or perhaps a tort of some sort? This will usually be done by the local court according to the legal categories it has at its disposal (according, therefore, to the rules of the *lex fori*).

So far, so good. It seems that all you need to do is to characterise the relationship and this will naturally yield the jurisdiction and the applicable law. Unfortunately, there seems to be a certain looseness in private international law in how the characterisation process is allocated in the chain of reasoning, and this can prove to be troublesome. At times it appears to kick in after the applicable law is chosen. In that case the characterisation is determined in accordance with the applicable law. At other times, especially in the case of so-called incidental questions,[7] characterisation seems to precede the applicable law stage. So, in the shipping dispute problem, it is theoretically possible that the Greek court may feel that it has jurisdiction because the debt is in Greece; for the same reason, in the absence of an alternative express choice of law, it may then determine that the applicable law is Greek and consequently that the claim is in contract (according to Greek law). Unfortunately (hypothetically, of course for the purposes of this article), the Dutch court may feel that the claim should be characterised by Dutch law and accordingly sees it as a maritime claim. On the basis of this characterisation, the applicable law would be Dutch. This is something of a legal quagmire – resolvable in theory but in practical reality a legal entanglement from which a good deal of deft reasoning and careful manoeuvring may be required in order to arrive at a satisfying answer.

If anything is apparent from the above examples, and from the reality of commerce and finance itself, it is that that the neat theoretical line of reasoning set forth in Figure 1 is not representative of what actually happens. Ultimately, this appears to be so for two basic reasons. Often, the importance of the characterisation problem seems to be underrated. What is more, the end result of the total legal analysis may be that, in reality, the legal "answer" may not turn out to be the product of just one legal system.

B. A three-step interaction route

For the purposes of international financial law (IFL), experience and logic tends to suggest that one adopt an empirical *modus operandi* drawing on and adapting traditional procedures found in private international law but stretching beyond them.

When faced with a cross-border problem (instrument, transaction or relationship) the proper initial query is indeed always: what is the *applicable jurisdiction* and what is the *applicable law*? Thankfully, in the case of financial transactions carried out on the international financial markets, the answer would seem to be fairly straightforward. In practice it appears to always be the case that applicable law is expressly chosen by the parties and so inscribed in the relevant documents. So normally is the jurisdiction. On this basis, one might think that the whole problem has been suitably side-stepped by the markets.

Unhappily, some courts may not recognise the choice of law or the choice of jurisdiction the parties have agreed as exclusively binding, for any number of reasons. Their decision may be based on a general impression that the transaction or relationship is not sufficiently connected to the law and jurisdiction nominated by the parties, to questions of public policy, to accusations that the transaction is a sham, a simulation, to an innate repugnance to what is considered to be little more than forum shopping. Rather than upholding the parties' choice as unassailable and sacrosanct, a court may instead step in to defeat it. This appears to be particularly possible where the transaction or relationship in question could, according to the local law of the reviewing court, be classified differently to the characterisation given it by the parties. Aptly, this well-known legal phenomena is known as "recharacterisation", and is not just a remote possibility occurring in developing jurisdictions, but quite a familiar event even in developed jurisdictions.[8] And if recharacterisation occurs domestically (where only *one* jurisdiction is involved), then the likelihood that it could pop up in a cross-border financial transaction, where more than one jurisdiction is involved, is correspondingly higher. So characterisation lies at the heart of the issue.

There is one more consideration to bear in mind. Even in a relatively uncomplicated case, such as where the applicable jurisdiction is readily established and the applicable law readily identified, and even the resultant characterisation accepted, for the purposes of, say, contract law,[9] a number of other snags could nonetheless materialise. What about mandatory rules of law (*inter alia* for financial matters: the insolvency regime, tax and public law regulations, including securities laws and criminal law, of the local jurisdiction)? When and to what extent do these apply? What about the law of the place of performance (which may be neither the governing law of the contract or the law of the local receiving jurisdiction but often a highly relevant consideration in conflict of laws)? Especially in relation to these last two items, the burning question of how the particular instrument, transaction or relationship is characterised (in other words, what it *is*, legally speaking) might also end up having to be determined with reference to these other legal variables.

Thus, it quickly becomes clear that the activities of reference in dealing with cross-border financial markets transactions will always appear to be *three* rather than two:

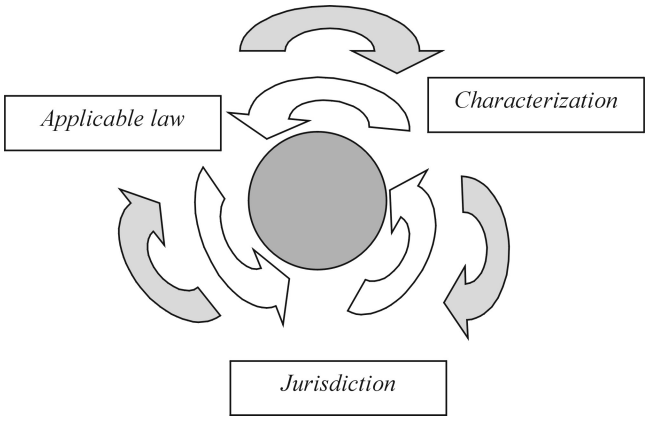

Figure 2

identification of applicable law, establishment of jurisdiction, certainly; but also – crucially – characterisation.

To summarise, the three-step process would actually look like Figure 2.[10]

Notice how the protocol envisaged is purposely iterative and multi-referential. An effort to be dynamic in approach and flexible in response is required since, in market reality, the applicable law and jurisdiction often determine the characterisation, while at the same time, the characterisation will often determine the applicable law and jurisdiction. Sorry, but it does appear at times to be a reiterative, chicken-or-egg, bite-your-own-tail situation potentially involving looping and feedback.

Indeed, the final result of the legal syllogism in IFL may not be the signalling of just one legal system to the exclusion of others. Even though it may be so in the mind of any individual court involved in analysing the situation, it may not be so for all the courts potentially involved. That's reality. Not at all like the ideal world of deferential legal comity. That is the bad news. The good news is that the market has actually been aware of this fact for some time (whether consciously or not) and, as we shall see, has evolved methods to deal with it.

