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British Institute of International and Comparative Law

CHARACTERISATION AND CHOICE OF LAW FOR KNOWING RECEIPT

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Abstract Knowing receipt requires the satisfaction of disparate elements under English domestic law. Its characterisation under domestic law is also unsettled. These in turn affect the issues of characterisation and choice of law at the private international law level, as knowing receipt sits at the intersection of the laws of equity, restitution, wrongs and property. This article argues that under the common law knowing receipt ought to be considered as sui generis for choice of law purposes and governed by the law of closest connection to the claim. Where the Rome II Regulation applies, knowing receipt fits better within the tort rather than unjust enrichment category and the escape clause in Article 4(3) of the Regulation ought to apply.

Keywords: private international law, knowing receipt, choice of law, characterisation, restitution, unjust enrichment, equity, tort, wrongs, property, Rome II Regulation.

I. INTRODUCTION

Lord Selborne in *Barnes v Addy* held that: 'strangers are not to be made constructive trustees …. unless [they] receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees'.[1] The so-called first limb of *Barnes v Addy* is commonly known as knowing receipt, while the second limb is commonly known as dishonest assistance. Whilst it is uncontroversial that dishonest assistance is characterised as a tort for private international law purposes,[2] the status of knowing receipt is more debatable. The resolution of this issue at the conflict of laws level is complicated by the

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[1] (1874) LR 9 Ch App 244, 251–252.

[2] eg, *Cronos Containers NV v Stefan M Palatin* [2002] EWHC 2819 (Comm), [2003] 2 Lloyd's Rep 489 [18] (Brussels regime); *Casio Computer Ltd v Sayo (No 3)* [2001] EWCA Civ 661, [2001] 1 ILPr 43 (Brussels regime); *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) [223]. cf *Metall und Rohstoff AG v Donaldson Luftkin & Jenrette Inc* [1990] 1 QB 391 (CA) 474 (service out under the RSC 1965 Ord 11 r 1(f)); *Grupo Torras SA v Al-Sabah* [2001] CLC 221 (CA).

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fact that the nature and characterisation of knowing receipt under domestic law is unsettled.

This article considers the most appropriate characterisation category and choice of law rule for knowing receipt claims. It is not concerned with claims for the return of the misappropriated trust property *in specie*, which is a claim founded on the claimant's proprietary right to the property.[3] The focus is on cases where personal liability is sought to be imposed on a recipient who is a third party or stranger to the trust.

The structure of the article is as follows. In order to understand the issue at the private international law level, one must first understand how knowing receipt is dealt with under domestic law. This is addressed in Section II. Section III then deals with the characterisation process and how certain features of knowing receipt may raise particular issues. Next, the various potential characterisation categories and consequential choice of law rules are examined in Section IV. Section V puts forward a proposed solution before Section VI draws the article to a close.

II. Domestic Laws on Knowing Receipt and Equivalent Claims

A. English Law and Other Common Laws

The classic statement on the requirements for a knowing receipt claim was articulated by Hoffmann LJ (as he then was) in *El Ajou v Dollar Land Holdings*:

> the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty.[4]

Subsequent decisions have further deepened our understanding of the action. The level of knowledge which triggers culpability is pegged at the level at which it would be 'unconscionable' for the recipient to retain the benefit of the receipt.[5] While the recipient need not retain possession of the property in order to be liable, the requisite state of knowledge and possession must coincide.[6] Although the defendant is conventionally described as a 'constructive trustee', this language is 'nothing more than a formula for equitable relief'.[7] Nevertheless, the defendant is fixed with custodial duties

[3] If the property remains in the defendant's hands, an action for the return of the property *in specie* will normally be the preferred action. Knowing receipt is usually pursued if the defendant no longer has the property or the property has fallen in value.

[4] [1994] 2 All ER 685 (CA) 700.

[5] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 (CA).

[6] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [76].

[7] *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1582 (Ungoed-Thomas J).

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which are similar to those voluntarily undertaken by express trustees.[8] This means that the defendant is under a duty to restore the misapplied assets and not to deal with the assets inconsistently with their custodial duty.[9] Thus the defendant is personally liable for the value of the property at the time of receipt and remains liable even if the property is no longer in their hands. Further, the defendant would be required to disgorge any profits made from the trust property[10] or to compensate for losses caused to the trust.[11]

Since the remedies are generally restorative and could entail disgorgement of gains, it has been said that the defendant's liability is restitutionary in nature.[12] It has been pointed out that use of 'restitution' in this context may be misleading because it may be thought to be synonymous with unjust enrichment.[13] At the same time, it has also been argued that knowing receipt ought to be a strict liability claim founded on unjust enrichment.[14] So far, this has not gained much traction in the courts.[15] Another argument made is that knowing receipt is essentially a wrongs-based liability founded in equity.[16]

The recent Court of Appeal decision in *Byers v Saudi National Bank*[17] helps shed light on knowing receipt under English law and also illustrates the potential conflict of law issues which may arise. The claimants were SICL, a company registered in the Cayman Islands, and its joint liquidators. Shares in five Saudi Arabian companies which were registered in the name of Mr Al Sanea had been transferred to Samba, a Saudi Arabian bank. Samba's assets and liabilities were subsequently transferred to the defendant, Saudi National Bank. SICL alleged that the shares had been held on trust for it by Mr Al Sanea and the transfer to Samba was in breach of trust. SICL pursued a knowing receipt claim against Samba. Samba conceded that it had the requisite level of knowledge which could render it culpable for knowing receipt. Nevertheless, it argued

[8] *Byers v Saudi National Bank* [2022] EWCA Civ 43, [2022] 4 WLR 22.

[9] C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 8.198.

[10] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1577].

[11] *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [31]. See also *Thanakharn Kasikorn Thai Chamkat (Mahachon) (aka Kasikornbank Public Co Ltd) v Akai Holdings Ltd (in liquidation)* (2010) 13 HKCFAR 479.

[12] eg, *Polly Peck International plc v Nadir* (CA, 17 March 1993), *The Times* 22 March 1993; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) 386.

[13] *Goff & Jones* (n 9) para 8-202.

[14] P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] LMCLQ 296; cf P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623, 651–4; Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart 1998) 231 (parallel strict liability and fault-based claims).

[15] eg, *Byers* (n 8); *Akindele* (n 5); *Arthur v The Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 [36]. For other jurisdictions, see *Farah Construction Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; *Citadel General Assurance Co v Lloyds Bank Canada* [1997] 3 SCR 805 (Canadian SC) [50]–[51]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevience* [2013] SGCA 36, [2013] 3 SLR 801 [109]–[110].

[16] W Swadling, 'The Nature of "Knowing Receipt"' in PS Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart 2017) 303; L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412.

[17] (n 8).

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that the claim ought to fail on the basis that SICL did not retain any interest in the shares once the transfer from Mr Al Sanea to Samba had been effected. The Court proceeded on the basis that the knowing receipt claim was governed by Cayman Islands or English law, it being unnecessary to decide between the two laws as it was common ground that there was no material difference between them.[18]

The Court held that the liability of a knowing recipient is a custodial liability comparable to that voluntarily undertaken by an express trustee. It stated: 'While it may be legitimate to refer to knowing receipt as a species of equitable wrongdoing, it is not based exclusively on fault. For liability to arise, the defendant must also have received trust property …'.[19] Thus, a continuing equitable proprietary interest is a precondition for success.[20] This meant that SICL's claim hinged on whether the law of Saudi Arabia would recognise SICL as retaining a form of ownership interest at the point of transfer of the shares to Samba. Fancourt J at first instance had answered this in the negative.[21] Although Saudi Arabian law would recognise SICL as having some form of ownership interest in the shares prior to the transfer, on the facts the registration of the shares in Samba's name was conclusive of its ownership rights against all third parties. The Court of Appeal refused to disturb Fancourt J's findings on Saudi Arabian law. Accordingly, SICL's action for knowing receipt failed.

Knowing receipt is also well-known in other jurisdictions with a common law heritage. However, there may be divergences in the scope of knowing receipt within the common law world. Different positions may be taken on issues such as whether knowing receipt includes situations of misuse of corporate assets where there is a breach of fiduciary duty but no breach of trust as there is no trust,[22] or whether a bank who receives money for a client can be a knowing recipient.[23] These differences show that it is still important to identify the governing law of the knowing receipt claim even if the contest is between the laws of common law countries as the outcome of the claim may turn on which law applies. These differences within the domestic laws of the common law countries, however, are largely immaterial for the question of the appropriate characterisation and choice of law rule for knowing receipt.

B. Hybrid Laws and Civil Laws

Scotland and South Africa are hybrid law systems which have trusts but not equity. Scotland has incorporated knowing receipt into its law.[24] Under

[18] *Byers v Samba Financial Group* [2021] EWHC 60 (Ch) [15].
[19] (n 8) [69].
[20] ibid [78]–[79].
[21] (n 18).
[22] Compare *Farah Constructions* (n 15) [113] with *Akindele* (n 5).
[23] The matter is still unsettled even under English law: *Uzinterimpex JSC v Standard Bank plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep 456 [39]–[40].
[24] *Commonwealth Oil and Gas Co Ltd v Baxter* [2009] CSIH 75, 2010 SC 156.

