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Characterisation in Estonian Private International Law— a Proper Tool for Achieving Justice between the Parties?

1. Introduction

The purpose of the present article is to illustrate how the method of characterisation could be used in Estonian private international law in order to achieve justice between the parties. It is not surprising that neither the Estonian Code of Civil Procedure^{*1} (hereinafter referred to as the ECC) nor the Private International Law Act^{*2} (hereinafter referred to as the PILA) contains any provisions addressing how the characterisation/classification (*kvalifitseerimine/karakteriseerimine*) should be done—this is a question that various jurisdictions have traditionally left to be decided by the case law and legal theory.^{*3}

In general, there are three approaches to how the problems of characterisation can be solved. First, a court can characterise the issue at hand by its own domestic rules (characterisation by the *lex fori* approach). Secondly, a court can characterise the particular issue by the law that is expected to be applicable to the issue (characterisation by the *lex causae* approach). Although characterisation by *lex causae* might be favoured for achieving uniformity of judgements between courts of two different states (especially if these courts both follow similar choice of law rules), the *lex fori* approach is generally preferred for its practical advantages. After all, a court is best equipped with knowledge of its own substantive law, and in-depth analysis of foreign characterisation rules in the phase of choosing the applicable law would be burdensome to the parties, if not even unjust and contrary to their reasonable expectations. Even though there is no clear statutory rule in Estonian law as to how the characterisation should take place, some Estonian authors have expressed

¹ Tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197; RT I, 30.12.2010, 2 (in Estonian). English text available at <http://www.just.ee/23295> (1.7.2011).

² Rahvusvahelise eraõiguse seadus. – RT I 2002, 35, 217; RT I 2009, 59, 385 (in Estonian). English text available at <http://www.just.ee/23295> (1.7.2011).

³ Taking into account the long history of the problem, an exhaustive reference to the sources relating to the characterisation is impossible to make. However, for the most recent treatments of the topic, see R. Baratta. General Issues of Private International Law in the European System Reflections by Italian Scholars The Process of Characterization in the EC Conflict of Laws: Suggesting a Flexible Approach. – Yearbook of Private International Law 2004/6, pp. 155–169; J. Fawcett, J. M. Carruthers. Cheshire, North & Fawcett Private International Law. 14th ed. New York: Oxford University Press 2008, pp. 75–109; L. Collins (ed.). Dicey, Morris and Collins on the Conflict of Laws. Volume I. 14th ed. London: Sweet & Maxwell 2006, pp. 37–59.

a view that the characterisation by the Estonian courts should generally be done according to the *lex fori* and not by the *lex causae*⁴, provided, of course, that a particular problem in the case does not derive from a European or international instrument, in which case an autonomous interpretation should be preferred. Developing such autonomous concepts forms the third solution to the problem of characterisation, which prevails in the EC conflict of laws.

The author proposes that, though each of these approaches has its benefits, neither of these methods should be taken as the absolute rule in Estonian private international law. Though clear-cut rules are advantageous as they advance certainty in legal disputes, the method of characterisation should be flexible in order to realise justice between the parties.

2. The different approaches to characterisation

2.1. The use of autonomous definitions in Estonian private international law

A court may give meaning to a particular term used in a private international law rule by reference to certain autonomous definitions. Such definitions are created with account taken of the purpose of particular conflict rules and the findings of comparative law. They are not composed by reference to the substantive law of the forum or *lex causae*, and they differ according to the particular international instrument or system of rules in which the given term is used. For example, the term ‘tort’ can have a slightly different meaning in a European or bilateral instrument.

The autonomous concepts can be found in most European private international law instruments and international conventions. For example, it is to be expected that the problem of characterising certain issues as contractual or tortious will lose its meaning in Estonian private international law as more and more contractual and extra-contractual commercial disputes will be governed by the new Rome I⁵ and Rome II⁶ regulations, which will gradually replace the Estonian PILA rules on the law applicable to contractual and extra-contractual relationships. Naturally, recourse to autonomous concepts should prevail if the Estonian courts would apply the Hague Conventions or other conventions that are binding on the Republic of Estonia.⁷

Similarly, in interpretation of the concepts contained in the bilateral treaties concluded between the Republic of Estonia on one side and the Republic of Latvia, the Republic of Lithuania⁸, the Republic of Poland⁹, the Russian Federation¹⁰, or the Ukraine¹¹ on the other, there is a strong argument in favour of developing the autonomous definitions when giving meaning to the terms used in such treaties. Otherwise, a plurality of solutions might arise, depending on which courts are about to resolve a particular legal dispute, or, if the tractable concept is contained in a harmonised jurisdiction rule, confusion might even arise as to which court is competent to settle the dispute at hand. The bilateral treaties concluded with the Republic

⁴ I. Nurmela. *Rahvusvaheline eraõigus (International Private Law)*. 3rd ed. Tallinn: Juura 2008, p. 50 (in Estonian). On the distinction between the characterisation according to *lex fori* and *lex causae* in the context of personal connecting factors, see K. Sein. *Law Applicable to Persons Pursuant to Draft Private International Law Act*. – *Juridica International* 2001 (VI), pp. 135–136.