Is the problem in IFL any different from that extant in international business law generally? In reality it is more of a core problem in IFL for number of reasons. Firstly, there are fewer international treaties and conventions regulating IFL compared to those, for example, which seek to discipline international trade and business. More importantly, the intangible and inherently cross-jurisdictional nature of the subject matter of IFL (international cash flows, cross-border obligations) make it significantly more vulnerable *intrinsically* to multi-jurisdictional battering on a endemic basis: whereas it may *at times* be difficult to confidently reduce problems in international trade transactions to one or more determinate answers, problems in IFL, because of their nature, will *always* be open to a potential indeterminateness, which needs, of course, to be dealt with.

1. Examples

In the case of the loan contract we looked previously, the questions to address would have been: what would the contract seem to be under English law (law of contract), under Chinese law (the law of incorporation of the borrower and the law of place of performance), perhaps also according to the law of the relevant US jurisdiction(s) relating to the US organised lender (and, of course, the guarantee might invoke Italian law, the law of the guarantor). Well, a loan is a loan, you might say. True enough, but is it a line of credit, an overdraft facility, an advance facility, a promise to lend, a deposit, or something else? For civil law lawyers, there is a need to answer the question of which legal category the loan slots into: does it remind one of a *mutuum,* a d*epositum*? Is it a line of credit or some other type of relationship, each with different private law and public law characteristics? What is the guarantee structure and how and where can it be enforced? Do the peculiar clauses contained in the loan deriving from its cross-border pedigree (*inter alia*: tax clauses, increased costs clauses, interest protection provisions, prepayment options and so on) represent a potential problem? The chances are that not all the jurisidictions involved will provide the same answer.

Meaning: in these cases in relation to the legal and fact situation there is more than one legal concept and more than one legal conceptualisation of the transaction being used in various systems, each of which is legitimately connected to the transaction (instrument or relationship), a fact that cannot be ignored.

Meaning: the systems of procedure and substantive law impinging on the legal situation at the same time will number more than one. And there is a real possibility that the resultant conflict may not turn out to be easily resolvable.

To help understand the process, it would be useful to look at another familiar example. Let us take the example of a stock lending transaction. One party A lends shares to another party B. Party B is obliged to redeliver the same amount of the same shares to the party A at some predetermined date.[11]

Let us suppose that party A and party B are from different jurisdictions. Party A's jurisdiction defines the stock lending contract as a bailment (deposit) and Party B's jurisdiction defines it as a sale and repurchase. Fortunately, there is an initial agreement and the parties choose the law of party A's jurisdiction as the governing law of the contract. Assuming party B's conflict rules accept this (usually they do), then any action by A in B's courts would be based on bailment rules. However, two problems tend to arise. Are the bailment rules applied by B the same as A expected them to be?[12] Secondly, even if the private law rules applied are the same as A expected, what about the public law rules in B's jurisdiction? From a tax point of view, or a bankruptcy point of view, or that of any securities legislation extant in B's jurisdiction, will the contract still be considered a bailment, or rather a sale and resale?

To make matters worse (certainly from a practitioner's point of view), one must also reflect on other possibilities. If, for some reason, an action for delivery has to be brought in the jurisdiction of the shares that are the subject matter of the transaction, what would be the outcome? Would the stock lending be considered a bailment, a sale or perhaps akin to a third possibility (such as a notional loan secured by stock)?[13]

Another evident example is the case of cross-border factoring, where the problems arising from competition between diverse legal systems in a typically multi-system context seem to engender endemic uncertainty. Mainly, this appears to be caused by the fact that the choice of law (and jurisdiction) for the assignment and subrogation of receivables is a function of their characterisation. While in some systems of law the debt involved is considered a form of property, in others, it constitutes a purely personal right. This causes problems. Not even international conventions such as the Rome Convention on Applicable Law seem to help resolve the problem since their application to the legal situation may, in the first place, depend on how that legal situation is initially characterised.[14]

Perhaps one of the most dramatic examples of vulnerability to this recurrent characterisation risk has been in the

field of derivatives. Since the growth of substantial derivatives markets in the early 1980s, these instruments (swaps, forwards in one form or other, stock lending transactions and so on) have on various occasions been subjected to close perusal by a number of courts worldwide. Beginning with the *Hammersmith* case in the United Kingdom (which declared a number of swap contracts entered into by local authorities null and void),[15] a string of European cases (in France, Italy and Germany for instance) have over the years thrown into doubt the legality of swaps and of other derivative transactions. Often the grounds of the various decisions have been narrow questions of specific legislative construction; at other times they have entailed ascertaining the legal nature of the instruments involved, a broader question. Even in the United States, the original financial breeding ground for the instrument, legislative intervention in the early 1990s was necessary in order to allay potential problems associated with the legal characterisation of the swap (for instance, was the swap an entire, or indivisible contract or really two parallel loans?).[16] Concern over characterisation questions ran deep, even to the extent of throwing into question whether derivatives contracts were legitimate financial instruments or merely forms of gaming and wagering. These questions still persist and seem to be endemic.[17] So, the lesson to draw from history is that even if the cross-border derivative contract looks fine from the perspective of your local jurisdiction, you must be constantly aware, and consequently be prepared for the fact, that that situation may not turn out to be the case in any number of other potentially impinging jurisdictions. I imagine that in the wake of the current financial crisis quite a number of similar issues are bound to emerge during the inevitable global restructuring and associated litigation processes.

2. Distinguishing

A number of points need to be made at this stage, on the basis of what has thus far been said.

Clearly, IFL differs from private international law. To begin, with private international law seems largely to resolve bi- rather than multi-jurisdictional cases. Any conflict it needs to resolve is normally between two competing systems. Reference may be made to others, but only in the context of resolving the tension between the *two* chief legal contenders. Moreover, in doing so private international law normally attempts to identify a *single* proper law governing a transaction (this precept is often called the unity-of-law principle), principally for the admirable aim of avoiding confusion. On the contrary, IFL *assumes* that the choice of the law in any given jurisdiction will not necessarily hold in another jurisdiction. It assumes that, in reality, more than one law (and often more than two laws) may turn out to be practically applicable to all or part of the transaction and devises strategies accordingly.