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South African law, a beneficiary is able to pursue an unjust enrichment claim against a third party who has received trust funds.[25]

Civil law systems which have introduced the trust into their laws also accommodate knowing receipt claims. For example, under Chinese law, the beneficiary has a remedy against a third party who knowingly receives trust property for the restoration of the property or compensation for loss suffered by the trust.[26] This is equivalent to the common law doctrine of knowing receipt.[27]

German law is a paradigm example of a jurisdiction which adopts neither equity nor the trust. That said, a claimant could have a remedy against a knowing recipient under German law. The German law of unjustified enrichment includes enrichment which derives from an unlawful interference by the defendant (Eingriffskondiktion). This category is largely analogous to restitution for wrongs under English law.[28] In contrast with the English position, Eingriffskondiktion is clearly based on the principle of unjustified enrichment.[29] Eingriffskondiktion was formerly understood to cover only absolute rights, ie rights which the owner enjoys against anyone,[30] but has now expanded to include non-absolute rights. For example, German law has the Treuhand, a device under which property which is transferred by the Treugeber (transferor) to the Treuhänder (transferee) is managed by the latter for the benefit of the former in accordance with the contract between them. Eingriffskondiktion would cover an action by a Treugeber against a creditor of the Treuhänder who had seised funds held in the Treuhand.[31] This seems to be a close fit to the common law knowing receipt claim.

Further, German tort law may also provide a solution. A beneficiary's rights would not fall within one of the enumerated rights listed in the general tort rule in Section 823(1) of the German Civil Code, ie Bürgerliches Gesetzbuch (BGB),[32] but recourse could be had to Section 826 BGB. This provides: 'A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.'[33] However, the threshold of fault required under Section 826

[25] E Cameron, M de Waal and P Solomon, *Honore's South African Law of Trusts* (6th edn, Juta 2018) 454.

[26] Chinese Trust Law, art 22. See L Ho, R Lee and Jin J, 'Trust Law in China: A Critical Evaluation of Its Conceptual Foundation' in L Ho and R Lee (eds), *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis* (CUP 2013) 94, 243.

[27] ibid 96.

[28] G Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (OUP 2009) 11.

[29] Bürgerliches Gesetzbuch, section 812, para 1 sent 1 alt 2. English translation of the BGB at <https://www.gesetze-im-internet.de/englisch_bgb/>.

[30] Dannemann (n 28) 92.

[31] *LG Saarbrücken BeckRS* 2014, 03053. See further *MüKoBGB/Schwab*, 8 Aufl 2020, BGB § 812 Rn 333; *BeckOK BGB/Wendehorst*, 62 Ed 1.5.2022, BGB § 812 Rn. 132, 133.

[32] A beneficiary's right under a trust would likely be considered to be a personal right under German law, unless the German courts adopt an internationalised understanding of it. Section 823(1) does not cover personal or obligational rights: C van Dam, *European Tort Law* (2nd edn, OUP 2013) 82.

[33] English translation at <https://www.gesetze-im-internet.de/englisch_bgb/>.

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BGB[34] appears to be higher than that required for knowing receipt under English law where passive receipt, albeit with the requisite mental element, suffices to found liability.

When one considers other civil law systems, generally, the claimant would be able to pursue an action against a third party who has received 'trust' assets under the law of unjust enrichment[35] or the law of tort or delict.[36] If the latter route is adopted, similarly to German law, the requisite threshold of fraud appears to surpass the English common law standard of 'unconscionability'. Civil law systems may require the third party recipient to have participated in the breach by the 'trustee',[37] to have full knowledge of the breach of 'trust',[38] or to have acted *mala fide*.[39]

Thus non-common law systems have either developed knowing receipt or its equivalent under their domestic law, or offer a remedy to the claimant in similar circumstances under either the law of unjust enrichment or tort.

III. SOME ISSUES CONCERNING CHARACTERISATION

A. Difficulties in Characterising Knowing Receipt

It is accepted that characterisation proceeds on the basis of an 'enlightened'[40] or 'internationalist'[41] *lex fori*. This means that foreign law concepts which are unknown or similar but not identical to domestic law concepts should be characterised in line with the closest analogous domestic law concept.[42] It also means that a domestic law concept which is unknown or similar but not identical to concepts known abroad should not be characterised solely with reference to how that concept is viewed under domestic law. Knowing receipt falls under the latter category as it is *stricto sensu* unknown in civil law countries which do not have the concept of the trust.

There are two main reasons why the characterisation of knowing receipt in private international law is difficult. First, it is unknown in most civil law

[34] See van Dam (n 32) 83.

[35] Swiss Code of Obligations, draft Art 529q(1). See L Thévenoz, 'Under the Hood of the Draft Swiss Trust Law' (2022) 28(9) Trusts & Trustees 1, 5 (advance article).

[36] See generally, DJ Hayton, SCJJ KOrtmann and HLE Verhagen (eds), *Principles of European Trust Law* (Kluwer 1999) vol 1, art VII and the accompanying national commentaries on this article in the book.

[37] Ph Rémy, 'National Report for France' in *Principles of European Trust Law* (n 36) 157, citing what is now French Code Civil, art 1240 (formerly art 1382).

[38] A Borrás and C González Beilfuss, 'National Report for Spain' in *Principles of European Trust Law* (n 36) 171.

[39] RK Feldthusen, 'National Report for Denmark' in *Principles of European Trust Law* (n 36) 193.

[40] O Kahn-Freund, *General Problems of Private International Law* (Sijthoff & Noordhoff 1980) 227–31.

[41] *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825 [26]; *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379 [46]. See also *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387 (CA) 407 (Auld LJ).

[42] eg, *Re Bonacina* [1912] 2 Ch 394 (CA).

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countries. That said, other equitable claims are equally unknown in civil law countries. However, knowing receipt is arguably more difficult to characterise in comparison with most of the other equitable claims. Equitable claims may be founded on a pre-existing relationship, such as a breach of trust or breach of fiduciary duty. Setting aside the Australian approach for the moment, it can be intuitively appreciated that these claims arise out of that pre-existing relationship and that the law governing that relationship would be an appropriate choice of law rule.[43] Knowing receipt, like dishonest assistance, does not arise out of a pre-existing relationship. Dishonest assistance is frequently, although not invariably, pursued alongside knowing receipt. Yet in comparison with knowing receipt, the characterisation of dishonest assistance in private international law is relatively clear-cut. It belongs in the tort category as there is a close parallel between dishonest assistance and inducing breach of contract.[44]

The second reason why knowing receipt is difficult to deal with in private international law is that its characterisation under domestic law remains unsettled. Technically, this should not matter much because the position under domestic law is not determinative for private international law purposes. Otherwise, as Clarke J (as he then was) remarked in *OJSC Oil Co Yugraneft v Abramovich*, one is assuming that English law is applicable in order to determine whether foreign law is.[45] However, the domestic law approach provides a helpful starting point. As Clarke J went on to observe: '[T]he exercise is not without value insofar as it illustrates the factors likely to be material in a [knowing receipt] claim.'[46]

B. Preliminary Observations

Before delving into the issue of the appropriate characterisation and choice of law rules for knowing receipt, a few points should be made clear. First, success in a knowing receipt claim may require satisfaction or the determination of various elements, and some of these elements may be governed by their own choice of law rules. This can be seen from *Byers v Saudi National Bank* where the Court proceeded on the basis that the law of the Cayman Islands or English law was the applicable law to the knowing receipt claim. The reference

[43] *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 WLR 1157; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2006] SGCA 39, [2007] 1 SLR(R) 377. See also L Barnard, 'Choice of Law in Equitable Wrongs: A Comparative Analysis' (1992) 51 CLJ 474. cf *Arab Monetary Fund v Hashim* (Chadwick J, unreported, 15 June 1994); *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 (CA) (application of proper law of the relationship by virtue of *Dicey* sub-rule 2(a)). Although *Kuwait Oil Tanker* is sometimes interpreted as authority for a restitutionary characterisation and application of *Dicey's* rule for knowing receipt, the defendants were held to owe fiduciary duties to the claimants and were not merely constructive trustees: [189]–[193].

[44] *Royal Brunei Airlines* (n 12) 387.

[45] (n 2) [252].

[46] ibid. Clarke J referred to and dealt with knowing receipt as a 'restitutionary claim' but this presupposes the point.

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to Saudi Arabian law as the *lex situs* to determine if SICL retained beneficial interest in the shares upon transfer to Samba was only because the Cayman Islands and English domestic laws on knowing receipt required, as the Court held, the claimant to have a 'continuing proprietary interest' in the property.[47] Hence the applicable law to the knowing receipt claim determines what kind of rights must be held by the claimant in order to sustain the action, and the *lex situs* would determine if those rights have been acquired.[48]

Other examples of an issue governed by its own choice of law rule in the context of a knowing receipt claim include whether the state of mind of the owner or director of a company which received the trust property can be imputed to the company. This raises the issue of choice of law regarding piercing the corporate veil.[49] The defence that the stranger is a *bona fide* purchaser for value is another example. In *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*,[50] the claimant company, part of the Maxwell business empire, had pursued a 'restitutionary' claim for return of shares belonging to it which had been pledged as security for loans given to other companies within the Maxwell empire. Upon the borrower's default, the lenders perfected their security over the shares. This claim is now understood as a knowing receipt claim.[51] The Court of Appeal agreed with Millett J (as he then was) at first instance[52] that the relevant issue at stake was one of priority of title to be governed by the *lex situs*.

In principle, that some of the issues arising in the context of the claim can be governed by their own choice of law rule raises the incidental question. This problem arises when the answer to a main question can only be determined by considering a subsidiary, or incidental, question, and both questions involve foreign elements thereby necessitating application of choice of law rules. There is uncertainty as to whether the incidental question ought to be governed by the *lex fori*'s choice of law rule for that specific question or by the equivalent choice of law rule of the *lex causae* for the main question.[53] For example, if Ruritanian law is held to be the applicable law to the knowing receipt claim and assuming that Ruritanian law requires the claimant to establish a 'continuing proprietary interest' in the property, it is uncertain if the incidental question of whether the claimant has a proprietary interest is to be assessed by application of the English or Ruritanian property choice of law rule. However, in the commercial context at least, courts tend

[47] (n 8) [106].
[48] P Tudsri, 'Characterization of Proprietary Restitution in the Conflict of Laws' (2012) 44 OttawaLRev 261, 284 at n 113.
[49] The choice of law rule for which is unclear: *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 [131] (no single choice of law rule); *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 2767 (Comm) (*lex incorporationis*); *Akhmedova v Akhmedov* [2019] EWHC 1705 (Fam), [2020] 1 FLR 144 (*lex fori*).
[50] (n 41).
[51] *Byers* (n 8).
[52] [1995] 1 WLR 978.
[53] Lord Collins of Mapesbury and J Harris (gen eds), *Dicey, Morris and Collins on The Conflict of Laws* (16th edn Sweet & Maxwell 2022) para 2-044.