⁵ 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). – OJ L 177, 4.7.2008, pp. 0006–0016.

⁶ 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). – OJ L 199, 31.7.2007, pp. 0040–0049.

⁷ Estonia is bound by thirteen Hague Conventions and the Hague (2007) Protocol. See www.hcch.net (1.4.2011).

⁸ Eesti Vabariigi, Leedu Vabariigi ja Läti Vabariigi õigusabi ja õigussuhete leping (Treaty between the Republic of Estonia, the Republic of Lithuania and the Republic of Latvia on the legal aid and legal relations). – RT II 1993, 6, 5 (in Estonian)

⁹ Eesti Vabariigi ja Poola Vabariigi vaheline leping õigusabi osutamise ja õigussuhete kohta tsiviil-, töö- ning kriminaalasjades (Treaty between the Republic of Estonia and the Republic of Poland on the legal aid and legal relations in civil- employment- and criminal matters). – RT II 1999, 4, 22 (in Estonian).

¹⁰ Eesti Vabariigi ja Vene Föderatsiooni leping õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades (Treaty between the Republic of Estonia and the Russian Federation on the legal aid and legal relations in civil- family- and criminal matters). – RT II 1993, 16, 27 (in Estonian).

¹¹ Eesti Vabariigi ja Ukraina leping õigusabi ja õigussuhete kohta tsiviil- ning kriminaalasjades (Treaty between the Republic of Estonia and the Russian Federation on the legal aid and legal relations in civil- and criminal matters). – RT II 1995, 13/14, 63 (in Estonian).

of Poland, Republic of Latvia, and Republic of Lithuania have for the most part been superseded by the relevant European private international law rules (for example, by the Brussels I Regulation^{*12} and Brussels II bis Regulation^{*13}), but the autonomous concepts developed by the case law of the European Court of Justice cannot be used when Ukrainian or Russian citizens are involved in Estonian court proceedings or where the matter falls outside the scope of the European regulations. The following example illustrates the potential problems that may face the courts when they characterise the terms found in the bilateral treaties by Estonian substantive law according to the *lex fori*.

The bilateral treaty concluded between the Republic of Estonia and the Russian Federation (the Estonian–Russian Treaty) uses the notion of the ‘place of residence’ (in Estonian, *elukoht*; in Russian, *местожительство*) as a general personal connecting factor. For example, under Article 40 (3) of the Estonian–Russian Treaty, an injured party may submit his tort claim to the court of a State Party in whose territory the tortfeasor has his ‘place of residence’. If the Estonian courts would characterise the ‘place of residence’ under the *lex fori* (i.e., under the Estonian substantive law rules), provisions from the General Part of the Civil Code Act^{*14} would apply. According to §15 (1) in conjunction with §8 (2) of the General Part of the Civil Code Act, a minor under the age of 18 is considered to reside in the place where his legal guardian (usually a parent) has residence. Only exceptionally can it be decided that a minor ‘resides’ separately from his guardian—if the guardian has given consent to such determination and if the minor actually lives away from his guardian. Thus it is that, in general, claims against such minors would have to be submitted to the court of the place where the guardian of the particular minor resides. For example, if a minor actually resided in Estonia but without his guardian’s consent and his guardian were to reside elsewhere, he might not be sued in Estonia at all if the concept of ‘residence’ would be characterised under the *lex fori* (i.e., according to Estonian substantive law) by the Estonian court. Then the minor’s residence would be equated to his guardian’s and the claimant might be unable to sue the minor in Estonia at all. Such a solution could be tolerated only if the claimant could sue this particular minor in Russia. However, if the ‘residence’ of a minor is characterised differently under Russian substantive law, it might come to pass that the claimant will not be able to submit his claim even to the Russian courts.

