Characterization of Proprietary Restitution in the Conflict of Laws

PATTARAPAS TUDSRI*

This article examines the interaction of the law of restitution for unjust enrichment and the law of property with private international law. Classically, in private international law, the first step in the analysis of the governing law of a dispute with international elements is the classification of the dispute. This classification process sometimes involves much complexity, and this has been the case particularly for claims which in the domestic common law have been described as "proprietary restitution".

This article begins by examining many of the critical, long-lasting debates concerning the domestic law organization of the concepts of restitution and unjust enrichment, with particular regards to proprietary restitutionary remedies which may arise in connection with claims said to be based on unjust enrichment. When turning to private international law, the author seeks to develop an approach that attempts to go beyond the internal debates on classification and to arrive at a more neutral approach of classification that is likely to work well with the choice of law rules which have been developed essentially in accordance with the civilian, as opposed to the common law, categories of causes of action. In analyzing the classification process at the private international law level, the author attempts to address all of the major domestic law proprietary restitutionary claims such as claims to traceable proceeds, proprietary claims to the profits of wrongdoing, resulting trusts, constructive trusts arising in mistaken transfers and remedial constructive trusts.

Dans cet article, on examine l'interaction du droit de la restitution pour enrichissement injustifié et du droit des biens avec le droit international privé. Traditionnellement, en droit international privé, la première étape de l'analyse du droit régissant un conflit comportant des éléments internationaux consiste à cataloguer le conflit en question. Ce processus de qualification met parfois en jeu davantage de complexité, ce qui fut particulièrement le cas des actions qui, en *commonlaw* national, furent décrites comme des réclamations en « restitution de biens ».

L'article commence en analysant un certain nombre de débats persistants et critiques concernant l'organisation, par un système de droit national, des concepts de restitution et d'enrichissement injustifié, en examinant en particulier les recours applicables en matière de restitution de biens susceptibles de surgir dans le cadre d'actions en justice que l'on dit fondées sur un enrichissement injustifié. En se tournant vers le droit international privé, l'auteur cherche à élaborer une approche qui dépasserait le cadre des débats internes sur la classification et aborderait de façon plus neutre cette classification afin de mieux fonctionner avec les règles de conflit de lois, lesquelles ont été élaborées en grande partie en fonction des catégories de causes d'action civilistes, par rapport à celles propres à la *commonlaw*. En analysant le processus de classification au niveau du droit international privé, l'auteur tente de traiter toutes les demandes principales de restitution de biens selon le droit du pays, telles que les demandes relatives à des produits identifiables, les revendications de biens relatives à des profits résultant d'actes répréhensibles, à des fiducies résultoires, à des fiducies constructoires découlant de transferts erronés et à des fiducies constructoires de nature réparatoire.

* D.C.L. Candidate, McGill University; LL.M. (McGill); B.A. (Cantab). This article is developed from the dissertation originally submitted as part of the LL.M. program requirements at McGill University. Much of the remaining work was completed during the author's tenure as lecturer of private law and private international law at the Faculty of Law, Chulalongkorn University. The author is indebted to Professor Lionel D. Smith for his guidance and invaluable comments on the original drafts of this article. He would also like to thank the two anonymous referees and the editors of *Ottawa Law Review*. The usual disclaimers apply.

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> The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result. They appear to have had almost no influence on the practice of the courts in England.[1]

I. INTRODUCTION

Despite characterization being the first step which the courts have to encounter in any given conflict of laws case, few would doubt the accuracy of the above statement in relation to the degree of clarity that common law courts have given to the characterization process. The difficulties stem from the fact that it is inherent in the choice of law rules that there is more than one potentially relevant system of law. Each of these competing laws may hold an entirely opposite view on the classification of the issues before the court, and these views may also be entirely different from the classification that the forum would accord to its domestic cases.[2] To add to this complication, there are also uncertainties regarding the "thing" to be characterized.[3] The courts have made reference to "the issue," "the question in this action," "the relevant rule of law" and "the cause of action."[4] However, these

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1 Sir Lawrence Collins, ed, *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed (London, UK: Sweet & Maxwell, 2006) at para 2-006 [*Dicey, Morris & Collins*].

2 JJ Fawcett, JM Carruthers & Sir Peter North, eds, *Cheshire, North & Fawcett: Private International Law,* 14th ed (Oxford, UK: Oxford University Press, 2008) at 43-44 [*Fawcett, Carruthers & North*].

3 George Panagopoulos, *Restitution in Private International Law* (Oxford, UK: Hart Publishing, 2000) at 31-36 [Panagopoulos]; *Dicey, Morris & Collins*, *supra* note 1 at para 2-007; Christopher Forsyth, "Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of laws" (1998) 114 Law Q Rev 141 [Forsyth].

4 *Macmillan Inc v Bishopsgate Investment Trust Plc and Others (No3)*, [1996] 1 WLR 387 at 391, 393, [1996] 1 All ER 585 CA (Eng) [*Macmillan*].

terms seem to be used "loosely and interchangeably" and with little clarification.[5] Although it is beyond the scope of this article to explore the theoretical basis of conflict of laws characterization,[6] it suffices to mention here that characterization is ultimately dealt with by the forum. Accordingly, it must be done in accordance with the forum's own conflict of laws rules, which may be guided, but not controlled, by its purely domestic law.[7]

Even though the "enlightened *lex fori*" (law of the forum) approach to characterization is theoretically sound, it may be difficult to put into practice. This difficulty is particularly acute in relation to the area of law known in the domestic law[8] of the common law tradition as proprietary restitution. The reason for this lies in the different approaches toward the property-obligations divide adopted at the conflict of laws and the domestic law levels. Whereas the conflict of laws has traditionally embraced a Romanistic characterization together with clear boundaries between the law of property and obligations, these two areas of law are most deeply intertwined and have never been "usefully" distinguished in the common law domestic law.[9] It has even been suggested that an attempt to classify proprietary restitution as falling within either the law of property or obligations may

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5 Panagopoulos, *supra* note 3 at 32.

6 See *Dicey, Morris & Collins*, *supra* note 1 at paras 2-008–2-011; see generally Forsyth, *supra* note 3 at 153-54 for references to different models of characterization proposed by leading conflict scholars such as Falconbridge, Lipstein and Kahn-Freund; O Kahn-Freund, "General Problems of Private International Law" (1974) 143 Recueil des Cours 139 at 374-77; Kurt Lipstein, "Characterization" in K Zweigert and U Drobnig, eds, *International Encyclopedia of Comparative Law: Private International Law* (Tübingen, DE: Martinus Nijhoff Publishers, 1999) at 5-7.

7 This is the view advocated by Kahn-Freud and Lipstein. It is known as the "enlightened *lex fori*" approach. See *Macmillan*, *supra* note 4 at 407, Auld LJ. One alternative approach is to see characterization as being divided in two stages: the first involving characterization under the *lex fori* and the second under the *lex causae*. This approach may however be problematic where the same issue is classified differently under the two *leges*. For example, in a case where the forum is England but the *lex causae* is Spanish, if the issue is characterized as tort by English law, the scope of the applicable law would be limited to Spanish tort law only. Difficulties may arise where Spanish law considers the matter to fall within its contract law, with the result that no legal rules under Spanish tort law are applicable to the issue. On the contrary, according to the "enlightened *lex fori*" approach, English conflict rules will apply to both stages. Relevant Spanish rules will be applicable either because they are rules of tort law in the eyes of the *lex fori* or because the issue may properly be characterized as contractual. See Stephen GA Pitel, "Characterisation of Unjust Enrichment in the Conflict of Laws" in Jason Neyers, Mitchell McInnes and Stephen GA Pitel, eds, *Understanding Unjust Enrichment* (Oxford: Hart Publishing, 2004) at 333-37 [Pitel]; North, Fawcett & Carruthers, *supra* note 2 at 45-50. See also *Re Maldonado Estate, State of Spain v Treasury Solicitor*, [1954] P 223, [1953] 2 All ER 1579.

8 In this article, the term "domestic law" does not refer to the domestic law of any particular jurisdiction. It is employed here as a term of art referring to the internal law of the common law jurisdictions, particularly in the wake of the growing academic discussion and judicial pronouncement on the law of restitution. Where the domestic law of a particular jurisdiction is addressed, specific designation will be used: e.g. English law, Singapore law, the common law of Canada.

9 David Ibbetson, "Unjust Enrichment in England before 1600" in Eltjo JH Schrage, ed, *Unjust Enrichment: The Comparative Legal History of the Law of Restitution*, 2d ed (Berlin: Duncker & Humblot, 1999) at 133. See Andrew Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 Law Q Rev 412 at 412 [Burrows, "Unmasking"]. Burrows describes the relationship between the law of property and unjust enrichment as "the last great unsolved mystery for those working in the law of restitution."

seem rather "pointless" for domestic law purposes.[10] Whether or not the conflict of laws should adopt this attitude toward classification is, however, questionable. In the conflict of laws, classification can be crucial to the claims; the resultant choice of law regime identified by the characterization process may point to different applicable laws, which ultimately lead to different results.[11] In examining the characterization of proprietary restitution for conflict of laws purposes, this article argues that the confusion surrounding the domestic comprehension of the doctrinal basis of proprietary restitutionary claims should not be transposed onto the conflict of laws, where the distinction between property and obligations must be kept clearly defined. For causes of action known in the domestic law as proprietary restitution, in which proprietary entitlement is at stake, the applicable law should be identified solely by choice of law rules for property. The language of "restitution" and of "proprietary restitution" should be carved out from the conflict of laws. Rule 230 in *Dicey, Morris & Collins*, which refers to choice of law for restitution, should therefore be regarded as an unfortunate addition to the existing categories of choice of law regimes. To reach this conclusion, this article demonstrates that the obligational *restitutionary* approach is fundamentally flawed because it fails to address properly the distinction between restitution and unjust enrichment. This approach too readily accepts the projection of the law of restitution—still in an "embryonic"[12] stage of development, with its confused treatment of property and obligations—onto the Civilian-based conflict of laws structure.[13] In contrast, the proprietary approach is convincing. Even though it entails an outright rejection of the possibility that property rights may be created as a response to unjust enrichment, a strict divide between property and obligations should not be regarded as problematic. This approach seems to attach proper weight to the *situs* of the property in dispute. If the purpose of the choice of law rules lies in the identification of the law which has the closest connection to a given dispute, it is difficult to see why the law of the location of the asset should not

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10 Lionel Smith, "Unravelling Proprietary Restitution" (2004) 40 Can Bus LJ 317 at 337. In relation to domestic law, Smith argues that proprietary restitution can only be properly analyzed by reference to the nature of trust. Trust arises out of obligations: obligations owed by trustees to the beneficiaries in relation to the trust assets, and the duty owed by third parties not to interfere with those obligations. The proprietary rights of the beneficiaries can be seen as derivatives of these obligations. The relevant "rights" and "obligations" thus represent two sides of the same coin. It therefore seems unfruitful to discuss whether proprietary restitution is sourced in property or obligations. See also Lionel Smith, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 Law Q Rev 412 [Smith, "Structure of Trusts"]; Lionel Smith, "Philosophical Foundations of Proprietary Remedies" in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) [Smith, "Philosophical Foundations"]. Compare Burrows, "Unmasking", *supra* note 9; Andrew Burrows, "Unravelling Proprietary Restitution: A Response to Professor Lionel Smith" (2005) 41 Can Bus LJ 424; Andrew Burrows, "The English Law of Restitution: A Ten-Year Review" in Neyers, McInnes & Pitel, *supra* note 7 at 23-29.

11 This point is central to the dispute in *Macmillan*, *supra* note 4. See discussion in Part II(D), below.

12 Panagopoulos, *supra* note 3 at 28.

13 The cause of confusion is partly attributable to treatment of the choice of law for restitution as a separate classification within the law of obligations by the editors of *Dicey, Morris & Collins*. See *Dicey, Morris & Collins*, *supra* note 1 at para 34R-001(Rule 230).

always play a leading role when the dispute is concerned with a restitutionary claim alleging property rights in that asset.

The approach to characterization adopted in this article—that the conflict of laws requires a strict characterization process—may appear striking to many conflict lawyers. For them, the debate on the correct classification is redundant, since the substantive choice of law rules may be manipulated to ensure that proper effect is given to the law of the country that is most closely connected to the claim. While it is true that as long as the proper law can be identified, there appears to be nothing which necessitates the change to the indifferent attitude that the common law courts have toward characterization, this article shows that only the strict approach to characterization can provide a starting point based on which a doctrinally coherent and intelligible system of choice of law rules may be formulated. By adopting this approach, conflict lawyers can avoid the type of confusion that has long trapped commentators on the domestic law in the contentious area known as proprietary restitution.

On the scope of inquiries to which the analysis presented in this article is confined, two important points need to be clarified. First, this article is primarily predicated on the common law as understood in England, since that is where the common law domestic comprehension of proprietary restitution collides head-on with the Romanistic structure of private law traditionally adopted at the conflict of laws level. In England, the collision between these two great legal traditions garners even greater significance in light of the harmonization of the European conflict of laws regimes.[14] This approach, however, does not preclude drawing assistance from other common law jurisdictions where the English discussion on proprietary restitution is deficient or offers less clarity. Second, while a complete discussion on characterization in the conflict of laws may entail references to the substantive choice of law rules, the identification of the applicable law should theoretically surface only after the process of characterization is exhausted. While referring to the substantive choice of law process, care must be taken not to lose sight of the primary aim of this article, which is to establish a strict property-enrichment divide in the conflict of laws characterization.

This article employs the following structure. First, the confusion that surrounds the domestic comprehension of the terms "restitution" and "unjust enrichment" will be discussed in Part II, where it is argued that one should be extremely careful in projecting these two terms onto the conflict of laws. Building on the correct understanding of the terminology, the proper understanding of proprietary restitution will then be offered. In Part III, the article examines the

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14 See EC, *Convention on the Law Applicable to Contractual Obligations* [1980] OJ, L 266/1 [*Rome Convention*]; EC, *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 177/6 [*Rome I Regulation*]; EC, *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199/40 [*Rome II Regulation*].

basis of proprietary remedies in various cases where the right *in rem* is alleged to arise for the reversal of unjust enrichment. This will be examined comparatively, in light of the domestic law and the conflict of laws.

II. UNJUST ENRICHMENT, RESTITUTION AND PROPERTY

A. Introductory Notes

Before discussing the English understanding of the conflict of laws rules in relation to proprietary restitutionary claims, and the influence that the domestic treatment of proprietary restitution may have upon that understanding, it is necessary that a precise structure of the domestic law of restitution and unjust enrichment be examined. Subparts II(B) and II(C) set out to achieve that very purpose. Nonetheless, it is appropriate at this stage to outline the usage of the terminology "restitution" and "enrichment" in the English conflict of laws. The existence of "restitution" as a separate choice of law regime originated with the editors of *Dicey, Morris & Collins* in Rule 230, which reads:

> Rule 230—(1) The *obligation to restore* the benefit of an *enrichment* obtained *at another person's expense* is governed by the proper law of the obligation.
> (2) The proper law of the obligation is (*semble*) determined as follows:
> (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
> (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
> (c) If it arises in any other circumstances, its proper law is the law of the country where the *enrichment* occurs.[15]

Of course, none of the rules in *Dicey, Morris & Collins* are authoritative as law in England. Nevertheless, the editors' delicate treatment and detailed discussion of the rules and case law referred to in the explanatory text that accompanies each rule has made the book a traditional, definitive reference point for English judges and practitioners. This description of *Dicey, Morris & Collins* is even more accurate in

15 *Dicey, Morris & Collins*, *supra* note 1 at para 34R-001 [emphasis added]. This rule is a relatively recent addition. It first appeared as a separate category of "quasi-contract" in the 6th edition of the book in 1949, probably as a response to the ruling of Lord Atkin in *United Australia Ltd v Barclays Bank Ltd*, [1941] AC 1 at 28, [1940] 4 All ER 20 HL (Eng), which explicitly rejected the implied contract theory of the duty to make restitution. "Restitution" as a separate category was however only recently introduced in the 13th edition published in 2000, probably in recognition of the House of Lords' decision in *Lipkin Gorman v Karpnale Ltd*, [1991] 2 AC 548, 3 WLR 10, HL (Eng) [*Lipkin Gorman*]. For implied contract theory, see *Sinclair v Brougham*, [1914] AC 398, [1914] All ER Rep 393 HL (Eng).

relation to materials which fall squarely within the present Rule 230 and which, prior to the adoption of the *Rome II Regulation*, were entirely regulated by case law.[16] As will be demonstrated in Part III of this article, the classification of claims as "restitution" in *Dicey, Morris & Collins* has, rather unfortunately, been commonly received in England. At worst, Rule 230 and its predecessors represent a compendium of case law, and a persuasive digest of it, by highly qualified commentators. At best, they are quasi-legislation in England.

Returning to the language adopted by Rule 230, undoubtedly the terminology used in this rule: "obligation to restore," "enrichment," and "at another's expense," seems to suggest that the rule is drafted specifically for claims concerned with the reversal of unjust enrichment. However, under the domestic law, at least three different types of claims could potentially fall within the ambit of the law of restitution.[17] The first group consists of claims arising to reverse unjust enrichment, such as an action for payments for goods supplied or services rendered under a void,[18] avoided,[19] or frustrated[20] contract,[21] and an action for money had and received.[22] The second group covers claims based on disgorgement of profits gained by a wrongdoer, such as an action for an account of profit brought against a person in breach of fiduciary duty,[23]

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16 *Rome II Regulation*, *supra* note 14 at 45. Article 10 (Unjust Enrichment) of the *Rome II Regulation* now governs many of the situations which would fall under Rule 230 in *Dicey, Morris & Collins* and its predecessors. In comparison, the UK conflict rules relating to other areas of the law of obligations were codified relatively early. For contracts, the common law ceased to operate since the adoption of the *Contracts (Applicable Law) Act 1990* (UK), c 36, which implemented the *Rome Convention*, *supra* note 14, and which has since been superseded by the *Rome I Regulation*, *supra* note 14. For torts, except in relation to defamation claims, the operation of the common law was excluded by the *Private International Law (Miscellaneous Provisions) Act 1995* (UK), c 42, which has recently been replaced by the *Rome II Regulation*, *supra* note 14.

17 Adeline Chong, "Choice of Law for Unjust Enrichment/Restitution and the Rome II Regulation" (2008) 57 ICLQ 863 at 865 [Chong, "Rome II Regulation"].