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to ignore the incidental question. Instead, an issue-by-issue approach, as in *Byers*, is adopted where any incidental question is treated as a separate issue governed by English choice of law rules.

In sum, the identification of the law governing the knowing receipt claim does not mean that that particular law will govern each and every issue arising in relation to that claim; but identifying that law is a necessary starting point, as this needs to be known in order to identify the necessary constituent elements and potential defences.

Secondly, the result of the characterisation and choice of law process could be that the law of a civil law country, which does not adopt equity, is the governing law of the knowing receipt claim. Self-evidently, the question to be answered by that foreign civil law cannot be whether a claim for knowing receipt based on the facts would succeed, for this is a question to which there would be no answer under that law. Instead, the relevant question to be posed is: what would the foreign civil law court do when presented with the facts?[54]

Thirdly, the characterisation of knowing receipt may potentially differ under the common law and under the Rome Regulations. For the purposes of determining whether the matter falls within the scope of the Rome I[55] or Rome II[56] Regulations, and which particular provision applies, autonomous definitions of legal concepts divorced from the common law definitions must be adopted.[57]

IV. POSSIBLE APPROACHES TO CHARACTERISATION AND CHOICE OF LAW

In principle, characterisation precedes the identification of the governing law of the claim. However, as Mance LJ (as he then was) noted in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC*, there is an 'element of interplay or even circularity' in the process of characterisation and identification of the applicable law.[58] Indeed, for cases concerning knowing receipt, given the uncertainty concerning the law, it seems advisable to deal with both characterisation and choice of law in tandem, as the consideration of the appropriateness of the choice of law rule may in turn inform the appropriateness of the characterisation.

The choice of law rule for knowing receipt has only been considered in a handful of cases. A few jurisdictional cases deal with the issue of characterisation and these can also be helpful when considering choice of law, but the mismatch between the jurisdictional and choice of law categories has to be borne in mind. For example, Article 4 of the Rome II Regulation refers

[54] R Stevens, 'Choice of Law for Equity: Is it Possible?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 175–7.

[55] 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.

[56] 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.

[57] *Dicey, Morris and Collins* (16th edn) (n 53) para 2-005.

[58] (n 41) [29].

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to the place in which the damage occurs whereas Article 7(2) of the Brussels I recast Regulation refers to the place where the harmful event occurred or may occur.[59] In terms of the heads of service out under the Civil Procedure Rules, knowing receipt fits under the 'constructive trustee' ground,[60] thus cases brought on the basis of this ground of the CPR are unlikely to be helpful when trying to derive principles for choice of law purposes. Jurisdictional cases in which the question of choice of law is considered when determining the issue of *forum non conveniens* are of course relevant.

Recalling Clarke J's comment on the relevance of domestic law to the conflicts process,[61] there are four potential characterisation categories: equity, because the action is an equitable one; torts or wrongs, because the defendant must be at fault; restitution, because of the nature of the remedies granted or because it may be founded on or similar to unjust enrichment; and property, because it is dependent on the claimant establishing a subsisting equitable interest in the property. The analysis in this section will look at each of these four potential characterisations.

A. Equity

That knowing receipt is an equitable claim does not change the characterisation and choice of law process. As the New Zealand Court of Appeal commented: 'It would be anomalous to apply one system of law to an issue which would have arisen at law, and another to an issue which would have been for the Courts of Equity to deal with.'[62] The Australian approach, however, stands out: the *lex fori* is the general choice of law rule for equitable claims.[63] This approach has been argued to be based on misguided references to older cases, where the court of equity only exercised jurisdiction over a defendant when there was sufficient connection between the proceedings and the forum. In other words, jurisdictional rules were a proxy for choice of law rules.[64] Now, however, the same jurisdictional rules—where the lack of a sufficient connection does not deprive the court of jurisdiction—apply regardless of whether the claim is founded on common law or equity. Indeed, the *lex fori* approach has been attenuated by concessions which take into account the attitude of the law of the place where the circumstances arose or conduct was undertaken[65] and by the development of a number of exceptions to the *lex fori* rule.[66] The *lex fori* approach has been increasingly called into question.[67]

[59] *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) [485].
[60] CPR PD 6B para 3.1(15).
[61] (n 2) [252].
[62] *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (NZCA) [30].
[63] *National Commercial Bank v Wimborne* (1978) 5 BPR [97, 423] (NSWSC) [11, 982].
[64] RW White, 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11 SydLR 92.
[65] *Paramasivam v Flynn* (1998) 90 FCR 489 (Full Court of the Federal Court of Australia) 503.
[66] *Murakami v Wiryadi* (2010) 268 ALR 377 (NSWCA) 404.
[67] eg, *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846 [494].

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In any event, the *lex fori* as a general choice of law rule for equitable claims has been rejected in England.[68] Therefore, attention will now be turned to the other, more promising, approaches.

B. Restitution

1. Arguments of principle

When knowing receipt is described as being 'restitutionary' in nature, one must be careful to differentiate the various senses in which the word 'restitution' could be used. First, restitution in this context could be a reference to the substantive law of restitution. Used in this sense, it almost always means that restitution is used as a synonym for unjust enrichment. Secondly, there is a substantial body of opinion that considers the law of restitution to be an umbrella category covering unjust enrichment and restitution for wrongs and, more controversially, proprietary restitution.[69] Under this second sense of the word 'restitution', knowing receipt is viewed as a species of wrongdoing and is described as being restitutionary because the remedies granted focus on the defendant's gain rather than the claimant's loss.

The relevance of whether 'restitution' is used in the first or second sense is that while knowing receipt will clearly be governed by the choice of law rule for unjust enrichment according to the first sense of the term, there is a strong case to be made that it should be governed by the choice of law for the foundational wrong under the second sense.[70] Most of the authorities favouring a restitutionary characterisation for knowing receipt do not make it clear whether restitution is to be understood in the first or second sense.[71]

It is more precise to consider the use of the word restitution in the first sense as pointing towards an unjust enrichment characterisation than a restitutionary characterisation. Under domestic English law, unjust enrichment is often described as 'autonomous' or 'subtractive' unjust enrichment. The word 'autonomous' denotes that unjust enrichment is an independent cause of action.[72] The word 'subtractive' indicates that the defendant's enrichment was subtracted from the claimant's wealth. The two labels are usually treated as being synonymous with each other.[73]

[68] *Base Metal* (n 43); *Yugraneft* (n 2).

[69] See P Birks, *Unjust Enrichment* (2nd edn, Clarendon Press 2004) 11–16; A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 9–12; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 7–17.

[70] cf D Friedmann, 'Restitution for Wrongs: The Basis of Liability' in *Restitution: Past, Present and Future* (n 14) 133.

[71] cf R Plender and M Wilderspin, *The European Private International Law of Obligations* (5th edn, Sweet & Maxwell 2020) para 24-077, who refer to a possible third sense: proprietary restitution.

[72] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[73] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221 (HL) 226-7.

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The view that knowing receipt should be characterised as a claim founded on unjust enrichment—whether at the domestic level or private international law level—stems from three lines of argument, which to an extent overlap: first, it fits within the unjust enrichment framework,[74] as the relevant unjust factor is the lack of consent or ignorance;[75] secondly, knowing receipt should be reconceptualised as a strict liability claim arising upon receipt of the trust property and based on unjust enrichment;[76] and thirdly, knowing receipt is sufficiently similar to unjust enrichment that it should be dealt with in a similar manner.

The first two arguments, which advance the view that knowing receipt is based on unjust enrichment, have not gained much judicial support under domestic law.[77] Nevertheless, 'unjust enrichment' for private international law purposes could of course be a wider category than that found under domestic law. This brings us to the third line of argument which draws on the similarities between common law unjust enrichment claims and equitable knowing receipt claims under domestic law, rather than arguing that the latter is founded on unjust enrichment. Both actions require that the defendant received property in which the claimant had a proprietary interest, the receipt of property rather than the retaining of property by the defendant is the crucial factor and the remedies are personal in nature and assessed with reference to the value of the property that the defendant received.[78] Thus, many scholars argue that the two actions are 'essentially analogous'[79] to each other or that there is 'sufficient overlap'[80] in the requirements to merit placing knowing receipt into the unjust enrichment category for choice of law purposes.

The second sense in which the word 'restitution' is used to support characterising knowing receipt as restitutionary is that it is an example of restitutionary wrongdoing. 'Restitution' is commonly used to describe gain-based remedies which focus on the defendant's gain, rather than the claimant's loss.[81] The word 'restitution' is also used to denote the restoration of trust assets whether *in specie* or by payment of their monetary value.[82] Thus, the nature of remedies granted pursuant to a successful claim in knowing receipt can aptly be described as being 'restitutionary'. Even if the claim were to be acknowledged as being founded on wrongdoing as opposed to unjust enrichment, the nature of the remedies places it within the law of restitution. Whether this means that it is appropriate to characterise knowing

[74] See ibid 227. See also *Gold v Rosenberg* [1997] 3 SCR 767 (Canadian SC) [41] (Iacobucci J); *Citadel v Lloyd's Bank* (n 15) [30], [46]–[49] (La Forest J).