According to the Russian Civil Code’s^{*15} Article 2.20.2 (*Место жительства гражданина*), minors under the age of 14 are considered to live in the place where their legal representative resides. Therefore, if a 16-year old minor were actually to be living in Estonia, he would have a ‘residence’ in the meaning of the Estonian–Russian Treaty in Estonia in the eyes of the Russian courts but not in the view of the Estonian courts. Conversely, he might have a residence in Russia according to the Estonian courts but not in the eyes of the Russian courts. Such inconsistency should be avoided when one is interpreting the terms of the Estonian–Russian Treaty. An autonomous concept of ‘place of residence’ for the purposes of interpretation of this bilateral treaty should be developed in order to avoid situations wherein the claimant is not able to make his claim in either of the signatories’ courts. In order to do this, the judge should distance himself from his own substantial law rules and find a balance between the need to protect the interests of the minor(s) and the need to bring about justice between the two parties.

It can be assumed that the purpose of the general rule of jurisdiction, which requires a link between the defendant and the forum, is to balance out the advantages that the claimant has gained through having the initial choice of whether to commence proceedings or not. Such an objective would lose its meaning if the defendant cannot really use the advantages that the ties to the home state would otherwise be destined to give him. Hence, the general rules of procedural representation should be taken into account when one is developing an autonomous term ‘place of residence’ for minors in the context of the bilateral treaties. For example, under the Estonian Code of Civil Procedure, in §202 (2), only those minors who have reached the age of 15 have the right to participate in the legal proceedings jointly with their legal representative. There-

¹² Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 012, 16.1.2001, pp. 0001–0023.

¹³ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. – OJ L 338, 23.12.2003, pp. 0001–0029.

¹⁴ Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian). English text available at <http://www.just.ee/23295> (1.7.2011).

¹⁵ Гражданский кодекс российской федерации от 30.11.1994 N 51-ФЗ. Available at <http://www.consultant.ru/popular/gkrf1/> (1.07.2011).

fore, in the case where a minor who lives in Estonia and apart from his legal guardian is younger than 15 years, it is highly questionable whether the claimant should be able to sue minor in the Estonian courts under the Estonian–Russian Treaty. This is because, in this case, the legal guardian of the minor who would have to be involved in the proceedings in the stead of the minor himself would not have any fundamental ties to Estonia.

Although autonomous concepts can create more certainty in the characterisation phase, recourse to such concepts is not always possible, for practical reasons. Not all Estonian conflict rules are contained in European or bilateral instruments. In addition, although there exists an authoritative organ for giving meaning to the autonomous concepts found in the European instruments—the ECJ—no such organ exists when the bilateral treaties come into play and the judges might be tempted, therefore, to turn to the *lex fori* or *lex causae* when faced with characterisation problems.

2.2. Characterisation by the *lex fori* or by the *lex causae*?

In certain cases, the *lex fori* approach is already expressly provided by the Estonian private international law rules themselves. For example, in order to determine the ‘residence’ of a natural person in the meaning of the PILA, a reference to Estonian substantive law is clearly made by the PILA’s §10 itself.^{*16} Such examples are, however, rare and will not be considered further, on account of their specific nature and scope. The existence of particular references to *lex fori* in some of the Estonian conflict rules should not necessarily be taken to mean that there is an absolute characterisation rule in Estonian private international law in favour of the *lex fori*. As practical as this solution might be for the Estonian legal practitioner, an absolute characterisation rule according to the *lex fori* must surely have exceptions, since strict adherence to the *lex fori* is not always even possible if the Estonian courts are faced with concepts that the domestic legislator has never foreseen. In such cases, a characterisation by the *lex causae* might be more appropriate in order to locate the issue under the Estonian private international law rule.

Examples illustrating the problem of recourse to *lex fori* not always being preferable include *mahr* (the bride price in Islamic law), which has not yet drawn the attention of the Estonian courts but has, for example, been ruled on by the neighbouring Swedish courts.^{*17} According to the Swedish authorities, the *mahr* could under Swedish law be characterised in two ways—if the *mahr* is intended to provide the divorced wife with the everyday necessities of life, it seems natural to consider it to be a kind of lump-sum maintenance, while conflict rules on the division of matrimonial property are closer to hand if the *mahr* appears to have more to do with the equalisation of the property situation of the spouses.^{*18} Should the Estonian courts encounter concepts alien to Estonian law (such as the *mahr*), a similar characterisation rule seems preferable. It should be noted, however, that this problem could soon be resolved on the European level as the European Commission has presented its proposal for a Council Regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions in relation to matters of matrimonial property regimes (COM (2011) 126 of 16 March 2011).^{*19} It will be interesting to see how the scope of the proposed regulation would interact with the scope of the existing Maintenance Regulation.^{*20}

In addition, blind characterisation by the *lex fori* might in certain cases even lead to the violation of basic rights and freedoms of the parties, not to mention their reasonable expectations. A good example here would be a same-sex marriage or same-sex partnership entered into or registered abroad, a possibility for which several Member States of the European Union have already provided.^{*21} Under the Estonian

^{*16} This reference leads to the General Part of the Civil Code Act §14 (1), which states that the residence of a natural person is in the place where the person habitually or principally lives.