To be truthful, there are cases where the concurrent application of more than one law are contemplated by private international law but these tend to be limited. One such instance is the where the strategy of *renvoi* is recognised and adopted. In this case, a local court deciding on a situation with foreign elements may, in accordance with *its* domestic rules (of conflicts), apply the domestic rules of a foreign court (it effects *renvoi* to or, in other words, defers to the rules of the other court). In so doing it may feel it needs to apply not just the substantive rules but also the *conflict* rules of the other jurisdiction. This may cause complications. For example, if court A defers to the rules of court B and those rules in turn require that reference be made to the rules of court A, then a complicated forensic game ensues with the legal ball notionally lobbying from one court to another.[18] The aspect to note here is that the whole process is directed at discovering a single system of law to govern and resolve the situation. Regrettably, in order to achieve this result, the rules applied may turn out to be unexpected and/or produce unpredictable results. Moreover, the actual rules of *renvoi* differ radically from jurisdiction to jurisdiction.[19]

For this reason, the application of the doctrine often seems to be limited to matters of family law, succession and, more recently, international criminal law.[20] Commonly, its application is excluded in cases involving contract law or tort.[21]

A more tolerant attitude to concurrent jurisdiction in private international law may be seen at work in those rules which allow the application of rules of different legal systems to different aspects of the relationship, a process known as *dépeçage*.[22] According to normal conflicts rules, it is possible for a contract to be governed by more than one law, different parts being subject to different legal regimes. This, for example, is explicitly recognised by the Rome Convention[23] and is already provided for in many national conflict rules. However, there seems to be a common consensus amongst conflicts scholars that *dépeçage* is rare and uncommon, and presumably not to be encouraged – probably because splitting a contract in this way may prove to be legally inconvenient.[24]

Given the existence of the above two doctrines it might be said that concurrent jurisdiction in private international law is not unknown and indeed that there is allowance made for it in the customary rules. Look again. It might well be that the normal conflict-of-laws analysis and mindset could ultimately turn out to be inadequate for the realities of IFL.

Far from being exceptional, the activities of r*envoi* and *dépeçage* turn out to be quite common in relation to legal issues arising in IFL. Sometimes the parties themselves or the circumstances of the cross-border relationship itself make it desirable or unavoidable. For example, It is not uncommon for derivatives governed by the ISDA standard documentation to provide for one law to govern the master and another to govern the credit support annex. The resultant *dépeçage* will be a product of the express choice of the parties. It will be the result of the way the global market is constructed. Cross-border financings also commonly exhibit a mix of legal pedigrees: the financing contract will be in one law, some security in another, other related contracts in yet another, and so on.[25] At times this multi-legality will even be imposed by the mandatory rules of local law. In short, there may not be *one* system of law governing exclusively all aspects of the instrument, transaction or relationship, even in terms of the choice made by the parties involved.

So, while the logic of traditional *renvoi* and *dépeçage* in private international law will always sustain that *in the end* the instrument, transaction or relationship will be governed by a single system of law, whatever that turns out to be (that is the point of the exercise), this simply fails to reflect reality of the international financial markets. As has been noted above, it is not uncommon for different parts of complex cross-border financial transactions to be subject to different legal systems, either voluntarily or otherwise.

Even more pointedly, it appears to be entirely possible that not only *different* parts of the instrument, transaction or relationship are subject to different systems and rules (and this is even possible under traditional *dépeçage*), but that the *same* parts may be (and this is not allowed under traditional *dépeçage* rules).[26] This results from the interaction of diverse legal systems in sometimes unexpected and often untraditional ways in relation to cross-border products and relationships which are themselves innovative and intrinsically multi-jurisdictional.

A number of strategies are adopted in IFL to deal with this reality. Most will be familiar and are encapsulated in the contractual mechanism now common in most cross-border financial contracts. We shall look at these in a later article.

Returning to the characterisation problem in more detail, it is precisely because a cross-border financial activity may be subject to more than one legal system acting in relation to the *same* parts of an instrument, transaction or relationship that makes characterisation a core process in IFL, one that needs to be addressed early, rather than later on. This is an important point to underscore as it may point to a fundamental difference in approach. While for domestic law purposes, the aim of characterisation is to fit the contract neatly into a *single* pre-existing private and/or public law category[27] and for private international law, characterisation is a tool used to locate the single domestic law to be applied,[28] in IFL, it is the process of identifying the *range* of possible characterisations that a product may attract.

Why is it necessary to identify a range of possibilities? Plainly, so the practitioner can anticipate the possible classifications of the instrument, transaction or relationship that relevant courts may make and prepare for such eventuality as far as possible. In a domestic situations, the applicable law is known and the characterisation is relatively straightforward: according to the local law, a financial transaction will fit neatly into a common known type for the purposes of, say, contract law (it is an executory contract for delivery of tangible movables, or of choses in possession and so on) and finds a clear identity for tax purposes, for regulatory purposes and so on. In IFL, the same legal instrument, transaction or relationship may be subject to competing rules, none of which will simply go away. Their application may depend on the classification given (whether it is an executory contract or not, for example, or property or contractual claim, whether it is a security instrument or not, and so on). The ultimate legal answer (or better, range of answers) may not be confined to a single tribunal or system. Hence the professional needs to guard against being unduly reductive in his or her legal reasoning.

It must be said there are instances when a court will traditionally not intervene to characterise. There several traditional cases when characterisation is not made by the *lex fori*. These include cases where there a choice of law has already been made by the parties (l*ex voluntatis*) or where it refers classification to another court's rules, or where real estate or immovables (when the *lex situs* is often said to apply) or where, from its point of view, a novel instrument transaction or relationship involves unknown legal institutions or concepts. The later instance has not been uncommon in cross-border financial transactions. This in itself will generate a potential problem of uncertainty.

The opposite is also true. There is a danger that where one court may dither or decline on characterisation, another court involved may not. Unluckily, that other court may not necessarily be the desired venue contemplated by the legal professional involved. Hence the professional needs to assimilate the idea that in IFL, characterisation may be the result of the dynamic interaction of more than one law (and of competing characterisations). Naturally, the number of entry points for characterisation-generating rules of classification are a function of the number of substantive laws relevant to the transaction and of the number of jurisdictions potentially involved.

3. Why the complication?

Why does characterisation, as well as the other steps in the legal syllogism (identifying applicable law, establishing jurisdiction), appear both in theory and in practice to be a particularly complicated process in IFL?

One reason for this has to do with the fact that the frame of references from which the issues are addressed is different from that normally associated with disciplines such as private international law. Quite simply, private international law rules are rules that have evolved for the benefit of the court in order to help it carry on its work. It is therefore an activity carried out from *the viewpoint of a court*, that is to say of the decision-making enforcement body.