[75] *Goff & Jones* (n 9) Ch 8; Burrows (n 69) Ch 16.

[76] See (n 14).

[77] Lack of consent or ignorance as an unjust factor has not been judicially accepted in English law. See (n 15) for authorities against the second argument.

[78] Virgo (n 69) 645.

[79] J Bird, 'Choice of Law' in F Rose (ed), *Restitution and the Conflict of Laws* (Mansfield Press 1995) 78. See also G Panagopoulos, *Restitution in Private International Law* (Hart 2000) 92–4.

[80] P McGrath, 'Choice of law in knowing receipt, unjust enrichment, dishonest assistance and equitable proprietary claims' (2009) 3 CRI 99.

[81] *Goff & Jones* (n 9) para 8-202.

[82] ibid.

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receipt as restitutionary for the purposes of choice of law is, however, a different matter.

The editors of Dicey, Morris and Collins argue that knowing receipt should be regarded as a claim for restitution in respect of an unjust enrichment. This is largely because the measure of recovery is gain-based, rather than compensatory in nature.[83] The same position is taken in relation to the Rome II Regulation in the latest edition of Dicey, albeit the editors acknowledge that 'the matter is uncertain'.[84] This approach seeks to characterise the remedy rather than the cause of action or the issue at stake.[85] There could be good grounds for doing so in some contexts[86] but it is difficult to discern those grounds in relation to knowing receipt.

It is questionable whether the remedy for knowing receipt is invariably restitutionary in nature. The Court of Appeal has held that the liability of a knowing recipient is 'compensatory' but this was merely for the purpose of determining whether a claim for contribution by a knowing recipient was one for 'damages' and 'compensation' within the meaning of the Civil Liability (Contribution) Act 1978.[87] More significantly, the Hong Kong Court of Final Appeal has held that 'equitable compensation' equivalent to that awarded for losses suffered under the tort of conversion would be granted for knowing receipt.[88]

Further, while in most cases the defendant's gain will be identical to the claimant's loss, where the latter is greater than the former the claimant can elect to seek compensation for their loss rather than restoration of the value of the misappropriated asset.[89] In addition, a restitutionary remedy, on one view, also seeks to compensate, albeit that the mode of calculating loss may differ from claims in tort.[90] The point is that remedies for knowing receipt are not invariably gain-based. This, then, belies a choice of law approach predicated on the remedy being restitutionary in nature.

It has already been seen that many civil law systems provide compensatory remedies for situations of knowing receipt. Under the common law, remedies are procedural in nature and hence governed by the *lex fori*[91] but this is not the approach of the Rome II Regulation, under which remedies are governed by the *lex causae*.[92] If an English court characterises knowing receipt as

[83] L Collins (gen ed), *Dicey, Morris and Collins on The Conflict of Laws* (14th edn Sweet & Maxwell, 2006) paras 34-010, 34-041.

[84] *Dicey, Morris and Collins* (16th edn) (n 53) para 36-064; cf para 2-036.

[85] A Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2008) para 4.103; Plender and Wilderspin (n 71) para 24-078.

[86] For example, where a proprietary remedy arises and it would be of little use to decide the claim otherwise than in accordance with the courts of the *situs*. See A Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts' (2005) 54 ICLQ 855.

[87] *Charter plc v City Index Ltd (Gawler and others, Part 20 defendants)* [2007] EWCA Civ 1382, [2008] Ch 313.

[88] *Thanakharn* (n 11).

[89] *Goff & Jones* (n 9) para 8-200.

[90] TM Yeo, *Choice of Law for Equitable Doctrines* (OUP 2004) para 8.09.

[91] *Phrantzes v Argenti* [1960] 2 QB 19; *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1.

[92] Rome II Reg, art 15(c). See also Rome I Reg, art 12(1)(c).

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restitutionary on the basis of the remedies available under English domestic law, it seems slightly odd if it ultimately grants a compensatory remedy because that is the measure awarded under the foreign applicable law under Rome II.

2. The authorities

Of the few authorities on the point, the preponderance favour a restitutionary characterisation. Most of the cases were decided on the basis of the common law and have applied or cited the common law choice of law rule for restitution in Dicey.[93] The earliest appears to have been the judgment of Millett J (as he then was) in *El Ajou v Dollar Land Holdings*,[94] where he stated that knowing receipt is 'the counterpart in equity of the common law action for money had and received. Both can be classified as receipt-based restitutionary claims.'[95]

Rule 230 in the 14th edition of Dicey provides:

> (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.[96]

Rule 230 is placed in the chapter titled 'Restitution'. It is substantively the same as when it first appeared in the 6th edition of Dicey in the chapter titled 'Quasi-Contract',[97] which suggests it was formulated with unjust enrichment actions in mind. Insofar as knowing receipt is founded on, or is similar to, unjust enrichment, Rule 230 would provide the appropriate choice of law rule. Applying Rule 230 to knowing receipt on the basis that the remedy is

[93] *Nabb Brothers Ltd v Lloyd's Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch) is sometimes cited as tentative authority for knowing receipt being restitutionary for the purposes of service out but Collins J (as he then was) appeared to be referring to an equitable *proprietary* claim when he was considering this point in *obiter dicta* (see esp [72], [74]–[77]).

[94] [1993] 3 All ER 717 (rvrsd on another point (n 4) (CA)).

[95] ibid 736 (see also 738). See also *Polly Peck* (n 12); *Macmillan (No 3)* (n 52) (Millett J), aff'd (n 41) (CA) 398 (Staughton LJ), 417 (Aldous LJ) (claim was restitutionary in nature but proprietary issue was at stake).

[96] *Dicey, Morris and Collins* (14th edn) (n 83) para 34R-001. Rule 230 is not reproduced in the later editions of *Dicey, Morris and Collins* which discuss the relevant provisions of the Rome II Regulation.

[97] JHC Morris (gen ed), *Dicey's Conflict of Laws* (6th edn Sweet & Maxwell, 1949) rule 167. For a brief historical account of the rule, see *Barros Mattos Jnr v Macdaniels Ltd* [2005] EWHC 1323 (Ch) [85].

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'restitutionary' in nature stands on less firm ground, for the reasons given above. In addition, Rule 230 was originally formulated before the division between unjust enrichment claims and restitution for wrongs claims became generally accepted.[98]

In the earlier decisions, courts tended to apply sub-rule 2(c) to knowing receipt. In *El Ajou v Dollar Land Holdings,* Millett J considered, 'without discussion',[99] that the governing law of the knowing receipt claim was the law of the country where the defendant received the money, relying on sub-rule 2(c).[100] The Court of Appeal in *Trustor v Smallbone*[101] applied English law when the misappropriated funds had been transferred from the claimant's English bank account to the recipient's English bank account. The Singapore Court of Appeal has also applied the law of the place of enrichment to knowing receipt.[102]

In later cases, courts have seised on the analysis of sub-ruIe 2(c) by Collins J (as he then was) in *Barros Mattos Jnr v Macdaniels Ltd* to the effect that it was not to be treated as a 'free-standing rule' to be mechanically applied irrespective of the factual circumstances or particular issue involved.[103] There has been a perceptible shift away from treating the sub-rules in paragraph two as fixed rules, and towards accepting that the primary choice of law rule is the general rule set out in paragraph one, for which the sub-rules merely provide guidance.

This shift can be seen in one of the leading cases on choice of law and knowing receipt, *Yugraneft v Abramovich*.[104] The claimant, Yugraneft, entered into a joint venture with Sibneft, a fellow Russian corporation. Sibneft was controlled by Mr Abramovich, a Russian citizen. Yugraneft alleged that it suffered losses pursuant to a fraud directed by Mr Abramovich as a result of which its interest in the joint venture vehicle, Sibneft-Yugra, was diluted drastically. Yugraneft sued Mr Abramovich and an English company involved in managing Mr Abramovich's business interests in England. Yugraneft's claims included dishonest assistance, tort, an equitable proprietary claim and most relevantly, unjust enrichment and knowing receipt in English law against Mr Abramovich, or in the alternative, unfounded enrichment under Russian law.[105] In their application for a reverse summary judgment, the defendants contended, inter alia, that Russian law applied to all the claims. Clarke J dealt with the knowing receipt and unjust enrichment claims together. He held that Rule 230 of Dicey applied, but emphasised that the fundamental principle is the application of the law that has the closest and

[98] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [116] (Lord Nicholls of Birkenhead), [230]–[231] (Lord Mance).

[99] *Macmillan (No 3)* (n 41) 408 (Auld LJ).

[100] (n 94) 736. See also *Haji-Ioannou v Frangos* [1999] 3 All ER (Comm) 865, 895 (application of the place of receipt without referring to *Dicey's* rule).

[101] Unreported, 9 May 2000, [2000] Lexis Citation 2960.

[102] *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] SGCA 105, [1994] 3 SLR(R) 312 (the action against the wife).

[103] (n 97) [117].

[104] (n 2).

[105] ibid [152]–[165].

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most real connection with the obligation, rather than a rigid application of the sub-rules.[106] On the facts, Russia was the place where the wrongs occurred, where the new participation interests in Sibneft-Yugra were issued, where the enrichment occurred, and where the proceeds were realised.[107] Thus the proper law of the obligation was Russian law. That being the case, the claims failed as being outside the Russian limitation period.