^{*17} M. Bogdan. International Encyclopaedia for Private International Law. Sweden. Suppl. 17 (April 2008). Kluwer Law International 2008, p. 37.

^{*18} *Ibid.*

^{*19} Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM (2011) 127 of 16 March 2011. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0126:FIN:EN:PDF> (1.7.2011).

^{*20} Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. – OJ L 007, 10.1.2009, pp. 0001–0079.

^{*21} For a general overview on this development, see K. Boele-Woelki. Family Law. The Legal Recognition of Same Sex Relationships Within the European Union. – Tulane Law Review 2007–2008 (82), pp. 1954–1960.

domestic family law rules^{*22}, a marriage can only be celebrated between a man and a woman and no same-sex partnership (let alone same-sex marriage) is provided for by any domestic legal acts. However, many of the Estonian conflict rules still simply refer to ‘marriage’ while no reference is made in the PILA to a civil or registered partnership, which is not known to Estonian private international law. Accordingly, the issue of whether same-sex partners are ‘married’ in the Estonian private international law sense is likely to arise in the Estonian courts at some point as such relationships are not expressly regulated by the Estonian conflict rules.

The issue of characterising same-sex marriage would most probably arise in the form of a preliminary (incidental) question in a maintenance, succession, or even parentage dispute. For example, under PILA §56 (1), the prerequisites for and obstacles to the celebration of a marriage and the consequences arising out of the marriage are governed by the law of the state of residence of the prospective spouses. It is possible that the issue of whether the same-sex parties are married or not can arise in a succession case if the rules applicable to succession allow the surviving partner to inherit from the deceased partner. Where the main issue (marriage) had no proximity to Estonia for the better part of the marital life of the spouses but the succession dispute ends up in the Estonian court (for example, because a spouse moved to Estonia shortly before his or her death), it is questionable whether the policy considerations of Estonian substantive law should influence the characterisation of the legal relationship between the foreign spouses. It might be more appropriate to characterise the legal relationship between the spouses as marital in the meaning of PILA §56 (1) and to consider the relevant policy considerations in the later phase of application of the foreign substantive law rule.

This solution could be presented by PILA §7, according to which foreign law will not be applied if the result of such application would be in obvious conflict with the essential principles of Estonian law (public policy). In such a case, the substantive rules of Estonian law will be applied. It has often been held that the application of a public policy clause should depend on the proximity that a particular legal relationship has with the forum. For example, A. Mills identifies a range of considerations that the courts should take into account when refusing to apply foreign rules on the grounds of public policy. According to Mills, these considerations include the proximity of the dispute with the forum state, the relativity of the norm that is breached, and the seriousness of the breach.^{*23}

The public policy clause in PILA §7 allows the courts to opt for a flexible approach toward foreign same-sex marriages. Addressing the issue of the same-sex marriage in the conflicts phase would allow the courts to evaluate what would be the exact result of the application of a relevant foreign rule in a particular case, what the proximity of the case to Estonia is, and what types of interests are at stake in each particular case and, hence, come to a conclusion as to whether a flexible solution would be in substantial conflict with Estonian public policy. However, if the claims of the surviving spouse were to be knocked down in the initial phase of characterisation (as would be the case if the characterisation is carried out according to the *lex fori*), such claimants might be left without any rights under the applicable substantive succession law, even if they have lived for most of their marital life with the expectation of being granted such rights after the death of their spouse. Neutrality of the conflict rule should be achieved, and the only way to achieve this is to characterise the ‘marriage’ in the meaning of the PILA as liberally as possible. A neutral conflict rule without any substantial assessment as to who is a proper ‘spouse’ in a marriage would accord respect to the differences of foreign law and the reasonable expectations of the parties and would reduce the possibility of relationships wherein persons would have different legal status in different jurisdictions. One might borrow the words of A. V. M. Struycken here: ‘[The recognition of foreign law as a law] is a sign of respect not only for the foreign law but for the legal community behind it. It is an attitude of respect and tolerance’^{*24}—an attitude that should not be ruled out in Estonian private international law simply because Estonian domestic law has traditionally been opposed to same-sex marriages.