18 *Kleinwort Benson Ltd v Lincoln City Council*, [1999] 2 AC 349, [1998] 3 WLR 1095, HL (Eng) [*Kleinwort Benson*]; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, [1996] AC 669, 2 All ER 961, HL (Eng) [*Westdeutsche*].

19 See discussion in Part III(C), below.

20 In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1943] AC 32, [1941] 63 TLR 308 HL (Eng) "partial failure of consideration" is not formally recognized as an unjust factor. However, the law lords' suggestive comments led to the legislative intervention under which regime restitutionary remedies are now available; see *Law Reform (Frustrated Contracts) Act*, 1943 (UK), 6 & 7 Geo VI, c 40, s 1. See also Ontario's *Frustrated Contracts Act*, RSO 1990, c F.34, s 3 and British Columbia's *Frustrated Contract Act*, RSBC 1996, c 166, s 5 for a similar development in Canada. These legislative interventions arguably carry the same effect as recognizing "partial failure of consideration" as an unjust factor. However, all these issues have been analyzed as part of contract law, rather than unjust enrichment.

21 See discussion in Part III(C).

22 Also included in this category are restitutionary remedies available for value of property transferred, *quantum valebat*, and of services, *quantum meruit*.

23 *Attorney-General for Hong Kong v Reid,* [1994] AC 324, [1993] 3 WLR 1143 HL (Eng) [*Reid*]; *Boardman v Phipps*, [1967] 2 AC 46, [1966] 3 All ER 721; Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) at 11-13 [Birks, *Introduction to Restitution*]; As a matter of English domestic law, the claimant's ability to assert a proprietary claim over bribes accepted by a fiduciary has recently been doubted; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administrative receivership) and others*, [2011] EWCA Civ 347, [2011] 3 WLR 1153 [*Sinclair Investments*]; Graham Virgo, "Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?" (2011) 70 Cambridge LJ 502; *c.f.* Carmine Conte, "No Proprietary Relief for Breach of Fiduciary Duty" (2012) 128 Law Q Rev 184.

breach of confidence,[24] or breach of contract.[25] The final group entails situations where the claimant alleges that the assets in the hands of the defendant have been impressed with the claimant's beneficial interests.[26]

Now the language of restitution under Rule 230 begins to look artificial. Claims or causes of action falling within the first group are clearly recognized as being based on an "independent source of rights," known as unjust enrichment, which "ranks next to contract and tort as part of the law of obligations,"[27] and could be governed by Rule 230. On the contrary, claims of the other two groups possess "a more cloudy basis."[28] Some commentators argue that they are based on wrongs and property, while some maintain that they can be sourced in unjust enrichment just as much as claims of the first type.[29] If the latter view is taken, does this mean that Rule 230 could potentially govern all claims alleging restitutionary remedies, including those of the second and third types?[30] As this article argues, the source of confusion and its impact on the conflict of laws can be found in the treatment of the terms "unjust enrichment" and "restitution" within the domestic law. It is this point which will be the object of discussion in the next subpart.

B. The Domestic Understanding of the Law of Restitution and Unjust Enrichment

Central to the debate on the domestic perception of the law of restitution is not the *meaning* which commentators have given to the terms "restitution" and "unjust enrichment," but rather the *scope* of both terms. All seem to agree that unjust enrichment refers to a *causative event*, whereas restitution refers to a *remedy*—a response to a causative event. Restitution in this sense stands parallel to compensation, which is a measure of damages commonly known in the law of tort and contract. Compensation refers to a remedy based on loss suffered by the claimant, whereas restitution is based on retransferring gains made by the defendant to the claimant.[31]

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24 *Attorney-General v Observer Ltd and Others (on appeal from Attorney-General v Guardian Newspapers Ltd (No2))*, [1990] 1 AC 109, 3 WLR 1988 HL (Eng) [*Observer*]. For the availability of proprietary remedies in Canadian law see *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14 [*Lac Minerals*].

25 *Attorney General v Blake (Jonathan Cape Ltd Third Party)*, [2001] 1 AC 268, [2000] 4 All ER 385 HL (Eng).

26 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, [1981] Ch 105, [1980] 2 WLR202, [1979] 3 All ER 1025 [*Chase Manhattan*]; *Macmillan*, *supra* note 4.

27 *Banque Financière de la Cité v Parc (Battersea) Ltd*, [1999] 1 AC 221 at 227, [1998] 1 All ER 737 HL (Eng). See also, *Lipkin Gorman*, *supra* note 15 at 559, Lord Templeman, 578, Lord Goff; *Kleinwort Benson*, *supra* note 18 at 371-72, Lord Donaldson; *Woolwich Equitable Building Society v Inland Revenue Commissioners*, [1993] AC 70 at 196-97, [1992] 3 All ER 737 HL (Eng), Lord Browne-Wilkinson; *Westdeutsche*, *supra* note 18 at 710, Lord Browne-Wilkinson.

28 Chong, "Rome II Regulation," *supra* note 17 at 865.

29 See Pitel, *supra* note 7 at 350; *Dicey, Morris & Collins*, *supra* note 1 at para 34-033; *Arab Monetary Fund v Hashim (No 9)*, [1996] 1 Lloyd's Rep 589; *Grupo Torras SA v Al-Sabah & Anor*, [2001] CLC 221 [*Grupo Torras*]; *Base Metal Trading Ltd v Shamurin*, [2004] EWCA Civ 1316, [2005] 1 WLR 1157 [*Base Metal*].

30 The reason for uncertainties in the answer to this question lies in the fact that English courts have had little opportunity to consider cases of equitable wrongs with international elements. See Andrew Dickinson, "Applicable Law Arbitrage – An Opportunity Missed?" (2005) 121 Law Q Rev 374 at 379.

31 Peter Birks, *Unjust Enrichment*, 2d ed (Oxford: Oxford University Press, 2005) at 11.

When Professor Peter Birks put forward the Quadration Theory of Restitution and Unjust Enrichment, much dispute developed.[32] Under this doctrine, unjust enrichment is the *only* causative event that will lead to a restitutionary response, and restitution is the *only* remedy suitable for an event known as unjust enrichment. No longer is there a need to contrast the meaning of unjust enrichment and restitution. They seem to be one and the same.

Quadration requires that every cause of action that can be accorded with restitutionary remedies must be explicable in terms of unjust enrichment. This point is central to the confusion in the area. Generally, it is settled law that an independent cause of action based on unjust enrichment comprises three elementary components: (i) the defendant's enrichment; (ii) the claimant's corresponding impoverishment; and (iii) an unjust factor.[33] In order to accommodate the Quadrationist view, the language of these three elements has to be strained beyond its breaking point. Examples of restitutionary remedies traditionally considered to be a response to a cause of action based on wrongs immediately spring to mind. Under the Quadration theory, these cases would have to be analyzed in terms of the three irreducible parts of the law of unjust enrichment. Take for example the liability to account for profits gained in breach of confidence; it is well established that restitution can be awarded as a response to an independent action alleging the wrongful breach.[34] The remedy is gain-based, measured by reference to the profits that the defendant has made in connection with the commission of the wrong. Unlike other autonomous unjust enrichment cases, the question of whether there is the presence of an unjust factor need not be addressed. Neither is there any need for an analysis on deprivation, or the extent to which that deprivation can be said to correspond to the defendant's enrichment. On the contrary, by applying the unjust enrichment structure to the claim, the Quadrationists are forced to adopt an artificial analysis of deprivation and an unjust factor. They argue that the wrong committed against the claimant, without more, can represent the requisite deprivation.[35] Moreover, an unjust factor can also be found in that wrong.[36] This is striking, not only because

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32 Birks, *Introduction to Restitution*, *supra* note 23 at 17. The author states that "[t]he perfect quadration between restitution and unjust enrichment is no more than a fortunate accident" at 18.

33 In Canada the third element is said to be an absence of juristic reason, rather than a presence of an unjust factor. The Canadian model seems to have been influenced by the Civilian emphasis on absence of cause. See *Pettkus v Becker*, [1980] 2 SCR 834, 117 DLR (3d) 257 at 274, Dickson J. However, it has been shown that in practice there is hardly any difference between the analyses by the courts employing the Canadian model of absence of juristic reasons and the traditional English model of establishing an unjust factor. See Lionel Smith, "The Mystery of 'Juristic Reason'" (2000) 12 Sup Ct L Rev 211; Lionel D Smith et al., *The Law of Restitution in Canada: Cases, Notes, and Materials* (Toronto: Emond Montgomery, 2004) at 268-70 [Smith et al]. See also *Garland v Consumers' Gas Co*, 2004 SCC 25, [2004] 1 SCR 629, 237 DLR (4th) 385.

34 *Observer*, *supra* note 24.

35 Often, it is almost impossible to prove that the claimant would have been enriched but for the defendant's wrongful conduct. Equating "wrongs" with "deprivation" would only add to the artificiality of "interceptive subtraction." See Smith et al, *supra* note 33 at 318, 446.

36 PBH Birks, "The Independence of Restitutionary Causes of Actions" (1990) 16 UQLJ 1 at 12; Andrew Burrows, *The Law of Restitution*, 2d ed (London, UK: Butterworths, 2002) at 25-26, 44 [Burrows, *Restitution*].

such wrongs are traditionally considered to be an independent source of rights, but also because the only element which can sensibly be seen as providing a linkage between autonomous unjust enrichment and restitution for wrongs seems to lie in the fact that the remedy awarded is measured by reference to the defendant's gain.[37] In other words, the unifying force between the two cases can be found *not* in the *cause of action* based on unjust enrichment, but rather in the *remedies*. This finding reinforces the view that restitution cannot and must not be confused with unjust enrichment.[38] Unjust enrichment will always lead to restitutionary remedies, but a restitutionary response is not confined to a causative event of unjust enrichment. It may also be generated by wrongs.[39]

In the domestic law, the notion of restitution is unquestionably distinguishable from unjust enrichment. Quadration is no longer sustainable.[40] The implication of this discussion on the conflict of laws is clear: since characterization must focus on the *cause of action*,[41] and since restitution is a term used to describe *a remedial response* and not *a cause of action*, the adoption of restitution as an autonomous choice of law regime in *Dicey, Morris & Collins* should be regarded as an "unfortunate" addition to the conflict of laws.[42] Although the editors explicitly recognize that there is no need for the conflict of laws rules to "mirror in every detail the emerging structure of the domestic law of restitution,"[43] the treatment of restitution as a separate choice of law category seems to suggest that they too have failed to heed this warning. Therefore, the introduction of Article 10 of the *Rome II Regulation*,[44] correctly headed "Unjust Enrichment," is an innovation that should be welcome.

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37 Edelman also finds a connection between the two cases in the general notion of "corrective justice." See James Edelman, *Gain-Based Damages* (Oxford: Hart Publishing, 2002) at 1-4.

38 Both Birks and Burrows have since abandoned the idea of unifying what they originally referred to as "unjust enrichment by subtraction" and "unjust enrichment by wrongdoing." The latter is subsequently relabelled "restitution for wrongs." See Birks, *Unjust Enrichment*, *supra* note 31 at 11-15; Andrew Burrows, Ewan McKendrick & James Edelman, *Cases and Materials on the Law of Restitution* (Oxford: Oxford University Press, 2007) at 929-30.

39 Some commentators prefer describing this type of restitutionary remedy as "disgorgement" of wrongful gains, rather than "restitution." See Smith et al, *supra* note 33 at ch 10.

40 Note the titles of Birks' publications in 1985, *Introduction to the Law of Restitution*, and 2005, *Unjust Enrichment*. Birks explicitly abandoned the Quadration Theory; see Birks, *Unjust Enrichment*, *supra* note 31 at 11.

41 *Macmillan*, *supra* note 4 at 417, Aldous LJ; Pitel, *supra* note 7 at 349.

42 *Ibid*; Chong, "Rome II Regulation," *supra* note 17 at 872.

43 *Dicey, Morris & Collins*, *supra* note 1 at para 34-005.

44 *Rome II Regulation*, *supra* note 14 at 45. The Regulation, which came into force on 11 January 2009, has as its primary objective the harmonization of the conflict of laws rules for non-contractual *obligations* in the member states of the European Union. By clearly labelling Article 10 the choice of law regime for "unjust enrichment," this Regulation supports the approach to characterization of proprietary restitution adopted in this article: there is a clear-cut, Continental-based boundary between *property* and *obligations*, and the law of the place of enrichment is only of relevance in the latter category of claims. In a claim where proprietary interests are at stake, decisive significance must be given to the law of the *situs*, not the law of the place of enrichment. Accordingly, cases in which the English courts have invoked Rule 230(2)(c) in *Dicey, Morris & Collins* (or the rule's predecessors) in order to apply the law of the place of enrichment to claims alleging proprietary remedies, would now have to be reinterpreted. See discussion in Part III(B), below, and cases referred to in *infra* notes 89-94.

It is recognized that the term restitution must not be conflated with unjust enrichment[45] and that there are boundaries neatly drawn between wrongs and unjust enrichment; however, the distinction is much less clear between unjust enrichment and property within the domestic law, to which the discussion now turns.

C. Property, Unjust Enrichment and Proprietary Restitution

> The relationship between the law of property and the law of unjust enrichment/restitution has long been regarded as fiendishly complex and problematic. Indeed one can regard it as the last great unsolved mystery for those working in the law of restitution.[46]

As Professor Andrew Burrows emphasized, the boundaries between property and unjust enrichment are subject to a vigorous debate among commentators on the law of restitution. Before moving on to the discussion in the context of the conflict of laws, it is important that the difficulties surrounding the debate under the domestic law be clearly understood. It is the purpose of this subsection to unravel the boundaries between the law of property and unjust enrichment in the domestic context, and to identify the implications that the domestic boundaries may have on the characterization process for conflict of laws purposes.

In the domestic law, the focus of this debate lies in the question of whether the laws of property and unjust enrichment are wholly independent of each other.[47] At one extreme, those who are in favour of total separation argue that unjust enrichment, as an independent source of rights, can only generate a personal remedy. The opposing view holds that claims for the reversal of unjust enrichment can be both personal and proprietary. The discussion shall start with this latter view.

Under the structure of Professor Birks' map of private law, there is a clear divide between *causative events* and *responses*. These responses may be classified, *inter alia*, into compensation or restitution.[48] The criterion for this classification is the aim that the courts have in ordering these remedies. However, according to Birks, responses may also be classified in accordance with their exigibility. Classified in this way, rights realizable in court will fall into either the category of rights *in rem*

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45 For a parallel discussion in the civilian jurisdictions on the use of the terms "restitution" and "unjust enrichment," see Chong, "Rome II Regulation," *supra* note 17 at 867.

46 Burrows, "Unmasking," *supra* note 9 at 412.

47 It is generally accepted that civil law systems adopt a clear distinction between these two areas of law, reflecting the boundary drawn in classical Roman law between *vindicatio* and the *condictiones*. See George Gretton, "Proprietary Issues" in David Johnston & Reinhard Zimmermann, eds, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, UK: Cambridge University Press, 2002) at 571; John Bell, Sophie Boyron & Simon Whittaker, *Principles of French Law* (Oxford, UK: Oxford University Press, 1998) at 402-03; Birks, *Unjust Enrichment*, *supra* note 31 at 32.

48 Birks, *Unjust Enrichment*, *ibid* at 24. The remaining categories of responses are "punishment" and "other goals."

or rights *in personam*.[49] It is inherent in this structure that rights *in rem*, like their in *personam* counterparts, can be a response to every type of causative event; namely manifestation of consent, wrongs, unjust enrichment and other miscellaneous events. Property and unjust enrichment are therefore inseparable; for the two are not in the same sequence, just as it is impossible to separate contract and compensation.[50]

However, Birks' structure of private law, together with his treatment of rights *in rem* as a *response*, is extremely contentious. Birks acknowledged that he originally derived his classification of causative events from Roman law, but the relevant Roman classification was directed only to personal, not proprietary rights.[51] The logic of imposing the structure of the Roman law of *obligations* onto the entirety of common law private law, which encompasses both obligations and property, looks difficult to defend. For example, Birks' outright rejection of property as an independent source of rights, or a causative event, forced him to adopt a rather artificial treatment of pure proprietary claims. He identified "receipt of another's thing" as a causative event under the "other miscellaneous events" category even though this hardly looks any different from recognizing property or interference with property rights as an independent source of rights in itself.[52] The better view seems to be that a right *in rem* is also itself an event, which may generate a personal as well as a proprietary response.[53] Where a proprietary response is sought to remedy a causative event based on a pre-existing proprietary right, the claim is known as a pure proprietary claim.[54] It is an equivalent to the *actio vindicatio* in the Roman law of property, and clearly falls within the ambit of the law of property.[55] The relevant right *in rem* does not arise to reverse unjust enrichment.

Aside from the artificiality in the treatment of pure proprietary claims, Birks' structure of private law has led to one further confusion: that of proprietary

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49 *Ibid* at 28.

50 Peter Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] NZL Rev 623 at 627 [Birks, "Categorical Truths"].

51 Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UWA L Rev 1 at 9.

52 Birks, "Categorical Truths," *supra* note 50 at 657; Peter Birks, "Misnomer" in WR Cornish et al, eds, *Restitution Past Present and Future: Essays in Honour of Gareth Jones* (Oxford, UK: Hart Publishing, 1998) at 24.

53 RB Grantham & CEF Rickett, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] NZL Rev 668; Peter Millett, "Proprietary Restitution" in Simone Degeling & James Edelman, eds, *Equity in Commercial Law* (Sydney, AU: Lawbook Co, 2005) at 318-19 [Millett, "Proprietary Restitution"].

54 *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)*, [1995] 3 All ER 747 at 758, [1995] 1 WLR 978, Millett J [*Macmillan* 1995]; Peter Millett, "Restitution and Constructive Trusts" (1998) 114 Law Q Rev 399 at 415-16 [Millett, "Constructive Trusts"]; Millett, "Proprietary Restitution," *supra* note 53 at 320.