Similarly, in *Fiona Trust & Holding Corporation v Privalov*,[108] Smith J accepted that the applicable law was that with the closest connection to the claim. He did not think that the place of enrichment played any significant role in the identification of this law when payments were made into Swiss bank accounts in the name of a British Virgin Islands company allegedly owned by Russians.[109] Instead, weight was placed on the location of the breach of duty by the primary wrongdoer which caused the payment to be made and how and where the recipient acquired the requisite level of knowledge.[110] In *Alliance Bank JSC v Aquanta Corporation*, the claimant was a Kazakh bank which alleged that it had been a victim of a massive fraud. The principal conspirator was the claimant's former Chairman, D6. The claimant alleged that it had been induced to acquire American Treasury notes which were then secretly used as security for loans made by two Cypriot banks to D1 to D4, which were offshore companies beneficially owned by D6. The loan monies were laundered through offshore companies and the majority ultimately ended up with D9, a Kazakh holding company which was owned at that time by D6 and his brothers, D7 and D8. The claims advanced included dishonest assistance, knowing receipt and unjust enrichment claims against D6 to D9. Each loan agreement was accompanied by a guarantee agreement between Alliance and the relevant Cypriot bank. The Cypriot banks enforced their charge over the notes when the loan agreements were defaulted upon.

As regards the knowing receipt claim, Burton J referred to *Yugraneft* approvingly and concluded that there was a sufficiently arguable case that Rule 230(2)(a) applied, with the relevant contract being the loan agreements which gave rise to the enrichment, all of which were governed by English law.[111] On appeal, this was undisturbed.[112] The Court of Appeal thought there was a 'powerful' argument that Kazakh law was the applicable law, because it had the closest connection to the obligation to restore given the pre-existing relationship between the claimant and D6 or, alternatively, on the basis of any of the provisions of Article 10 of Rome II but it was loath to disturb Burton J's assessment.[113]

[106] ibid [246].
[107] ibid [254]–[255], [261].
[108] [2010] EWHC 3199 (Comm) [162] (aff'd without consideration of the knowing receipt claim [2013] EWCA Civ 275).
[109] ibid [179].
[110] ibid [180]–[181].
[111] [2011] EWHC 3281 (Comm) [43].
[112] [2012] EWCA Civ 1588, [2013] 1 All ER (Comm) 819 [90].
[113] ibid [86].

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An explanation why Rule 230 is the relevant choice of law rule can be found in *Yugraneft*. Clarke J referred to the comments of Hoffmann LJ (as he then was) in *Polly Peck International plc v Nadir*[114] that the nearest common law analogy for knowing receipt is an action for money had and received.[115] The action for money had and received is founded on unjust enrichment. In another part of the judgment, he said that knowing receipt gave rise to an 'obligation to restore an unjust enrichment'.[116] His treatment of the unjust enrichment and knowing receipt claims together[117] indicates that he thought their foundations to be similar, if not identical. *Yugraneft* is, then, authority for placing knowing receipt in the unjust enrichment category, with references to 'restitution' in the judgment to be understood in the first sense of the word.

In most other judgments, however, no reasons are given for the application of the rule.[118] In *Trustor*,[119] there was no discussion of the basis of a knowing receipt claim. In *Fiona Trust*, Smith J[120] cited the obiter comments in the Court of Appeal decision in *Grupo Torras SA v Al Sabah* to the effect that knowing receipt 'may on examination prove to be either a vindication of persistent property rights or personal restitutionary claim based on unjust enrichment by subtraction'[121] without indicating which provided the better basis. In *Alliance Bank*, Burton J followed *Yugraneft* and *Fiona Trust* with little discussion and thought that the relevant choice of law rule was that in Dicey or, in the alternative, Article 10 of Rome II.[122] Article 10 deals with unjust enrichment and the reference to it indicates that Burton J supported an unjust enrichment characterisation.

The list of authorities is thin, but they show more support for an unjust enrichment characterisation for the purposes of choice of law than a broader restitutionary understanding based on remedial consequences.

C. Torts or Wrongs

1. Arguments of principle

Knowing receipt is not a tort under domestic law.[123] However, torts for the purposes of conflict of laws can bear a wider meaning than in domestic law. Indeed, it has been argued that 'wrongs', rather than 'tort' is a better label for conflict of laws purposes generally.[124]

Some of those who support a tortious characterisation do so for equitable wrongs more generally, without considering knowing receipt as such.[125] That

[114] (n 12). [115] (n 2) [184]. [116] ibid [246]. [117] ibid [262].
[118] *Alliance Bank* (n 112) [85]–[86]. [119] (n 101). [120] (n 108) [159].
[121] (n 2) [122] (case on dishonest assistance) [122] (n 111) [42]–[43].
[123] cf *Carriere Industrial Supply Ltd v Toronto Dominium Bank* [2014] OJ No 5461 (Ontario Superior Court of Justice) where HJ Wilton-Siegel J referred in his judgment to the 'tort of "knowing receipt"'. [124] Yeo, *Choice of Law for Equitable Doctrines* (n 90) para 8.62.
[125] eg, R Stevens, 'The Choice of Law Rules of Restitutionary Obligations' in *Restitution and the Conflict of Laws* (n 79) 188–90; Yeo, *Choice of Law for Equitable Doctrines* (n 90) paras 8.62–8.69;

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said, knowing receipt would fit within Rabel's definition of 'tort' for choice of law purposes, that is 'any unlawful invasion of the interests of another person, causing damage or harm to a person'.[126] Knowing receipt can also usually be accommodated as a tort or delict in civil law systems.[127] A tortious or wrongs-based characterisation does not necessarily contradict the view that knowing receipt is an example of restitutionary wrongdoing: the relevant wrong is the causative event and it is that which should be the object of the characterisation process.

The failure to convince the courts that knowing receipt ought to attract strict liability under domestic law may suggest that the causative event is the wrongful state of mind of the defendant.[128] In other words, the crux of the claim concerns the mental element. However, in *Byers v Saudi National Bank* the Court of Appeal emphasised that the recipient's state of mind is only one element, and a continuing proprietary interest was equally necessary under domestic law.[129]

Another justification for a tortious characterisation is the similarity between knowing receipt and conversion. Both involve the defendant wrongfully retaining and dealing with property belonging to another.[130] Liability to compensate for consequential loss, which is a feature of wrongs-based actions, can also arise in knowing receipt claims if the loss caused to the trust is greater than the value received.[131] It has therefore been argued that for domestic law purposes knowing receipt is the equitable analogue of the common law tort of conversion.[132] This lends support to the argument that it should be characterised as a tortious action for the purposes of conflicts of law.[133]

Naysayers point out that, unlike conversion, knowing receipt is parasitic on an initial breach of trust by the trustee[134] and that fault is necessary.[135] Another point is the 'wrongs' relied on for conversion and for knowing receipt are different: for conversion it is the voluntary interference with another's property; for knowing receipt it is the receipt of property with the requisite blameworthy state of knowledge.[136]

There are further objections to a tortious characterisation. First, it appears that mere passive receipt of misappropriated property is not sufficient to

cf the argument that restitution for wrongs should be classified as claims for unjust enrichment, without specifically considering knowing receipt: P Torremans (ed), *Cheshire, North and Fawcett: Private International Law* (15th edn, OUP 2017) 842.

[126] E Rabel, *The Conflict of Laws: A Comparative Study* (prepared by Ulrich Drobnig) (2nd edn, University of Michigan Law School 1960) vol 2, 235.

[127] Text to (nn 33–39).

[128] Tudsri (n 48) 281.

[129] (n 8) [20], [70], [76].

[130] In civil law systems such as French law, an action in detinue against the third party would be available provided the French court views the claimant's right as a right *in rem*: Rémy (n 37) 157.

[131] L Smith, 'W(h)ither Knowing Receipt?' (1998) 114 LQR 394, 396.

[132] ibid.

[133] Dickinson (n 85) para 4.103. There is somewhat oblique acceptance of the analogy with conversion in *Cronos* (n 2) [18].

[134] D Sheehan, 'Disentangling Equitable Personal Liability for Receipt and Assistance' [2008] RLR 41, 53.

[135] Panagopoulos (n 79) 92.

[136] TM Yeo, 'The Right and Wrong of "Knowing Receipt" in the Law of Restitution', 2009 Yong Pung How Professorship of Law Lecture, para 28 <https://ink.library.smu.edu.sg/yph_lect/4/>.

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give rise to liability in a number of the civil law countries: more active participation on the part of the defendant is required.[137] In that sense, under these civil law systems the actions seem to better approximate to dishonest assistance or the tort of inducing breach of contract rather than knowing receipt.[138] If this is correct, that a tortious claim is available in civil law countries on facts which would give rise to both dishonest assistance and knowing receipt under domestic English law is neither here nor there for the purposes of identifying the appropriate choice of law category for knowing receipt. Although a claim for knowing receipt is usually brought alongside a claim for dishonest assistance, it would be wrong to conflate the two claims. This is because the bases for the two claims are different: 'One is receipt-based liability ….; the other is a fault-based liability as an accessory to a breach of fiduciary duty.'[139] The 'wrongs' involved are fundamentally different: assisting the trustee in the breach of their duties as a trustee in the case of dishonest assistance; receiving misappropriated property with the requisite state of knowledge in the case of knowing receipt.

Secondly, tortious remedies are usually assessed on the basis of loss or damage suffered by the claimant, whereas the usual remedy for knowing receipt focusses on the defendant's gain. Civil law systems place particular emphasis on the compensatory function of tort law.[140] However, the loss suffered by the claimant and the gain accruing to the defendant will usually be identical in a knowing receipt claim. Further, as previously mentioned, a compensatory remedy sometimes too would be available.

Thirdly, the focus on the element of fault ignores other crucial elements which underpin the claim. Yet this objection is equally applicable to other suggested characterisation: for example, if one were to argue that the requirement that the claimant has a subsisting proprietary interest in the property indicates that the foundation of the claim is the protection of property rights and so a proprietary characterisation is appropriate, this ignores the fact that receipt alone is insufficient.