Another example of how characterisation by the *lex fori* might not serve the reasonable expectations of the same-sex parties arises in the case of maintenance claims. PILA §61 provides a general conflict rule

²² See the Family Law Act (Perekonnaseadus) §1 (1). – RT I 2009, 60, 395; RT I, 21.12.2010, 4 (in Estonian). English text available at <http://www.just.ee/23295> (1.7.2011).

²³ A. Mills. The Dimensions of Public Policy in Private International Law. – Journal of Private International Law 2008 (August), pp. 210–218.

²⁴ A. V. M. Struycken. Co-ordination and Co-operation in Respectful Disagreement. General Course on Private International Law. Leiden/Boston: Martinus Nijhoff Publishers 2009, p. 318.

for the maintenance cases in ‘family relationships’ with reference to the Hague Maintenance Convention of 1973^{*25}, which Estonia became a party to on 22 October 2001 and which entered into force in relation to Estonia on 1 January 2002. Some authors have expressed a view that the notion of ‘family relationship’ in the meaning of the 1973 Hague Convention should be construed autonomously and liberally.^{*26} However, the voices from the Hague have recently asserted that the characterisation of such ‘family relationships’ as involving same-sex partnerships would continue to be left to the decision of the Member State even after the new Hague 2007 Maintenance Protocol^{*27} became applicable. As a member state of the European Union, Estonia is bound, by the Maintenance Regulation’s Article 15, to apply the Hague 2007 Maintenance Protocol from 18 June 2011.

According to the explanatory report drawn up by Andrea Bonomi on the new Hague 2007 Maintenance Protocol, ‘[t]he existence and the validity of same sex marriages or partnerships [...] continues to be covered by the national law of the Contracting States, including their rules of private international law. Moreover, the Protocol does not specify whether maintenance obligations arising out of such relationships are included within its scope; this omission is intentional, in order to avoid the draft Protocol running up against the fundamental opposition existing between the States of these issues’.^{*28} However, as previously argued, Estonian courts should not exclude same-sex partnerships when characterising even ‘family relationships’ in the meaning of the Hague 1973 Convention Protocol or the Hague 2007 Maintenance Convention. The opposite solution would make it impossible to take into account both the interests of the forum and the interests of the parties, which can better be achieved with the general bar of public policy provided by both—the convention^{*29} and the protocol.^{*30}

Finally, it is worth mentioning that there is no constitutional limit in Estonian law as to the different forms of marriage or family relationships. In line with §27 (2) of the Estonian Constitution^{*31}, it has simply been stated that the spouses have equal rights, but no mention of a requirement that such spouses be of opposite sexes has been made. According to §27 (1) of the Constitution, everyone has the right to the inviolability of private and family life. The intent of the Constitution is to grant such rights also to those citizens of foreign states or stateless persons engaged in proceedings in the Estonian courts—as derived from §9 (1) of the Constitution, the rights, freedoms, and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia. The interpretation of the Constitution should evolve as the society itself evolves. Recently, the questions of same-sex partnership and same-sex marriage have been heavily discussed in Estonian general public discourse.^{*32} Although the prevailing opinion on these questions still seems to be rather conservative (for example, most members of the newly elected Riigikogu are against the establishment of such institutions in the Estonian substantive law)^{*33}, problems related to foreign same-sex partnerships could be cured by the neutral conflict rules, which would allow the courts to respect the foreign institutions without necessarily implementing such institutions in Estonian domestic law.

²⁵ Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=86 (1.4.2011).

²⁶ H. Watts. The legal position in international law of heads of states, heads of governments and foreign ministers. – *Recueil des Cours* 1994 (247) 3, p. 189.

²⁷ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Available at http://www.hcch.net/index_en.php?act=conventions.text&cid=133 (1.7.2011).

²⁸ Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Explanatory Report drawn up by Andrea Bonomi. Hague Conference on Private International Law, October 2009, p. 12. Available at <http://www.hcch.net/upload/wop/expl39e.pdf> (1.7.2011).

²⁹ See Article 11 of the Hague 1973 Convention.

³⁰ See Article 13 of the Hague 2007 Maintenance Protocol.

³¹ Eesti Vabariigi Põhiseadus. – RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian). English text available at <http://www.just.ee/23295> (1.4.2011).

³² See, for example, the analysis published by the Estonian Ministry of Justice on the unregistered partnerships and the legal consequences of such partnerships A. Olm. *Mitteabieluline kooselu ja selle õiguslik regulatsioon* (Non-marital Cohabitation and Its Legal Regulation). Eraõiguse Talitus, Õiguspoliitika osakond, Justiitsministeerium. Tallinn 2009. Available at <http://www.just.ee/orb.aw/class=file/action=preview/id=44568/Mitteabieluline+kooselu+ja+selle+%25F5iguslik+regulatsioon.pdf> (1.4.2011) (in Estonian).