55 At common law, the action for vindication of pre-existing property rights fell into disuse following the decline of the writ of detinue until its abolition by the *Torts (Interference with Goods) Act* 1977 (UK), c 32, s 2. This occurred partly due to procedural advantages associated with the claim in conversion. The remnant of vindication at common law may, however, be found in the self-help remedy of reception; see Charles Rickett, "Old and New in the Law of Tracing" in Degeling & Edelman, *supra* note 53 at 123-28. Moreover, following *Westdeutsche*, *supra* note 18, the need for an assertion of property rights at common law seems to be dying out, given the relative ease with which the court found a fiduciary relationship for the purpose of establishing a claim in equity, together with its more generous tracing rules; see David Fox, "Common Law Claims to Substituted Assets" [1999] RLR 55 at 74 [Fox, "Substituted Assets"].

restitution, restitutionary proprietary claims, or as most accurately described, proprietary unjust enrichment claims. Although an acceptance of the view that property rights constitute a separate causative event, which may lead to an *in rem* response, does provide an explanation for pure proprietary claims, it does not eliminate the possibility that a right *in rem* may be created to reverse unjust enrichment. Birks and Burrows adamantly advocate the view that, in some situations, a claim based on unjust enrichment will contain a proprietary element, which can lead to a proprietary response.[56] Such proprietary claims may then fall within the scope of the law of unjust enrichment within the domestic law,[57] and, as George Panagopoulos argues, it may be appropriate to characterize the claims as unjust enrichment for conflict of laws purposes, so as to be governed by the choice of law rules for unjust enrichment, rather than property.[58]

On the contrary, other commentators reject the suggestion that proprietary restitution forms part of the law of unjust enrichment. For Graham Virgo and Peter Millett, there are no proprietary unjust enrichment claims,[59] and no sensible distinction can be drawn between pure proprietary claims and restitutionary proprietary claims.[60] Both types of claim involve an assertion of subsisting property rights, the existence of which has traditionally been treated as part of the law of property, not of the law of unjust enrichment. For example, the question of whether a resulting trust arises in circumstances where legal title has been transferred but the transferor did not intend to pass on the whole beneficial interest, has long been determined by the rules governing the passing of title, which are located within the law of property. In this example, if a resulting trust were to be imposed, the result would be that the recipient, as a new legal owner, would not be enriched by the transfer in any meaningful sense,[61] since he or she would be under a strict obligation

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56 Burrows proposes that the requisite proprietary element can be found where an unjust enrichment claimant has not taken the risk of the defendant's insolvency. See Burrows, "Unmasking", *supra* note 9 at 423-28; Peter Birks, "Establishing a Proprietary Base" [1995] RLR 83.

57 See e.g. Robert Chambers, *Resulting Trusts* (Oxford, UK: Clarendon Press, 1997), where the author argues that resulting trust is a chief proprietary remedy for unjust enrichment.

58 Panagopoulos, *supra* note 3 at 66-81.

59 Millett's rejection of unjust enrichment as a basis for restitutionary proprietary remedies is, however, less explicit than Virgo's. Although Millett, writing extra-judicially, talks of proprietary restitutionary remedies being available for "subtractive unjust enrichment," it is clear from his analysis that he does not regard "unjust enrichment" as an independent source of rights that may lead to proprietary remedies. Rather, it is the law of property that determines whether the claimant has proprietary interests. For example, the question of whether mistake was so fundamental as to prevent title passing is traditionally addressed by the law of property. See Millett, "Constructive Trusts," *supra* note 54 at 407-17, especially at 414.

60 Graham Virgo, *The Principles of the Law of Restitution*, 2d ed (Oxford: Oxford University Press, 2006) at 573 [Virgo, *Principles*].

61 In other words, "enrichment" and "impoverishment" for Virgo have a legal meaning. A person cannot be said to be impoverished if he or she retains an equitable title to the property, even if that property has been transferred to a new legal owner. See also W Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 OJLS 627 at 638-643. In contrast, Birks adopts a factual approach to "enrichment." A recipient can be "enriched" through the acquisition of legal title, even if he or she is not beneficially entitled to the property.

to retransfer the property to the original owner.[62] The implications of this approach on the conflict of laws seem to be that wherever the claimant asserts proprietary interests in the property held by the defendant, it is ultimately the rules of property law that determine the question of title, and the claim must be governed by the choice of law rules for property, not for unjust enrichment.

D. The Confusion in *Macmillan Inc v Bishopsgate Investment Trust Plc (No3)*

The unjust enrichment-property divide under the conflict of laws was directly confronted by the Court of Appeal in *Macmillan Inc v Bishopsgate Investment Trust Plc (No3)*.[63] The case involved a fraudulent scheme engineered by Robert Maxwell to exploit the assets of the claimant corporation by pledging them as security for various loans advanced by the defendants. All relevant transactions, including the deposit of share certificates as security for loans, took place in England, except that the assets in dispute were shares with book entries in New York. It was undisputed that England was the place of receipt and thus of enrichment, but New York was the *situs* of the shares.[64] When the defendants eventually became registered legal owners of the shares, the question to be decided was whether the defendants' title was affected by the claimant's equitable interests. In English law, the defendants were not *bona fide* purchasers because they had constructive notice of the fraudulent scheme. However, under New York law the defendants' title would be defeated only if they had actual notice, which they did not. The fate of the claim seemed to depend on its characterization. Staughton and Aldous LJJ accepted Macmillan Inc's assertion that the cause of action was in restitution while Auld LJ held that the case would have been seen as "receipt-based restitution" in English domestic law.[65] Nevertheless, their Lordships agreed that the issue to be answered, the question of title, was to be characterized as proprietary and went on to apply New York law as the law of the *situs*. Although no one seems to doubt the correctness of the result, the Court's rationale sparked a wide debate on characterization.[66] While the Court held that the cause of action was properly described as restitutionary, it refused to

62 *Portman Building Society v Hamlyn Taylor Neck*, [1998] 4 All ER 202. See also Lionel Smith, "Property, Subsidiarity and Unjust Enrichment" in Johnston & Zimmermann, *supra* note 47 at 619-21 [Smith, "Subsidiarity"].

63 *Macmillan*, *supra* note 4.

64 There are some suggestions that England could have been the *situs*. For the discussion on this point see John Stevens, "Restitution or Property? Priority and Title to Shares in the Conflict of Laws" (1996) 59 MLR 741 at 744 [Stevens, "Priority"]; Adrian Briggs, "From Complexity to Anticlimax: Restitution and Choice of Law" [1995] RLR 94, n 6.

65 *Macmillan*, *supra* note 4 at 407, Auld LJ, at 397, Staughton LJ, and at 418, Aldous LJ. "Restitution" here seems to be used in a narrow sense, with a meaning synonymous to "unjust enrichment."

66 See Forsyth, *supra* note 3; Stevens, "Priority," *supra* note 64; Briggs, *supra* note 64; Joanna Bird, "Choice of Law Rule for Priority Disputes in Relation to Shares" [1996] LMCLQ 57; William Swadling, "A Claim in Restitution?" [1996] LMCLQ 63; Robert Stevens, "The Law Applicable to Priority in Shares" (1996) 112 Law Q Rev 198 [Stevens, "Shares"].

apply Rule 230 in *Dicey, Morris & Collins*. Instead, the Court explained that the issue was properly characterized as property. The *dictum* in the Court of Appeal, that the claim was restitutionary, is the main source of confusion in the unjust enrichment-property debate in private international law. As Professor John Stevens points out:

> *Macmillan* highlights the danger of the use of the term "restitution" to label claims that involve an assertion of pre-existing proprietary entitlement to specific assets. [...] The real distinction that should have been drawn is between claims which are founded on an autonomous principle of unjust enrichment and claims which are founded upon proprietary entitlement.[67]

In the following section, this article shall examine different cases that are alleged to be cases of proprietary restitution arising to reverse unjust enrichment. The basis of proprietary remedies in each claim will be discussed in light of both the domestic law and the conflict of laws. It will be argued that the restitutionary rationale, which has plagued the domestic law in relation to claims alleging proprietary remedies, should not be transposed onto the conflict of laws. For private international law purposes, the language of unjust enrichment should not be employed to belie the proprietary characteristics of claims asserting proprietary entitlement.

III. COMPARATIVE ANALYSIS OF PROPRIETARY RESTITUTION IN THE DOMESTIC LAW AND THE CONFLICT OF LAWS

A. Claims to Substitute Assets: *Foskett v McKeown*

Foskett v McKeown[68] involves a claim over traceable proceeds of a misappropriated trust fund. Despite the explicit recognition of Lord Millett that the "transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment,"[69] Professors Birks and Burrows are insistent in their assertion that *Foskett* represents a case in which a proprietary remedy is awarded to reverse unjust enrichment.[70] For Birks, it is a "fiction of persistence" to regard proprietary interests in the substitute assets as the very same rights as the rights in the original asset.[71] He maintains that it is "odd to say that a right in a car about which at the time nobody knew anything arose from a declaration of trust of money," and that it is "even more odd when the right itself

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67 Stevens, "Priority," *supra* note 64 at 744.

68 [2001] 1 AC 102 [*Foskett*].

69 *Ibid* at 127, 132. The *dicta* of Lord Browne-Wilkinson and Lord Hoffman also support this view, at 108-09, 132. For an interesting parallel discussion on substitution at common law, see Fox "Substituted Assets," *supra* note 55.

70 Birks, *Unjust Enrichment*, *supra* note 31 at 35. See also Burrows,"Unmasking," *supra* note 9 at 429.

71 Birks, *Unjust Enrichment*, *supra* note 31 at 35.

mutates," where the "claimant has a choice in relation to the substitute whether to take a beneficial interest proportionate to his involuntary contribution or a security interest for the amount of that contribution."[72] Property rights in the substitute must, quite to the contrary, be seen as freshly created in order to reverse the unjust enrichment that the defendant gains by receiving the trust asset.

Notwithstanding Birks' criticism, the rationale proposed by the law lords in *Foskett* is convincing. A claim to the proceeds of funds misappropriated by a trustee is one of the clearest examples of cases based on the assertion of pre-existing equitable proprietary rights. The notion of property is undoubtedly a legal concept. It refers, not to a physical thing, but to an *in rem* right in that thing. To draw a complete distinction between the rights in the original assets and the rights in the substitute or proceeds ignores the nature of trust property and equity's attitude toward trust as an obligation with respect to the property. As Professor Lionel Smith explains, a trust obligation to deal with a specific property for the benefit of another is, in the eyes of equity, fixed not only on that property, but can be extended to any asset which represents it.[73] Where trust money is applied in the purchase of another asset, "the trustee is not in a position to say that he acted otherwise than as a trustee in so using it."[74] It follows from this observation that a bilateral obligation will be created in relation to the traceable proceeds. Equity will treat such obligation as a trust obligation and accord it with a property-like protection. This line of reasoning also explains why the beneficiary can choose between a lien and ownership interests; equity has little problem in allowing the beneficiary an additional right of election against a wrongful fiduciary.[75] The trust analysis thus leaves little room for unjust enrichment as an explanation for the creation of proprietary interests in the proceeds or substitute assets.[76]

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72 *Ibid*.

73 Smith, "Philosophical Foundations," *supra* note 10 at 302-04. Also, trust obligation can extend beyond the original obligor (trustee) to a third party recipient of the trust property other than the *bona fide* purchaser of the trust asset. See also James Penner, "Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds" in Chambers, Mitchell & Penner, *supra* note 10 at 313, 322-28 [Penner, "Value"]. The author uses Smith's explanation of equity's treatment of trust assets to further his own "fund interest theory."

74 Smith, "Philosophical Foundations," *supra* note 10 at 304.

75 Sarah Worthington, *Proprietary Interests in Commercial Transactions* (Oxford, UK: Clarendon Press, 1996) at 174-182, especially at 175-177 [Worthington, *Proprietary Interests*]. The right of election is only available against a person in breach of positive fiduciary obligations. This is always the case when a trustee under an express trust misappropriates trust money.

76 For Smith, unjust enrichment *may* be a sufficient explanation of the trustee's *personal* obligation to make restitution, but it is the operation of equity which turns that obligation into trust. See Smith "Philosophical Foundations," *supra* note 10 at 298; Smith, "Subsidiarity," *supra* note 62 at 621. *C.f.* Virgo, *Principles*, *supra* note 60 at 574. For Virgo, even personal claims which arise in relation to the receipt of trust property or breach of trust do not need to employ the language of unjust enrichment, for it is "sufficient [for a personal claim to arise] that the defendant has received property in which the claimant has a proprietary interest at the time of its receipt." See also, Millett, "Proprietary Restitution," *supra* note 53 at 318-19. Sir Millett usefully distinguishes between *a purely personal claim* which aims at reversing unjust enrichment and a *property-based personal claim* which is brought to recover the value of the claimant's property and which does not need to be explained in terms of unjust enrichment. Property-based personal claims are best seen as not flowing from a causative event of unjust enrichment, but property rights itself. See also Grantham & Rickett, *supra* note 53.

Further, it negates the need to find an unjust factor, which is a requisite of an explanation based on unjust enrichment. It is hardly surprising that none of the unjust factors suggested by Birks and Burrows to explain a proprietary response, such as absence of consent,[77] powerlessness, or ignorance,[78] have been recognized by the courts. In such cases, "it is not necessary to rely on the unjust enrichment principle at all."[79]

For the purpose of conflict of laws, it is the trust reasoning which seems to prevail. In England, choice of law rules for disputes arising in connection with an express trust obviously fall within the scope of the *Recognition of Trusts Act 1987*, which gives effect to the *Hague Trust Convention*.[80] Thus, at least for the conflict of laws, the deployment of the language of reversal of unjust enrichment to explain the basis of proprietary interests in a substitute asset following breach of an express trust seems illusory. The proper choice of law will be identified by the trust regime in the *Hague Trust Convention*, rather than by choice of law rules for restitution. It is noteworthy to mention, however, that despite the choice of law rules for trust being traditionally considered as part of the choice of law for property,[81] the framework for the substantive choice of law rules for trust is primarily obligation-based. It is *prima facie* the will of the settlor which determines the applicable law, and the chosen law need not have any objective connection with the trust.[82] This looks more like an express choice of law in the choice of law rules for contract, rather than choice of law for property, which is often governed by the law of the *situs* of the property in question. Moreover, in the absence of an express choice, the trust will be governed by the law with the closest connection; a non-exhaustive list of relevant factors is provided by the *Hague Trust Convention*.[83] *Situs* of trust assets is only one factor to be taken into account, alongside other considerations such as the place of administration of the trust as designated by the settlor, the named trustee's place of residence or business, and the objects of the trust and the places where they are to be performed. It suffices to say that where proprietary interests under an express

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77 Peter Birks, "Property, Unjust Enrichment, and Tracing" [2001] 54 Curr Legal Probs 231 at 246 [Birks, "Tracing"].

78 Burrows, "Unmasking," *supra* note 9 at 418, 423.

79 Virgo, *Principles*, *supra* note 60 at 574.

80 *Convention on the Law Applicable to Trusts and on their Recognition*, 1 July 1985, Can TS 1993 No 2 [*Hague Trust Convention*]. Commentators in favour of characterization of proprietary restitution as unjust enrichment also concede that where an express trust is involved, the claim is properly described as purely proprietary, akin to *vindicatio* in equity and must be governed by choice of law rules for property. See Panagopoulos, *supra* note 3 at 75; Jonathan Harris, "The Trust in Private International Law" in J Fawcett, ed, *Reform and Development of Private International Law* (Oxford, UK: Oxford University Press, 2002) at 196-97 [Harris, "Trust"].

81 *Dicey, Morris & Collins*, *supra* note 1, places a chapter on trust within the property category alongside immovables, transfer of movables, administration of estates, succession, and effect of marriage on property.

82 *Hague Trust Convention*, *supra* note 80, Art 6.

83 *Ibid*, Art 7.

trust are at stake, the *situs* of the property is not necessarily determinative of the applicable law.[84] Nevertheless, this is not to suggest that the obligational character of an express trust cannot be reconciled with its characterization as property in the conflict of laws. Choice of law rules, envisaged by the *Hague Trust Convention*, do conform to the general approach of choice of law for property. For express trusts, the relevant *situs* is not the place where the trust property is situated; rather it is the *situs* of the trust which determines the applicable law.

B. Breach of Equitable Obligations and Wrongs.

1. Characterizing the Underlying Wrongs

The characterization of breach of equitable obligations and equitable wrongs is problematic because of the wide range of categories in which the issues in connection with equitable obligations and wrongs may be characterized. Depending on each equitable obligation, the relevant issues may be seen as being sourced in tort, contract, unjust enrichment as well as property. This is hardly surprising given the general difficulties in locating within the Civilian structure of the conflict of laws the equitable causes of action, which are a peculiar feature of the common law system. In order to properly address the complexities concerning the characterization of equitable wrongs, it is necessary that the discussion in this subsection not be limited to cases involving proprietary claims in restitution for wrongs, but be extended to a general analysis of claims alleging equitable wrongs. The analysis shall build upon the discussion of the terms restitution and unjust enrichment in Part II(B) and argue that the automatic application of Rule 230 in *Dicey, Morris & Collins* to equitable claims is entirely inappropriate. Rather, characterization of the underlying wrong may point toward choice of law rules for tort, contract, unjust enrichment, or property. Rule 230(2)(c), which is directed to the law of the place of enrichment, cannot be automatically applied where an equitable wrong is alleged, even if the remedy sought is properly described as restitutionary. Nevertheless, it will also be seen that where a proprietary restitutionary remedy is involved, the law governing the underlying wrong is not necessarily determinative of proprietary consequences of equitable wrongs. The cause of action in such cases may still be characterized as property.[85]

The difficulties in this area are partly attributable to the inert attitude that common law courts have toward characterization. In the few cases that have

84 The same could be said of choice of law for succession where domicile of the deceased plays a leading role. This point is recognized by Panagopoulos, *supra* note 3 at 67-68; *c.f.* Adeline Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54 ICLQ 855 [Chong, "Choice of Law"]; Robert Stevens, "Resulting Trusts in the Conflict of Laws" in Peter Birks & Francis Rose, eds, *Restitution and Equity: Resulting Trusts and Equitable Compensation* (London, UK: Mansfield Press, 2000) vol 1 [Stevens, "Resulting Trusts"].

85 Compare Panagopoulos, *supra* note 3 at 61-81.

reached the courts, the discussion was immediately directed to the identification of the applicable law, with little attention being given to the characterization process. Moreover, judges, obviously influenced by *Dicey, Morris & Collins*, often talked of restitutionary choice of law rules when considering cases involving equitable wrongs. As explained in Part II(B), restitution may refer to disgorgement (restitution for wrongs) or autonomous unjust enrichment (restitution for subtractive unjust enrichment).[86] Although a clear distinction has now been drawn between restitution for wrongs and autonomous unjust enrichment in the domestic law, judges tend to use the term restitution (which covers both areas) synonymously with unjust enrichment in the conflict of laws.[87] The result is that when judges consider an issue to be restitutionary, they feel obliged to apply Rule 230(2)(c), which points to the law of the place of enrichment, notwithstanding that the issue raised is concerned, not with subtractive unjust enrichment, but with restitution for wrongs.[88] Cases that have adopted this line of reasoning include those concerning claims for bribes,[89] misappropriated money received in breach of fiduciary duty,[90] unlawful conspiracy in breach of duty of good faith and honesty,[91] and breach of confidence.[92] This looks rather unsatisfactory, given that these causes of action are obviously based on wrongs, but the law of the place of enrichment was held to be the *lex causae* (proper law).