Simply put: *private international law rules relate to the activity of a court. Their purpose is to establish the single system of law which should be applied to the legal and fact situation by that court. The key dynamic involved is that depicted in Figure 3.*

This is a correct representation of the situation from the Court's point of view. From its standpoint, the legal answer will undoubtedly be the result of its decision as to which rules of local or foreign law are to apply.

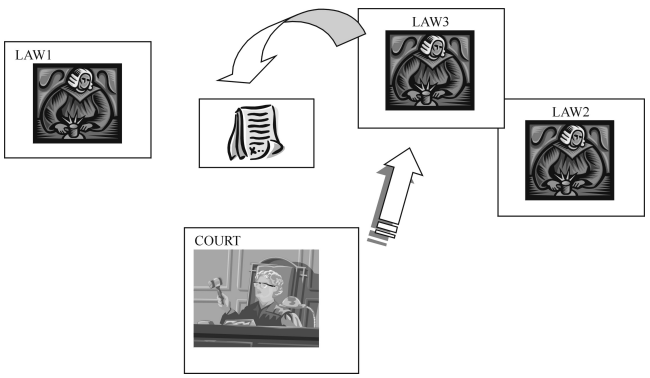

Figure 3

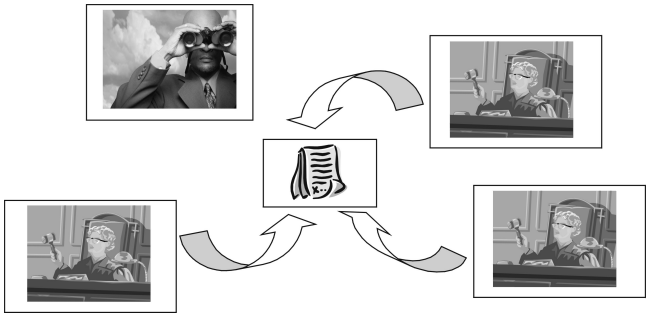

Figure 4

On the other hand, the appropriate approach in IFL ("the IFL protocol") represents an activity carried out from *the standpoint of the legal adviser.* A market professional needs to pre-empt the strategies that could be adopted not just by one court but by any number of courts which could become potentially involved as each searches for the proper legal system or systems to apply when that court feels it needs to act as a decision-making or enforcement body with respect to a financial transaction – a theoretical puzzle to solve for the client which has extremely practical consequences. Visually, the reality of the legal and market situation can be best represented as in Figure 4.

The IFL protocol is a practitioner activity. It aims to discover the range of involved courts which might apply the rules of their legal system. It reflects legal and market reality.

In addition, one must also remember that the legal complexity of the situation will be enhanced by whatever law, or laws, each visibly involved court may further implicate in the process either as a substantive matter or via any relevant incidental question. Ultimately, the true situation is actually more like the one sketched out in Figure 5.

Ever since Savigny's attempt to codify private international law and identify uniform rules to ensure uniformity of outcomes (perhaps in an attempt to discourage forum shopping), scholarly debate has raged over the nature of conflicts rules and the proper policy and legal theory that they should reflect.[29] Whatever the merits of each side of the debate, the empirical evidence seems to confirm a suspicion that one could be forgiven for having: in reality, courts tend to like to intervene. Some have held that this happens even when in order to do so courts may need to strain theoretical constructs. Perhaps they do so, if they do indeed do so, on the basis of a deep belief in the need to protect territorial interests (whatever happens on or touches my jurisdictional turf is consequently in my interests to review) or (quite apart from other formal considerations) in a desire to ensure justice is done for the deserving party. Not surprisingly, empirical evidence seems to indicate that modern trends in certain jurisdictions actually tend to be towards residence-based, recovery-orientated and forum-centred applications of conflicts rules.[30] It should therefore come as no surprise that the scope for intervention in cross-border financial instruments, transactions and relationships may turn out to be particularly prevalent and extensive.

Time for a reassuring observation. As it turns out, the international markets do not appear to be in the grip of legal anarchy or of a game of legal roulette where the outcome is never predictable. As already adumbrated in the previous article in the series, there appear to be common themes and underlying legal structures in most jurisdictions (what I call "deep structures"). These, and the apparent existence of widespread common approaches (not identical, but similar enough), make prediction and an interaction strategy possible.

Before proceeding, a passing thought on a not unrelated idea. Some have blithely asserted that there actually exists a consistent, naturally occurring legal order on the international markets which emerges from the interstices of practice. In this regard, suggestions are at times made that the financial markets, like international trade, float around in something of a legal vacuum which is filled by naturally occurring supranational rules developed from the practice of merchants (in this financial case bankers, funds, financial institutions and investors). According to this idea, the markets are not really subject to local legal regimes, and if they are subject to anything precisely legal, are subject to a kind of *lex mercatoria*: as if the multi-jurisdictional nature of the markets created a legal no man's land which the financial operative can exploit to approximate a truly efficient market (free of the trappings of heavy-handed regulation) and in so doing create an informal yet effective self-enforcing, self-referential regime of legal norms. Every experienced financial markets practitioner knows this idea to be evidently unfounded and little short of heresy. Nonetheless the notion continues at times to be seriously advocated.[31] The existence of special treatment for international financial transactions (for example the creation of the special Eurobond regime in

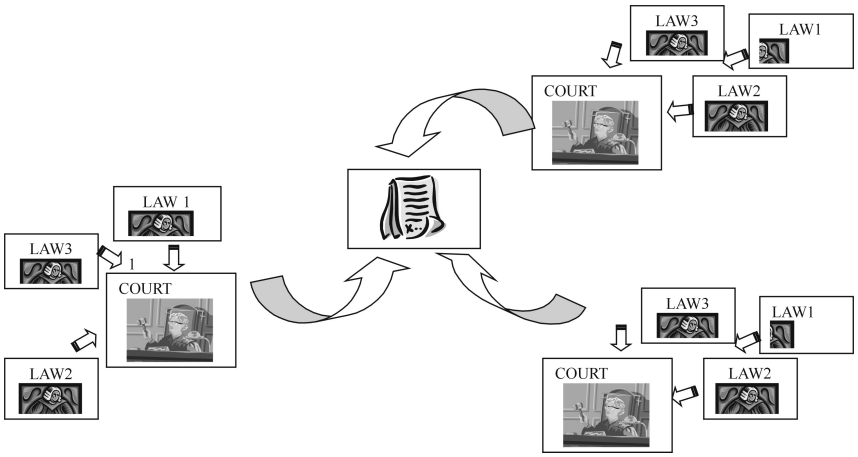

Figure 5

London in the 1980s) and the existence of special international banking facilities may have led to this erroneous conclusion. In any event, as any practitioner well knows, international financial transactions are still very much subject to local legal determination.[32] The idea, however, does at least have the merit of affirming that there is order "out there".