2. *The authorities*

The authorities are mixed. In *Bank of Tokyo-Mitsubishi v Baskan Gida Sanayi Ve Pazarlama AS*, Collins J described knowing receipt claims as 'tortious or

[137] eg, BGB (n 29) section 826: 'intentionally inflicts damage on another person'; French Code Civil, arts 1240 and 1241 cover intentional torts (see G Wagner, 'Comparative Tort Law' in M Reimann and R Zimmermann, *The Oxford Handbook of Comparative Law* (OUP 2019) 999).

[138] Section 826 of the German BGB covers intentional acts *contra bonos mores* causing damage to another person and includes cases analogous to, inter alia, the tort of inducing breach of contract: van Dam (n 32) 83. The analogy drawn under French law is with 'third parties who take part in the breach of a contractual obligation': Rémy (n 37) 157.

[139] *Grupo Torras* (n 2) [122]. See also *Royal Brunei Airlines* (n 12) 386; *Polly Peck* (n 12) (Hoffmann LJ).

[140] Wagner (n 137) 996.

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quasi-tortious' for the purposes of the Brussels regime.[141] The decision of Lloyd J in *Dexter Ltd v Harley* is to a similar effect.[142] In contrast, the Court of Appeal in *Metall und Rohstoff AG v Donaldson Luftkin & Jenrette Inc* held that it was not 'founded on a tort' for the purposes of Order 11 r1 (f) of the Rules of Court.[143] In *Fiona Trust*, Smith J was of the view that knowing receipt is neither a tort nor analogous to a tort for choice of law purposes.[144] Knowing receipt was treated as being governed by Article 4 of Rome II in *FM Capital Partners Ltd v Marino* and Cockerill J described the action as a 'tort',[145] but this is probably because the parties were content to proceed on this basis. Cockerill J had in fact invited submissions on whether Article 10 would be the more appropriate provision, but the parties did not take up the invitation.[146]

D. Property

In a number of cases, most recently *Byers v Saudi National Bank*,[147] it has been accepted that a knowing recipient owes custodial duties akin to that undertaken voluntarily by an express trustee to ensure the proper administration of the trust.[148] This accords with the requirement that a subsisting equitable interest is a prerequisite for a claim. That is why a knowing recipient is often said to be accountable for the value of the trust property received, this language echoing that used to describe the duty of an express trustee.[149] Whilst the duties imposed on a knowing recipient differ in scope from that of an express trustee,[150] the fundamental duty to protect and restore trust property is the same. This equivalence indicates that the core of a knowing receipt claim is the protection of the beneficiary's equitable proprietary interest and this in turn suggests that a proprietary characterisation might be appropriate for choice of law purposes.[151]

Some scholars also consider knowing receipt to be a form of proprietary restitution within the domestic law framework.[152] That the action rests on the claimant's proprietary entitlement is also alluded to by civil law systems which have introduced the trust into their laws, as in China.[153]

This then raises the question of whether the Hague Trusts Convention,[154] enacted into English law by the Recognition of Trusts Act 1987, is relevant.

[141] [2004] EWHC 945 (Ch), [2004] 2 Lloyd's Rep 395 [137], [240], [241].
[142] *The Times* (2 April 2001) (on Brussels Convention, art 5(3)).
[143] (n 2) 474.
[144] (n 108) [159].
[145] (n 59) [89].
[146] ibid [482].
[147] (n 8) [49]-[51].
[148] eg, *DD Growth Premium 2X Fund (in liquidation) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36, [2018] Bus LR 1595 [58]; *Arthur* (n 15) [37]; *Independent Trustee* (n 6) [80]–[82].
[149] C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 130, 157–8.
[150] *Williams* (n 11) [31].
[151] Plender and Wilderspin (n 71) para 24-080.
[152] Virgo (n 69) 645–55.
[153] Ho, Lee and Jin (n 26) 95.
[154] Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

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This was raised in the earlier stages of the *Byers* litigation.[155] Article 11(3)(d) of the Convention provides that 'the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum'. This appears to exclude knowing receipt claims from the scope of the Convention. However, Professor von Overbeck, who authored the Explanatory Report to the Convention, has noted that: 'The meaning of this sentence has to be ascertained from its history rather than from its wording' and that it 'refers not to third parties to whom the trustee has transferred assets in breach of trust, but to third persons, in a contractual relationship with the trustee, who hold assets of the trust; practically, this concerns bankers'.[156]

The Convention provides that a trust is governed by the law chosen by the settlor, or, if no choice is made, by the law with which it is most closely connected.[157] Its rules are primarily designed for express trusts. Although an analogy is drawn between the custodial duties owed by the trustee of an express trust and a knowing recipient, transposing the choice of law approach suitable for express trusts to knowing receipt is not appropriate. Party autonomy is generally given effect in order to protect the legitimate expectations of the parties. In the case of knowing receipt, the relevant parties are the beneficiary and the knowing recipient, both of whom are not involved in the initial choice of law by the settlor, unless the settlor is also a beneficiary under the trust. Applying the law of closest connection *to the trust* ignores crucial elements of a knowing receipt claim and involves the consideration of factors not all of which are particularly relevant to knowing receipt.[158]

The UK, however, has extended the scope of the Convention to 'any other trusts of property arising under the law of any part of the United Kingdom or by virtue of a judicial decision whether in the United Kingdom or elsewhere'.[159] This ostensibly covers constructive trusts.[160] Despite a knowing recipient being described as a 'constructive trustee', no 'real' constructive trust is in place.[161] After all, knowing receipt is normally pursued in cases where the trust property has been dissipated or is no longer identifiable through tracing or following. There can be no (constructive) trust if there is no property which can form its subject matter.

For these reasons, knowing receipt should be regarded as falling outside the scope of the Hague Trusts Convention. If so, a proprietary characterisation under common law points toward the application of the *lex situs*. While there

[155] *Byers v Samba Financial Group* [2020] EWHC 853 (Ch) (case management decision).

[156] AE von Overbeck, 'Law Applicable to, and Recognition of Trusts in Switzerland: the Possible Future under the Hague Convention' (1996) 2(5) Trusts and Trustees 5, 7.

[157] Hague Trusts Convention, arts 6 and 7.

[158] Hague Trusts Convention, art 7.

[159] Recognition of Trusts Act 1985, section 1(2).

[160] cf Chong (n 86) 856–8.

[161] *Williams* (n 11) [19]; *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 404; *Paragon Finance plc v DB Thakerar & Co (A Firm)* [1999] 1 All ER 400 (CA) 409. See also L Smith, 'Constructive Trusts and Constructive Trustees' (1999) 58 CLJ 294.

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is a tendency to advocate for the application of the *lex situs* even in relation to personal claims relating to property,[162] it is of greatest relevance where questions of title are concerned. The application of the *lex situs* is based on practical reasons: the courts of the *situs* have control over the property and so a result that is not in accordance with the *lex situs* would frequently be ineffective,[163] and the parties expect the *lex situs* to govern the issue of who owns title to property.[164] Personal claims are different. Therefore, it is arguable that a proprietary characterisation is inappropriate for knowing receipt because the property choice of law rules do not fit the action. Moreover, most civil law systems would not recognise the claimant's equitable rights to be proprietary in nature.[165]

In addition, a claimant's proprietary entitlement is not protected only by means of a proprietary claim; under common law recourse can also be had to the tort of conversion. As a result, that a knowing receipt claim is based on the claimant's proprietary entitlement does not point inexorably towards a proprietary characterisation. As has been noted in relation to claims based on invasion of property, it is 'merely a question of legal technique whether the original owner is protected by special provisions forming part of the law of property, by claims in the nature of tort or by the rules on unjustifiable enrichment'.[166]

E. Summary

That knowing receipt is an equitable action does not affect the choice of law analysis. The fact that under English domestic law, the nature of the remedies granted is restitutionary or the foundation of the action could be seen as being based on the beneficiary's equitable proprietary right should have no bearing on its characterisation and choice of law rule. This leaves two remaining candidates: unjust enrichment and tort. Whether either provides the best fit for knowing receipt for the purposes of choice of law will now be considered.

V. THE SUGGESTED APPROACH

Knowing receipt is unique in that it requires a confluence of disparate elements —a subsisting proprietary interest, fault, receipt of property belonging to another—for the action to be mounted. Indeed, it has been described as a composite claim.[167] Each of these elements points towards a different characterisation. None of them are determinative; all are required in order to

[162] eg, sub-rule 2(b) of the *Dicey* rule. [163] *Macmillan (No 3)* (n 41) 424. [164] ibid 400.
[165] In the context of the Brussels regime, see Case C-294/92 *Webb v Webb* ECLI:EU:C:1994:193.
[166] K Zweigert and D Müller-Gindullis, 'Quasi-Contract' in K Lipstein (ed), *International Encyclopedia of Comparative Law* (Mohr Siebeck 1974) 30–7.
[167] P Jaffey, *Private Law and Property Claims* (Hart 2007) 191.

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found the cause of action. It is for this reason that comparisons between knowing receipt and other causes of action under domestic law are bound to invite disagreement: the elements will not match up exactly and there will be different views as to which element should be drawn on for choice of law purposes.

The argument that knowing receipt should be seen as restitutionary for choice of law purposes simply by virtue of its remedial consequences has been rejected above. Although supported by some authorities, it is suggested that treating knowing receipt as a form of 'unjust enrichment' is also unsatisfactory. It is not generally accepted that it is founded on unjust enrichment under domestic law. Unjust enrichment can of course be a broader category for the purposes of conflict of laws and it could be argued that it belongs within this category since it shares some characteristics with actions for autonomous unjust enrichment. However, the same is true of knowing receipt and the tort of conversion. The solution to the characterisation issue therefore cannot depend on similarities with other actions which fall firmly into one of the established choice of law categories. The argument for a tortious characterisation, in addition to its similarity with conversion, is that the state of mind of the recipient is the crux of the action. However, it is not the *only* essential ingredient.