One cause of action, knowing receipt, merits a more detailed analysis. In *El Ajou v Dollar Land Holdings*, Millett J held that a knowing receipt claim is "the counterpart in equity of the common law action for money had and received," and that both "can be classified as receipt-based restitutionary claims."[93] In an *obiter dictum* he stated that such claims are subject to Rule 230(2)(c).[94] The applicable law was therefore held to be the law of the place of enrichment, identified by choice of law rules for unjust enrichment. At first sight, this analysis seems contradictory

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86 See, *supra* notes 37-39 and accompanying texts.

87 Chong, "Choice of Law," *supra* note 84 at 868, n 86. See e.g. cases referred to in *infra* notes 89-94. *C.f.* In cases of breach of equitable obligations, which begs no restitutionary remedies, the courts have made clear that there would be no question of unjust enrichment and the courts are not required to attach decisive significance to the place where enrichment took place; see *Base Metal Trading Ltd v Shamurin*, [2003] EWHC 2419, [2004] 1 All ER (Comm) 159 at para 42, Tomlinson J. The issue of choice of law for a non-restitutionary equitable claim was reversed on other grounds in the Court of Appeal in *Base Metal*, *supra* note 29 at paras 50-58.

88 Chong, "Rome II Regulation," *supra* note 17 at 891. For examples of application of Rule 230(2)(c) in *Dicey, Morris & Collins*, to restitution for wrongs, see cases referred to in *infra* notes 89-94. See also, *Chase Manhattan*, *supra* note 26 at 109 (cited to Ch).

89 *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)*, [1994] 3 SLR 257 at para 37 [*Thahir*].

90 *HSBC Ltd v United Overseas Bank Ltd*, [1992] 2 SLR 495 [*HSBC Ltd*], referred to in *Thahir*, *ibid* at para 39.

91 *Kuwait Oil Tanker v Al Bader (No 3)*, [2000] 2 All ER (Comm) 271 [*Kuwait Oil Tanker*].

92 *Douglas v Hello! Ltd (No 6)*, [2006] QB 125 at paras 96-97.

93 [1993] 3 All ER 717 at 736 [*El Ajou*]. See also *Royal Brunei Airlines v Tan*, [1995] 2 AC 378 at 386.

94 See also *Trustor AB v Smallbone*, [2000] EWCA Civ 150, at paras 61-62 [*Smallbone*].

to the subsequent extra-judicial writing on the domestic law of Millett J himself, where he argues that both the equitable claim of knowing receipt and the action for money had and received are "property-based personal claims," as opposed to a "purely personal claim to reverse unjust enrichment."[95] On this latter approach, the causative event which triggers such personal claims is not unjust enrichment, but the claimant's right in the property at the time of receipt. Moreover, in case of knowing receipt, there is also much force in holding that the causative event may be found in the tortious conduct committed by the defendant.[96] If it is the causative event which should be the object of characterization,[97] it appears unclear why the *lex causae* in *El Ajou* should automatically be identified by choice of law rules for unjust enrichment in Rule 230, rather than those for property or tort. The analysis must delve deeper.

It is noteworthy that the differences between each characterization should not be exaggerated. In cases of knowing receipt, characterization as restitution, tort or property seems to invariably result in the same *lex causae*. This is because the place that is the *situs* of the property, when the relevant facts giving rise to the cause of action occur, always coincides with the place where the wrongful receipt is committed, and where the enrichment arises.[98] In practice, there is little difference to be drawn between each approach to characterization; however, at a doctrinal level, it means that the explicit approval by Millet J of Rule 230(2)(c) should remain *obiter* only. It cannot be taken as his approval that a cause of action alleging an equitable wrong may be automatically characterized as restitutionary for the purpose of conflict of laws.

In contrast to *El Ajou*, Collins J subsequently recognized that, for wrong-based restitutionary claims, the authorities in favour of Rule 230(2)(c) were weak.[99]

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95 Millett, "Proprietary Restitution," *supra* note 53 at 318-19. Although Millett explicitly distinguishes between property-based personal claims and purely personal claims arising to reverse unjust enrichment, he suggests that both types of claims may share some common features such as the availability of the change of position defence; at 324-25. See also *supra* note 76 and an accompanying text.

96 *BCCI (Overseas) v Akindele*, [2000] 3 WLR 1423 at 1439, Nourse LJ. The recipient's state of knowledge must be "such as to make it unconscionable for him to retain the benefit of the receipt." The courts have declined to impose receipt-based personal liability on recipients in good faith [*Akindele*]; *Re Diplock*, [1948] Ch 465. See AJ Oakley, ed, *Parker and Mellows:the Modern Law of Trusts*, 9th ed, (London, UK: Sweet & Maxwell, 2008) at para 10-214.

97 See accompanying text to *supra* notes 4-6.

98 See TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford, UK: Oxford University Press, 2004) at 314. For a comparable point in relation to mistaken transfers, see discussion in Part III(D), below, final paragraph. For a detailed analysis on choice of law for knowing receipt, see c 5, 8 at 310-14, 320-322 especially at 311. The author usefully distinguishes between claims alleging a specifically enforceable *personal* obligation to transfer property or its value to reverse unjust enrichment and proprietary claims based on existing property rights. The former, including claims for knowing receipt, will be characterized as lying within choice of law rules for unjust enrichment, whereas the latter falls under the regime for property.

99 *Barros Mattos Junior v Macdaniels Ltd*, [2005] EWHC 1323 (Ch) at para 117, [2005] 1 WLR 247 [*Barros Mattos*].

Quite to the contrary, the characterization of equitable wrongs has in fact been very unsettled. Some cases point toward choice of law rules for tort,[100] while others have held that neither choice of law rules for unjust enrichment nor choice of law rules for tort were applicable, but that there is a distinct set of rules applicable to equitable claims.[101] In light of these complications, the editors of *Dicey, Morris & Collins* have offered a rather unsatisfactory suggestion. They argue that where the purpose of the equitable claim is to "disgorge an unjust enrichment," the claim would fall within Rule 230(2)(c), but not where the claim is for compensation.[102] This is striking because the term disgorgement is commonly associated with restitution for wrongs, so as to avoid confusion with the language of enrichment, which is confined to cases of autonomous unjust enrichment.[103] Also, this approach entirely ignores the fundamental point that these equitable claims are based on wrongs.

Given the wide variety of possible characterizations of equitable claims, Professor Tiong Min Yeo persuasively argues that there should not be a global, separate conflict of laws characterization for breach of equitable obligations.[104] Even though the remedy may be described as gain-based, receipt-based or restitutionary, the claim should not be automatically characterized as restitution or unjust enrichment[105] so as to place significant weight upon the law of the place of

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100 This is one possible interpretation of *Arab Monetary Fund v Hashim (No 11)*, (29 July 1994) unreported (dishonest assistance), since Chadwick J relied on *The Halley*, (1868) LR 2 PC 193 (Privy Council), a seminal case which laid down the rule that a wrong committed abroad could only be subject of litigation in England only where the alleged wrong would also have been actionable as tort if committed in England; see Yeo, *supra* note 98 at 272-76 especially at para 8.30. The approach adopted by Chadwick J should however be contrasted with the analysis of Evans J of a related action in *Arab Monetary Fund v Hashim (No 9)*, [1993] 1 Lloyd's Rep 543, partially reversed on other points by the Court of Appeal in *Arab Monetary Fund (No 9)*, *supra* note 29 (bribes). In that case, it is possible to read the decision of the trial judge as having given either a contractual or a restitutionary characterization to a restitutionary claim to bribes. At 566, Evans J held that *lex contractus* applied since the bribe agreements and payment were ancillary to the contract of employement and the building contract in connection with which the bribes were made; thus Rule 201(2)(a) [predecessor of Rule 230(2)(a)] applied. See also Yeo, *supra* note 98 at 232-33; *c.f.* Robert Stevens, "The Choice of Law Rules of Restitutionary Obligations" in Francis Rose, ed, *Restitution and the Conflict of Laws* (Oxford, UK: Mansfield Press, 1995) at 190 [Rose, *Restitution*]. Stevens argues that the approach of Evans J is doubtful because the contract is neither sufficient nor necessary for claims alleging breach of fiduciary duties. *Arab Monetary Fund (No 9)* was distinguished in *Thahir*, *supra* note 89 at 271-72.

101 *Grupo Torras*, *supra* note 29 at para 123 (dishonest assistance); *Base Metal*, *supra* note 29 especially at paras 73-74 (breach of equitable duty of care owed by director of a company). For further discussion, see Yeo, *supra* note 98 at 276-84; *Dicey, Morris & Collins*, *supra* note 1 at paras 34-036–34-039.

102 *Ibid* at para 34-041. Panagopoulos acknowledges that this approach is at least arguable, but concludes that such claims are best characterized in the same way as the underlying wrong; Panagopoulos, *supra* note 3 at 86.

103 See *supra* note 39 and accompanying text.

104 Yeo, *supra* note 98 at 276-84.

105 As argued in Part II(B), the language of "restitution" and "unjust enrichment" seem to be used synonymously in the conflict of laws; see Chong "Choice of Law," *supra* note 84 at 868, n 86.

enrichment.[106] Rather, the distinction between law and equity should not be relevant in the eyes of the conflict of laws.[107] Actions considered by the domestic law as equitable claims or claims analogous to equitable wrongs, should be characterized by reference to the underlying wrongs, which may fall within any one of the main choice of law categories—contract, tort, unjust enrichment and property.[108] Thus, if a breach of the fiduciary duties in question arose in connection with a contract, it should be characterized as contractual.[109] Similarly, where a wrong is committed by an express trustee in breach, the claim should be considered by the choice of law rules for trust. If a claim is made against a third party assisting in breach of trust or fiduciary duty, then the claim should be governed by choice of law rules for tort.[110]

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106 The assertion that decisive weight should be placed upon the law of the place of enrichment where the cause of action is characterized as restitutionary is itself contentious. In *Ojsc Oil Co Yugraneft v Abramovich*, [2008] EWHC 2613 (Comm) at paras 246-62 [*Yugraneft*], Clarke J stated that though Rule 230(2)(a)-(c) is an indicator of which law is likely to constitute the law with the closest connection to the claim, both a claim in knowing receipt and a claim in unjust enrichment "must in principle be determined by its proper law," which may differ from that identified by Rule 230. In the instant case Russian law applied as the law of the place where both the wrong and the relevant enrichment occurred. Nevertheless, the judge also went on to determine English rules on knowing receipt and held that even if he had been wrong in holding that Russian law was the proper law of the claim in knowing receipt, the claim would still have failed as a matter of English law; see paras 372, 385. See also *Barros Mattos*, *supra* note 99 at paras 117-18; *Rome II Regulation*, *supra* note 14 at Art 10(4). In contrast, for a view that the law of the place of enrichment governs claims in unjust enrichment, in absence of contractual relationship between the parties and other than claims in land, see *Dicey, Morris & Collins*, *supra* note 1 at para 34-040; *In Re Jogia*, [1988] 1 WLR 484 at 495-96; *Arab Bank NewYork Ltd v Barclays Bank*, [1952] 2 TLR 920 at 924; *El Ajou*, *supra* note 93 at 736, reversed in the Court of Appeal on other grounds [1994] 2 All ER 685; *HSBC Ltd*, *supra* note 90; *Thahir*, *supra* note 89.

107 In the New Zealand Court of Appeal case of *Attorney General of England and Wales v R*, [2002] 2 NZLR 91 at 103, Tipping J opined that "[i]t is difficult to see the logic or overall desirability of making a distinction between legal issues and equitable issues… when deciding which legal system should govern [the issue in dispute]," and that for conflict of laws purposes "[l]aw and equity should be viewed as a consistent whole." It is arguable that the term equitable has no "discrete role to play in the characterization of issues for the purpose of choice of law"; *Dicey, Morris & Collins*, *supra* note 1 at para 2-035.

108 Yeo, *supra* note 98 at ch 8; *Thahir*, *supra* note 89 at 276.

109 *Arab Monetary Fund (No 9)*, *supra* note 29. Again, the difference between each type of characterization should not be overstated. Characterization as "unjust enrichment" or "restitutionary" may also lead to the application of the *lex contractus*; see Rule 230(2)(a) in *Dicey, Morris & Collins*, *supra* note 1 at para 34R-001; *Rome II Regulation*, *supra* note 14 at Art 10(1); *Yugraneft*, *supra* note 106 at para 247. However, it seems more doctrinally coherent to characterize the claim as contractual and consequently to invoke directly the application of *lex contractus*, rather than to classify it as an enrichment claim, which is normally associated with the law of the place of enrichment.

110 In the domestic law, the notion that dishonest assistance could be regarded as a tort was firmly rejected; *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc*, [1990] 1 QB 391 at 474. Nonetheless, the courts recognized that for private international law purposes this type of equitable wrongdoing had marked similarities to a tort and was governed by the double actionability rule which was applicable to tort claims; *Dubai Aluminium v Salaam*, [1999] Lloyd's Rep 415 at 467; *Grupo Torras*, *supra* note 29 at para 123. In *Yugraneft*, *supra* note 106 at paras 222-223, Clarke J, while stating that it was not necessary to engage in characterization, held that if it was necessary he would "strongly incline" to holding that dishonest assistance could be regarded as falling squarely within the statutory regime for choice of law for tort under the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42. At present it is clear that such claims would be governed by the *Rome II Regulation*. See also Yeo, *supra* note 98 at 320; *Arab Monetary Fund (No 9)*, *supra* note 29. *Dicey, Morris & Collins*, *supra* note 1 at para 34-033. Similarly, in the domestic law the remedies for dishonest assistance are regarded not as *restitutionary*, but *compensatory* in nature; see Graham Virgo, "Interest, Constructive Trusts and the Conflict of Laws Revisited" [2001] RLR 76 at 79, n 24 [Virgo, "Interest Revisited"].

It is then arguable that the *dictum* of Millett J in *El Ajou*, discussed earlier, is not entirely inaccurate.[111] The domestic understanding of the causative event, which triggers a restitutionary response for the equitable claim of knowing receipt, may remain open to debate. In the conflict of laws, however, it is appropriately described as an equitable counterpart of the action for money had and received—a classic example of unjust enrichment.[112] The reference made to the law of the place of enrichment may, therefore, be sustainable.[113]

2. Proprietary Consequences of Equitable Wrongs

This article turns next to discussing the implications on cases where proprietary restitution is alleged following a breach of equitable obligations, as earlier explored in Part II(B). Even as a matter of domestic law, it is difficult to see how restitution for wrongs could fit within autonomous unjust enrichment cases.[114] With respect to taking bribes, for example, it is not clear whether the requisite impoverishment element can be proved. The disputed notion of "interceptive subtraction" would have to be extended beyond its proper scope to accommodate that possibility.[115] However, by employing a proper trust analysis, it is arguable that at the moment of receipt of bribes, or when breach of fiduciary duty is committed, equity intervenes by imposing on the defendant an obligation to hand over the assets to the claimant. It is the operation of equity which gives a property-like protection over the relevant asset in favour of the beneficiary. That obligation arose to reverse enrichment, but the description of unjust enrichment is neither sufficient nor necessary for the intervention of equity.[116] The relevant cause of action is not based on unjust enrichment as an independent source of right; it is a distinct action founded upon breach of equitable obligations. For the conflict of laws purpose, it *may* then be arguable that the underlying wrong provides a proper platform for equity to intervene and impose proprietary remedies in accordance with the law governing that

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111 *El Ajou*, *supra* note 93 at 736.

112 *Ibid*. In *Yugraneft*, *supra* note 106 at paras 162-64, 237, 246, although the claimant submitted two separate types of "receipt-based" claims in knowing receipt and unjust enrichment, Clarke J dealt with both claims simultaneously, referring to choice of law for *restitutionary* claims.

113 See also *supra* note 106 and accompanying text. For knowing receipt, another important question may also be raised as to whether the claimant had proprietary rights in the property at the time of the defendant's receipt. In principle, the analysis should be the same as a claim based on the wrong of interference with property rights which is governed by Rule 231 on tort; see *Dicey, Morris & Collins*, *supra* 1 at para 35-027. The kind of property rights required to sustain the action is determined by the applicable law, but whether the claimant had acquired that right is governed by the *lex situs*. For example, in *Yugraneft* at para 359, while examining the proprietary base required in the claim for knowing receipt in English law, the judge referred to the provision of Russian law to assess whether the claimant had acquired the requisite proprietary interests. In *El Ajou*, *supra* note 93 at 736, this point was not addressed possibly because the law applicable to the knowing receipt claim coincides with the *lex situs*; see Yeo, *supra* note 98 at 159-60.

114 *Reid*, *supra* note 23.

115 See Smith et al, *supra* note 33 at 318, 446. See also *supra* note 35 and accompanying text.

116 Pitel, *supra* note 7 at 338-44 especially at 341.

wrong. It seems convincing that the question of whether the claimant can assert proprietary rights over the bribes should be determined, not by reference to the *lex situs*, or law of the place of enrichment, but to the proper law of the underlying wrong.[117] For instance, in *Arab Monetary Fund v Hashim (No 9)*,[118] where the claimant brought an action against an employee who accepted bribes, it was held that the action to recover the bribes was governed by the law of Abu Dhabi, the *lex contractus* (the governing law of contract), not Swiss law, which was the law of the place of receipt of the bribes. Although no question of proprietary interest was pleaded, since under Abu Dhabi law the obligation to transfer the property fell short of fully vested proprietary rights,[119] had Abu Dhabi law considered that the claimant had a fully vested property right in the bribes, then effect would have to be given to that property right, regardless of the position of the analogous claims under Swiss law, the law of the *situs* and the place of enrichment.

On the contrary, an insightful observation is made by Professor Yeo in favour of the application of the *lex situs*. Yeo focuses on the situation where the relevant asset has been subsequently moved. He suggests that if the applicable law (X) imposes on the defendant a mere personal obligation to transfer the property to the claimant, but the property is then moved to a jurisdiction (Y) where an analogous claim would result in a fully vested right *in rem*, effect should be given to the law of the *situs*.[120] For Yeo, there is a "*continuing* obligation" to transfer the property which can subsequently be turned into a vested property right by the law of the *situs*.[121] Thus, in *Arab Monetary Fund*, had the money in Switzerland been transferred to the forum (England), the claimant would have immediately been regarded as an equitable owner.[122] There is much force behind this proposition; it would lead to uniformity of rules concerning entitlement to the asset, which should ultimately be determined by the *lex situs*.[123] Although Professor Yeo does not explicitly comment on the implication of his proposition for the characterization of these wrong-based proprietary claims, the language of *situs* seems supportive of their characterization as property.