C. The nature of the markets: products and processes

A question which now has to be answered is: why are cross-border financial transactions particularly and structurally vulnerable to intervention from multiple courts (which leads to the consequence that the different steps in the IFL protocol are necessarily multi-faceted and dynamic). The answer is fundamentally to be found in the nature and workings of the financial markets themselves.

I cite a few aspects: the product, the process, public law and legal mind sets.

To begin with, the very nature of the *product* which is bought and sold by the financial markets make it particularly susceptible to the legal tug of war that often takes place in an international arena. As was mentioned previously, it is the intangible and inherently cross-jurisdictional nature of the subject matter of IFL which makes it significantly exposed to jurisdictional competition. How? IFL deals largely in concepts. Not only in *intangible* rights but in *rights in* intangibles. It tends to deal with cash flows, in computer entries located in more than one jurisdiction, in obligations that straddle more than one jurisdiction and system of law. This essentially means that there are a number of potential problems. One is localisation. While a car, a bale of wool, piles of copper or precious stones tend to physically sit in one location, usually in a warehouse or on a pier, many of the objects of IFL are not so conveniently positioned. Since they obviously do not have a GPS global positioning reference, there may naturally be divergence amongst courts as to where exactly they rest.

What is more, the intangible itself is an abstract signifier, a mental construct, open to interpretation and reconstruction. While this is so in the usual course of events in relation to any intangible such as a right, a privilege or a duty in any area of law, it is a particularly core problematic in IFL. In other areas of law, once the exact content of the signifier is settled (*what* exactly the right *is*) there is normally no uncertainty as to what these reinterpreted intangibles refer to. It is usually something physical that can be delivered or handled. In IFL, the very object of the right may be another right or other intangible represented or described by some form of scrip which is its only physical manifestation. It may be said that in the end it all potentially resembles a mere game of words. At the end of the long chain of words there may be physical goods, or there may not be. Whether there are or not, there always seems in any case to be a lot going on in between. Perhaps a prime example of this sometimes intense legal activity at the heart of IFL can be discerned in commentary on the recent financial crisis, in the accusation made by some economists that the international financial markets created volumes of paper assets that ended up being many multiples of any real underlying physical assets (an epiphenomena gone mad, as it were).

A third aspect which certainly tends to make things involved is the high rate of product innovation which takes place on the international financial markets. Innovation in the markets may lead to neoteric products that defy immediate analysis from a domestic legal point of view (private and/or public law). This means difficulty in the domestic characterisation process. So, even if a dominant law is identified, it is difficult to apply to the product. Even when it is applied, it is difficult to reach an exhaustive or conclusive solution: I call this the "subject matter" problem. One needs to be aware that innovation in financial products occurs not just in the "economics", but also in the "legalities". An end to the process does not seem to be in sight. Even though the ancient Greeks and Romans may be said to have thought of most things, they seem to have missed out on a few recent financial strategies, which include products derived from debundling, rearranging, permutation and economic and legal reorganisation. Despite the current financial crisis, or perhaps because of it, ingenuity may not grind to a complete halt and we can expect to see more innovation on the markets in the future.

Payment systems complicate matters. They call into question the nature of fundamental notions such as money, by creating *bank money* (dots, not dollars, electrons, not euros). One of the striking things about "bank money" may be that it does not just act as a *means* of performance but as the *object* of the performance itself. This inevitably leads to a subject matter problem. Although IFL products *look* the same as their domestic counterpart, they are actually a legally different species. Even though sharks and killer whales *look* the same (marine-dwelling predators possessing fins and a tail) they actually belong to different parts of the animal kingdom (one is a fish, the other a mammal). Are a domestic bond and an international bond a different legal species? A normal domestic bank account and an international bank account may well be. Even though leopards and cheetahs look similar, they actually *do* things quite differently and are an entirely different breed of cat. We shall look at this aspect in the next article.

Process innovation and the globalisation of process has, amongst other things, also led to difficulties in assessing where the *situs* of the relationship lies. This exacerbates the split personality problem. An express indication by parties may not be exhaustive, not because the *place* of performance may be elsewhere (a traditional conflicts problem), but because the *process* of performance is elsewhere, and "other", relative to a party's expectation.

D. Public law

It would not be surprising to learn that public law norms regularly govern cross-border instruments, transactions and relationships.[33] They do so because part or all of the instrument, transaction or relationship are consciously within the ambit of a regulatory jurisdiction (that of the express choice

of law, for example) or because the product, the process or the players involved are in some way connected and subjected to mandatory rules of an involved jurisdiction or systems of law. Most jurisdictions wish to protect investors. In order to so in a globalised financial arena, they seem to need to reach out to arrangements which would otherwise not involve their private law jurisdiction.

An interesting point to note here is that while in private international law public norms may not seem to feature much as a relevant consideration, they are central to IFL. Some systems may feel that conflicts rules are all about resolving competition between *private* law rules. Little or no provision is made for resolving conflicts between *public law* rules. As often as not, foreign public norms are considered outside the scope of private international law. Sometimes, they are expressly excluded from consideration.[34] The only exceptions may be international public law norms established by international treaties and conventions. The complications introduced by public law on IFL will be dealt with in more detail in a subsequent article.

In anticipating the range of laws which could impinge on an IFL instrument, transaction or relationship, the manner in which public law may interact (via executive decrees, legislation, regulation of governments or public bodies) needs to be considered – as does the fact that many of these public norms may have explicit extraterritorial ambitions. In general in this regard, we find ourselves dealing not just with specific legislation but potentially with social policy issues seen through the residual legal categories associated with doctrines of public order, natural justice or public policy.