Given that neither unjust enrichment nor tort provides an ideal fit, it is suggested that knowing receipt ought to be considered as *sui generis* for conflicts purposes and form its own special choice of law category. It could be argued that the creation of a choice of law category which is unknown in countries with different legal traditions is unduly parochial, but a claimant would in practice pursue a knowing receipt claim in the courts of a country where such a claim is known. Provided the question asked of the applicable foreign civil law is focussed on how the foreign court in question would address the facts at issue,[168] criticisms of parochialism are misplaced.

It is suggested that the appropriate choice of law rule is the law of closest connection *to the claim*. Only a proper law approach can take into account the various elements which make up the claim and accord them, and the surrounding circumstances, their relevant weight. This differs from Rule 230 (1) of Dicey which favours the law of closest connection to the *obligation to restore the enrichment*. The net should be cast wider, as will be explained below.[169]

There are some hints supporting the suggested approach in the case law. In *Fiona Trust*, Smith J, while not rejecting an unjust enrichment characterisation, expressed a preference for the application of the law of closest connection with the claim rather than with the obligation to restore.[170] In *FM Capital Partners*, Cockerill J held that English law governed the knowing receipt claim under

[168] Text to (n 54). [169] Text to (nn 194–201). [170] (n 108) [162].

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Article 4(3) of Rome II because the 'centre of gravity' of the wrongdoing pointed towards England.[171]

The creation of a separate category for knowing receipt claims, however, is only possible in the very small, residual category of cases where the common law still applies to a civil and commercial claim or in other countries which are not constrained by the operation of the Rome Regulations. The Rome I and Rome II Regulations are designed to provide a comprehensive framework of choice of law rules for contractual and non-contractual obligations in civil and commercial matters. They continue to apply in the UK post-Brexit as retained EU law and their operation was preserved during the transition period.[172] The European Union (Withdrawal) Act 2018[173] and the secondary legislation enacted under its auspices[174] ensure the continued application of the Regulations[175] in the UK beyond the Implementation Period completion day.

As a result, knowing receipt will be dealt with under Rome II in the vast majority of cases under UK law. It does not fall under Article 1(2)(e) of Rome II, which excludes 'non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily' from the scope of the Regulation as the action involves a third party to the trust.[176]

Few cases have properly scrutinised the applicable law for knowing receipt claims under the Rome II Regulation. The two candidates are Article 4, concerning the general choice of law rule for torts or delicts, and Article 10, concerning the choice of law rule for unjust enrichment. Both are subject to any choice of law agreed on by the parties after the event giving rise to the damage occurred.[177]

In *ED & F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd*, the High Court did not decide firmly between a tortious and an unjust enrichment characterisation.[178] In *First National Trustco (UK) Ltd v Page*, due to the lack of argument to the contrary, it was accepted that Spanish law governed the knowing receipt claim on the basis of the choice of law rules for unjust

[171] (n 59) [519] (point not appealed in [2020] EWCA Civ 245, [2021] QB 1).

[172] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L 29/7, art 66.

[173] European Union (Withdrawal) Act 2018 section 3(1), as amended by the European Union (Withdrawal Agreement) Act 2020, section 25(2)(a).

[174] The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations (SI 2019/834), as amended by The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020/1574).

[175] With some self-evident amendments, none of which affect the provisions discussed in this section. References to the applicability of the Regulations post-Brexit should be understood to be to the versions transposed into domestic law as retained EU law.

[176] *Dicey, Morris and Collins* (16th edn) (n 53) para 36-065.

[177] Rome II Reg, art 14(1)(a).

[178] [2019] EWHC 1661 (Comm), [2019] ILPr 40 [70]–[73] (point not considered on appeal: [2019] EWCA Civ 2073, [2020] 2 All ER (Comm) 551).

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enrichment and constructive trusts as argued for by the defendant.[179] The parties in *FM Capital Partners*[180] proceeded on the basis that the various claims against the third party should be decided in accordance with Article 4 of Rome II, declining Cockerill J's invitation to consider the potential applicability of Article 10 in relation to the claim for knowing receipt. In *Alliance Bank v Aquanta*, the Court of Appeal alluded to the applicability of Article 10.[181] In sum, the scant authorities are of little help.

Article 4(1) provides for the application of the 'law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'. This law yields to the law of common habitual residence of the claimant and defendant if they share that common habitual residence at the time when the damage occurs.[182] Article 4(3) provides for an escape clause:

> Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Article 2(1) provides: 'For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.' The natural meaning of the word 'damage' in Article 4(1) has the connotation of loss. If this is disregarded and focus is placed on the 'consequence' arising out of knowing receipt, that is, the gain received by the defendant, Article 4(1) could be interpreted as pointing towards the law of the place of receipt by the defendant, rather than the law of the place of loss by the claimant. For example, where misappropriated funds are transferred from the trust account in country A to the recipient's account in country B, the law of country B is the applicable law. However, there is an inherent circularity in this reasoning: it presupposes that the 'consequence' of the claim should be determined in accordance with English domestic law principles, whereas in principle the consequence of the claim would be for the *lex causae* to determine pursuant to Article 15(c). Further, this interpretation is inconsistent with the approach taken for tort claims, which focusses on the place of immediate damage.[183] If one aligns the approach and interpretation of Article 4(1) with that taken for tort cases, the place of damage would be the location of the misappropriated asset immediately prior to its transfer to the recipient.[184]

[179] [2019] EWHC 1187 (Ch) [271]. The decision on the knowing receipt claim was not appealed: [2020] EWCA Civ 107. [180] (n 59). [181] (n 112) [86]. [182] Rome II Reg, art 4(2).
[183] C-350/14 *Florin Lazar v Allianz SpA* ECLI:EU:C:2015:802.
[184] Dickinson (n 85) para 4.105.

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This would point towards the law of country A being the applicable law in the example above.

Turning to an unjust enrichment approach, Article 10 sets out a cascading scheme of rules. Article 10(1) provides:

> If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

If there is no such law, the governing law is that of the parties' common habitual residence, if they share the same habitual residence when the event giving rise to the unjust enrichment occurs.[185] Where the applicable law cannot be determined on the basis of either of the two preceding provisions, Article 10(3) points toward the law of the country in which the unjust enrichment occurred. Article 10(4) contains the familiar escape clause in favour of the law of a country which is manifestly more closely connected to the non-contractual obligation arising out of the unjust enrichment.

It has been said that Article 10 is concerned with reversing transfers of value to the defendant that can be attributed to the claimant and thus would not cover knowing receipt where the value is transferred to the defendant by the wrongdoing trustee.[186] However, this is not apparent from the wording of Article 10 itself and would be at odds with the position taken in some countries, such as Germany, which do not insist on there being a direct transfer from the claimant to the defendant.[187]

Another issue is whether the relationship referred to in Article 10(1) must be pre-existing or whether it can arise upon the commission of the relevant act. Teare J in *Banque Cantonale de Genève v Polevent Ltd* thought the relationship had to be in existence before the relevant facts occurred and could not be created by the commission of the tort itself.[188] If so, it is doubtful whether Article 10(1) could be applicable to knowing receipt claims which concern the potential liability of a stranger to the trust. Even if a prior relationship did exist between the parties, the relationship will usually not 'concern' or bear a close connection with the non-contractual obligation for the same reason, ie that the defendant receives the property as a 'stranger'. Further, the governing law of the trustee–beneficiary relationship is irrelevant under Article 10(1) because the relevant relationship is that between the claimant beneficiary and the defendant knowing recipient.

Article 4(3) specifically refers to a 'pre-existing' relationship whereas Article 10(1) only refers to a 'relationship'. Moreover, the original draft of Article 10(1)

[185] Rome II Reg, art 10(2).
[186] Dickinson (n 85) para 4.104.
[187] Dannemann (n 28) 33–4.
[188] [2015] EWHC 1968 (Comm) [16]-[17]. See also *Dicey, Morris and Collins* (16th edn) (n 53) para 36-031; Dickinson (n 85) paras 4.15, 10.23–10.27.

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referred to 'a relationship previously existing between the parties'[189] and its omission from the final version suggests that the relationship need not be pre-existing. It has therefore been argued that the 'relationship' between the parties may arise at the same time as the claim for the purposes of Article 10(1).[190] This interpretation would also align with the laws of some civil law countries, which regard claims that under English law would be considered as restitution for wrongs to be founded on unjust enrichment.[191] If this is correct, it could be argued that the relationship which arises between the claimant and the knowing recipient is tortious[192] and so Article 10(1) simply refers back to Article 4. This has the advantage of the same law being identified under both routes, thereby skirting the characterisation problem altogether. However, it is suggested that this circuitous route is best avoided, and Article 4 applied in the first instance.

Others have pointed out that the applicable law may end up being the same under both Article 4 or Article 10.[193] This is true if 'relationship' in Article 10(1) is interpreted as suggested above, or the law of the parties' common habitual residence applies pursuant to either Article 4(2) or Article 10(2). If the competition is between Article 4(1) and Article 10(3), Article 4(1) likely points towards the law of the place where the asset was located prior to the transfer, whereas Article 10(3) probably points toward the law of the place to where the asset is transferred, at least where the requisite state of mind is acquired in the same place. A rigid solution in favour of the law of either place, however, is unsatisfactory. Both could be subject to manipulation and, more fundamentally, the identification of one single locus as being determinative of the applicable law fails to take into account the various elements of the action. For example, the trust property could have been transferred from country A to country B, but the defendant acquired their blameworthy state of knowledge in country C after having transferred the property to country D.