Nevertheless, Yeo's proposition, and the characterization as property, may be open to challenge on two grounds. First, it is unclear whether in a reverse situation, where the property is transferred from Y to X, the claimant's fully vested property in the bribes, granted by jurisdiction Y, can be extinguished because of non-recognition by jurisdiction X of the proprietary consequences of an analogous

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117 Joanna Bird, "Bribes, Restitution and the Conflict of Laws" (1995) LMCLQ 198 at 199 [Bird, "Bribes"].

118 *Arab Monetary Fund (No 9)*, *supra* note 29.

119 For treatment of a similar claim in English law, see *Reid*, *supra* note 23.

120 Yeo, *supra* note 98 at paras 5.54-5.55.

121 *Ibid* at para 5.54.

122 This outcome presupposes that *Reid*, *supra* note 23, still represents the law in England; Compare *Sinclair Investments*, *supra* note 23.

123 *Macmillan*, *supra* note 4.

wrong. The outcome may look undesirable since it is open to the possibility that the defendant, like Mr. Hashim, could channel the bribes to a jurisdiction under which the claimant can claim no priority.[124] Secondly, and more importantly, under the property choice of law rules, the substantive property rules applicable to *inter vivos* transfers are those of the place of the last transaction in the property, rather than any place where the property subsequently happens to be situated.[125] The last relevant transaction in the case of acceptance of bribes is the place of receipt. However, under Yeo's proposition, *situs* other than the place of receipt may be relevant. For him, the "*continuing* obligation" could lengthen the life of the transaction.[126] In the hypothetical example above, the giving of a bribe, which had ended in Switzerland, would be revived when the bribe was subsequently transferred to England, so that England could properly be regarded as the place of the last relevant transaction. The artificiality of this approach becomes apparent: how can it be said that England, which could well be a transitory *situs*, was the place with the closest connection to the claim?[127] In any event, Yeo's proposition was made in absence of any support from the existing judicial decisions.[128] If one accepts the view that claims asserting proprietary rights, which arise from an equitable wrong, should be characterized in the same way as the underlying wrong, one would argue that the relevant cause of action lies in the breach of an equitable obligation, and that the consequences of the breach are to be governed by the *lex causae* of the underlying obligation. Where the *lex situs* is involved, such as to give effect to title subsequently obtained by a third party within the *situs*, it is essentially the public policy of the forum which operates in favour of the *lex situs* in a question concerning title. Alternatively, the issue of priorities of title can be seen as constituting a distinct inquiry to be separately characterized.[129] On the surface, it looks arguable that the question of whether the claimant has a fully vested property right might be determinable by the law governing the underlying wrong.

While in the next subpart a doctrinal response to the two arguments against characterization as property shall be formulated,[130] an additional reason,

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124 This outcome would also be inconsistent with *Cammell v Sewell*, (1858) 3 H&N 617 [*Cammell*] and *Winkworth v Christie, Manson & Woods Ltd*, [1980] Ch 496 [*Winkworth*].

125 Jonathan Harris, "Tracing in the Conflict of Laws" (2002) 73 Brit YB Int'l L 65 at 85 [Harris, "Tracing"].

126 Yeo, *supra* note 98 at para 5.54.

127 Yeo also recognizes that his proposal is most justifiable where the new *situs* is not a transient one; see Yeo, *supra* note 98 at 166.

128 Yeo relies on the *dictum* of Millett J in *El Ajou*, *supra* note 93 at 736, that the claimant need not prove proprietary interests in every intermediate jurisdiction that the relevant asset has passed through in order to establish a receipt-based restitutionary liability. But this is a distinct *dictum* concerning a tracing process. See Yeo, *supra* note 98 at 166. He also based his submission on an alternative interpretation of *Chase Manhattan*, *supra* note 26, which is in any event an object of much criticism. See *Westdeutsche*, *supra* note 18; Millett, "Proprietary Restitution," *supra* note 53 at 318.

129 This is the explicit ruling of *Macmillan*, *supra* note 4; Panagopoulos, *supra* note 3 at 79; Forsyth, *supra* note 3.

130 See discussion on *renvoi* in the final two paragraphs of Part III(B)(3), below.

based on practicality, can be given to demonstrate why claims alleging proprietary remedies should be unanimously classified as property within the conflict of laws. The explanation lies in the pervasiveness of the ancillary issue of title. Exclusively between the claimant and the defendant, there seems to be a purely theoretical difference between holding that the defendant has a specifically enforceable obligation to transfer a specific property to the claimant,[131] and that the claimant has a fully vested equitable right. The real difference can only be found where a right of a third party is involved: if the claimant has a proprietary right in the bribe, the claimant must be able to assert that right against the whole world. Accordingly, on the underlying wrong approach, if the applicable law gives title to the claimant, the claimant may retain that title until it is extinguished by factors prescribed in that applicable law. This, however, does not represent the rules on the determination of title. Generally, at the time of the transfer, a transferee is able to expect that a valid passage of title in accordance with the law of the *situs* is not affected by any encumbrances which may potentially have been created by some foreign laws that governed the preceding transfers.[132] Thus, where an issue of priorities of title is raised, the *lex situs* will ultimately determine the question concerning title.The property rules of the applicable law, therefore, seem only relevant where the dispute is exclusive between the two original parties.[133] But as has been shown, in these two-party situations, the assertion of title is unnecessary. On the other hand, where a third-party's right is at stake, a separate question of title will always be raised, and the law governing this separate question will be that of the *situs*. It would be highly anomalous if questions of title were to be governed by the law applicable to the underlying wrong when there was no involvement of a third party, and the *lex situs* when the rights of a third party were at stake.[134] This provides a sufficient reason to uphold the view that, when the issue is concerned with proprietary entitlement, the *lex situs* must apply, and that the cause of action, which alleges property rights, should always be characterized as property, regardless of whether the event triggering those proprietary remedies could be seen as having its foundation in tort, contract or

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131 For civil lawyers, this is "a textbook example of a purely personal right, namely the *ius in personam ad rem acquirendam*." For common law lawyers, this personal right seems to be "a pigeonhole in a logical space in which there is no pigeon" since a specifically enforceable obligation to transfer a piece of property is seen as giving rise to a fully vested equitable proprietary entitlement; Gretton, *supra* note 47 at 572.

132 *Macmillan*, *supra* note 4 at 400, Staughton LJ.

133 Nonetheless, where the claimant brings an action for declaration of title over a specific asset, the fact that no third parties need be present in the litigation should not belie the fact that the right of a third party in relation to the asset is ultimately at stake. Hence, even in such cases, the *lex situs* should be determinative of the issue of title.

134 *Glencore International AG v Metro Trading International Inc*, [2000] EWHC 199 (Comm), [2001] Lloyd's Rep 284 at para 30 [*Glencore* cited to Lloyd's Rep]. For criticism of *Glencore* on this point, see Janeen M Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules concerning Inter Vivos Transfers of Property* (Oxford: Oxford University Press, 2005) at para 3.76.

unjust enrichment.[135] This practicality may further be relied upon to override the fact that, under the conflict of laws, the object of characterization should be the issue or the cause of action, rather than the remedy sought.[136] Surely, a personal cause of action based on an equitable wrong must be characterized by reference to the underlying wrong. But where the remedies sought are proprietary, there will always be a separate issue of title, which is ultimately characterized as property. George Panagopoulos describes this as an ancillary issue to be characterized separately from the main cause of action.[137] He argues that the proprietary aspect of the remedy should not carry undue weight, affecting a proper analysis on the underlying cause of action. This position appears unsustainable. How can an issue, which is certain to arise in relation to a claim, be described as a mere ancillary issue? Rather, it must be the focus of the relevant cause of action. On this account, if restitutionary claims alleging equitable wrongs are sought, any proprietary aspects of the claims must be governed by the law of the *situs*. Proprietary claims will always be characterized as falling within the property regime in the conflict of laws.

3. Delineating the Boundary of the Proprietary Issue in Equitable Claims: Thahir v Pertamina *Revisited*

The problem of characterization in relation to equitable wrongs was faced by the Court of Appeal of Singapore in *Thahir v Pertamina*,[138] where the relevant issues raised the possibility of being equally characterized as tort, contract, unjust enrichment and property. In this case, General Thahir, a senior employee of the claimant, an Indonesian state enterprise, acquired a substantial sum of bribes, which were kept in a Singapore account held jointly by himself and his wife. After the General's death, the claimant enterprise sued the wife. In the High Court, it was held that the law of the forum, Singapore law, was applicable to equitable claims.[139] The Court

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135 This view is advocated by Chong, "Choice of Law," *supra* note 84 and Stevens, "Resulting Trusts," *supra* note 84. Yeo recognizes the importance of the *lex situs* in determining the question of title but refuses to give a conclusive comment on characterization of the cause of action; Yeo, *supra* note 98 at 314. In comparison, in *Yugraneft*, *supra* note 106 at paras 344-378, after holding that Russian law governed the claim in knowing receipt, the judge went on to consider whether the claimant could assert a proprietary lien or constructive trust over the proceeds of the original interests acquired by the defendants following the alleged commission of a wrong. In doing so, he invoked English rules of tracing and following. This *may* be taken as implicitly supporting the view that a proprietary remedy for knowing receipt is a remedial issue to be governed by the *lex fori*. Nonetheless, arguably English law has no interests here. None of the assets which were alleged to be wrongly acquired by the defendants, i.e. the increase in participation interests in a Russian joint-venture, or their alleged substitute, were situated in England. At best, the judge's reasoning, at para 385, should be treated as part of a spirited attempt to justify his conclusion that the claimant would still have had no reasonable prospect of success had English law governed the claim in knowing receipt. This interpretation also seems to be in line with the defendants' alternative defence put forward in para 168 of the judgment.

136 Chong, "Choice of Law," *supra* note 84 at 880-81; *c.f.* Bird, "Bribes," *supra* note 117 at 199.

137 Panagopoulos, *supra* note 3 at 79-81.

138 *Thahir*, *supra* note 89.

139 *Sumimoto Bank Ltd v Thahir*, [1993] 1 SLR 735, Lai J.

of Appeal rightly dismissed this approach. It, however, affirmed the judgment on the grounds that the issue should be characterized as restitutionary. The law of Singapore was applicable by virtue of it being the law of the place of enrichment; however, "the conflict of laws issues raised by the case are not as straightforward as would appear from the Court of Appeal's treatment of them."[140] The Court's conclusion, that the personal claim fell within the choice of law rules for unjust enrichment, is far from satisfactory. First, the Court readily assumed that the case was analogous to the common law unjust enrichment by subtraction actions, and should be governed by the same choice of law rules. This conclusion might be correct if the claim was, in fact, analogous to the equitable claim for knowing receipt.[141] However, the underlying cause of action in this case might as well have been based on dishonest assistance, which would have called for choice of law rules for tort.[142] Secondly, although the Court correctly identified that the primary issue before it lay in the wife's personal liability, it failed to notice the incidental question of breach of fiduciary duty committed by General Thahir.[143] Singapore law, as the law governing the wife's liability, was held to govern the entirety of the question relating to liability, including the earlier breach of duties by the husband. The result seems to be that, in attempting to avoid invoking choice of law rules for contract, the Court was forced to distinguish this case and *Arab Monetary Fund* on a "spurious ground."[144] The alleged distinction was that the place of enrichment in *Arab Monetary Fund*, Switzerland, was transitory, whereas in *Thahir* the fund was deliberately paid to the Singapore account and remained there for over 20 years. With a better analysis, the Court could have distinguished the two cases on the grounds that while the primary issue in *Arab Monetary Fund* was the liability of the person in breach of fiduciary duties arising from the contract, the defendant in *Thahir* was a party outside the contractual relationship. This distinction would be sufficient to justify the disapplication of *lex contractus*.

The third and the most unsatisfactory aspect of the Court's rationale is in the proprietary aspect of the case. Here, the Court found that the defendant held the fund on a constructive trust in favour of the claimant.[145] However, it was not properly explained how proprietary consequences could arise where the law governing the underlying wrong, which was alleged to be the source of the property right, Indonesian law, was not open to that possibility. Even as a matter of

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140 Bird, "Bribes," *supra* note 117 at 198.

141 *Thahir*, *supra* note 89 at para 47; *El Ajou*, *supra* note 93 at 736; *Yugraneft*, *supra* note 106 at paras 237, 246.

142 *Ibid* at paras 222-223. Bird, "Bribes," *supra* note 117 at 199. Nonetheless, it is likely that the choice of law rules for tort would also point to Singapore law. *Thahir*, *supra* note 89 at paras 48, 58.

143 Yeo, *supra* note 98 at para 7.69.

144 Bird, "Bribes," *supra* note 117 at 201; *Thahir*, *supra* note 89 at para 46.

145 *Ibid* at paras 16, 57. Having assumed that Singapore law applied to the whole claim, the Court of Appeal applied *Reid*, *supra* note 23. The Court did not, however, provide reasons as to why Singapore law should be applicable to the proprietary claim.

Singapore law, the Court also seems to conflate the notion of constructive trust with that of liability as constructive trustee. As emphasized by several commentators,[146] a constructive trust is concerned with proprietary interests, while liability to account as a constructive trustee arises from equitable personal claims based on knowing receipt or dishonest assistance.[147] It is thus astonishing that the Court held:

> [the defendant] by reason of her complicity and involvement in the transfer of the deposits to the account in the joint names of Gen Thahir and herself also became a *constructive trustee*, and when she became the sole owner of the deposits she continued to hold them on a *constructive trust* for Pertamina.[148]

The alleged knowing receipt or dishonest assistance could only provide grounds for personal liability to account, and not a proprietary remedy. The Court's explanation of knowing receipt and dishonest assistance was relevant to the defendant's personal liability only. It did not explain why the defendant should hold the bribes on a constructive trust. On the facts, *Thahir* was concerned with an interpleader proceeding, which could be heard only on the condition that the claimant had proprietary interests in the fund deposited in the account now held by the defendant.[149] Given that neither Indonesian law nor traditional Singapore law on knowing receipt nor dishonest assistance could sufficiently explain the imposition of a constructive trust, there must be an alternative analysis of *Thahir* that could justify the existence of such proprietary remedies.

One possible explanation of the Court's finding may be found in Yeo's proposition based on continuing obligation.[150] Following the original breach of a fiduciary relationship governed by Indonesian law, General Thahir was to be treated as owing a continuing duty to make restitution to the claimant. Once the relevant asset was transferred to Singapore, Singapore law of equity could intervene and impose a constructive trust upon the relevant asset provided that such intervention

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146 Millett, "Constructive Trusts," *supra* note 54 at 399-400; Chong, "Choice of Law," *supra* note 84 at 855; Virgo, "Interest Revisited," *supra* note 110 at 79; *Grupo Torras*, *supra* note 29 at para 122.

147 *Royal Brunei Airlines*, *supra* note 93 (knowing receipt); *Akindele*, *supra* note 96 (dishonest assistance). In *Yugraneft*, *supra* note 106, the claimant based its claims on four separate grounds: (i) dishonest assistance (ii) knowing receipt (iii) unjust enrichment and (iv) proprietary claim for an interest under a constructive trust or a lien. This clear pleading permitted the judge to extensively and accurately deal with the conflict of laws issues in dishonest assistance and knowing receipt separately from proprietary claims.

148 *Thahir*, *supra* note 89 at para 58 [emphasis added]. See also paras 48, 60.

149 *Ibid* at para 16.

150 Yeo, *supra* note 98 at 163, para 5.48. This explanation should be contrasted with choice of law rules for tangible movables according to which cross-border movement of goods could have no bearing upon proprietary entitlement; *Cammell*, *supra* note 124.

would be triggered by an analogous breach in Singapore law.[151] With proper analysis, the Court should have pointed out that the fiduciary duties owed by General Thahir were governed by Indonesian law, but proprietary consequences of the breach of those duties were governed by the *lex situs*, Singapore law. In relation to the proprietary claim, Singapore law was applicable neither because Singapore was the place of enrichment,[152] nor because the question of proprietary consequences was a remedial issue determinable by the *lex fori*,[153] but because the claim was proprietary in nature. Flowing from this analysis, Indonesian law as the proper law of the underlying wrong would be used to identify both the content of the relevant fiduciary duties and whether those duties were in fact breached. Proprietary consequences of the breach were, however, governed by Singapore law, the *lex situs*. It is submitted that this approach will not undermine the internal balance in the domestic law of the respective systems. Fiduciary duties found to be breached under Indonesian law must be proved to be analogous to those under Singapore law before proprietary remedies could be ordered.[154] Here, one can only regret the Court's failure to refer to Indonesian law at all. However, on the facts of the case, it is arguable that such a flagrant breach could not have gone unnoticed under Indonesian law.[155] The imposition of a constructive trust in *Thahir* may still be seen as correct.[156]

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151 This interpretation does not necessarily imply that the common law of Singapore recognizes that a claim in knowing receipt may take on a proprietary character. Generally, such a proprietary claim would serve no useful function since the beneficiary who wishes to bring a proprietary claim can simply assert his entitlement to the asset against the recipient, whose knowledge of the beneficiary's interest debars him from taking the asset free of the beneficiary's prior equitable interests. This oddity in *Thahir*, *supra* note 89, seems to result from the Court's reasoning at paras 47, 56, that relies on *El Ajou*, *supra* note 93, to the extent that the claimant's action could be described as a case of "knowing receipt" which triggers the choice of law rules for restitution. This leads to the application of the law of the place of enrichment, Singapore law. *Reid*, *supra* note 23, thus applied, with a result that the wrongful fiduciary held the bribes on a constructive trust in favour of the principal and that such an interest could then be traced into the account held by the defendant. Yet, as a matter of domestic Singapore law, it is difficult to see how *Reid* could be used as an authority supporting a proprietary remedy for an action of knowing receipt. The better view adopted here is that *Reid* applied not because Singapore law was the law of the place of enrichment, but the *lex situs*. The cause of action was proprietary and strictly called for the choice of law rules for property.

152 *Thahir*, *supra* note 89 at para 48. This appears to be a rather unsatisfactory basis on which the Court of Appeal reached its conclusion.