Is this peculiar to IFL? Probably. Because the impact of public law norms on a regular and central basis in IFL means that the nature of the legal problem mutates. In private international law, jurisdiction is established by reviewing the facts of the case, to find connecting elements: nationality, domicile, activities of the parties, and so on. In IFL a law (public legislation) may determine jurisdiction independently of the parties' specific acts or status. To cite two, albeit extreme, examples: if a financial instrument not involving a citizen of country A uses country A's currency, then country A might grab jurisdiction (on the basis of currency control regulations); if that same instrument was later sold to a citizen of country B who was resident abroad (not even in country B), then country B might grab jurisdiction (on the basis of local securities laws) even though there was no other connection to country B than the sale of the financial instrument to a citizen by a third party. This later case in particular is very possible.[35]

E. Civil law and common law mind-sets

The practice of IFL requires that one is constantly aware that even first assumptions in private law matters may differ radically between systems. One commonly encountered dichotomy is that constituted by the different mind-set and juridical approach of civil law lawyers compared to that adopted by common law lawyers, a diversity which in cross-border transactions at times generates legal tension, often of some practical consequence.

One well-known case involves the timing and significance of the characterisation process as carried out in the two systems. For civil law lawyers, the qualification process is a fundamental, natural first step. In domestic law, the end to be achieved is the identification of the legal category or class to which the relationship seems to belong. For the sake of simplicity, I shall refer to transactional items, such as contracts, although the general principles apply more widely. During a typical civil law analysis one asks not only what legal category of contract or relationship does the instrument under consideration fit into, but also, if it does not fit neatly into any given legal pigeon-hole, what contractual type it most resembles, legally speaking. Principally, the sources of reference are the express provisions of the local legal code which provides for specific recognised forms of contract – only once this characterisation has occurred can the validity and legal attributes of an instrument, transaction or relationship be ascertained with absolute confidence.[36] All this is done at the level of private (contract) law.[37]

Common lawyers tend not to have to worry about the classification, or characterisation, of an instrument in order to ascertain the validity and legal attributes of an instrument as a matter of private (contract) law. Usually, common law jurisdictions tend to be more permissive in the sense of assuming the legitimacy of contract types, as long as the contract is properly formed. A contract is a valid contract so long as it exhibits the indicia of a valid contract.[38] The contents of a contractual obligation need not conform to any prescribed type in the way that civil law lawyers prefer civil law contracts to do. The question of legitimacy of the contract in common law only arises at some later stage for the purposes of regulatory, tax and similar legislation which presupposes a formal consideration of the legal nature of the contract.[39]

Common lawyers, in particular, should be aware of this legal fact of life. At least half the world's jurisdictions will not only seek to qualify the cross-border instrument, transaction or relationship according to their legal ideas, for the purposes of public law, but may also (necessarily) do so for the purposes of private law (contract, etc). This means that, in certain circumstances, the instrument, transaction or relationship may be subject to serious questioning in a relevant jurisdiction even though it might otherwise appear to be a valid contract for public law purposes in that same jurisdiction; this might lead to unexpected recharacterisations or in other ways place the parties' apparent express choices in jeopardy of being ignored.

In the not so distant past this actually happened in quite a number of European civilian jurisdictions in relation to derivatives contracts, causing a good deal of legal indigestion as jurisdictions attempted to metabolise into their systems neoteric contractual concepts such as the swap. Even where the express governing law of the contract was an unproblematic common law regime (eg English law), the involved civilian system (which might have been, for example, the law of a counterparty) often seemed to balk at the implications of accepting an unorthodox, non-indigenous contractual form locally. Notably, this sometimes occurred at the level of private law interpretation, quite apart from and in addition to any further implications of a public law nature.

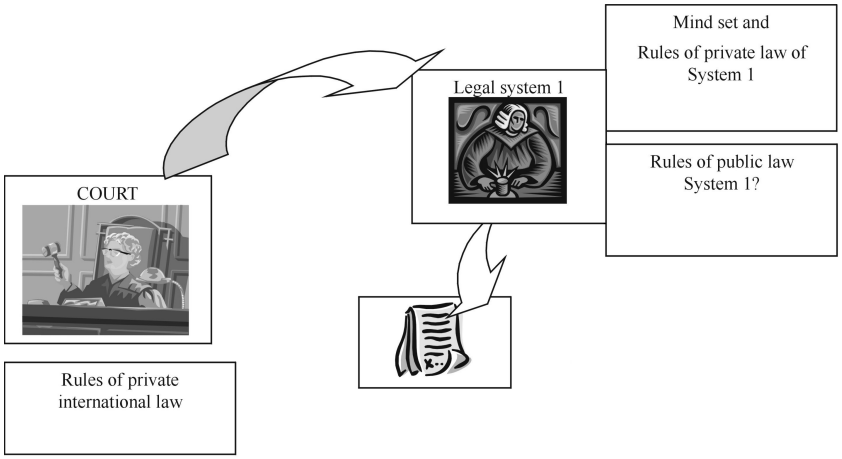

Figure 6

Awareness of the existence of other legal mind-sets is highly advisable in IFL. Common law lawyers need to be aware of civil law presumptions and the possibility that this may determine cross-border antinomies. Equally, civil law lawyers cannot afford not to be aware of the ever-present possibility that other systems may look at instruments, transactions or relationships in quite different ways to which they might otherwise have expected. Socialist systems and Islamic-inspired systems have proven that this is so on more than one occasion.

Bringing these other elements into the equation, we can further refine our mental picture of things in IFL. For any given jurisdiction, the process will look something like the situation portrayed in Figure 6.

Each court determines the applicable law, which in turn determines the rules of private law to be applied. On the other hand, the rules of public law applicable may be multi-sourced. Whether a court takes jurisdiction will often as not depend on the result of an initial process of characterisation assessment.

As the number of international counterparties and the places where security and performance are located multiply, so do the number of potentially involved jurisidictions. Combining the visual map represented in Figure 5 above with these further refinements, one could represent the actual legal and market situation as in Figure 7.

F. Fortunately . . .

Sometimes arriving at an answer in IFL may not at first seem either particularly easy or especially definitive.