³³ As reported by the main Estonian daily newspaper Postimees on 15 March 2011. See *Riigikokku pääsenud samasooliste kooselu ei seadustaks* (Members of the Riigikogu Would Not Legalise Same-sex Cohabitation). – *Postimees*, 15.3.2011. Available at <http://poliitika.postimees.ee/?id=403033> (1.7.2011) (in Estonian).

2.3. Avoiding the characterisation problems by implementing the rules of recognition

The Estonian legislator has sometimes solved the problems of characterisation by developing corresponding rules on recognition of foreign acts or documents. For example, PILA §24 contains a general conflict rule on succession, according to which the law of the state of the last residence of the deceased generally applies to succession. Among other things, this law determines who is capable of inheriting (PILA §26 (2)). However, a court may be freed from the characterisation problems it faces when applying these conflict rules because under the Law of Succession Act's³⁴ §165 (4) a succession certificate prepared in a foreign state is recognised in Estonia if the procedure for the preparation and the legal effect thereof are comparable to the provisions of Estonian law concerning succession certificates. Thus an interesting solution is achieved—although the court might be able to avoid recourse to the conflict rule, it is still required to carry out a comparison between the Estonian substantive law and the relevant foreign law in order to evaluate whether a person is entitled to inherit. This has been done by the courts on several occasions and so far has not given rise to any problems (at least when comparisons with the laws of the neighbouring Scandinavian states have been carried out).³⁵ However, the recourse to recognition and enforcement does not always solve the characterisation problems, since often such recourse is not possible, if a relevant document or judgement does not exist.

3. Illustration of the problem of characterisation—some recent examples from Estonian case law

3.1. Distinction between substance and procedure

It has traditionally been accepted that matters of procedure should be governed by the rules of the court (*lex fori*) whereas the substantive issues may also be governed by foreign law, if such foreign law is applicable to a particular legal relationship (*lex causae*).³⁶ However, this distinction between matters of procedure and matters of substance is not necessarily an easy one to draw, since the procedural norms can often be found in the substantive law codes and *vice versa*.

Even the essence of the conflict rules themselves is not clear-cut—when reference is made to a foreign law, a private international lawyer is always faced with the question of whether the reference should be interpreted as leading toward that foreign law as a whole including its conflict-of-laws rules or only to foreign substantive law norms. This particular problem is usually solved by the doctrine of *renvoi* accepted in the forum that is resolving the case. No such question arises in relation to foreign procedural norms related, for example, to the taking of evidence or service of documents—for practical reasons, it is generally assumed that foreign procedural norms are never applicable in the court deciding a particular case. However, the mere possibility that a foreign conflict rule might be applicable in a domestic court reflects the thinking that such rules are not simply procedural but relate to various substantive policy considerations such as the protection of weaker groups or the fulfilment of parties' best expectations as to the potentially applicable law. The limitation of claims and the question of the reduction of damages are the issues best illustrating the rivalry between procedural- and substantial-law arguments in Estonian private international law, which have recently demanded the attention of the Estonian courts.

³⁴ Pärimisseadus. – RT I 2008, 7, 52; RT I 2010, 38, 231 (in Estonian). English text available at <http://www.just.ee/23295> (1.7.2011).

³⁵ For the case involving a succession certificate issued in Finland, see Harju Maakohus, Court decision, 2.11.2010, No. 2-10-21311. For the case involving a succession certificate issued in Sweden, see Harju Maakohus, Court decision, 14.9.2010, No. 2-10-33314.

³⁶ On the particular characterisation problems relating to the issues of substance and procedure, see the recent works of J. M. Carruthers. Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages. – *International and Comparative Law Quarterly* 2004 (53), pp. 691–711; C. Forsyth. "Mind the Gap": A Practical Example of the Characterisation of Prescription/Limitation Rules. – *Journal of Private International Law* 2006, April, pp. 169–180.

3.2. Time limitations on enforcement of foreign judgements

The leading solution in modern European private international law has been to characterise the issues of limitation of claims generally as pertaining to substance rather than to procedure.^{*37} The same conclusion has been reached in the Estonian case law regarding the PILA, wherein the foreign rules on limitation periods have been applied as part of the *lex causae* applicable to a particular international contract.^{*38} Therefore, in general, the question of how to characterise the question of the limitation of claims has been resolved in Estonian private international law. However, an interesting problem is presented by the Estonian General Part of the Civil Code Act (hereinafter referred to as the GPCCA) in its §157, which deals with, among other things, the limitation period for enforcing foreign judgements in Estonia.