153 See *Yugraneft*, *supra* note 106 at paras 177-185 for a proposition that a global application of *lex fori* to equitable claims should be rejected and paras 344-378 together with the discussion in accompanying text to *supra* note 135 for a proposition that proprietary remedies for knowing receipt should not be regarded as remedial so as to be governed by the *lex fori*. *C.f.* Issues concerning damages and priorities between claimants to limited funds are regarded as procedural questions, which are to be resolved by the *lex fori*. See *Dicey, Morris & Collins*, *supra* note 1 at paras 7-033–7-044, and at para 34-033. A procedural issue of priorities should also be distinguished from a substantive issue concerning the question whether a proprietary interest has been created. The validity and nature of the right is determined by its proper law; the *lex fori* only comes into play at a later stage to determine the order of payment; see North, Fawcett & Carruthers, *supra* note 2 at 92-94.

154 Yeo, *supra* note 98 at para 5.55.

155 The Court of Appeal swiftly dismissed the defendant's challenge on evidence, simply stating that the breach was obvious; *Thahir*, *supra* note 89 at para 27.

155 This conclusion presupposes that *Reid*, *supra* note 23, remains good law in Singapore; Compare *Sinclair Investments*, *supra* note 23.

Therefore, in *Thahir* the Court's finding that Singapore law was applicable as the law of the place of enrichment in a restitutionary equitable claim, either for knowing receipt or dishonest assistance, should be seen as *obiter dicta* only. As the case involved an interpleader proceeding, the claimant's proprietary interest was an essential prerequisite. The above analysis suggests that this case cannot be relied upon to show judicial support for characterization of cases that allege proprietary restitution falls within the choice of law rules for unjust enrichment. The reason is that the *dicta* on personal liability for knowing receipt or dishonest assistance could not have had any bearing on proprietary claims. The claimant's property right did not flow from the defendant's personal liability. Rather, it was a property right that was founded upon the preceding breach of fiduciary duties by General Thahir and that could subsequently be traced into the account held by the defendant. Singapore law, as the *lex situs* of the fund, was determinative of the existence of this proprietary remedy. This analysis of *Thahir* enables the dispensing of most cases that have been cited as authorities for the proposition that proprietary restitution is governed by choice of law rules for unjust enrichment under Rule 230(2)(c) in *Dicey, Morris & Collins*.[157]

The discussion shall now return to the argument that characterization of proprietary restitutionary claims as property may be open to abuse: for example, could General Thahir's wife have transferred the money, which had long been deposited in Singapore, over to her Ruritanian account, having learned that the domestic law of Ruritania did not recognize the claimant's proprietary interest in the fund? Yeo recognizes the weakness in his proposition, suggesting simply that, in relation to proprietary consequences of breach of equitable obligations, effect must be given to the law of the *situs* "at least where the new *situs* is not a transient one."[158] However, the criteria to which the Court could refer to in answering whether the new *situs* is "transient" are left unanswered. Suppose that the fund was successfully moved to Ruritania. Should the Court refer to the law of Ruritania or Singapore, or even Indonesia, to determine whether the new *situs* was transitory? The answer to this question could be found in the approach to characterization suggested above. Recalling the proposition that proprietary claims should always be characterized as property for the conflict of laws purpose, it follows that law of the *situs* will apply. Here, Ruritanian law will be used to determine whether the defendant should have held the fund on a constructive trust. Nevertheless, the reference to Ruritanian law should not be limited to Ruritanian domestic law, but rather to Ruritanian law including its private international law rules. In other words, for questions concerning property rights, the court should allow the possibility of *renvoi*.[159] Priorities of title

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157 See *Smallbone*, *supra* note 94; *Kuwait Oil Tanker*, *supra* note 91. *C.f.* Chong, "Choice of Law," *supra* note 84 at 867-71; Virgo, "Interest Revisited," *supra* note 110; Graham Virgo, "Interest, Constructive Trusts and the Conflict of Laws" [2000] RLR 122.

158 Yeo, *supra* note 98 at 166, para 5.54.

159 *Ibid* at 160, para 5.43.

should be a question left to be resolved by the policy of the entirety of the law of the *situs*, and not just its domestic law.[160] This is why we refer to that law in the first place: to apply the foreign law as the foreign court would apply. Such approach will provide room for the possibility that where *situs* is transitory, the *lex situs*, including its private international law rules, will resolve the question of title by referring to another law, which in most cases will be the law of the place of the last relevant transaction.[161] The reliance on the application of *renvoi* may look striking; *renvoi* has been perceived as the principal unanswered question affecting cross-border transfers of movable property and there are manifest uncertainties concerning the scope of its application.[162] Nevertheless, in our specific example, the result would appear untoward if the interpleader proceeding in Singapore was declined simply because the defendant could randomly channel the asset to a third jurisdiction that does not recognize proprietary consequences of breach of equitable obligations.

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160 *Dicey Morris & Collins, supra* note 1 at 84, para 4-025 and the *Third Cumulative Supplement to the 14th edition up-to-date to October 1st 2009* at 5; Stevens, "Shares," *supra* note 66 at 199-200. Although recent cases have refused the adoption of *renvoi* in relation to tangible movables, judges in all those cases have acknowledged the possibility that *renvoi* may apply in appropriate situations; *The Islamic Republic of Iran v Berend*, [2007] EWHC 132 (QB) at para 20, [2007] 2 All ER (Comm) 132, Eady J; *Dornoch Ltd v Westminster International BV (TheWD Fairway)*, [2009] EWHC 889 (Admlty) at paras 85-89, [2009] 2 All ER (Comm) 399, Tomlinson J. Although in *Barros Mattos*, *supra* note 99 at para 120, Lawrence Collins J accepted that "the claim to the application of *renvoi* in restitution claims is weak," he also held that "there is no authority directly in point" and it was unnecessary to determine the issue since the relevant foreign (in this case, Swiss) conflict of laws rules were not proved. An opposite approach may be found in *Blue Sky One Ltd v Mahan Air*, [2009] EWHC 3314 (Comm) at paras 156-185, [2007] 2 All ER (Comm) 132 [*Blue Sky*], where Beatson J propounded an outright rejection of *renvoi* in relation to choice of law for movable tangibles. Nonetheless, it is arguable that *Blue Sky* could be distinguished since it involves title to tangible property, as opposed to the claim in *Thahir* which deals with proprietary interests in intangibles. Determination of the applicable law in cases concerning these two classes of property should be kept distinct and conflict lawyers should not be misled by the global application of a single rule. See PJ Rogerson, "The Situs of Debts in the Conflict of Laws – Illogical, Unnecessary and Misleading" (1990) 49 Cambridge LJ 441. If there is any analogy to be drawn, it is between funds temporarily deposited and goods in transit. While it is relatively clear that the latter is an established example of exception to the *lex situs* rule, choice of law rules for the former are less obvious. Unless the choice of law rule for the transfer of intangible property adopts an exception similar to the goods in transit rule, property interests in the funds temporarily deposited should be determined by the proper law, the *lex situs*, including its conflict rules. For a proposition that "goods in transit" is a recognized exception to the *lex situs* rule, see *Winkworth*, *supra* note 124 at 501; Carruthers, *supra* note 134 at 88-90. For a comparable suggestion that there should be an exception to Rule 230(2)(c) where a *personal* restitutionary claim is advanced in relation to funds temporarily deposited, see *Yugraneft*, *supra* note 106 at para 247.

161 The outcome would be consistent with *Cammell*, *supra* note 124, and *Winkworth*, *supra* note 124 at 501. See Harris, "Tracing," *supra* note 125 at 85. The approach adopted here presupposes that at least in relation to funds temporarily deposited, the question of policy concerning the balancing between the security of title and the security of transaction should be answered by reference to a policy adopted by the *lex situs* including its conflict rules; see *Macmillan* 1995, *supra* note 54 at 1008, Millett J (cited to WLR).

162 *Winkworth*, *supra* note 124 at 514, Slade J; *Glencore*, *supra* note 134 at para 38; *Macmillan* 1995, *supra* note 54 at 1008. Arguably, the relevant policy consideration behind recent cases which have rejected the application of *renvoi* differs from that underlying the hypothetical example here. Those cases involve the balancing between the security of a purchase and the security of title in movables. Here, the focal question is whether the interpleader's claim should be permitted to proceed.

Under the scheme of the *Rome II Regulation*, characterization of claims alleging proprietary restitution as falling within property or unjust enrichment may also be of great significance. Characterization as proprietary claims may result in the application of *renvoi*. However, if the matter is characterized as that of unjust enrichment, it will fall within the ambit of the Regulation under which *renvoi* is precluded.[163] Therefore, even in cases where the substantive rules of the choice of law, for both property and unjust enrichment, point to the same applicable law, the application of *renvoi* could potentially lead to divergent results. Characterization may then, in certain circumstances, carry vital implications for the claimant's prospect of success. For the reasons given above, every claim alleging proprietary interests based on equitable wrongs should be classified as property for the purpose of characterization in the conflict of laws.

C. Resulting Trusts and Transfers Pursuant to Void/Avoided Contracts

It is commonly accepted that a resulting trust arises where one person transfers legal title to property to another, or has made contributions to the purchase price of an asset now held in the name of another while having no effective intention to benefit that recipient.[164] Such equitable interests may be retained, such as where the transfer is made pursuant to a void contract that is nonetheless effective to pass legal title.[165] Equally, there are cases where entitlement to an asset, having earlier passed absolutely to the recipient, is regained or revested in equity in favour of a transferor at his election to exercise the equitable right to rescind a voidable contract.[166]

163 *Rome II Regulation*, *supra* note 14 at Art 24. This is pointed out by Chong, "Rome II Regulation," *supra* note 17 at 897, where the author notes that "[t]here does not seem a way around this [divergence of results]"; *c.f.* Panagopoulos, *supra* note 3 at 80-81, separately analyzes the proprietary issue in an "ancillary issue of title" and relies on *public policy* of the forum, rather than *renvoi*, to solve the problem of transitory *situs*. Arguably, it is possible to exclude altogether the application of *renvoi* from the European regimes for choice of law, for both contractual and non-contractual obligations, since these are seen as complete systems, consisting of a general rule for an identification of the proper law and a criterion for displacement of this general rule. In contrast, within the property regime strict adherence to the *lex situs* can obscure the fact that in several situations the *lex situs* may not be the law with the closest connection to the claim. This article argues that in absence of coherently articulated choice of law rules for property interests in a fund, which take into consideration the possibility that there may be another law which is more closely connected with the claim than the *lex situs*, resort must be had to *renvoi*. For a comparable use of *renvoi* in the choice of law for tort, see the Australian case of *Neilson v Overseas Projects Corporation of Victoria Ltd*, [2005] HCA 54; *Blue Sky*, *supra* note 160 at para 182. See also *Rome I Regulation*, *supra* note 14 at Arts 4(3), 20; *Rome II Regulation*, *supra* note 14 at Arts 4(3), 10(4), 11(4), 12(2)(c), 24; *c.f. Winkworth*, *supra* note 124 at 501.

164 However, in the case of purchase-price resulting trusts, the beneficiary neither *regains* nor *retains* the interests in the asset, which is clearly newly acquired by the resulting trustee. It is unclear why these interests are not described as constructive trusts; Worthington, *Proprietary Interests*, *supra* note 75 at 191.

165 Such as where title passes because of a formal conveyance of the property, or where the property can no longer be identified by the rules of tracing at law, but remains identifiable by equitable tracing.

166 Similarly, legal title is revested if rescission takes effect at law (e.g. on grounds of duress or fraudulent misrepresentation). Arguably, the analysis offered in this part is equally applicable to rescission at law. The language of "retained" and "regained" interests is taken from Worthington, *Proprietary Interests*, *supra* note 75 at c 7.

As resulting trusts are commonly perceived as restitutionary trusts,[167] it is of no surprise that the existence of these trusts will be linked to the scheme of the law of unjust enrichment. This may potentially lead to confusion in the characterization process at the conflict of laws level. As above, such characterization should not be misled by the debate pertaining to the causative events giving rise to restitutionary trusts under the domestic law.

Regarding the regained or revested equitable interests, the proprietary consequences of rescission seem to be explicable on neither traditional property nor unjust enrichment analysis. The reason can be found in the nature of the right of rescission. Pending rescission, the transferee could deal with the asset as an absolute owner. What renders this title defeasible is not a vested proprietary interest, but a mere equity held by the transferor. This mere equity is not fully vested into an ownership interest until the moment that the transferor exercises his or her right of rescission. Thus, a traditional property analysis, which is based on the continuing existence of a vested proprietary interest, may not be used to explain the causative event of claims alleging proprietary restitution following rescission. With regard to unjust enrichment, although it is commonly accepted that personal consequences of rescission may be explained in terms of unjust enrichment,[168] the unjust enrichment analysis does not offer a satisfactory explanation to the question of why proprietary remedies should be available. While it is true that the recipient is enriched by his receipt of a particular asset, the reversal of unjust enrichment may be achieved not only by returning that asset, but also any other asset of an equivalent value. If the remedy is based on unjust enrichment, then the claimant should be allowed to claim personal remedies in lieu of the return of property.[169] But the court cannot allow this. Where the relevant property is still intact, rescission will invariably result in the return of that property. In contrast, where the property is already dissipated, it is said that *restitutio in integrum* is not possible; there could be no right of rescission.[170] Subsequent personal remedies sought will be those of damages in lieu of rescission,

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167 Millett, "Constructive Trusts," *supra* note 54 at 401. *C.f.* Penner, "Value," *supra* note 73 at 329.

168 Virgo, *Principles*, *supra* note 60 at 31. It is now settled in the domestic law that *restitutionary* claims following failure of contract are claims arising to reverse *unjust enrichment*; the unjust factor being failure of consideration, or specifically absence of consideration; see e.g. *Kleinwort Benson and Westdeutsche*, *supra* note 18. This analysis is equally true for both void contracts and avoided contracts since rescission will result in the contract being taken as void *ab initio*; *c.f.* SJ Stoljar, *The Law of Quasi-Contract*, 2d ed (Sydney, AU: The Law Book Company Ltd, 1989) at 222, where the author argues that even within the framework of domestic law such remedies are contractual in nature.

169 Penner, "Value," *supra* note 73 at 329; *c.f.* Sarah Worthington, "The Proprietary Consequences of Rescission" [2002] RLR 28 at 54-55 ff [Worthington, "Rescission"]. Worthington argues that "unjust enrichment provides the rationale underpinning the law's response to rescission" including its proprietary consequences at 55. She uses unjust enrichment to explain why the extent of proprietary claims could be reduced by the change of position defence.

170 There may however be proprietary consequences where the asset is not dissipated, but substituted. Worthington, "Rescission", *ibid* at 59-60.

not restitutionary remedies for unjust enrichment.[171] Therefore, as Millett explains, in the domestic law, "a retransfer *in specie* after rescission is best regarded, not as a consequence of a constructive trust or resulting trust, nor as a response to unjust enrichment, but as part of the working out of the equitable remedy of rescission, which is tightly controlled and subject to its own defences."[172]

Fortunately, the characterization of consequences of rescission in the conflict of laws seems to be settled. Transfer of title is traditionally considered in separation of the contract underlying the transaction.[173] The general rule is that the question of whether the right of rescission exists is determined by reference to the law governing the contract,[174] and the question relating to the passing of title is governed by the law of the place where the property is situated at the time of the transfer. It follows that an issue concerning proprietary consequences of rescission, which is an integral part of an inquiry into the passing of title, must be treated as a proprietary issue to be determined by property rules of the *lex situs*. As explained, the scope of the *lex situs* should encompass both the domestic law of the *situs* and its conflict of laws rules. This is so the validity of the transfer of proprietary right may have to be decided by reference to the *lex contractus*, particularly where the *situs* is transitory.[175]

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171 See e.g. *Misrepresentation Act 1967* (UK) c 7, s 2(2); *Mahoney v Purnell*, [1996] 3 All ER 61. *C.f.* Commentators have argued for the possibility that a party may be ordered to make monetary restitution in lieu of specific restoration, so impossibility of *restitutio in integrum* would not automatically bar rescission. However, this method of rescission, known as "pecuniary rescission," has not been explicitly recognized by the court; Burrows, *Restitution*, *supra* note 36 at 541-42; Virgo, *Principles*, *supra* note 60 at 32-33; E Bant, "Restitutio in Integrum and the Change of Position Defence: Lessons from Rescission" [2007] RLR 13 at 26; Worthington, "Rescission", *supra* note 169 at 65; N Nahan, "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 UWA L Rev 66; P Birks, "Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence (*Mahoney v Purnell*)" [1997] RLR 72.

172 Millett "Proprietary Restitution," *supra* note 53 at 321 [emphasis added]. Millett also controversially remarks that specific restitution following rescission "should be confined to cases of land or other property of special value to the claimant;" Millett, "Constructive Trusts," *supra* note 54 at 416. The rationale behind this submission seems to coincide with the proprietary consequences of breach of contract of sale which is specifically enforceable. A claim for breach of contract typically sounds in damages only, but equity may impose a constructive trust upon the object of sale where the vendor fails to honor his specifically enforceable obligation; see Worthington, *Proprietary Interests*, *supra* note 75 at 168-172. Such restriction on proprietary restitution, as proposed by Millett, is nonetheless inconsistent with existing authorities; *Car & Universal Finance Co Ltd v Caldwell*, [1965] 1 QB 525, [1964] 1 All ER 290. In the context of insolvency, see Richard Calnan, *Proprietary Rights and Insolvency* (Oxford, UK: Oxford University Press, 2010) at paras 4.84-4.93; compare E Bant, "Trusts, Powers and Liens: An Exercise in Ground-Clearing" (2009) 3 J Eq 286 at 302-03 (Bant, "Trusts, Powers and Liens").

173 *Dicey, Morris & Collins*, *supra* note 1 at paras 24-006–24-008.

174 Characterization of the right of rescission as unjust enrichment or contractual seems apt either way, since Rule 230(2)(a) [for claims arising *in connection with* a contract] will also point to the *lex contractus*; see *Dicey, Morris & Collins*, *supra* note 1 at 34-017–34-029; Pitel, *supra* note 7 at 353 argues that the remedy following an ineffective contract will be characterized as "contractual" simply because "[r]escission has historically been analyzed as a contractual remedy, and absent widespread change of view, is likely to continue to be characterized as part of the law of contract."