Fortunately, at this stage in the globalisation process, the legal categories for dealing with financial instruments, transactions and relationships seem not to constitute a

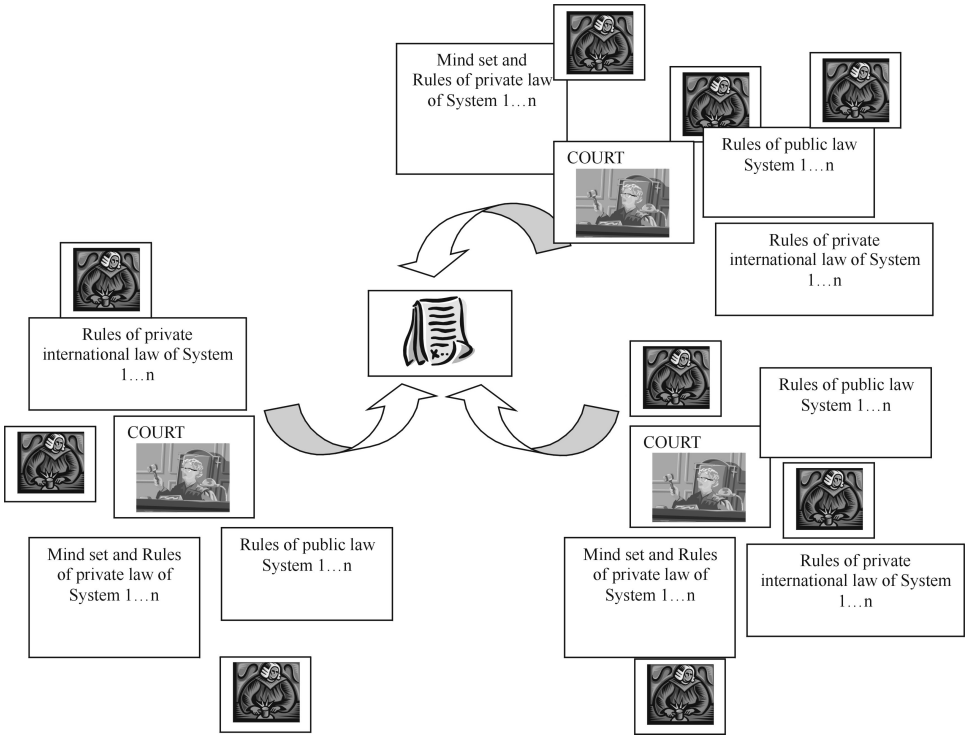

Figure 7

hopelessly eccentric or impossibly open system, and patterns do seem to emerge on the basis of which it is possible to construct a predictive model. Activity in loans, bonds, notes and other forms of financial paper, equity instruments and derivatives contracts (stock lending, repo, swaps, forwards, futures, etc) and associated with arranging, advising on, issueing, underwriting, selling and buying these instruments seems to be have been carried out cross-border, and cross-jurisdictionally, without major legal impediments. Well, perhaps.

In the next part of this series of articles we shall see what techniques have been developed in IFL in order to deal with the potential problems arising from the intrinsically multi-jurisdictional nature of cross-border transactions.

But first we will need to discuss in that same article that most "financial" of all financial topics:. . . Money. ■

Paul Sebastianutti is a common law and civil law lawyer who lectures in International Financial Law for the Pallas Consortium (University of Barcelona, University of Bologna, University of Essex, University of Konstanz, University of Lodz, University of Luiss Guido Carli, University of Jean Moulin Lyon III, University of Münster, and University of Nijmegen). Paul has been head of the legal department for Group

1 (2009) 3(1) *LFMR* 64.

2 So it is, for example, in English law: "The English conflict of laws is a body of rules whose purpose is to assist an English court in deciding a case which contains a foreign element." JG Collier, *Conflict of Laws* (Cambridge University Press, 3rd edn, 2001), 3. Similar concepts are echoed in the French *droit international privé*, the foreign element being termed the *élément d'extranéité*), in the Italian *diritto privato internazionale* and in the German *internationales Privatrecht*. And so on. A similar tack appears to be taken in non-European systems: see, for example, Huang Jin and Du, "Chinese Practice in Private International Law" [2003] *Chinese Journal of International Law* 2 and [2008] *Chinese Journal of International Law* 7.

3 The concept is commonly used in English and continental European systems of private international law.

4 This is the term used in the United States, see Restatement (Second) of Conflict of Laws s 188.

5 The range of applicable categories available in the various jurisdictions that might be involved certainly seem to represent something of a Latin devotee's delight: they might include concepts such as *lex propria*, *lex patriae*, *lex contractus*, *lex causae*, *lex loci solutionis*, *lex situs*, *lex loci contractus*, *lex obligationis*, *lex voluntatis*, *lex fori*, *lex domicili*, *lex loci actus*, *lex loci damni*, etc, etc. And that is just in the mainstream common law and civil law systems of law. There may be quite different concepts extant in legal systems belonging to other families or to hybrid regimes.

6 In the English case *Macmillan Inc v Bishopsgate Investment Trust plc* [1996] 1 ALL ER 585, Auld LJ accepted that in current times, "the proper approach is to look beyond the formulation of the claim and to identify according to the *lex fori* the true issue or issues thrown up by the claim and the defence".

7 In private international law, the term " incidental question" is used to denote any subsidiary issue that needs to be decided before the main issue can be. Leading cases have usually involved family law and succession issues.

8 Classic instances of recharacterisation in domestic law contexts have in the past impacted on financial structures ranging from simple financing facilities, to leasing arrangements, to complex securitisation. Frequently the issue raised has been whether the transaction was effected in compliance with certain provisions of relevant law and was protected from the risk that a court might recharacterise it irrespective of any legal label actually used by the parties, indeed despite their express intentions. In some of these cases, transfers of assets, for instance, were not taken to give rise to a "true sale" as proclaimed by the parties in the paperwork, but to something else such as a conditional assignment, a loan or a pledge. Certain security arrangements have also been requalified by courts: common law courts have struggled with the categorisation of the nature of charges over book debts, and civil law systems have had problems in relation to security over future debts. Tax tribunals everywhere seem to greatly enjoy recharacterising transactions, when it seems suitable for them to do so.

9 That is, where the characterisation of the transaction under foreign law as a certain type of contract rather than another is accepted by the local law of the receiving court.

10 I call this the "IFL protocol".

11 For the purposes of this article, I actually discuss a rudimentary form of "stock lending", which does not correspond in every detail to that which the markets may denote by the use of the term. For example, on the London markets, stock lending usually refers to collateralised transactions. In other jurisdictions the same or similar transactions may be designated as a "repo", a "spot/term" trade, and so on..

12 Do B's Conflicts rules apply A bailment rules or local B bailment rules?

13 Without getting involved in the technicalities, some jurisdictions, in fact, exclude bailment rules and follow a different approach based on a theory of ownership and options law concepts.

14 On this issue see eg Freddy Salinger, "International Factoring and Conflicts of Laws" (2007) 1 *LFMR* 7. Also in the same issue of *LFMR*, Orkun Akseli, "Turkish Law and UNICTRAL's Work on Assignment of Receivables" (2007) 1 *LFMR* 45.