According to the above-mentioned §157, the limitation period for claims arising out of enforceable court judgements and from the agreements approved by a court or from other execution documents is 10 years. Questions as to the execution of judgements should generally be subject to the law of the forum, since they are the integral parts of the process, which the claimant has elected to adopt when suing in a particular forum.^{*39} Thus, GPCCA §157 should, from the point of view of private international law, be considered to be procedural and not substantive.

Taking into account the 10-year limitation set forth by GPCCA §157, one might ask why the Estonian legislator should uphold claims that might have already been time-barred in the state of the original judgement or under the law that the parties have chosen to be the applicable law. However, such foreign judgements might very well have been made in a case involving parties of whom at least one had a close connection to Estonia, which justifies the application of the limitation period found in §157. In addition, although it is possible to argue that the limitation of claims arising from contract, tort, or similar legal relationships is a matter that the parties could foresee if they foresee the law applicable to such a legal relationship, it is quite another thing to say that a person entering into a contract would, by a mere choice of law, foresee the legal effects of the judgement decided under such applicable law.

Finally, there is one other argument for treating GPCCA §157 as procedural in the private international law sense. If the application of GPCCA §157 were to depend on the choice of law made by the parties, different judgements would be treated differently, depending on the parties' choice of law, since foreign law is presumably more often relied upon in foreign proceedings. It would be more than odd if the enforcement of foreign judgements were subject to different time limits, when compared to local judgements, given that the enforceable foreign judgements and local judgements are otherwise regarded as equal under the Estonian domestic rules of enforcement (see the Code of Enforcement Procedure^{*40}, §2 (1) 2 and §2 (1) 5)). In this connection, it is worth noting that GPCCA §157 was recently amended (with effect from 5 April 2011) such that the previous 30-year limit was replaced with a 20-year-shorter limitation period. This is to be welcomed, since the 30-year limitation involved a remarkably long period. However, there remains a problem for the parties if the foreign law prescribes a shorter limitation period than the current 10 years found in GPCCA §157.

3.3. Reduction of damages by the Estonian courts

Certain problems of characterisation related to the reduction of damages can be raised in light of the recent case law of the Supreme Court of Estonia to illustrate the rivalry between the procedural and substantive law interests in the characterisation process. This development is related to the rule in the Estonian substantive law act—the Law of Obligations Act^{*41} (hereinafter referred to as the LOA), in §140—that allows the Estonian courts to reduce the amount of compensation for damages if compensation in full would be grossly unfair with regard to the person so obliged or for any other reason not reasonably acceptable. In such cases,

³⁷ On the opposite view held in the older English common law see L. Collins (ed.). *Dicey, Morris and Collins on the Conflict of Laws*. 14th ed. London: Sweet & Maxwell 2006, pp. 196–198.

³⁸ See: Pärnu Maakohus, Court decision, 29.11.2010, No. 2-09-27841.

³⁹ J. Fawcett, J. M. Carruthers (Note 3), p. 109.

⁴⁰ Täitemenetluse seadustik. – RT I 2005, 27, 198; RT I 14.03.2011, 1 (in Estonian). English text available at <http://www.just.ee/23295> (1.4.2011).

⁴¹ Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 4.2.2011, 2 (in Estonian). English text available at <http://www.just.ee/23295> (1.7.2011).

all circumstances, especially the nature of the liability; the relationships between the persons; and their economic situations, including insurance coverage, shall be taken into account. Because of its location in the general part of the LOA, this provision is applicable in both contractual and tort liability cases.

From the standpoint of private international law, it is questionable whether §140 of the LOA should be characterised as a procedural or a substantial rule. In order for us to resolve this question, two considerations must be taken into account. First, is the application of this rule purely left to the discretion of the courts, and are the courts bound by this provision in every case, regardless of the arguments presented by the parties? If so, there is an argument in favour of deciding that said norm is a procedural one. Secondly, is the application of this rule something that the parties could have foreseen when they chose Estonian law as the substantially applicable law? If it is, then there is an argument in favour of considering this norm to be a substantive rather than procedural one.