175 See *supra* note 160 and accompanying text. This proposal should be contrasted with the position adopted in *Glencore*, *supra* note 134 at paras 29, 42, where Moore-Bick J, while rejecting *renvoi*, held that to the extent that the domestic law of the *situs* gives effect to the parties' intentions as expressed in the contract, it is open for the *lex situs* to apply the proper law of the contract in order to ascertain such intentions. A further alternative approach involving an "ancillary issue of title" is adopted by Panagopoulos, *supra* note 3 at 80-81.

Next this article turns to the retained equitable interests. Where resulting trusts arise in connection with a valid transfer of legal title pursuant to a void contract, characterization under the conflict of laws is similar to situations where the contract is voidable. The validity of the transfer, and of the transaction effecting the transfer, forms two separate inquiries and proprietary consequences must be dealt with by the *lex situs*. Thus, Rule 230(2)(a) which governs restitutionary claims "arising in connection with a contract" cannot be used to determine questions relating to title.[176] This analysis is also analogous to cases of purchase money resulting trusts, where the claimant alleges that he has provided the purchase price for a property bought abroad in the defendant's name. Here, an issue of title must be decided in accordance with the *lex situs*, notwithstanding that this might not be the law that has the closest connection with the relationship between the parties. On its face, this proposition may stand at odds with the decision of the Court of Appeal in *Lightning v Lightning Electrical Contractors Ltd*,[177] where the court held that English law, as the law governing the relationship between the parties, was determinative of the question of title in a property registered in Scotland. Millett LJ remarked that it would be "absurd" to apply *lex situs* in situations where another law provides connections to all elements of the relationship except the *situs* of the relevant property. As he argued:

> Such a rule would lead to bizarre results if, for example, A's instructions were to buy properties in more than one jurisdiction, for the consequences of the same arrangement might then be different in relation to the different properties acquired. It would also lead to bizarre results if A left it to B's discretion to choose the property to be acquired since that would give B the unilateral power to decide on the legal consequences of the transaction he had entered into with A.[179]

However, similar to failed contracts, the law governing the relationship between the parties need not be determinative of proprietary consequences. If it were otherwise, the question of title would have to be characterized differently between cases where third-party rights have intervened and cases where there is no involvement of third parties.[180] The former would be characterized as a proprietary issue determinable by the *situs* rule,[181] while the latter as an issue regulated by the law governing the relationship. In order to avoid such inconsistency, the decision in

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176 Claims arising "in connection with a contract" are given a wide interpretation to encompass personal consequences of a failed contract. See *Dicey, Morris & Collins*, *supra* note 1 at para 34-028.

177 (23 April 1998) unreported [*Lightning*]; *Dicey, Morris & Collins*, *supra* note 1 at para 29-064.

178 Stevens, "Resulting Trusts," *supra* note 84 at 156; Chong, "Choice of Law," *supra* note 84 at 871, 877-78; *c.f.* Joanna Bird, "Choice of Law" in Rose, *Restitution*, *supra* note 100 at 118 [Bird, "Choice of Law"].

179 Stevens, "Resulting Trusts," *supra* note 84 at 156.

180 *Glencore*, *supra* note 134 at para 30, Moore-Bick J.

181 Panagopoulos would see it as raising an *ancillary* issue, see *supra* note 3 at 79-81.

Lightning would have to be reinterpreted. One possible explanation is that the claim was characterized as proprietary and was governed by the law of Scotland, including its conflict of laws rules, which pointed to English law for determination of title. The application of *renvoi* could then provide a safeguard against the "bizarre results" envisaged by Millett LJ. Alternatively, it is also possible that Scottish domestic law, as the applicable law identified by the Scottish conflict rules, recognized an English title arising from resulting trusts.[182]

D. Proprietary Consequences of Mistaken Transfers and Transfers by Ignorance

Issues relating to the nature of claims arising from mistaken transfers and transfers by ignorance are arguably posited at the very heart of the unjust enrichment-property debate. Unlike cases concerning transfers pursuant to void and voidable contracts, examined in the previous part, considerations pertaining to contracts, which could potentially obscure the division between property and enrichment, are not present here. At the level of the conflict of laws, it is in cases of mistaken transfers and transfers by ignorance where a direct clash occurs between the *situs* rule and the enrichment regime of Rule 230(2)(c) in *Dicey, Morris & Collins*. The discussion in this part shall commence with a detailed survey of the domestic understanding of a causative event, which provides the basis for recovery of assets transferred in these situations. On that footing, characterization of such proprietary claims for the purposes of the conflict of laws shall ensue, again with an argument that these claims invoke the choice of law regime for property.

With regard to cases of transfers by ignorance in the domestic law, the original legal owner is able to bring a *vindicatio* claim, asserting that he remains the owner throughout, because there is no intention to transfer the property to the claimant.[183] Examples of these situations are where the prevalent mistake in the claimant's mind when making the transfer is severe, or where the claimant is wholly ignorant of the transfer.[184] However, there may also be instances where legal title passes despite the ignorance of the legal owner. While it is clear that remedies should be permitted to the original legal owner, it is necessary to determine whether the true basis of recovery, in the eyes of the domestic law, falls squarely within the law of unjust enrichment or the law of property. The facts of

182 This analysis is analogous to the explanation of Moore-Bick J in *Glencore*, *supra* note 134 at paras 29, 42.

183 Virgo, *Principles*, *supra* note 60 at 132.

184 For fundamental mistake, see e.g. *Cundy v Lindsay*, (1878) 3 App Cas 459; *c.f.* Charlie Webb, "Property, Unjust Enrichment, and Defective Transfers" in Chambers, Mitchell & Penner, *supra* note 10 at 358-62. The author argues that no distinction should be drawn between simple mistake cases where a personal claim based on unjust enrichment is available because there is no *intention to benefit*, and cases involving fundamental mistake, where an assertion of title is possible because of an absence of the *intention to pass title*. For him, with the exception of a transfer on trust, "the intention to pass title and the intention to benefit are, in such cases, indivisible." Therefore, both cases should be treated alike. The disposition should be effective until rescinded.

Lipkin Gorman v Karpnale Ltd[185] provide an excellent example for this discussion. Here, Cass, a solicitor, misused his power of attorney to withdraw a client's money held by the claimant solicitors' firm and used it to gamble at the defendant club. Although the House of Lords held unanimously that the firm could recover the money, the precise basis of the House of Lords' decision is unclear. The difficulties of working out the rationale of *Lipkin Gorman* may be attributable to the way that the case was pleaded. Although the claimant could equally have brought a proprietary claim involving an assertion of equitable title, the case as pleaded was concerned only with a personal claim: an action for money had and received.[186] As Lord Goff explained, Cass acquired legal title to the money on receipt,[187] and had the case been pleaded in equity he would have had no problem finding that Cass held the money on trust for the claimant.[188] That much is clear, but the rationale for the success of a personal claim requires a closer inspection.

As Birks argued, *Lipkin Gorman* was concerned purely with an action for unjust enrichment.[189] However, since Cass acquired legal title to the cash before transferring it to the defendant club, and issues concerning equitable entitlements were not put before the court, it was not clear what could indicate the requisite correspondence between the defendant's enrichment and the claimant's impoverishment. In Birks' view a non-proprietary, causal link was sufficient to establish a claim against a remote recipient and the claimant only had to prove that the club would not have received money *but for* the money having been taken from the firm. However, it is doubtful whether this non-proprietary link could have been sufficient. The requisite correspondence needs to be established by a transactional linkage, not a causal one.[190] Cass could still have intended to gamble at the club even if he had failed to withdraw the claimant's money. Neither was it possible to establish a transactional link by invoking the claimant's equitable entitlement. An unjust enrichment claim, complemented by an equitable transactional link, would undermine the well-settled distinction between a receipt-based personal claim in equity, which requires the defendant's notice of the claimant's title,[191] and the strict liability regime of the common law action for money had and received.[192] In any event, it would be odd to allow a purely personal claim to reach beyond a direct

185 *Lipkin Gorman*, *supra* note 15.

186 *Ibid* at 572, Lord Goff; *c.f. El Ajou*, *supra* note 93, where the claim based on ignorance, involving breach of fiduciary duty, was explicitly pleaded in equity.

187 This was the result of the common law rule that enables a dishonest partner who, outside the scope of his authority, makes a withdrawal from an account to which the partnership is entitled, to vest the title to money in himself, rather than in the partnership; *Union Bank of Australia v McClintock*, [1922] 1 AC 240; *Commercial Banking Co of Sydney Ltd v Mann*, [1961] AC 1.

188 *Lipkin Gorman*, *supra* note 15 at 572-574.

189 Peter Birks & Charles Mitchell, "Unjust Enrichment" in Peter Birks, ed, *English Private Law* (Oxford, UK: Oxford University Press, 2000) vol 2 at paras 15.26-15.32.

190 Smith, "Structure of Trusts," *supra* note 10 at 417. This is now confirmed in *Foskett*, *supra* note 68.

191 *El Ajou*, *supra* note 93. *Akindele*, *supra* note 96 (unconscionable receipt), *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 (constructive notice).

192 Smith, "Structure of Trusts," *supra* note 10 at 434-36.

recipient of the money.[193] Birks' explanation of *Lipkin Gorman*, based on unjust enrichment, seems unsatisfactory.

An alternative explanation of *Lipkin Gorman* is suggested by Smith, who argues that there is a distinction to be made between unjust enrichment claims based on title and those concerning defective transfers. *Lipkin Gorman* was a title-based unjust enrichment claim, and the requisite correspondence between the enrichment and impoverishment in such cases could be established by a "title link," provable by a tracing exercise.[194] This approach does have support from the distinction proposed by Millett between a "purely personal claim" and a "property-based personal claim" discussed earlier.[195] For Millett, a property-based personal claim "even at law …can be brought against a successor in title of the original recipient."[196] This rationale may explain why the claimant could trace its ownership interest to the money now held at law by the defendant, despite the legal title having vested in Cass, and not the claimant, immediately before being passed on to the defendant club. Nevertheless, Professor David Fox doubted Lord Goff's reliance on the historical cases of *Taylor v Plumer*[197] and *Marsh v Keating*[198] in concluding that the original legal owner was entitled to trace his or her property into the product.[199] Essentially, he argued that *Taylor* was in fact an equitable claim[200] and that *Marsh* was difficult to reconcile with cases concerning ratification in the law of agency.[201] Neither case could, therefore, be invoked to support the finding of Lord Goff that the claimant could show his or her interests in the money immediately before the defendant's receipt, in order to support his or her personal claim based on unjust enrichment. Even if Smith's model of title-based enrichment claim is accepted, it is still unclear how the requisite "title link" could be proved for the purpose of establishing a claim in the instant case.

Another alternative explanation may be that *Lipkin Gorman* involved not a personal, unjust enrichment claim, but a *vindicatio* action following rescission at common law.[202] The claim in *Lipkin Gorman* might have represented a common law

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193 Millett, "Proprietary Restitution," *supra* note 53 at 319.

194 Smith "Structure of Trusts," *supra* note 10 at 417-18; *Lipkin Gorman*, *supra* note 15 at 573-74.

195 *Supra* notes 4-6 and accompanying texts.

196 Millett, "Proprietary Restitution," *supra* note 53 at 319.

197 (1815) [1814-23] All ER Rep 167 KB (Eng).

198 (1834) [1824-34] All ER Rep 226 HL (Eng).

199 Fox, "Substituted Assets," *supra* note 55; *c.f. Lipkin Gorman*, *supra* note 15 at 573-74, Lord Goff.

200 Fox, "Substituted Assets," *supra* note 55 at 60 ("*Taylor v Plumer* and the equitable principles … have been transplanted into the common law").

201 *Ibid* at 64-67 especially at 66.

202 As the domestic common law lacks an action to enforce directly legal interests in property other than land, the explanations adopted by commentators who accept *Lipkin Gorman* as an action based on some form of proprietary interests may vary slightly. Sheehan analyzes the claim as an action for money had and received contingent upon an election to revest a legal title; Duncan Sheehan, "Proprietary Remedies for Mistake and Ignorance: An Unseen Equivalence" [2002] RLR 69 at 85; Fox considers it as an action for conversion; Fox, "Substituted Assets," *supra* note 55 at 70-72. In contrast, Smith prefers an analysis based on a personal enrichment action parasitic upon a vested interest "less than full common law ownership"; Lionel D Smith, *The Law of Tracing* (Oxford, UK; Clarendon Press, 1997) at 325-26, [Smith, *Tracing*]; Lionel Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 Tex L Rev 2115 at 2163.

equivalent to cases of transfers voidable in equity. While a transferor who enjoys an equitable right of rescission has power torevest an equitable title, a transferor whose intention has been vitiated by grounds for rescission recognized at common law, or who is completely ignorant of the transfer, which is for some reasons effective at law, can revest a legal title.[203] As opposed to the previous approaches, the adoption of this line of reasoning would immediately locate *Lipkin Gorman* within the law of property, rather than unjust enrichment, and would clash head-on with the explicit recognition of Lord Goff in *Lipkin Gorman* that the claim brought by the claimant was strictly personal.[204]

With respect to cases involving mistaken transfers, there are opposing views on the question of whether beneficial title to the fund will pass to the transferee at the time of the transfer.[205] On the one hand, some advocate the view that the transferee obtains beneficial title, while the transferor retains mere power to rescind the transfer.[206] The nature of the transferor's interest is that of an inchoate title, which falls short of a vested proprietary right.[207] Only once rescission is effected

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203 Recognized grounds for rescission at law are fraudulent misrepresentation and coercion amounting to duress. The prime difference between a power to rescind the conveyance at law on these grounds and a power to revest legal title in *Lipkin Gorman*-type (ignorance) cases is that, in the case of rescission, a power is defeasible by a *bona fide* purchase defence; *Phillips v Phillips*, (1861) 4 De GF & J 208, 45 ER 1152. In contrast, it is controversial whether the *Lipkin Gorman*-power is similarly vulnerable. Compare Sheehan, *supra* note 202 at 76-77, 85; Smith, *Tracing*, *supra* note 202 at 337. The only clear cases where a *bona fide* purchase defence may defeat a *Lipkin Gorman*-power are in relation to title to money and negotiable instruments; this point was conceded in the argument made in *Lipkin Gorman*, *supra* note 15 at 557, and also in cases of sales in market overt; see Bant, "Trusts, Powers and Liens", *supra* note 172 at 299.

204 *Lipkin Gorman*, *supra* note 15 at 572.

205 Another view, which is not of concern here, is that the transferor can have resort to personal claims only; William Swadling, "Rescission, Property, and the Common Law" (2005) 121 Law Q Rev 123; *Westdeutsche*, *supra* note 18. Note also the conceptual difficulties in holding that interests in the fund are actually transferred between the parties. The interests in the chose in action held in the beneficiary's bank account are freshly created by the bank and have never been owned by the originator; see David Fox, *Property Rights in Money* (Oxford, UK: Oxford University Press, 2008) at ch 5; Calnan, *supra* note 172 at para 4.108.

206 Birke Häcker, "Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model" (2009) 68 Cambridge LJ 324; Worthington, "Rescission," *supra* note 169; *El Ajou*, *supra* note 93. This mere power to revest title, being a mere equity, will subsist until defeated by *bona fide* purchase by a subsequent recipient or until the property has been dissipated. Once rescission is sought, the resulting trust would relate back to the time of transfer, as if an equitable ownership interest has never been passed on to the recipient; *Re Garnett*, [1886] 33 ChD 300 at 306.

207 This view is generally accepted, but it is in no way universal. For an alternative view, Sheehan argues that both powers to revest legal and equitable title are fully vested proprietary rights, with a result that only an equitable power may be defeated by a *bona fide* purchase of a legal interest; Sheehan, *supra* note 202 at 75-77, 85. *C.f.* B McFarlane, *The Structure of Property Law*, (Oxford, UK: Hart Publishing, 2008) at 299-303 where the author argues that, unlike equitable powers, a common law power is similar to a vested equitable right. The consequence is that the transferee of a property subject to a common law power is at no time permitted to treat the property as his own. Furthermore, in the context of insolvency, a mere power may be regarded as a fully vested proprietary interest exercisable against trustees in insolvency; Calnan, *supra* note 172 at paras 4.84-4.93; Compare Bant, "Trusts, Powers and Liens", *supra* note 172 at 302-03.

does that mere equity become fully vested and the transferor can avail himself or herself of a proprietary claim over the original asset or its substitute. On the other hand, other commentators are in favour of the immediate trust interest model.[208] For them, the asset is not simply impressed with a mere equity, but a fully vested equitable proprietary interest. The leading authority in support of this immediate trust interest model could be found in *Chase Manhattan Bank v Israel-British Bank (London)*,[209] which is, however, an object of controversy.[210] Nonetheless, for the purpose of characterization, it is unnecessary to definitively decide which model the transferor's subsisting interests reflect. Whether the claim is concerned with a mere equity or a fully vested equitable ownership interest, the existence of a proprietary remedy is not explicable by reference only to the law of unjust enrichment. As has been noted, a reversal of unjust enrichment could be achieved by stripping the defendant of not just the very object which he or she received from the claimant, or its traceable proceed, but any asset within the defendant's patrimony.[211] The availability of a proprietary remedy cannot be a result of a causative event based on unjust enrichment.

Suppose the power model is adopted and beneficial title passes at the time of the transfers, an additional problem of characterization at the level of domestic law may resurface in relation to contingent claims in this model. Of course, a transferor may bring a personal action for the reversal of unjust enrichment on grounds of mistake; it is relatively clear that this action is characterized as part of the law of unjust enrichment in the domestic law.[212] However, provided that the transferor's asset is still identifiable, there may also be an issue concerning the claimant's assertion of proprietary interests following rescission. The relevant question here is whether title that accrues post-rescission does in fact arise to reverse unjust enrichment, with the effect that the cause of action may be classified as an enrichment claim within the domestic law. One may find the enrichment classification palatable as it

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208 Chambers, *Resulting Trusts*, *supra* note 57 at 23-25; Smith, "Philosophical Foundations," *supra* note 10 at 293-97 especially at 295-96. Smith, for example, argues that mistaken transfer cases are analogous to cases where resulting trusts arise in favour of a person who has fully performed his part of the contract, such as those who have made a payment of full price under a contract of sale; *c.f.* Worthington, *Proprietary Interests*, *supra* note 75 at 171, argues that trust could only arise where performance was completed pursuant to a contract which is specifically enforceable.

209 *Chase Manhattan*, *supra* note 26.