15 *Hazell v Hammersmith and Fulham LBC* [1990] 2 WLR 17 (Div Ct); [1990], 2 WLR 1038 (CA); [1991] 2 WLR 372 (HL).

16 Starting in 1989 and 1990, relevant legislation was amended in the United States federal system in order to clarify unresolved issues regarding derivative contracts.

17 Until February 2007, Russian courts, for instance, could reclassify as gaming contracts cash-settled financial derivatives entered into with Russian counterparties and/or governed by Russian law (pursuant to Art 1062 of the Russian Civil Code). As at that date, the Code was duly amended. Unhappily, according to commentators, the exact wording of the amendment may mean that the problem is still not entirely resolved and may linger on in some form.

[18] For example, the rules of court A may subject a particular asset (for the sake of simplicity, a tangible moveable, or chose in possession) to the rules of its *situs* (say, the location of court B), whereas, for some reason, the rules of court B which are notionally applied by court A, subject the asset to the domicile or nationality of the property (which may even be the location of court A). Then there is a potential problem. If the assets are intangible, it is even more fun.

[19] Some jurisdictions apply partial (also known as "single") *renvoi*; others prefer total (aka "double") *renvoi*. Others, prefer not to allow *renvoi* at all.

[20] See Robert Sloane: "The Expressive Capacity of International Punishment", Columbia Public Law & Legal Theory Working Papers (2006), paper 06100.

[21] Art 15 of the Rome Convention on the Law Applicable to Contractual Obligations excludes application of *renvoir* to contractual matters.

[22] An alternative to the conventionally erudite French expression is the more direct US term "picking and choosing".

[23] Rome Convention on the Law Applicable to Contractual Obligations: Art 3(1). Art 4 applies where there is no express choice.

[24] Indeed, the recognition of *dépeçage* as a legal option in the Rome Convention was in point of fact criticised the Convention's official commentators: see M Giuliano and P Lagarde, "Report on the Convention on the Law Applicable to Contractual Obligations" [1980] OJ C–282(1).

[25] Yes, it may be true to sustain that all these related contracts are independent, albeit expressly cross-referential, agreements each governed by its particular law, and that therefore we are not dealing with true *depecage* which occurs within the ambit of the same contract. On the other hand, some courts will view all the related agreements arising from the same legal situation and as forming one single legal whole, the express connectedness between the single parts allowing for such an interpretation. If this is taken to be so, then one would have a true case of standard *depecage*. If not, it remains a multi-jurisdictional case, however it is technically defined.

[26] I call this the split personality problem.

[27] In civil law jurisdictions, classification is also for private law purposes; in common law jurisdictions, the effort to typify is usually reserved for public law purposes.

[28] Again, without getting bogged down in (without doubt, immensely interesting) detail, one needs to note that in private international law "characterisation" (or "classification" for the English and "qualification" for the French) normally involves a technical review of pleadings or causes of action, with a view to establishing the legal nature of the case and the extent to which elements of foreign law apply.

[29] Friedrich Carl von Savigny in his seminal nineteenth-century work, *System des heutigen römischen Rechts*, outlines a system of private international law which groups hypothetical cases into 39 categories and provides an equal number of connecting factors to determine applicable law. Neat and definitive. Since then, the debate has been vigorous and nothing seems any longer to be so neat and definitive. Some thinkers prefer a formal, rigid, rules-based approach (nice for predictability), while others prefer to temper rules with an eye to what is most appropriate in the circumstances (a so-called standards approach which searches for the most appropriate governing law in order to "ensure justice").

[30] In a sense the move away from the purely territorial basis to a most significant relationship (US) or most close connection (Europe) criterion is a sign of attempting to find the most naturally just result. It avoids having to mechanically apply rigid theoretical constructs which often ignore context.

[31] More by civil law academics than by common law or civil law laywers. Many common international contracts extant on the markets contain forms and contractual clauses inspired by common law practises. To the extent that these are unfamiliar to certain civil law jurists, the impression that the author has is that they have been mistaken for the independent creations of merchant law, when in fact they are firmly rooted in and governed by the common law legal system to which they refer.

[32] On the issue of whether it can be said that a *lex mercatoria* governs the financial markets, see P Sebasttianutti, "The Capital Markets", in M van Empel (ed), *Financial Services In Europe* (Dordrecht, Kluwer Law International, 2008), 70ff.

[33] For present purposes, I shall use "public law" to denote those branches of the law which govern and regulate relationships between private parties and the state. This would therefore include not just administrative law but also revenue law, criminal law, market regulations, etc (in contrast to private law which is concerned solely with relationships between private parties and, exceptionally, with public bodies acting as if they were private parties). This is more a civil law dichotomy than a common law one, though it seems to be perfectly familiar to common law systems.

[34] It is well known that municipal systems are very usually extremely hostile to the recognition locally of foreign tax or criminal law norms (unless specific treaties or international conventions are in place).

[35] It is the reason for the complicated sales restriction language in international bond issues.

[36] These are called nominate, or "typical", contracts as opposed to innominate, or "atypical", contracts.

[37] A note for common lawyers: civil law jurisdictions tend to invert the usual common law principle. No longer is the presumption: everything is normally to be considered permissible under the law unless it is expressly prohibited by it; rather, it seems that the generally preferred inclination for the civilian lawyer is to consider that anything the law does not expressly declare permissible may well be prohibited. In order to be sure that a contract is valid a civilian lawyer, therefore, normally seeks to assimilate the form of contract before him to a known contract type mentioned in the relevant civil code or national legislation. If it fits, then there is certainty as to its legal credentials. If it does not, then it is worrying, although all is not lost. She/he can attempt to argue that the particular form of contract is analogous in form or intent to one or more known contract types or to relevant parts of those contracts. If this fails, then she/he may have to simply assert that the commercial interests involved are nonetheless worthy of legal protection and declare the contract legitimate, albeit *sui generis*. Which does not mean she or he will necessarily be comfortable with the result.

[38] Evidence of an offer and of acceptance, good and adequate consideration, an intention to enter into legal relations and not being contrary to general principles of public order. See one of the acknowledged authorities in common law jurisdictions: *Chitty on Contracts* (London, Sweet & Maxwell, 30th edn, 2008).

[39] And of course for the purposes of common law Conflicts rules.