For a long time, the prevailing view in the Estonian legal theory was that the application of LOA §140 did not depend on whether the obliged person relied on that provision; that is, a court could have reduced the amount of damages on its own initiative.^{*42} However, in its recent decisions, the Supreme Court has explicitly stressed that a court does not have to apply this provision on its own initiative^{*43} and, even more, that the court can turn to this provision only if it has been relied upon by one of the parties.^{*44} Thus the reduction of damages is something that a party has to plead for, which would make it substantive, not a procedural rule. A similar solution has been adopted in Estonian case law with regard to the limitation of claims^{*45}, which is an issue that has generally been characterised in modern private international law as substantive rather than procedural.^{*46}

Because of the location of LOA §140 in a substantive law act, it should also be assumed that the parties, when choosing Estonian law as the law applicable to contract or tort, must foresee the possible application of this provision as a part of the chosen law. Therefore, there is another argument in favour of characterising the issue of reduction of damages in Estonian law as a substantive rather than a procedural issue.

It has sometimes been argued that the ‘thing’ characterised should be not the legal norm but the issue itself, since the language of the conflict of laws is written in terms that connect categories of legal issue with a particular choice of law.^{*47} The ‘issue’ to be characterised in the case of reduction of damages is related to the extent of the liability of the debtor. Although not worded as a classical rule of liability, LOA §140 has as its purpose limitation of the liability of the debtor by the assessment of the proper damages to be awarded. Such issues should probably be dealt with under the Rome I Regulation as the question of ‘limitation of liability’ in the sense of Article 15 (b) of the regulation, as has been done in addressing the statutory reduction clauses found in Portuguese, Swedish, and Dutch law.^{*48} Since LOA §140 could also be applicable in contractual disputes, a similar characterisation should be achieved in the context of the Rome I Regulation. It is noteworthy that the list of issues pertaining to the scope of the applicable law (based on Article 12 of the Rome I Regulation^{*49}) is not exhaustive. Therefore, the inclusion of LOA §140 within the scope of Article 12 of the Rome I Regulation should not be problematic. In addition, it has been stressed expressly by the commentators on said regulation that if the applicable law limits the amount of compensation, such a rule will apply notwithstanding the existence of a contrary rules of the *lex fori*.^{*50}

⁴² P. Varul *et al.* (eds.). *Võlaõigusseadus I. Üldosa (§§1–207)*. Kommenteeritud väljaanne (Law of Obligations Act I. Commented Edition). Tallinn: Juura 2006, p. 491 (in Estonian).

⁴³ CCSCd, 13.4.2011, 3-2-1-11-11, paragraph 16.

⁴⁴ CCSCd, 9.3.2011, 3-2-1-169-10, paragraph 16.

⁴⁵ CCSCd, 3.6.2003, 3-2-1-70-03, paragraph 13.

⁴⁶ For example, such is the solution under the Rome I Regulation Article 12 (d) and Rome II Regulation Article 15 (h).

⁴⁷ A. Briggs. *The Conflict of Laws*. 2nd ed. New York: Oxford University Press 2008, p. 12.

⁴⁸ R. Plender, M. Wilderspin. *The European Private International Law of Obligations*. 3rd ed. London: Sweet & Maxwell 2009, p. 442, Note 45.

⁴⁹ According Article 12 of the Rome I Regulation: 1. The law applicable to a contract by virtue of this Regulation shall govern in particular: (a) interpretation; (b) performance (c) within the limits of the powers conferred on the courts by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract. 2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

⁵⁰ R. Plender, M. Wilderspin (Note 48), p. 415.

One might argue that the characterisation of the issue of the reduction of damages as substantive rather than procedural deprives the Estonian courts of the possibility to uphold justice between the parties since LOA §140 expressly allows the Estonian courts to take into account the reasonable expectations of the obliged person and the ‘gross unfairness’ of the possible amount of compensation. However, with the need to secure the reasonable expectations of both (contracting) parties taken into consideration, it is probably a good thing that this rule is not given universal application as a procedural rule. Otherwise, parties who have chosen foreign law to govern their legal relationship but who have come before the Estonian courts to resolve their dispute would suddenly be faced with a vaguely worded procedural norm hidden away in a substantive law code leaving them to the mercy of the discretion of the court.

4. Conclusions

No comprehensive theory of characterisation has yet been established in Estonian private international law. Therefore, Estonian courts are faced with the difficult task of finding a proper legal category for factual issues, relationships, and connections to which the Estonian legislator has not paid enough attention when enacting the Estonian private international and domestic law rules. Although many of the characterisation problems have already been solved and more will probably be solved by the European legislator, the issue of characterisation remains when the domestic private international rules or the bilateral treaties concluded with the Republic of Estonia come into play. It is hoped that the Estonian courts will solve such problems in a flexible manner, taking into account the need to achieve justice between the parties.