It is therefore suggested that the escape clauses in Article 4(3) and Article 10 (4) should be relied on:[194] apart from weighing up the connection between the claim with each of countries A to D, other factors could also be relevant, including party connections,[195] the governing law of the trust,[196] where acts of assistance (if any) were rendered by the defendant to the trustee and the governing law of the relationship between the defendant and the trustee. The weight to be attributed to each factor would depend on the facts of the

[189] European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II")' art 9(1), COM (2003) 427 final.

[190] *Cheshire, North and Fawcett* (n 125) 843.

[191] eg, German BGB, section 812 para 1, sent 1 alt 2.

[192] Yeo, 'The Right and Wrong of "Knowing Receipt"' (n 136) para 30.

[193] Dickinson (n 85) para 4.105. See also Tudsri (n 48) 281 (in the context of the common law).

[194] See also Dickinson (n 85) para 4.105.

[195] *Byers v Samba Financial Group* (n 155) [144], [175]; *FM Capital Partners* (n 59) [519].

[196] *Byers v Samba Financial Group* (n 155) [144], [175].

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case.[197] Less weight would be given to the laws of country B or country D if it were shown that it was merely a 'temporary staging post'[198] or if the asset was transferred to those locations due to a contrivance by the trustee or recipient. For example, the place of receipt should be given little weight if the location was chosen to obfuscate the identity of the true recipient.[199] If the defendant not only received trust property but also colluded with the trustee to defraud the claimant, weight should be given to the place where the acts of assistance enabling the transfer of property to the defendant took place and to the law governing the relationship between the two wrongdoers.[200] The governing law of the relationship between the trustee and the claimant also needs to be taken into consideration in some cases,[201] particularly if the trustee controlled the recipient, although generally this ought to be accorded less weight as one is concerned with the liability of the recipient rather than the primary wrongdoer.

This approach might may draw the criticism that it is contrary to the general ethos of Rome II, which seeks to provide clear rules and only allows the use of escape clauses in exceptional circumstances. That this is the general principle underpinning the operation of Article 4(3) and Article 10(4) is evident from the presence of the phrase 'manifestly more closely connected' in both provisions.[202] This has also been acknowledged in English decisions, where it has been noted that a 'high hurdle' must be overcome for the escape clause to apply.[203] However, Article 4 and Article 10 were each drafted with paradigmatic tort and unjust enrichment claims in mind. It is no surprise to find that neither is particularly suited to an equitable claim which defies easy characterisation and, it is suggested, this justifies clearance of the 'high hurdle'.

Further, UK courts now have the flexibility to interpret EU law in a looser fashion. The European Union (Withdrawal) Act 2018 provides that a UK court is no longer bound by the decisions of the Court of Justice of the European Union made on or after the Implementation Period completion day[204] although it 'may have regard' to them.[205] Neither the Supreme

[197] *Fiona Trust* (n 108) [162].

[198] Using the language of Evans J in *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543, 566 (in the context of bribes made to a corrupt fiduciary).

[199] *Fiona Trust* (n 108) [179].

[200] ibid [180]–[181].

[201] *Alliance Bank* (n 112) [86]; *Fundo Soberano De Angola v Santos* [2018] EWHC 2199 (Comm) [40].

[202] Commission Proposal (n 187) 12.

[203] *Pan Oceanic Chartering Inc v UNIPEC UK Co Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All ER (Comm) 196 [206]; *Cristiano Committeri v Club Mediterranee SA* [2016] EWHC 1510 (QB) [57]; *Gaynor Winrow v Mrs J Hemphill and AGEAS Insurance Ltd* [2014] EWHC 3164 (QB) [63]; *BNP Paribas SA v Anchorage Capital Europe LLP* [2013] EWHC 3073 (Comm) [64] (all on art 4 (3)).

[204] European Union (Withdrawal) Act 2018, section 6(1)(a), as amended by European Union (Withdrawal Agreement) Act 2020, section 26(1)(a).

[205] European Union (Withdrawal) Act 2018, section 6(2), as amended by European Union (Withdrawal Agreement) Act 2020, section 26(1)(a).

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Court[206] nor the Court of Appeal[207] are bound by CJEU decisions prior to the Implementation Period completion day relating to unmodified retained EU law. In fact, the CJEU has so far not dealt with knowing receipt under Rome II so even the question of the lower courts being bound does not arise. Concerns over legal uncertainty should the position under UK law deviate from that under EU law in the near aftermath of Brexit[208] have less force concerning the treatment of knowing receipt under Rome II.

Section 6(3)(a) of the European Union (Withdrawal) Act 2018 provides that the meaning of any retained EU law is to be decided 'in accordance with any retained case law', which includes UK court decisions on Rome II handed down prior to the Implementation Period completion day.[209] It has been seen above that there are no definitive English decisions on knowing receipt and Rome II which would constrain the court's hands moving forward.

It is therefore suggested that not only should English courts look toward Article 4(3) or Article 10(4) as the first port of call for knowing receipt claims, but that the legal framework allows them to do so. The rigmarole of considering the preceding rigid rules and then invoking the escape clauses should be unnecessary post-Brexit. That said, this may well result in a lack of uniformity in the approaches in England and EU Member States which would be inconsistent with one of the key objectives of private international law. Nevertheless, it is inevitable that divergences in approach on choice of law for obligations between the UK and the EU will develop and increase over time.[210] Ultimately, a rigid rule identifying one particular law is inappropriate and the application of the law of closest connection is the solution which best fits knowing receipt and this should be adopted under English law.[211]

It is possible to reach the same result regardless of whether a tortious or unjust enrichment characterisation is adopted. However, for intellectual clarity, it is clearly preferable to decide which is the appropriate category.

On balance, it is suggested that knowing receipt ought to be characterised as a tort for the purposes of Rome II. The support for this is not found under English

[206] European Union (Withdrawal) Act 2018, section 6(4)(a).

[207] European Union (Withdrawal) Act 2018, section 6(4)(ba), as amended by European Union (Withdrawal Agreement) Act 2020, section 26(1)(b); The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

[208] Department for Exiting the European Union, 'Legislating for the United Kingdom's withdrawal from the European Union, ch 2 <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union#chapter-2-our-approach-to-the-great-repeal-bill>.

[209] European Union (Withdrawal) Act 2018, section 6(7), as amended by European Union (Withdrawal Agreement) Act 2020, section 26(1)(a).

[210] A Dickinson, 'Realignment of the Planets: Brexit and European Private International Law' (2021) 41 IPRax 213, 219.

[211] If the claim were to fall under the Private International Law (Miscellaneous Provisions) Act 1995, it is suggested that the escape clause in section 12 should apply.

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domestic law, where neither 'tort' nor 'unjust enrichment' is a good fit. Instead, and somewhat paradoxically, support is found in systems which do not have knowing receipt. It has been seen above that civil law systems may deal with knowing receipt under either the law of unjust enrichment or tort. Under German law, Eingriffskondiktion and tort will frequently arise on the same facts but it has been argued that in this situation, the tort should be recognised as the dominant relationship for reasons of expediency and consistency.[212] In countries such as France and Italy, unjust enrichment is subsidiary to tort.[213] In any event, it appears that most civil law countries would consider the natural home for claims against third parties to be tort law.[214]

If, contrary to the arguments above, one were to consider that the nature of the remedies should also be a factor in the characterisation process, the deterrence function of tort law—which suggests that remedies need not be limited to compensatory remedies[215]—forms a part of tort law in civil law jurisdictions, albeit that it plays a secondary role to the compensatory function.[216] This suggests that civil law countries would not look in askance if the category of 'tort' for the purposes of private international law were extended to an action for which the remedy is gain-based.

VI. CONCLUSION

Mance LJ in *Raiffeisen* commented of the characterisation process that:

> The overall aim is to identify the most *appropriate* law to govern a particular issue. The classes or categories of issue which the law recognises at the first stage are man-made, not natural. They have no inherent value, beyond their purpose in assisting to select the most appropriate law …. They may require redefinition or modification, or new categories may have to be recognised accompanied by new rules …, if this is necessary to achieve the overall aim of identifying the most appropriate law.[217]

It has been argued that knowing receipt deserves its own characterisation category. This is for two reasons. First, it is *sui generis*. The action is unique as it sits at the intersection of equity, restitution, wrongs and property. Secondly, the most appropriate choice of law rule for knowing receipt is the

[212] P Mankowski, 'Unjust Enrichment (Restitution)' in J Basedow et al (eds), *Encyclopaedia of Private International Law* (Elgar 2017) vol II, 1811.
[213] S Meier, 'Unjustified Enrichment' in J Basedow et al (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012) vol II, 1745.
[214] See the respective national reports in *Principles of European Trust Law* (n 36) 121 (Swiss law) (cf Swiss Code of Obligations, draft art 529q(1)), 157 (French law), 171 (Spanish law), 192 (Danish law), 214 (Dutch law).
[215] Exemplary damages are available under the common law.
[216] Wagner (n 137) 1013.
[217] *Raiffeisen* (n 41) [27] (emphasis in original). See also *Rickshaw* (n 43) [81].

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law of closest connection to the claim, as this rule is best placed for taking account of the disparate elements that need to be proved. None of the existing choice of law rules applicable to the established categories are able reliably to lead to this result. Ideally, a new choice of law category ought to be developed for knowing receipt.

Faced with having to shoehorn knowing receipt into one of the categories found in Rome II, tort provides a better fit than unjust enrichment. However, rather than applying the single-locus rules in either Article 4(1) or Article 4(2), it is suggested that the escape clause in Article 4(3) in favour of the law of closest connection ought to provide the governing law for all knowing receipt claims. Of course, the application of the law of closest connection is wont to give rise to uncertainty. Nevertheless, it is the only solution which enables the various elements of the claim to be properly considered and suitably weighed on the facts of each case.

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