210 See *Westdeutsche*, *supra* note 18 at 715, Lord Browne-Wilkinson. Lord Browne-Wilkinson thought that *Chase Manhattan* "may well have been rightly decided" on the basis that "[a]lthough the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust"; *c.f.* Millett, "Constructive Trusts," *supra* note 54 at 412-13. For Millett, even notice of a mistake might not have been sufficient. *Chase Manhattan* "was wrongly decided, not because the defendant had no notice of the plaintiff's claim … but because the plaintiff had no proprietary interest for it to have notice of."

211 Penner, "Value," *supra* note 73 at 329.

212 *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, [1980] QB 677, [1979] 3 All ER 522.

offers consistency with situations where the transferor elects to pursue a personal action only. Nevertheless, the enrichment analysis of proprietary consequences of rescission is open to doubt; again, it does not explain why the original owner should obtain a proprietary interest in a particular asset. Further, an assertion of proprietary interests under a resulting trust following rescission only seems to require the claimant to prove the transfer together with an absence of consideration. If such a proprietary claim were to be explicable on grounds of unjust enrichment, it would probably reflect a *sine causa* unjustified enrichment model of the civilian tradition, rather than the common law perception of an unjust enrichment regime.[213]

Thus, in the domestic law, the tendency to oversubscribe proprietary claims to an unjust enrichment explanation should be resisted. To the extent that restitution refers to remedies available to a person seeking to vindicate his subsisting proprietary interests, proprietary claims undoubtedly form part of the law of restitution. But restitution is not unjust enrichment, and to explain proprietary restitutionary claims on the overarching principle of unjust enrichment is perhaps an attempt to resurrect the defunct theory of Quadration. This approach therefore looks unsustainable.

In an analogous discussion in the context of the conflict of laws, it is clear that proprietary and personal consequences of the transfer, such as cases relating to contracts and equitable wrongs, should be treated in separation. Despite claims involving mistaken transfers and transfers by ignorance being normally treated as classic examples of unjust enrichment cases, a stress on unjust enrichment reasoning should not be used to conceal the proprietary nature of the *vindicatio* claim, whether at law or in equity. Although it is true that the language of Article 10 of the *Rome II Regulation* makes clear that cases of "payment of amount wrongly received" will be treated as unjust enrichment, it is doubtful whether the "non-contractual obligations" referred to in Article 10 can encompass trust obligations relating to a specific asset.[214] Since few would doubt the rationality of treating separately the validity of the passing of title and that of the contract effecting the transfer, there is no reason why the position should be different where the underlying transaction is a unilateral transfer rather than a contract. As such, whereas personal claims are undoubtedly based on the reversal of unjust enrichment, proprietary claims and all questions relating to title, such as the existence or extinction of legal or equitable power to revest title, must be characterized as property and governed by the *lex situs*, including its rules of

213 Penner, "Value," *supra* note 73 at 330. This is because the traditional analysis of presumed resulting trusts involves a presumption of disposition on trust in favour of the transferor where the transfer is made for no consideration. Unlike unjust enrichment, the resulting trust analysis is not predicated upon there being anything unjust about the transfer.

214 *Rome II Regulation*, *supra* note 14 at Art 10.

conflict of laws.[215] The true basis of claim in cases such as *Lipkin Gorman*[216] would have to be clarified before characterization of claims can be considered should the case arise in the context of the conflict of laws. While as a matter of domestic law the ground of recovery in *Lipkin Gorman* may remain open to debate,[217] a definitive classification must be given to a cause of action, or issue, in private international law. Without it, the identification of an appropriate choice of law regime will not be possible.

From the perspective of the conflict of laws, it does not matter whether the assertion of property rights involves a fully vested ownership right or a mere power to revest title, whether at law or in equity, these are all claims concerning a question of title, which must be characterized as proprietary. Just as in the context of contract and the passing of title, the internal balance between personal and proprietary claims of the relevant legal systems can be safeguarded by an adoption of the rule against double recovery and a reference to an incidental question concerning the passing of title when considering the availability of a concurrent personal claim.

Some may argue that the significance of characterization in this particular context should not be exaggerated. The argument might run as follows: for money transfers, it is difficult to speculate on situations where the relevant *situs* does not coincide with the place of receipt and, therefore, of enrichment. Under Rule 120 in *Dicey, Morris & Collins*, the *situs* of choses in action is in the country "where they are properly recoverable or can be enforced."[218] For money in bank accounts, the

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215 On this analysis, *Chase Manhattan*, *supra* note 26, may well have been rightly decided. In that case, Goulding J found that under both New York and English law, a constructive trust was immediately created in favour of the transferor upon the mistaken transfer to the New York account of the defendant payee. Thus, it was unnecessary to decide which law governed the proprietary claim; see *Chase Manhattan*, *supra* note 26 at 115. Nonetheless, it is now clear this set of facts does not give rise to constructive trusts in English law; *Westdeutsche*, *supra* note 18, but *Chase Manhattan* may have been correctly decided because the proper law of the proprietary claim, the *lex situs*, was the law of New York under which remedial constructive trusts are available.

216 *Lipkin Gorman*, *supra* note 15.

217 As the defendant was solvent, it was unnecessary for the claimant to bring a proprietary action and the case was pleaded exclusively as a personal unjust enrichment claim. Nonetheless, as discussed above, the reasoning that the judge employed in upholding the claimant's personal action is contentious.

218 *Dicey, Morris & Collins*, *supra* note 1 at 1116. *C.f.* Rogerson, *supra* note 160 at 443-444, 457-460, where the author argues that the ascription of *situs* should be given up in relation to debts since the choice of law rules for transfers and enforcement of debts, which obviously include money held in bank accounts, aim at identifying the *lex causae*, which may not be the *lex situs*. For more recent discussion on this point, see *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC (The Mount I)* [2001] QB 825 at 849 criticizing *Re Queensland Mercantile and Agency Co* (1891), [1892] 1 Ch 219; Michael Bridge, "The Proprietary Aspects of Assignment and Choice of Law" (2009) 125 Law Q Rev 671; Trevor Hartley, "Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation" (2011) 60 ICLQ 29. Nevertheless, Rogerson concedes that her argument may succeed when the discussion centers on assignment and enforcement of personal debts and that it only applies where "the issue is not really proprietary" but involves only "the discharge of an obligation." Thus, to the limited extent that a contractual right is regarded as property for the purposes of assignment and enforcement, the ascription of *situs* may rightly be misconceiving. However, the issue at stake here is concerned neither with assignment nor enforcement, but rather with priority to proprietary entitlement to money held in a bank account. This raises an issue analogous to one which arose in *Macmillan*, *supra* note 4, and which, it is argued, is properly characterized as proprietary.

situs is the location of the branch where the account is kept.[219] Where money is mistakenly transferred into a bank account, this place should always represent both the relevant *situs* and the place of receipt and enrichment.[220] Therefore, at least in relation to money transfers, the question whether *Lipkin Gorman* or *Chase Manhattan*-type claims should be characterized as unjust enrichment or property may be redundant; the *lex situs* will always coincide with the law of the place of enrichment. Characterization may, therefore, seem apt either way. On the other hand, this line of argument may be questionable on two grounds. First, at a doctrinal level, it is undesirable to have the breadth of the common law perception of restitution in the domestic law obscure the clear Romanistic boundaries between property and obligations in the conflict of laws. Giving restitutionary classification to a proprietary claim is also conceptually inconsistent with *Macmillan*.[221] Secondly, while the view that, for money transfers, the *situs* should always correspond to the place of enrichment may be true, the non-separation between enrichment and property is prone to be misleading. Take for example a case where equitable mortgage is created over a fund deposited in an account held in New York to secure a loan taken out in London. Depending on the terms of contract between the mortgagor and the New York bank, the income stream from the fund may be directly generated in London to be applied in satisfaction of the repayment of loan monies. Here, whether the mortgagee validly obtains a security interest in New York is a proprietary question to be determined by the *lex situs* rule, but the governing law regarding the question of whether and to what extent the mortgagee is unjustly enriched by the income stream, if the mortgage turns out to be invalid, must be identified by the choice of law rule for unjust enrichment. In the latter case, it is misleading to say that the place of receipt of the failed mortgaged amount represents the place of enrichment, since the relevant receipt is that of the income stream not of the original fund. Conversely, the application of the restitutionary choice of law rules, though appropriate for dispute concerning the income stream, is futile in relation to claims asserting proprietary interests in the mortgaged fund.

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219 *Dicey, Morris & Collins*, *supra* note 1 at para 22-029.

220 This is analogous to transfers of negotiable instruments where the place of receipt and enrichment and the *situs* of the object of transfer always coincide; *Macmillan*, *supra* note 4 at 411; *Goodwin v Robarts* (1875) LR 10 Ex 337; *Picker v London and County Banking Co Ltd*, (1887) 18 QBD 515; *London Joint Stock Bank v Simmons*, [1892] AC 201. *C.f.* Where enrichment is alleged to arise from the deposit of share certificate, the place of receipt and enrichment may differ from the *situs* of shares (the place of incorporation); see *Macmillan*. For discussion concerning the *situs* of shares of the company see *supra* note 64 and literature cited therein.

221 *Macmillan*, *supra* note 4. However, this must be contrasted with *El Ajou*, *supra* note 93, where Millett J decided a proprietary issue, using the applicable law identified by the choice of law rules for restitutionary obligations. See also the discussion in *supra* note 151.

E. Remedial Constructive Trusts

In some jurisdictions, particularly in North America, there are cases where the court can exercise its discretion to impose constructive trusts to reverse or prevent unjust enrichment.[222] Although the concept of remedial constructive trusts has not found favour in England, the characterization of such claims under private international law may shed some light on the correctness of the treatment of all claims alleging proprietary ownership interests as property. Here, the word *remedial* should not mislead one into thinking that the imposition of constructive trusts is a procedural matter to be governed by the *lex fori*.[223] La Forest J has stated that under the domestic law, the imposition of remedial constructive trusts can "both *recognize* and *create* a right of property."[224] This *dictum* suggests that, despite being labelled as remedial, the finding of constructive trusts by the Canadian court is not merely a remedial option, but may equally represent recognition of substantive rights. For instance, in cases concerning trusts over matrimonial homes, there is little to distinguish between the Canadian approach, based on the remedial constructive trust, and the English court's finding of an institutional constructive trust.[225] Similarly, in *Chase Manhattan*, even though Goulding J recognized the possibility that New York law would have considered the claim as involving a remedial constructive trust, it is clear from his analysis that the imposition of a trust was not segregated from the substantive issue.[226]

If the remedial constructive trust is indeed a matter of substantive law, the remaining problem then lies in the identification of the appropriate choice of law rules. In fact, leading Canadian cases on remedial constructive trusts are all based on the reversal of unjust enrichment.[227] It not surprising then that the Canadian conflict of laws, obviously influenced by Canada's domestic law, would characterize the claim as being governed by the law of the place of enrichment. For example, in *Christopher v Zimmerman*[228] after the breakdown of a relationship, a common law

222 *Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621; *Rawluk v Rawluk*, [1990] 1 SCR 70, 65 DLR (4th) 161; *Ellingsen (Trustee of) v Hallmark Ford Sales Ltd*, 2000 BCCA 458, [2000] 190 DLR (4th) 47.

223 Yeo, *supra* note 98 at 128.

224 *Lac Minerals*, *supra* note 24 at 676 [emphasis added].

225 English courts may "impute" to one partner an intention to hold the property on trust for the other; *Stack v Dowden*, [2007] 2 AC 432 at para 34, Lord Walker. In analogous cases, Canadian courts often sought a "sharing intention" before imposing remedial constructive trusts; see John D McCamus, "Restitution on Dissolution of Marital and Other Intimate Relationships: Constructive Trust or Quantum Meruit?" in Neyers, McInnes & Pitel, *supra* note 7 at 367. Similarly, it is now clear that in English law a direct financial contribution to purchase price is not the sole indicator of the requisite intention. Domestic services and other indirect financial support may be relevant. Canadian law has recognized this possibility much earlier; see *Peter v Beblow*, *supra* note 222 at 647-48, McLachlin J; *Stack v Dowden*, at paras 69-70, Baroness Hale; McCamus, at 370.

226 *Chase Manhattan*, *supra* note 26 at 128 (cited to Ch). However, this was *obiter* only since the judge (controversially) found English law to be the same as New York law. So there was no need to decide whether the trust was governed by the proper law or *lex fori*.

227 *Pettkus v Becker*, *supra* note 33, and cases referred to in *supra* note 222.

228 2000 BCCA 532, [2001] 192 DLR (4th) 476.

wife claimed equitable interests over movables situated abroad. Having declined the trial judge's finding that the relationship was analogous to marriage, and that the claim should be characterized as marital property governed by the *lex domicilii* (law of the domicile), the Court of Appeal of British Columbia held that the claim was based on unjust enrichment and should be governed by the law of the place of enrichment. Arguably, the warning of Millett LJ in *Lightning* applies equally here.[229] It might accord with common sense that questions relating to entitlement to matrimonial movable property should be governed by one law only and that the result should not depend on the *situs* of each property, which may be randomly located.[230] However, it is difficult to see how the enrichment regime could ensure that result. There may well be different places of enrichment for the receipt of each property, which are very difficult to determine. On the facts of *Christopher*, the Court of Appeal had to order a new trial specifically to figure out such places. Hence, the Canadian court's enthusiasm on the law of unjust enrichment, both at the domestic and conflict of laws levels, should be regarded as anomalous. Even in the domestic law, commentators have doubted whether cohabitational cases are really explicable on the basis of the law of unjust enrichment.[231] For the conflict of laws, the editors of *Dicey, Morris & Collins* concede that, "in view of the diversity of situations [...] it may be that the place of the enrichment will not always give an answer which corresponds to the law which has the closest connection with the claim" and that "in some cases there will be a pre-existing relationship between the parties which, though not contractual, may justify giving weight to the law which governed that relationship."[232] It is clear that *Christopher* was an example of such cases. In light of this, one can only wonder why *Christopher* is cited as a good judicial approval of Rule 230(2)(c) in relation to a claim alleging title to property.[233] The trial judge's approach in characterizing the claim as matrimonial property is preferable. Failing that, characterization as a property claim, which leads to the application of the *lex situs* and *renvoi*, is also likely to point to the law with the closest connection to the relationship.

IV. CONCLUSION

As this article has demonstrated, the uncertainties surrounding characterization of proprietary restitution under the conflict of laws are partly attributable to the confusing usage of the terms "restitution" and "unjust enrichment." Where claims are properly found to be restitutionary, the courts have been precipitous in ruling that such claims should be governed by the choice of law regime for unjust

229 *Lightning*, *supra* note 177.
230 In contrast, title to immovable property is unquestionably governed by the *lex situs*.
231 Smith et al, *supra* note 33 at 361.
232 *Dicey, Morris & Collins*, *supra* note 1 at para 34-031
233 *Ibid* at 1885, n 5.

enrichment. However, on a closer inspection, none of the cases which have been relied upon as supportive authorities for the use of Rule 230(2)(c) to govern claims of proprietary restitution are actually about the reversal of unjust enrichment. As such, the restitutionary characterization of proprietary restitution may look difficult to defend.

Another source of uncertainties can be found in the English court's inactive attitude toward the characterization process. The Court of Appeal's decision in *Macmillan* is one of the rare instances where characterization was discussed in detail. Although it is commendable that the Court did not fall into the trap that the claimant in *Macmillan* had created by pleading the claim in restitutionary terms, the reasoning offered by the Court contributed little to clarifying the characterization of proprietary restitution. Perhaps, thanks to the Court's failure to rule definitively that all claims asserting proprietary ownership interests must be characterized as proprietary, *Macmillan* has been interpreted to accommodate the restitutionary approach to characterization of proprietary claims. Although such an approach, which involves the combination of a cause of action based on unjust enrichment and an ancillary proprietary issue, does benefit from internal consistency and could be relied upon to explain most cases of proprietary restitution, the underlying line of reasoning seems nothing but doubtful. It cannot explain why in *Thahir* or *Christopher* an ancillary proprietary issue did not arise. Nor can it provide justification for the different characterization of two similar claims where there is an involvement of a third party in one claim and none in the other.

On the other hand, although the theoretical justification for characterization as an assertion of hard-nosed property rights looks strong, the approach suffers from a lack of positive judicial support.[234] But again, that is perhaps caused by English law's general ineptitude at the conflict of laws characterization. Cases are shown to have been justly decided and the applicable laws rightly identified without the need to embark on a detailed characterization analysis. In any event, the substantive choice of law rules themselves can essentially be modified to give effect to the law with the closest connection, which is ultimately the *raison d'être* of the various choice of law regimes. Thus, it is unsurprising that many commentators on unjust enrichment-restitution in the conflict of laws feel more productive engaging directly in the substantive choice of law rules, rather than indulging in characterization.[235] Despite characterization being commonly understood as the first step that the court has to consider in its determination of the choice of law, proprietary restitution may be regarded as one of the few areas where an attempt to put the cart before the horse is perfectly apt. As Jonathan Harris summarizes:

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234 Bird, "Choice of Laws," *supra* note 178 at 118.

235 Yeo, *supra* note 98; Stevens, "Resulting Trusts," *supra* note 84 at 153; Harris, "Trust," *supra* note 80 at 212-13; Pitel, *supra* note 7 at 357. See e.g. *Yugraneft*, *supra* note 106 at para 222.

> where constructive and resulting trusts are concerned, there is a stronger argument for starting with the question "which law is it most appropriate to apply to equitable claims where a property interest is ultimately at stake?", rather than asking "is the cause of action one in unjust enrichment, restitution for wrongdoing or property?" Practical considerations, not the characterization process, may prove the key to finding suitable choice of law rules.[236]

On this account, the property-unjust enrichment divide seems no less "pointless" here than in the context of the domestic law.

On the contrary, if one holds the view, as this article does, that characterization is an essential step that provides a platform upon which a doctrinally coherent structure of substantive choice of law rules may be constructed, it is to be hoped that the regime of choice of law rules, under Article 10 of the *Rome II Regulation*, correctly headed "unjust enrichment," will do what *Foskett v McKeown*[237] was destined to do for English domestic law, and what *Boys v Chaplin*[238] has done for choice of law rules for tort. Proprietary restitutionary claims must, for the conflict of laws purpose, be regarded as raising a proprietary issue so as to call into action the choice of law rules for property and must be entirely excluded from the ambit of Article 10 of the *Rome II Regulation*. The opportunity that the Court of Appeal in *Macmillan* had in making clear the distinction between "property," "unjust enrichment" and "restitution" for conflict of laws purposes has arisen once more, and this time it should not be left unnoticed.

236 Harris, "Trust," *supra* note 80 at 212-13.
237 *Foskett*, *supra* note 68.
238 [1969] 2 All ER 1085.